THE ROLE OF INTERNATIONAL LAW IN THE NEGOTIATION OF PEACE AGREEMENTS

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ABSTRACT

Some 600 peace agreements aiming to bring an end to intra-state armed conflicts have been concluded since 1990. The proliferation of peace agreements in this period has been coupled with the internationalisation and normativisation of peace-making. Although there is no overarching international legal regime that governs intra-state peace-making, the practice, policy and scholarship of peace-making have increasingly asserted the relevance of international law to the negotiation of peace agreements and the emergence of new norms of peace-making. Against this backdrop, this dissertation identifies the main elements of the normativisation of intra-state peace-making and examines the extent to which such normativisation corresponds to positive international law by addressing two cross-cutting research questions: (i) Does existing international law stipulate a legal status for peace agreements or precise requirements for their negotiation process or content? (ii) Do the new norms of peace-making, which are proposed in international policy and scholarship, constitute *lex lata*, *lex ferenda*, or moral or political aspirations? The dissertation addresses the research questions in three parts, focusing respectively on the legal status, negotiation process, and contents of peace agreements. The first part focuses on the legal status of peace agreements aiming to end intra-state armed conflicts, which are concluded between governments and armed opposition groups, with a view to explaining whether they constitute international agreements. The second part then identifies the existing international legal norms and the proposed norms of peace-making relevant to the negotiation process of a peace agreement. It examines whether they provide for a legal duty to negotiate peace in intra-state armed conflicts, to include certain actors such as civil society or women in peace negotiations, or to exclude certain actors such as (alleged) perpetrators of international crimes, from negotiations. Finally, the third part investigates whether there is a duty to address certain substantive issue-areas, for example transitional justice or human rights, in a peace agreement and whether there are legal norms stipulating how the issue-areas should be regulated. The dissertation argues that international law does not recognise peace agreements between governments and armed opposition groups as sources of international obligations. As to the negotiation process and contents of peace agreements, it finds that the emerging norms of peace-making remain *lex ferenda* or as moral or political aspirations and that positive international law places limited normative constraints on the negotiation of a peace agreement. Nor does international law, as it currently stands, provide precise requirements as to the inclusion or exclusion of certain actors in negotiations or certain issue-areas in resultant agreements. However, despite their non-legal character, there is an emerging consensus on some norms of peace-making, such as the inclusion of women in peace negotiations, in international peace-making policy. Moreover, international actors, particularly the United Nations, undertake significant facilitative roles in the negotiation and implementation of peace agreements. As a comprehensive study of the role of international law in the negotiation of peace agreements, this dissertation aims to make a substantial contribution to this newly emerging field in international law. Its findings will benefit the doctrinal and policy debates on the desirability of further legalisation of peace-making and its constraining impact on the negotiation of peace agreements. Its conclusions as to the legal requirements for the negotiation of peace agreements and their legal status will also provide legal clarity to negotiating parties, mediators, donors, domestic and international courts, and other domestic and international actors involved in or affected by peace negotiations across the world.

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Memorandum of Understanding (Luena Agreement) (Angola), 4 April 2002

Memorandum of Understanding on Cessation of Hostilities Between the Government of the Sudan and the Sudan People's Liberation Movement/Army, 15 October 2002

Northern Ireland Peace Agreement (The Good Friday Agreement), 10 April 1998

Ouagadougou Political Agreement (Côte d'Ivoire), 04 March 2007

Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23 (12 December 2013)

Package of Measures for the Implementation of the Minsk Agreements (Ukraine), 12 February 2015

Peace Agreement between the Governement of Sierra Leone and the Revolutionary United Front (RUF) (Lomé Peace Agreement), 7 July 1999

Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement of Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003

Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 4 August 1993

Protocol on the results of consultations of the Trilateral Contact Group (Minsk Agreement) (Ukraine), 5 September 2014

Roadmap for Return of IDPs and Implementation of Abyei Protocol (Sudan), 8 June 2008

The Afghanistan Compact (31 January-1 February 2006)

The Comprehensive Agreement on the Bangsamoro (the Philippines), 27 March 2014

The Nationwide Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations, 15 October 2015

Tripoli Agreement (the Philippines), 23 December 1976

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Signature:

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FARC	Revolutionary Armed Forces of Colombia—People's Army
UN GA	United Nations General Assembly
GEMAP	Governance and Economic Management Assistance Program
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Person
IGAD	Intergovernmental Authority on Development
ILC	International Law Commission
LRA	Lord's Resistance Army
LTTE	Liberation Tigers of Tamil Eelam
MILF	Moro Islamic Liberation Front
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor (International Criminal Court)

PKK	Kurdistan Workers' Party
PLO	Palestine Liberation Organization
RUF	Revolutionary United Front
UN SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
SJP	Special Jurisdiction for Peace
SPLM/A	Sudan People's Liberation Movement
UCDP	Uppsala Conflict Data Program
UN	United Nations
UN CAT	United Nations Committee Against Torture
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNHCR	United Nations High Commissioner for Refugees
UNIFEM	The United Nations Development Fund for Women
VCLT	Vienna Convention on the Law of Treaties
WPS	Women, Peace and Security
YPS	Youth, Peace and Security
UN DPA	United Nations Department for Political Affairs
OIC	Organisation for Islamic Cooperation
SADC	Southern African Development Community
NGO	Non-governmental Organisation
USAID	United States Agency for International Development
DFID	Department for International Development (United Kingdom)

Chapter 1: Introduction – Peace Agreements Aiming to End Intra-State Armed Conflict

Some 600 peace agreements aiming to bring an end to intra-state armed conflicts have been concluded since 1990.[1] Although there is no overarching international legal regime that governs intra-state peace-making *per se*, the practice, policy and scholarship of peace-making have increasingly accepted the relevance of international law to the transitions from conflict to peace and to the negotiation of peace agreements. The UN has adopted various guidelines for mediators involved in peace negotiations. These guidelines ascertain, *inter alia*, the relevant requirements of international law.[2] The past few years have seen the regional organisations following in the UN's footsteps, establishing their interpretation of the relevance of international law to peace negotiations.[3] The proliferation of references to international law and norm-setting by international, regional, state, and non-governmental actors in the field of peace-making has led international legal scholars to contend that a new law of peace-making is emerging.[4] The increased references to international law in the negotiation process and text of peace agreements aiming to end intra-state armed conflicts are also cited as evidence for the emergence of a new law.[5]

Against this backdrop, this dissertation sets out to analyse the role of international law in the negotiation of peace agreements. Focusing on agreements negotiated to bring an end to intra-state armed conflicts, it aims to provide a comprehensive analysis of whether and how international law determines the (i) legal status, (ii) negotiation process, and (iii) contents of peace agreements. For this purpose, the dissertation both examines the positive international law relevant to peace agreements and assesses whether new legal norms or a law of peace-making is emerging. It addresses two cross-cutting research questions: 1. Does existing international law stipulate a legal status for peace agreements or precise requirements for their negotiation process or content? 2. Do the new norms of peace-making,

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[1] United Nations and University of Cambridge, 'Language of Peace' <https://www.languageofpeace.org/>.

[2] See Chapter 2, Table 1 and 2.

[3] See Chapter 2, Table 3.

[4] Christine Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008); Michal Saliternik, 'Reducing the Price of Peace: The Human Rights Responsibilities of Third-Party Facilitators' (2015) 48 Vanderbilt Journal of Transnational Law 179; Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge University Press 2015).

[5] See Chapter 2, Section 2.2.1.1.

which are proposed in international policy and scholarship, constitute *lex lata*, *lex ferenda,* or moral or political aspirations?

Beyond its doctrinal contribution, the dissertation presents negotiating parties, mediators, donors, international and domestic courts, as well as other domestic and international actors involved in, or affected by, peace negotiations with legal clarity as to the legal confines of the 'peace-making space'. The significance of such clarification is underscored by the warnings by some leading peace-making practitioners that the current impasse in some peace processes, for example in Syria, may be partly attributed to the diminishing room for political manoeuvre, especially for the UN mediators.[6] Therefore, the dissertation also provides insights into the tensions between normative considerations and practical and pragmatic requirements of peace-making. Overall, the findings of the dissertation will contribute to the debates and ongoing institutional efforts regarding the further legalisation and broader normativisation of peace-making.

This first chapter of the dissertation introduces the background to the topic, the gaps in the literature, and the framework for analysis adopted in this dissertation. It then explains the terminology, data sources and outline of the dissertation.

1.1. Background to the Topic: Expansion, Internationalisation and Legalisation of Peace-making

In the former UN Secretary-General Boutros-Ghali's *An Agenda for Peace*, peace-making is defined as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations".[7] Accordingly, peace-making is firstly used as a term for the peaceful settlement of disputes through "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means".[8] The term is also used more narrowly to denote the negotiation of peace agreements. This is the sense in which this dissertation, as well as the key international legal studies aiming to identify the applicable international law to the negotiation of peace agreements, uses the term.[9] Understood as such,

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[6] David Harland, *The Lost Art of Peacemaking* (The Centre for Humanitarian Dialogue 2018).

[7] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping (17 June 1992) UN Doc A/47/277 - S/24111*, para 20.

[8] Charter of the United Nations (24 October 1945) 892 UNTS 119, Art 33.

[9] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4). Two ongoing projects concerning the role of international law in the negotiation of peace agreements also construe peace-making in

the field of peace-making has been shaped by three trends following the end of the Cold War: expansion, internationalisation, and resultant normativisation of peace-making.

1.1.1. Expansion in the Number and Scope of Peace Agreements

Classical inter-state peace treaties have long been in demise,[10] whereas peace agreements concluded to bring an end to intra-state peace agreements have proliferated since the end of the Cold War.[11] Scholars of conflict studies find close correlations between the rise of negotiated settlements in intra-state armed conflicts and the changes in the international system.[12] The end of the Cold War superpower rivalry had allowed the resolution of intra-state armed conflicts in many countries including Angola, Cambodia and South Africa, leading to a peak in the numbers of negotiated settlements in the immediate aftermath of the Cold War. [13] On the other hand, the end of the Cold War triggered the outbreak of a number of conflicts, particularly in Eastern and Central Europe and sub-Saharan Africa.[14] The trend of negotiated settlements, however, continued in the resolution of the new conflicts, for example in Bosnia and Herzegovina, Sierra Leone and Liberia.[15] Many armed conflicts since the 1990s have been brought to an end through negotiated settlements. For example, the past few years have seen the conclusion of successful peace

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a similar sense, see 'Peace-Making and International Law' <https://www.lcil.cam.ac.uk/peace-making-and-international-law> accessed 19 August 2018.

[10] Tanisha M Fazal, 'The Demise of Peace Treaties in Interstate War' (2013) 67 International Organization 695 (Associating this phenomenon with the decline in inter-state wars with the outlawry of war, codification of jus in bello, and availability of peaceful dispute settlements methods to states. Noting also that the demise of inter-state peace treaties may be due the transformation of inter-state use of force into counterterrorism operations and interventions in intra-state conflicts, which do not typically end with negotiated settlements).

[11] Caroline A Hartzell, 'Civil War Termination', *Oxford Research Encyclopedia of Politics* (Oxford University Press 2016) 7 (Showing that since 1990s the number of negotiated settlements have more than doubled the number of military victories in intra-state armed conflicts); Joakim Kreutz, 'How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset' (2010) 47 Journal of Peace Research 243, 246 (Showing that only 20 of the 147 conflict terminations in the 1990-2005 period were military victories).

[12] See Lise Morjé Howard and Alexandra Stark, 'How Civil Wars End: The International System, Norms, and the Role of External Actors' (2018) 42 International Security 127.

[13] Hartzell (n 11) 8.

[14] Stathis N Kalyvas and Laia Balcells, 'International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict' (2010) 104 American Political Science Review 415, 416, 427–8 (Stating the reasons behind the surge in conflicts as the dissolution of multiethnic states, emergence of new states with contested boundaries, and weakening of client states in the absence of superpower support).

[15] General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), 21 November 1995; Peace Agreement between the Governement of Sierra Leone and the Revolutionary United Front (RUF) (Lomé Peace Agreement), 7 July 1999; Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement of Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003.

agreements in a number of conflicts, most notably in the Philippines and Colombia.[16] It must be noted that a joint United Nations-World Bank report published in 2017 notes a potential trend reversal in conflict resolution since 2010: while violent conflict and external support to conflict parties is surging, parties become more distant to negotiated settlements in some conflicts.[17] Scholars of conflict studies have also detected a return to the pursuit of military victories instead of negotiated settlements, particularly due to the conflicts in Libya, Syria and Yemen.[18] Although the emerging trend warrants a re-thinking of conflict resolution in respect of certain conflict types, whose parties are likely to be more resilient to negotiated settlements, peace agreements maintain their significance in other contexts.

What are the factors that have driven the rise of negotiated settlements to intra-state armed conflicts since the end of the Cold War? It is commonly accepted that conflicting parties enter into negotiated settlements when there is a hurting stalemate.[19] Therefore, the first reason behind the rise of negotiated settlements is that both the decrease of external support to conflict parties and the emergence of the UN peacekeeping during this period have made military victories more difficult to achieve and negotiated settlements more credible.[20] Bell argues that the post-Cold War developments in international law, particularly in relation to the applicability of international human rights law during armed conflicts, have also limited the parties' capacity to achieve a military victory.[21] Secondly, as explained in the following section, negotiated settlements have become part of the conflict resolution toolbox of international actors, who act as peace facilitators in peace processes by providing mediation, financial support, and technical assistance to parties.[22] The promotion of negotiated settlement by these actors, especially the United Nations and regional organisations, have arguably also driven the expansion in the number of peace agreements concluded.

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[16] The Comprehensive Agreement on the Bangsamoro (the Philippines), 27 March 2014; Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Colombia), 24 November 2016.

[17] *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (Main Messages and Emerging Policy Directions)* (The United Nations and the World Bank 2017) 1, 6.

[18] Mimmi Söderberg Kovacs and Isak Svensson, 'The Return of Victories? The Growing Trend of Militancy in Ending Armed Conflicts' (2013).

[19] I William Zartman, 'The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments' (2001) 1 The Global Review of Ethnopolitics 8.

[20] Virginia Page Fortna, 'Where Have All the Victories Gone? Peacekeeping and War Outcomes' [2009] APSA Toronto Meeting Paper 18, 24.

[21] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4) 31 et seq.

[22] Human Security Report Project, *Human Security Report 2009/2010* (Oxford University Press 2011) 71–73.

As with the numbers of peace agreements, their scope has also expanded. Peace agreements in intra-state conflicts have become comprehensive, lengthy and complex instruments negotiated during lengthy peace processes. It is no coincidence that the term 'peace process', which itself hints that peace-making is a matter of a lengthy process of negotiating and nurturing peace rather than a one-off event, became widespread in the field of conflict resolution only after the end of the Cold War.[23] In addition to the political disputes between the conflict parties and security arrangements, peace agreements increasingly regulate various political, social, economic and cultural issues. Assessing the UN Peacemaker database, Easterday finds that the issues addressed in peace agreements include, other than military issues and security arrangements, rule of law (53 per cent of all agreements included in the database), socio-economic and development issues (50 per cent), statehood, territory and identity (40 per cent), constitutional review (35 per cent), human rights (31 per cent), and transitional justice (22 per cent).[24]

Even the comparison of the lengths of peace agreements from different time periods, though essentially addressing the same conflict, is telling in this regard. The 1972 Addis Ababa Agreement on the Problem of South Sudan, which provides for regional self-government in South Sudan and delineates the powers between the central and regional governments, is a 13-page document.[25] By contrast, the 2005 Comprehensive Peace Agreement between the Government of Sudan and the SPLM/SPLA, a former rebel group and a current political party in South Sudan, is a comprehensive 258-page document.[26] It contains various provisions for international involvement in the implementation of the agreement, ranging from monitoring commissions to a peacekeeping force and international arbitration for boundary delimitation. A similar contrast in length is found between the 59-page Comprehensive Peace Agreement on Bangsamoro signed in 2014 between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) and the 6-page Tripoli Agreement signed in 1976 as a comprehensive settlement to the same conflict but with the MILF's parent rebel group MNLF.[27]

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[23] Jan Selby, 'Peace Processes: A Genealogy and Critique' [2008] RIP Presentation, University of Sussex 2.

[24] Jennifer S Easterday, 'Peace Agreements as a Framework for Jus Post Bellum' in Carsten Stahn, Jennifer S Easterday and Jenn Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 288.

[25] Addis Ababa Agreement on the Problem of South Sudan (Sudan), 27 February 1972.

[26] Comprehensive Peace Agreement between the Government of Sudan and the SPLM/SPLA, 9 January 2005.

[27] Tripoli Agreement (the Philippines), 23 December 1976.

Two main factors explain the expansion in the scope of peace agreements. Firstly, the changes in the natures of conflicts necessitated the tackling of a broader range of issues in peace agreements. The 2012 report of the then UN Secretary-General states that contemporary intra-state conflicts over governance implicate a variety of issues compared to more ideologically-driven conflicts of the pre-Cold War period and thus have led to an expansion of the peace-making agenda into "powersharing, wealth-sharing, constitutions, justice, human rights and security issues".[28]

Secondly, international and regional organisations active in the field of peace mediation have increasingly encouraged the conclusion of comprehensive peace agreements.[29] The 2014 OSCE Mediation Reference Guide, for example, provides that:

> "Ideally, a peace agreement should be comprehensive and based on the views, needs and interests of all conflict stakeholders and sectors of society. It should address all key issues relevant to the conflict and be forward looking. The agreement should recognize and express respect to all relevant international humanitarian, human rights and refugee laws, as well as recognized democratic standards and the rule of law."[30]

The 2009 report of the former UN Secretary-General on peace mediation urged the inclusion in peace agreements the issues of "human rights, gender, child protection, refugees and internally displaced persons, security arrangements, constitution-making, elections, power-sharing, rule of law, transitional justice, and wealth-sharing".[31] In fact, as early as in Boutros-Ghali's *An Agenda for Peace*, peace agreements were identified as instruments of not only negative peace, i.e. the absence of violent conflict, but also positive peace, understood as requiring "disarming the previously warring parties and the restoration of order, the custody and possible destruction of weapons, repatriating refugees, advisory and training support for security personnel, monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation".[32]

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[28] *UNGA Res 68/303: Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution (31 July 2014) UN Doc A/RES/68/303*.

[29] Jan Selby, 'The Myth of Liberal Peace-Building' (2013) 13 Conflict, Security & Development 57.

[30] *Mediation and Dialogue Facilitation in the OSCE: Reference Guide* (OSCE Conflict Prevention Centre 2014) 74.

[31] *Report of the UN Secretary-General on Enhancing Mediation and Its Support Activities (8 April 2009) UN Doc S/2009/189*.

[32] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* (n 7) para 55. It must be noted that this is but one conception of positive peace that is labelled as 'liberal peace'. On different

To conclude, this section demonstrated that following the end of the Cold War peace agreements aiming to end intra-state armed conflicts have expanded both in numbers and in scope. In addition to factors relating to the changes in the nature of conflicts, this phenomenon is associated substantially with the increased international attention to intra-state armed conflicts and the resultant international peace-making policy and activities. The next section elaborates on the internationalisation of peace-making.

1.1.2. Internationalisation of the Subject-Matter and Landscape of Peace-making

With the decline in inter-state wars and end of the Cold War, intra-state armed conflicts have dominated the international peace and security agenda. Freed from the restraining environment of the Cold War, the United Nations set out to establish a comprehensive policy framework for its actions to prevent, resolve and transform conflicts. The landmark report of Boutros-Ghali, *An Agenda for Peace*, marked the upsurge in international attention to conflicts and established the parameters for the UN's actions in preventive diplomacy, peace-making, peacekeeping and post-conflict peacebuilding.[33] As mentioned above, a "standard treatment" for intra-state armed conflicts has emerged involving the offering of mediation to conflict parties for the conclusion of peace agreements and deployment of peacekeeping forces.[34]

The increase in international attention has been, firstly, due to the threats posed to international peace and security by intra-state armed conflicts.[35] Post-9/11, international efforts to counter the rise of international terrorism and violent extremism have also underlined that intra-state armed conflicts are conducive to the proliferation of terrorism and connected the counter-terrorism agenda to the resolution of conflicts.[36]

Secondly, constitutional and political order of states have become a key concern of international politics. The hegemony of liberal democracy following the end of the Cold War

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conceptualisations of positive peace, see Particia M Shields, 'Limits of Negative Peace, Faces of Positive Peace' (2017) 47 Parameters 5, 8–12.

[33] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* (n 7).

[34] Richard Gowan and Stephen John Stedman, 'The International Regime for Treating Civil War, 1988–2017' (2018) 147 Daedalus 171, 171.

[35] For an exploration of the expanding notion of 'threat to the peace' and the relevant SC practice, see Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 Journal of Conflict and Security Law 15.

[36] 'Report of the UN Secretary-General on the Plan of Action to Prevent Violent Extremism (24 December 2015) UN Doc A/70/674'.

led to the "re-emergence of substantive models of domestic order as the proper concern of international politics".[37] With the view that peace-making processes present an opportunity to reshape the politico-legal order of transitional states gaining prominence in the international system, the processes of making, keeping and building peace within states have also gradually transformed from a predominantly domestic concern into a question of international politics. For example, the 2017 UN Guidance on Gender and Inclusion provides that peace processes "offer a critical opportunity for states and societies to reshape their political, security and socio-economic landscapes in order to lay the foundation for a peace".[38] As a similar reflection of "transitional optimism", [39] a report by the UK Department for International Development states that "peace processes and peace agreements provide a window of opportunity to reshape an existing political settlement".[40] As a result, the focus on domestic orders, statebuilding and peacebuilding in international policy and practice has gradually extended to peace-making, seen as potentially functioning as the foundational roadmap for further change in transitional societies.[41]

The internationalisation of the subject-matter of peace-making naturally occurred simultaneously with the internationalisation of the landscape of peace-making. Within the UN, a new institutional framework is created notably with the establishment of the Department of Political Affairs (DPA), Department of Peacekeeping Operations, the Peacebuilding Commission and the peace-building support unit and fund within the UN Secretariat. DPA was established in 1992 to assist the Secretary-General and his representatives and envoys with the good offices and mediation services they provide in inter-state and intra-state conflicts.[42] The creation of the Mediation Support Unit of the DPA in 2006, which has a Standby Mediation Team, marked the further expansion of the UN's involvement in peace-making as per the recommendation of the 2004 High-level Panel on

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[37] Nehal Bhuta, 'Against State-Building' (2008) 15 Constellations 517, 521.

[38] UN Department of Political Affairs, *Guidance on Gender and Inclusive Mediation Strategies* (United Nations 2017).

[39] Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar 2017).

[40] *Building Peaceful States and Societies: A DFID Practice Paper* (Department for International Development (United Kingdom) 2010) 8.

[41] Suhrke et al, for example, cites the World Bank and United Nations Development Programme consensus that peace agreements can serve as "a foundational roadmap for state-building", see A Suhrke, T Wimpelmann and M Dawes, *Peace Processes and Statebuilding: Economic and Institutional Provisions of Peace Agreements* (Chr Michelsen Institute, Bergen, Norway 2007). See also Ashraf Ghani and Clare Lockhart, 'Writing the History of the Future: Securing Stability through Peace Agreements' (2007) 1 Journal of Intervention and Statebuilding 275, 178.

[42] *Report of the UN Secretary-General on Enhancing Mediation and Its Support Activities* (n 31).

Threats, Challenges and Change.[43] The United Nations Development Programme also supports mediation efforts by contributing to the development of local mediation capacities.[44] UN Women is another important entity in this new framework with its work on the Women, Peace and Security agenda focusing on gender inclusion in peace negotiations and resultant agreements. Lastly, United Nations Environment Programme assists with or mediates natural resource negotiations. The "sustaining peace" approach of the UN, comprehensively introduced in the Secretary General's January 2018 report, aims to streamline all relevant operational fields of the UN, including human rights, humanitarian, development, peacebuilding, peace operations and political assistance, towards the achievement of sustainable peace.[45]

Regional organisations have also, to some extent, institutionalised their peace-making activities. Notably, the African Union (AU) has established the Peace and Security Council in 2002, functions of which include "peace-making, including the use of good offices, mediation, conciliation and enquiry".[46] Within the Association of Southeast Asian Nations (ASEAN), the Institute for Peace and Reconciliation was founded and the Organisation for Islamic Cooperation (OIC) established a Peace and Mediation Support Unit, both in 2013. Lastly, the Southern African Development Community (SADC) launched in 1996 its organ for Politics, Defence and Security, which is tasked with inter alia seeking to "manage and resolve inter- and intra-state conflict by peaceful means", including mediation, negotiation and good offices, as of 2001.[47]

Peace mediation has become a "crowded field" in this period.[48] In addition to international and regional organisations, a number of individual states, e.g. Norway and Sweden, have traditionally played active roles in conflict resolution. Recently, more states have become active in the field and started to adopt normative guidelines for peace

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[43] UN High-Level Panel on Threats Challenges and Change, 'A More Secure World: Our Shared Responsibility (2 December 2004) UN Doc A/59/565' (2004) paras 102–3.

[44] *UNGA Res 68/303: Strengthening the Role of Mediation* (n 28) para 28.

[45] *Report of the Secretary-General, Peacebuilding and Sustaining Peace (18 January 2018) UN Doc A/72/707 - S/2018/43*.

[46] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).

[47] SADC Protocol on Politics, Defence and Security Co-operation (14 August 2001).

[48] David Lanz and Rachel Gasser, 'A Crowded Field: Competition and Coordination in International Peace Mediation' [2013] Centre for Mediation in Africa, University of Pretoria, Mediation Arguments.

mediation. Germany's governmental commitment to peace mediation since 2014[49] and Scotland's 2017 international policy commitment to resolution of conflicts and involvement in the training of women peacemakers in the Middle East are among the examples of recent initiatives.[50] Non-Western state-led mediation initiatives are also on the rise, e.g. the Russia-Turkey-Iran-led Astana talks for the resolution of the Syrian conflict[51] and Qatar's role in the negotiations in Lebanon and Darfur.[52] Multiparty mediation has also increased, for example through the formation of informal groups of states to support particular peace-making attempts.[53] In addition to states and state-based coalitions, civil society organisations, non-governmental organisations (NGO), such as the Centre for Humanitarian Dialogue, Carter Center, Crisis Management Initiative and Conciliation Resources, and influential individuals have also emerged as major mediators.

The internationalisation of the subject-matter and landscape of peace-making has prompted efforts to adopt policies, codes of conduct and mediation guidelines specifically addressing peace negotiations and agreements. The next section turns to such efforts and the resultant legalisation and broader normativisation of peace-making.

1.1.3. From Pragmatism to Normativisation: Legalisation of Peace-making?

Peace-making was traditionally considered a matter of pragmatic bargaining. During a 2017 high-level panel discussion held by the UN Human Rights Council on the contribution of human rights to peacebuilding, the High Commissioner expressed the concern among peacebuilding professionals that the human rights agenda was preventing them from "seeking pragmatic solutions".[54] A USAID brief mentions the "traditionally realpolitik world of peace negotiations".[55] Pragmatism here does not imply that peace

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[49] Federal Foreign Office (Germany), 'Peace Mediation and Mediation Support' <https://www.auswaertiges-amt.de/en/aussenpolitik/themen/krisenpraevention/4-mediation>.

[50] 'Scotland's International Policy Statement' (2017) <https://www.gov.scot/Publications/2017/11/9897>.

[51] See 'Letter Dated 29 December 2016 from the Permanent Representative of the Russian Federation to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, UN '.

[52] See Sultan Barakat, 'Qatari Mediation: Between Ambition and Achievement' (2014) 12 Brookings Doha Center Analysis Paper.

[53] Teresa Whitfield, 'A Crowded Field: Groups of Friends, the United Nations and the Resolution of Conflict' (2005) 1 Center on International Cooperation, Studies in Security Institutions.

[54] 'Human Rights Council Holds High-Level Panel on Mainstreaming Human Rights with a Focus on the Contribution of Human Rights to Peacekeeping' (Geneva, 27 February 2017).

[55] USAID, 'Key Considerations When Supporting Peace Processes' (2013) 4.

negotiations used to be conducted in a legal vacuum or merely as per power politics. It rather denotes the prioritisation of the ideal of achieving an end to conflict in the first place.[56]

However, a shift to normativisation of peace-making is underway. A 2016 Background Note on Peace Mediation by the European External Action Service notes that "those mediating in conflicts today are faced with clearer, more comprehensive, but also more complex, international legal and normative frameworks that attempt to define what is (and what is not) acceptable in negotiations to end armed violence".[57] Similarly, in a series of interviews conducted with 22 mediators and mediation experts, they express that they are increasingly asked "to conform to a mushrooming set of norms, whether these are consigned in international law, in Security Council resolutions or in administrative guidance".[58] Bell also argues that peace-making has seen a "paradigm shift" to normativisation, which replaced the "assumption of primacy of unconstrained negotiations" by "put[ting] certain matters … off limits".[59] Just as pragmatism in peace-making does not denote negotiating in a legal or moral lacunae, nor does normativisation entail the absolute regulation of all aspects of peace-making. Normativisation rather concerns the insertion of constraints or guarantees regarding certain aspects of peace-making, which are deemed to increase the legitimacy of negotiation process and durability of resultant peace agreements,[60] yet at the expense of certain pragmatic peace-making compromises.

Before expanding on what the process of normativisation and legalisation of peace-making entails, a brief clarification on the terms is in order. Normativisation encapsulates the legalisation of peace-making but goes beyond that to include the emergence or increasing relevance of other types of norms, for example moral or political norms, as the quote above demonstrates by mentioning that "international legal *and normative frameworks*" are at play in peace mediation. As will be further explained below, the quoted formulation is common in peace-making policy documents. Legalisation, on the other hand, pertains only to the articulation of the relevance of existing legal norms to peace-making or of the emergence of

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[56] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2003) 28 International Security 5, 13.

[57] European External Action Service, 'Global Challenges and Trends in International Peace Mediation and Diplomacy: A Background Note' 2.

[58] Sara Hellmüller, Julia Palmiano Federer and Mathias Zeller, 'The Role of Norms in International Peace Mediation' (swisspeace; NOREF 2015) 7.

[59] Christine Bell, 'Peacebuilding, Law and Human Rights' in Roger MacGinty (ed), *Handbook on Peacebuilding* (Routledge 2012) 257.

[60] *United Nations Guidance for Effective Mediation* (United Nations 2012) 16.

new legal norms of peace-making. Legalisation of peace-making has had three main manifestations:

(i) Since 1990s, peace negotiations have been legalised, in the sense that political disputes are framed "by reference to legal concepts, rules and principles in peace negotiations".[61] This is part of a broader pattern of the legalisation and judicialisation of politics globally.[62] Such legalisation, however, does not stem from an understanding that peace-making is conducted within an overarching legal framework. Firstly, as Bell also argues, such references to international law are context-dependent and vary according to which particular issues are raised in a peace process.[63] Secondly, the above-explained expansion of the scope of peace agreements has also increased the overlap between the issue-areas regulated in peace agreements and in international law, and hence the references to international in peace negotiations and agreements.

The texts of peace agreements concluded since the end of the Cold War demonstrate the relevance of international law *as perceived* by the peace-making parties. As further explored in Chapter 2, such references range from general commitments to respect international law to specific legal norms typically in the areas of human rights, transitional justice, return of refugees and internally displaced persons, and gender inclusion.[64] Justifying the inclusion of amnesties for political crimes by reference to Article 6(5) of Additional Protocol II of the 1949 Geneva Conventions,[65] excluding certain international crimes from the scope of an amnesty by reference to the Rome Statute or general international law,[66] or undertaking to ensure the return and repatriation of refugees and IDPs in accordance with international law[67] are among some examples of the explicit references to international law in peace agreements.

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[61] Darrel Menthe, 'Legalization and the Mediation of International Disputes: The Balkan Experience' (2007) 23 Connecticut Journal of International Law 83, 85.

[62] Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press 2011).

[63] Christine Bell, 'Peace Settlements and Human Rights: A Post-Cold War Circular History' [2017] Journal of Human Rights Practice 1, 9.

[64] See Chapter 2, Section 2.2.1.1.

[65] Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000.

[66] Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement), 16 December 2002, Art III(8).

[67] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15); Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan on the Basis of the Doha Agreement for Peace in Darfur, 6 April 2013.

(ii) Secondly, as further explored in Chapter 3, peace agreements themselves have been legalised in the sense that they assume legalistic features or claim legal force. They mimic legal form and language, e.g. using words such as "shall" or "agree", in formulating obligations. They also contain provisions on their entry into force, amendment, and implementation in good faith as typical of international treaties. Some peace agreements even claim legal force: the 2002 Luena Agreement of Angola, for example, refers to an earlier peace agreement, the 1994 Lusaka Protocol as a "political-juridical instrument".[68] The 2016 Final Peace Agreement of Colombia is signed by the parties as "a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions, as per its international standing".[69] A number of international and domestic courts, including the Special Court for Sierra Leone, The Colombian Constitutional Court, and the Supreme Court of the Philippines, had to tackle the question of whether such legalisation of a peace agreement sufficed to consider it as an international agreement.

(iii) Thirdly, since 2000 within the UN and since 2010 more broadly, peace-making has seen a process of institutionalisation at the international level, as explained above, and of codification. The thematic reports, codes of conduct and mediation guidelines, or non-binding resolutions of the UN, regional organisations, international financial institutions, third states, and NGOs have laid out their peace-making policies and legal and other normative frameworks they aim to follow. These documents increasingly urge compliance with international law in peace-making and manifest the interpretation of the relevant international law by the respective actors. In 2012, the UN issued a Guidance on Effective Mediation, where it stated that peace agreements should "respect international humanitarian, human rights and refugee laws" and that mediation takes place "within the framework constituted by…global and regional conventions, international humanitarian law, human rights and refugee laws and international criminal law, including, where applicable, the Rome Statute of the International Criminal Court".[70] The 2014 OSCE Mediation Guidance similarly emphasises that peace agreements should "recognize and express respect to all relevant international humanitarian, human rights and refugee laws".[71] The relevance of international law is accentuated where provision of peace facilitation by these actors is conditioned on the compliance of agreements with international law. For example, the Panel

[68] Memorandum of Understanding (Luena Agreement) (Angola), 4 April 2002.

[69] Final Agreement to End the Armed Conflict (Colombia) (n 18) Preamble and Section 6.1.8.

[70] *United Nations Guidance for Effective Mediation* (n 60) 16, 20.

[71] *Mediation and Dialogue Facilitation in the OSCE: Reference Guide* (n 30) 74.

on United Nations Peace Operations urges that "requests for United Nations implementation of ceasefires or peace agreements need to meet certain minimum conditions", including "that any agreement be consistent with prevailing international human rights standards and humanitarian law".[72] This type of legalisation differs from the first manifestation explained above as it articulates an international legal framework, which draws on the relevant regimes of international law, that is generally applicable to peace-making.

It must be noted that the assumptions concerning the ascertainment and interpretation of international law inherent to the legalisation of peace-making do not necessarily reflect an accurate reading of *lex lata*. For example, does the 2016 Final Peace Agreement of Colombia constitute an international agreement merely because the parties intended to award it international legal status despite one of the signatories being an armed opposition group? Or, are peace-making parties under an international legal obligation to "express respect" for international law in the text of peace agreements, as the 2014 OSCE Mediation Guidance suggests? Therefore, the precise implications of international law for the legal status, negotiation process, and content of peace agreements need to be ascertained to establish whether the legalisation of peace-making, understood in the three senses explained above, correspond to positive international law.

The normativisation of peace-making is, however, not confined to legalisation. In addition to urging compliance with international law, the policy documents articulate a broader normative framework for peace-making. The nature of the norms that comprise the framework is not elucidated but it is clear from the wording commonly adopted in such documents that it is not (yet) considered as a part of international law. The 2012 UN Guidance for Effective Mediation, which is considered as a "comprehensive normative codification for peace mediation in international peace processes" and a source of a "normative framework for peace-making" by other actors in the field of peace-making, is a case in point.[73] The Guidance states that "[i]n addition to binding legal obligations, *normative expectations* impact on the mediation process, for example regarding justice, truth and reconciliation, the inclusion of civil society, and the empowerment and participation of

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[72] *Report of the Panel on United Nations Peace Operations (21 August 2000) UN Doc A/55/305 - S/2000/89*, para 58.

[73] Jean Arnault, 'Legitimacy and Peace Processes: International Norms and Local Realities' [2014] Accord: An International Review of Peace Initiatives 21, 24; Initiative Mediation Support Deutschland Gestaltung, *Normativer Bezugsrahmen Und Völkerrechtliche Grundlagen Der Friedensmediation* (Federal Foreign Office (Germany) & Initiative Mediation Support Deutschland 2017) 4.

women in the process".[74] It further mentions that mediation is carried out within "*normative and* legal frameworks".[75] Such expressions, including "international norms",[76] "international or global standards",[77] "normative and policy guidelines",[78] and "ethical and political norms of peace mediation"[79] are commonly mentioned along with "international law" as norms that bind peace-making actors in policy documents of domestic and international actors.

Such references suggest that the normativisation of peace-making does not always necessarily entail that the emerging norms of peace-making are intended to be part of international law. However, although the documents distinguish between law and other norms, what is problematic is the lack of elaboration on which specific norms are considered as legal norms and which non-legal. Therefore, Jean Arnault, the Special Representative of the Secretary-General and Head of the UN Mission in Colombia, asks: "What relation do these normative expectations bear to peace-making?"[80] One may add: are these norms part of a soft law of peace-making, *lex ferenda*, political and moral norms, or only expressions of best practice? For example, is the inclusion of women in peace negotiations a "normative expectation", as the UN Guidance argues, or a legal requirement, as argued by some scholars?[81] The clarification of the legal nature of any emerging norm of peace-making is important as divergence from legal norms entails responsibility under international law, whereas departure from other types of norms towards a pragmatic solution to an armed conflict could be justified and would not trigger international legal responsibility.

To recapitulate, peace-making is in a process of legalisation and broader normativisation. The extent to which this trend finds support in positive international law

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[74] *United Nations Guidance for Effective Mediation* (n 60) 16.

[75] ibid.

[76] *The EU Policy Framework on Support to Transitional Justice* (European Union 2015).

[77] *Report of the UN Secretary-General on Enhancing Mediation and Its Support Activities* (n 31); *African Union Mediation Support Handbook* (African Centre for the Constructive Resolution of Disputes (ACCORD) 2014).

[78] *Enhancing Gender-Responsive Mediation: A Guidance Note* (OSCE Secretariat 2013).

[79] Initiative Mediation Support Deutschland Gestaltung (n 73) 3.

[80] Arnault (n 73) 24.

[81] Christine Bell and Catherine O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements' (2010) 59 International and Comparative Law Quarterly 941, 943; Aisling Swaine, 'Law and Negotiation: A Role for a Transformative Approach?' (2016) 7 Global Policy 282, 285.

has not been fully addressed in the literature yet. The next section introduces the main strands in the literature on peace-making and situates this dissertation within it.

1.2. Gaps in the Literature

There are three main strands in the literature on peace agreements and international law. The studies in the first strand is concerned with the theorisation of the relationship between peace agreements and international law.[82] Although these studies involve discussions of the process-related and content-related requirements of international law in peace-making, their predominant objective is to offer a non-positivist vision of international law. For example, Bell asserts that *lex pacificatoria* cannot be explained within "a positive account of law, but requires a pluralist understanding of the concept of law".[83] In a similar vein, Kastner builds his understanding of "international legal-normativity" in peace-making on process-oriented legal pluralism.[84] According to them, the alternative visions offered can accommodate within the international legal realm both the emerging norms of peace-making that do not fulfil the criteria for sources of international law and the peace agreements despite their largely domestic character and non-state actor signatories.

Therefore, an ambiguity similar to that in the above-mentioned peace-making policy documents permeates the works in this strand. Some scholars interpreted the normative developments in peace-making practice and policy, as pointing towards the emergence of a new 'law' of peace-making. Two projects have particularly marked the emerging research field of 'peace-making and international law' in the late 2000s: The *jus post bellum*, as the law governing transitions from conflict to peace in general, and *lex pacificatoria*, as the law governing the negotiation of peace agreements in particular.[85] Several studies determining new 'international norms' of peace-making followed.[86] Although the content of the new law

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[82] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4); Kristen E Boon, 'The Application of Jus Post Bellum in Non-International Armed Conflicts' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014); Kastner (n 4); Michal Saliternik, 'Perpetuating Democratic Peace: Procedural Justice in Peace Negotiations' (2016) 27 European Journal of International Law 617; Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017).

[83] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[84] Kastner (n 4) 2.

[85] Carsten Stahn and Jann K Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (TMC Asser Press 2008); Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[86] See e.g. Kastner (n 4); Saliternik (n 82); Martin Wählisch, 'Normative Limits of Peace Negotiations: Questions, Guidance and Prospects' (2016) 7 Global Policy 261.

is varyingly determined in different projects, the new law is commonly understood to comprise the relevant legal norms in the existing international legal regimes and an emerging set of peace-making norms. Another commonality among the different projects is the acknowledgement of the peculiar normative nature of the new 'law' or 'norms' of peace-making. For example, Easterday argues that *jus post bellum* should be understood not as "rigid legal rules", but as legal norms and "normative practices of non-state actors and organisations" brought within a common interpretative framework and discourse.[87] As to *lex pacificatoria*, Bell contends that it is "not a fully-fledged legal regime" but a "developing law … articulating broad normative parameters".[88] These explanations make it clear that the new 'law' is not considered as international law proper in its entirety. What they do not clarify, however, is the extent to which it constitutes or is related to international law.

The second strand is that of the studies on the legal status of intra-state peace agreements.[89] Discussed in detail in Chapter 3, some of these studies do not comprehensively explore the relevant practice of peace agreements and of the Security Council or the international and domestic case-law. Moreover, similar to some of the studies mentioned in the previous paragraph, the majority of the studies on the legal status of peace agreements depart from positive international law in order to account for the legalistic and internationalised features of peace agreements.

Thirdly, there are studies that focus on particular peace agreements[90] or on particular issue-areas addressed in peace agreements. As to the issue-areas, self-determination,[91]

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[87] Easterday, 'Peace Agreements as a Framework for Jus Post Bellum' (n 24).

[88] Christine Bell, 'Of Jus Post Bellum and Lex Pacificatoria - What's in a Name?' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 182.

[89] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 American Journal of International Law 373; Olivier Corten and Pierre Klein, 'Are Agreements between States and Non-State Entities Rooted in the International Legal Order' in Enno Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011); Luisa Vierucci, *Gli Accordi Fra Governo e Gruppi Armati Di Opposizione Nel Diritto Internazionale* (Editoriale Scientifica 2013); Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-State Parties* (Cambridge University Press 2018).

[90] See e.g. Steven R Ratner, 'The Cambodia Settlement Agreements' (1993) 87 The American Journal of International Law 1; Paola Gaeta, 'The Dayton Agreements and International Law' (1996) 7 European Journal of International Law 147; Scott P Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011) 60 International and Comparative Law Quarterly 423.

[91] Kelly Stathopoulou, 'Self-Determination, Peacemaking and Peace-Building: Recent Trends in African Intrastate Peace Agreements' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013).

transitional justice,[92] human rights,[93] and power-sharing[94] have been the subject of thematic analyses. Although these studies are illuminating in relation to their respective thematic focuses and provide helpful starting points for future research, they mostly remain limited to certain case studies or regions and do not aim to provide a comprehensive examination of the international legal framework applicable to the respective thematic issue-areas.

Beyond international law, the field of peace and conflict studies offers insights into the underlying causes of conflict, conflict resolution tools, and negotiation theories but did not devote attention to normative considerations in peace negotiation until recently.[95] The field has started to acknowledge the emergent normativisation of peace-making. The emphasis in this literature is on the norms relating to the negotiation process of peace agreements. Scholars investigate the exclusionary or inclusionary effects of norms, either stemming from counter-terrorism laws and policies or from the norms requiring the participation of certain actors other than conflicting parties like civil society or women, on peace-making.[96] Although this literature provides evidence for the increasing acknowledgement of the normativisation of peace-making, it is largely indifferent to the nature of such norms, particularly as to whether they are legal norms or not.

Overall, especially during the last decade, peace agreements signed in intra-state armed conflict settings have received increased attention from scholars of international law and political science. In international legal scholarship, studies have addressed the relationship between peace agreements and international law at a theoretical level, the legal status of particular peace agreements, and the legality of certain procedural and substantive aspects of peace-making. The peace and conflict studies have further explored the role of norms in peace negotiations with a focus on process design. What is lacking is a

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[92] Naomi Roht-Arriaza, *Transitional Justice and Peace Agreements* (The International Council on Human Rights Policy 2005).

[93] International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements* (2006).

[94] Jeremy I Levitt, *Illegal Peace in Africa An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta* (Cambridge University Press 2014).

[95] Kastner also points out that the field ignores normative considerations, see Kastner (n 4) 21.

[96] See David Lanz, 'Who Gets a Seat at the Table? A Framework for Understanding the Dynamics of Inclusion and Exclusion in Peace Negotiations' (2011) 16 International Negotiation 275; Thomas Biersteker and Zuzana Hudáková, 'UN Sanctions and Peace Negotiations: Possibilities for Complementarity' (2015) 4 Oslo Forum Papers; Corinne Von Burg, *On Inclusivity: The Role of Norms in International Peace Mediation* (swisspeace; NOREF 2015); Hellmüller, Palmiano Federer and Zeller (n 58); Julia Palmiano Federer and Rachel Gasser, *International Peace Mediation and Gender: Bridging the Divide* (BRICS Policy Center 2017); Sara Hellmüller and others, *Are Mediators Norm Entrepreneurs? Exploring the Role of Mediators in Norm Diffusion* (swisspeace 2017).

comprehensive treatment of the role of international law in the negotiation of peace agreements from a doctrinal perspective to determine whether international law stipulates precise requirements for peace-making and whether there are new legal norms of peace-making emerging. Aiming to fill this gap, the dissertation adopts the following framework for its analysis of the topic.

1.3. A Framework for Analysis

This dissertation analyses the role of international law in the negotiation of peace agreements as to whether and how it shapes the (i) legal status, (ii) negotiation process, and (iii) contents of peace agreements.

Firstly, the dissertation examines whether peace agreements constitute international agreements. In general, implementation of a peace agreement is no less challenging than its conclusion by the parties. In order to increase the compliance pull of the agreement, peace-making parties, for example, incorporate monitoring and conflict resolution mechanisms with international involvement, request the deployment of a peacekeeping force, or request the incorporation of a peace agreement in a Security Council resolution.[97] Most peace agreements also make provision for its domestic legal incorporation. Yet, the challenges inherent in the implementation of a peace agreement in accordance with domestic law, which may itself be among the disputed issues between conflict parties, and the increased international involvement in the post-agreement phase foreseen in peace agreements have led some peace-making parties,[98] donor states,[99] and scholars[100] to seek ways of entrenching an agreement within the international legal realm by attaching it the status of an international agreement. Therefore, the dissertation examines whether peace agreement constitute international agreements in certain conditions and can be implemented as such.

The dissertation then distinguishes between legal and other types of norms that are relevant to the negotiation process of a peace agreement (process-related norms) and its

[97] For examples, see Chapter 3. On the importance and modalities of built-in safeguards in peace agreement implementation, see Madhav Joshi, Sung Yong Lee and Roger Mac Ginty, 'Built-in Safeguards and the Implementation of Civil War Peace Accords' (2017) 43 International Interactions 994.

[98] See e.g. Final Agreement to End the Armed Conflict (Colombia) (n 18).

[99] *Legal Dimensions of Peace Agreements in Internal Conflicts* (UK Foreign and Commonwealth Office 2016).

[100] See supra footnote 89.

contents (content-related norms).[101] As to the negotiation process, it has been argued by international lawyers that negotiated settlements are not only more morally superior or effective means of conflict resolution, but also an emerging legal requirement. As to whom must participate in negotiations, it has been argued that civil society, women, affected minority and indigenous groups, youth and children must be included in negotiations. On the other hand, there are exhortations that perpetrators of international crimes and terrorist offences must be excluded from negotiations. Therefore, the dissertation examines whether there is a duty to negotiate peace in intra-state armed conflicts (the norm of negotiation), to include certain actors in negotiations (the norm of inclusion), and to exclude certain actors from negotiations (the norm of non-negotiation).

As to the content of peace agreements, the dissertation examines whether there is a duty to address certain substantive issue-areas, for example transitional justice or human rights, in a peace agreement and whether there are norms stipulating how the issue-areas should be regulated. For example, is there a duty to include criminal justice mechanisms in a peace agreement? Can parties legally agree on general amnesties? Are there international legal guarantees that non-criminal justice mechanisms, such as truth commissions or local justice processes, must respect? Should a peace agreement contain a bill of rights or commitments to ratify international human rights treaties?

The threefold framework allows a comprehensive examination of the relationship between peace agreements and international law, with a view to determining the relevance of the existing international law and whether a new law, or legal norms, of peace-making is emerging. Where relevant, the legal analysis is accompanied by the discussion of policy and practice considerations as to the possible increase of the role of international law in peace-making, particularly in determining the legal status, negotiation process, and contents of peace agreements.

1.4. Terminology and Data Sources

Introducing this dissertation also requires clarifications on the key terms used and data sources.

[101] von Burg makes a similar distinction between, among others, prrocess-related and content-related norms in peace mediation, see Burg (n 96).

1.4.1. Peace process, peace negotiations, peace agreement

The term 'peace process' can be defined in many ways. Saunders defines it as "a political process in which conflicts are resolved by peaceful means", which involves a "mixture of politics, diplomacy, changing relationships, negotiation, mediation, and dialogue in both official and unofficial arenas".[102] Darby and Mac Ginty determine the key phases or themes in the political peace process as preparing for peace, negotiations, violence, peace accords, and post-accord implementation and reconstruction.[103] The political peace process ideally takes place in parallel to a social peace process, which is a "process of societal healing" through reconciliation, compromise, and forgiveness.[104]

The term is also used more narrowly to refer to the official phase of a peace process, comprising of, often elite-level, peace negotiations and resultant agreements.[105] Accordingly, 'peace negotiations' is understood as official negotiations held between all or some of the conflicting parties, often with the involvement of external peace facilitators. Civil society actors, women, victims of conflict-related crimes, and representatives of affected indigenous groups or minorities may be included in the official negotiations either through direct participation or consultative mechanisms.

Determining the criteria for what constitutes a 'peace agreement' appears to be a project-specific task. Databases and scholarly projects on peace agreements provide several different definitions depending on the aims and objectives of the respective project. Bell, for example, defines peace agreements as "documents produced after discussion with some or all of the conflict's protagonists, which address militarily violent conflict with a view to ending it".[106] This definition produces a large dataset of agreements broadly understood to include non-agreements, such as UNSC Resolutions that stipulate the terms of the resolution

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[102] Harold Saunders, 'Prenegotiation and Circum-Negotiation: Arenas of the Peace Process' in Chester Crocker, Fen Hamspon and Pamela Aall (eds), *Managing Global Chaos* (United States Institute of Peace 1996).

[103] John Darby and Roger Mac Ginty, 'Introduction: What Peace? What Process?' in John Darby and Roger Mac Ginty (eds), *Contemporary Peacemaking: Conflict, Peace Processes and Post-war Reconstruction* (Routledge 2008) 1–8.

[104] John D Brewer, *Peace Processes: A Sociological Approach* (Polity Press 2010) 263.

[105] See e.g. Jan Selby, 'The Political Economy of Peace Processes' in Michael Pugh, Neil Cooper and Maldy Turner (eds), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Palgrave Macmillan 2008) 15; Stina Högbladh, 'Peace Agreements 1975-2011 - Updating the UCDP Peace Agreement Dataset' in Therése Pettersson and Lotta Themnér (eds), *States in Armed Conflict 2011 (Research Report 99)* (Uppsala University: Department of Peace and Conflict 2012) 42.

[106] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4) 53.

of a conflict, e.g. Resolution 687 regarding the conflict between Iraq and Kuwait, or peace proposals of mediators, as these documents are assumed to have required some level of agreement or discussion by the parties.[107] The UN Peacemaker Database of Peace Agreements does not provide a definition but similarly compiles a broad range of documents, including formal peace agreements, informal agreements resulting from informal talks during peace processes, legislation and governmental acts that are outcomes of peace negotiations, UNSC Resolutions, ICJ decisions, and peace proposals.[108] Although such documents, which are not technically agreements between parties, are explored in this dissertation to explore the references to international law and norms, they are not referred to as peace agreements *per se*.

The Uppsala Conflict Data Program's Peace Agreement (UCDP) Dataset provides an alternative definition:

> "A peace agreement is a formal agreement between warring parties, which addresses the disputed incompatibility, either by settling all or part of it, or by clearly outlining a process for how the warring parties plan to regulate the incompatibility."[109]

Adopting the UCDP definition, this dissertation focuses on formal peace agreements. These agreements can be ceasefire agreements, comprehensive peace agreements, or sub-agreements dealing with selected aspects of the dispute between the parties. As formal agreements negotiated by conflict parties with the input of other domestic and international actors, they provide "snap-shots" of the peace-making perspectives of these actors and the role they attribute to international law in conflict resolution.[110]

To conclude, the analysis of the role of international law in this dissertation predominantly pertains to the official phase of a peace process comprising of official peace negotiations and resultant formal peace agreements. Three main reasons are behind this choice: (i) the normative developments analysed focus on official negotiations and agreements; (ii) potential bearers of any existing or emerging legal obligation are likely to

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[107] ibid.

[108] See "More info on the database" at 'The United Nations Peacemaker Database' <https://peacemaker.un.org/>.

[109] The Uppsala Conflict Data Program (UCDP), 'Definitions' <http://www.pcr.uu.se/research/ucdp/definitions/>.

[110] International Council on Human Rights Policy (n 93) 2 (Explaining that the focus on peace agreements in transitions from conflict to peace is justified as agreements allow comparisons across countries, form snap-shots of conflict resolution frameworks, and are at the centre of the focus of negotiations).

be the negotiating parties and third actors formally involved in peace negotiations and post-agreement implementation; and (iii) from a data collection perspective, references to international law in the official phase of peace processes can be more accurately discerned due to the availability of reports on peace negotiations and resultant agreements to public.

1.4.2. Intra-state armed conflict

In this dissertation, intra-state armed conflict is defined as a violent conflict between a government and one or more armed opposition group(s). The disputed incompatibility between the parties may be over governance or territory.[111] Hence, the dissertation does not adopt a quantitative definition of armed conflict based on the number of battle-related deaths, as is common in definitions of civil war in the conflict studies literature.[112] Nor is the legal classification of a conflict as a non-international armed conflict, or as an international(ised) armed conflict, determinative of the identification of an intra-state armed conflict in this study. Therefore, where the dissertation refers to intra-state armed conflicts, this does not denote an assumption about the legal classification of the conflict. From an international humanitarian law perspective, intra-state armed conflicts which are addressed by peace agreements explored in this dissertation are mostly non-international armed conflicts, but may also be international(ised) armed conflicts. Moreover, some violent conflicts, which have culminated in formal peace agreements, may not have reached the threshold of an armed conflict. The post-election violence in Kenya in 2007, for example, did not amount to an armed conflict but was resolved with a peace agreement in 2008.[113] The legal classification of an intra-state armed conflict may have implications for the legal status of a peace agreement, that is if one presumes that armed groups who are parties to a non-international armed conflict and sign a peace agreement acquire limited international legal personality. Such implications are pointed out in Chapter 3. The legal classification of the conflict, however, does not alter the normative framework of peace negotiations or the (putative) international legal norms of peace-making.

The majority of peace agreements aiming to end an intra-state armed conflict are signed by one state and one or more armed opposition group(s). However, some peace

[111] The definition is an adaptation of the definition adopted in The Uppsala Conflict Data Program (UCDP) (n 109).

[112] See e.g. ibid; Hartzell (n 11).

[113] Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government, 28 February 2008.

agreements aiming to end an intra-state conflict are signed by more than one state and at least with one armed opposition group. Among the notable examples of such agreements with a double character[114] is the General Framework Agreement for Peace in Bosnia and Herzegovina of 1995, commonly referred to as the Dayton Peace Agreement.[115] The main part of the Agreement is signed by three states, The Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, however, twelve annexes attached to this main agreement are signed by varying matches of these three states and sub-state entities, the Republika Srpska and the Federation of Bosnia and Herzegovina.[116] Such agreements are referred to as 'peace agreements with a double character' in Chapter 3, to capture the impact of the signatory constellation on its legal nature, and may be governed by international law only as between their states parties.

Lastly, focusing on peace agreements aiming to end an intra-state armed conflict, this dissertation does not address inter-state peace treaties that aim to end inter-state wars. Nor does it address inter-state treaties that address the inter-state dimensions of an intra-state armed conflict. Especially in cases of intra-state armed conflicts, which are internationalised or of otherwise concern to regional or other states, the conflict state and third states sign agreements to address the inter-state dimensions of the armed conflict, its causes and consequences. Such agreements often impose obligations on parties to respect the sovereignty and territorial integrity of each other, to refrain from interference in each other's internal affairs in accordance with international and regional legal principles, to prevent any third party from using their own territories for military purposes hostile to either party, and to disarm and disband terrorist groups originating and operating from their territories.[117] As inter-state agreements, they constitute international treaties as per the 1969 Vienna Convention on the Law of Treaties if they are intended to be binding. [118] Therefore, contrary to peace agreements aiming to end intra-state armed conflicts, these do not present challenges as to their classification. Moreover, as they concern the inter-state aspects of an intra-state armed conflict, they do not fall within the material scope of the laws, other types

[114] On 'peace agreements with a double character' see Chapter 3, Section 3.2.2.3.

[115] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15).

[116] ibid.

[117] See e.g. Agreement between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad concerning the practical modalities for the implementation of the Judgment delivered by the International Court of Justice, 3 February 1994, Arts 5-6; Agreement between the Governments of Sudan and Uganda (the Nairobi Agreement), 8 December 1999, Arts 1, 3-4.

[118] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (1969 VCLT), Arts 1-2.

of norms, or policies that address the process-related or substantive aspects of intra-state peace-making.

1.4.3. State, non-state and external actors in peace negotiations

The conflicting parties in an intra-state armed conflict, who engage in peace negotiations, are referred to as 'negotiating parties' in this dissertation. The state party is represented by the delegates of its government. The non-state party(ies) can be the representatives of any armed opposition group (AOGs), understood as "groups that are armed forces and use force to achieve their objectives and are not under state control".[119] Although the majority of peace agreements cited in this dissertation aim to end intra-state armed conflicts that amount to non-international armed conflicts, the set of conflicts covered is broader than that and, therefore, the definition of AOG does not require the fulfilment of conditions for an AOG to belong to a party to an armed conflict as per international humanitarian law.[120] The definition covers a broad range armed non-state groups, for example, those fighting on behalf of political movements, national liberation movements, minority or indigenous groups, de jure or de facto sub-state units, or dissident armed forces.

External actors involved in peace processes carry out peace facilitation roles in the negotiation and implementation of peace agreements by providing mediation, financial support, and technical and implementation assistance to parties. [121] Such actors often sign peace agreements as witnesses or guarantors. They are referred to as external actors or peace facilitators in this dissertation, unless specific mention is made to the character of the actor, for example, as a third state, international or regional organisation, or non-governmental organisation. As explained above, a number of peace agreements, referred to as peace agreements with a double character in this dissertation, are signed by third states as signatories, who are referred as a 'third state signatory'.

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[119] The definition is borrowed from David Petrasek, *Ends & Means: Human Rights Approaches to Armed Groups* (International Council on Human Rights Policy 2000).

[120] See Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, Common Art 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, Art 1. See also *Prosecutor v Tadić (Appeal Judgment) ICTY–94–1–A (15 July 1999)*.

[121] I borrow the term 'peace facilitators' from Saliternik (n 4).

1.4.4. Data sources

All peace agreements cited in this dissertation are accessed through the Language of Peace Database, a joint University of Cambridge-United Nations project.[122] The names and dates of the peace agreements are cited in accordance with the records in this database. Peace agreements cited in this dissertation can be found in 'List of peace agreements'.

As the texts of peace agreements do not always reflect the content of the negotiations, the study of agreements is complemented with secondary sources including international legal and policy instruments, international and domestic reports, scholarship, and media sources to identify references to international law and other norms during the negotiations.

A list of major documents of peace-making policy adopted by states, international and regional organisations, and non-governmental organisations is also compiled for this dissertation and can be found in 'List of official documents'.

1.5. Outline of the Dissertation

This introductory Chapter 1 explained the background to the topic, the gaps in the literature, and the framework for analysis adopted, as well as clarifying the terminology and data sources used. It is followed by Chapter 2, which expands on the process of legalisation and broader normativisation outlined above. The Chapter charts the sources of peace-making norms, clarifies the place of international law within that framework, and introduces different conceptions and theories regarding a new law of peace-making. It also clarifies the theoretical lens adopted in the dissertation as to the ascertainment of the legal nature of peace-making norms and juxtaposes it with the theoretical approaches adopted in the seminal works on peace-making and international law.

Having established what the normative framework of peace-making comprises and how the place of international law within that framework is understood in this dissertation, the next three chapters respectively focus on the legal status, negotiation process, and contents of peace agreements. Chapter 3 examines the legal status of peace agreements, i.e. whether they can be implemented as international agreements despite being signed by armed opposition groups. The Chapter concludes that peace agreements aiming to end intra-state

[122] United Nations and University of Cambridge (n 1).

armed conflicts and signed between states and armed opposition groups do not constitute international agreements. Nonetheless, international law bears relevance to the negotiation process and content of peace agreements. Focusing on the former, Chapter 4 examines whether there is a duty to negotiate intra-state peace in international law and whether international legal norms require the inclusion or exclusion of certain actors in peace negotiations. Chapter 5 then focuses on the role of international law in shaping the contents of peace agreements as to whether and how the issue-areas of transitional justice and human rights should be addressed in the agreements. The dissertation concludes by summarising its main findings and identifying possible directions for future research on the topic.

Chapter 2: Normativisation of Peace-making - What Role for International Law?

Peace-making, understood as comprising peace negotiations and resultant peace agreements, has been increasingly legalised and more broadly normativised since the end of the Cold War. As Chapter 1 outlined, this has implications for the legal status, negotiation process and content of peace agreements. In order to set the stage for the discussion of such implications in the following three chapters, this chapter expands on what the legalisation and broader normativisation of peace-making entail.

The chapter is structured into two main parts. The first part charts the categories, i.e. the different categories of formal sources of peace-making norms, which may comprise the normative framework of *a* peace process. The second part, then, introduces the question of whether there is an emerging international law of peace-making, taking into account the articulation of the relevance of international law to peace-making and the assertion of new peace-making norms in the sources identified in the first part. This part engages with the literature that theorise the relationship between peace agreements and international law, introduced as the first strand of the existing literature in Chapter 1, with a view to examining how the relevance of international law to the normative framework of peace-making is varyingly assessed depending on different theoretical approaches to the ascertainment and interpretation of international law. Asserting the main tenets of the formalist approach to international law-making adopted in this dissertation, the chapter concludes by arguing for the preservation of the boundary between international law and non-legal norms when assessing the legalisation and broader normativisation of peace-making due to legal and policy reasons.

2.1. Charting the normative framework applicable to the negotiation of a peace agreement

Each peace process takes place within a normative framework, which needs to be mapped on a case-by-case basis depending on the state, non-state and external actors involved. The overarching framework comprises various sub-components, namely the relevant international law, non-binding international instruments, domestic laws, organisational normative frameworks, domestic policy frameworks, the case-specific normative framework created by negotiating parties, normative commitments of armed opposition groups, and sub-state norms.

The 2012 UN Guidance for Effective Mediation acknowledges the plurality of normative sources in peace-making by stating that "peace mediation takes place within normative and legal frameworks", which include "the Charter of the United Nations, relevant Security Council and General Assembly resolutions and the Organization's rules and regulations", "the rules of international law that govern the given situation", and "normative expectations … for example regarding justice, truth and reconciliation, the inclusion of civil society, and the empowerment and participation of women in the process".[123] It further states that the relevant international legal rules may comprise "global and regional conventions, international humanitarian law, human rights and refugee laws and international criminal law, including, where applicable, the Rome Statute of the International Criminal Court".[124] A Fact Sheet published as part of a joint policy-development programme by the German Federal Foreign Office and the Initiative Mediation Support Deutschland more explicitly notes the multiplicity of normative frameworks at play in peace-making as comprising the methodological practices and ethical principles of peace mediation, mediation mandate, and domestic and international law.[125]

2.1.1. International law

International legal obligations of the state party to the conflict and peace negotiations, deriving from international treaties, customary law, or binding resolutions of international organisations, particularly the Security Council in this context, become a part of the normative framework of a peace process to the extent that they are relevant to the issues that arise. For states parties to the Rome Statute, it also becomes an important normative consideration, even though the Statute binds the Court not the state parties, except for their obligations to cooperate under the Statute.

As with the domestic law category, international legal obligations of third state peace facilitators may also be considered as part of the normative framework of a peace process due to their potential indirect effects on the negotiations. The UK Department for International Development, for example, emphasises that the engagement of the UK in the

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[123] *United Nations Guidance for Effective Mediation* (n 60) 16.

[124] ibid.

[125] Initiative Mediation Support Deutschland Gestaltung (n 73) 1. See also *Developing Guidance for Effective Mediation: Consultation With Regional, Subregional and Other International Organizations* (Organization for Security and Co-operation in Europe (OSCE) 2012) 27 (Noting that peace mediation takes place within 'a normative and legal framework', which includes 'evolving norms' that may be contested by some parties).

development of peace agreements is conditioned by its obligations under international humanitarian law, international human rights law and international criminal law.[126]

Lastly, there are potential ways of incorporating requirements about the negotiation process or content of a peace agreement in an internationally binding medium. For example, to do so, the Security Council may establish binding *ad hoc* requirements in relation to a particular peace process, the mediation mandate can be grounded in a binding resolution, or external peace facilitators may enter into international agreements with recipient states.

2.1.2. Non-binding international instruments

There are a number of non-binding international instruments that embody the normative commitments of states, international organisations, non-governmental organisations or sub-state institutions in the field of peace-making. For example, "the New Deal for engagement in fragile states", adopted in 2011 by the members of the International Dialogue on Peacebuilding and Statebuilding ("the Dialogue"), comprised of the g7+ group of 19 fragile and conflict-affected countries, development partners, and international organisations, underscores their commitments to "inclusive political settlements and conflict resolution".[127]

The 2008 Nuremberg Declaration on Peace and Justice, adopted as the outcome of an International Conference "Building a Future on Peace and Justice" and organised by the Jordan, Finland and Germany, is another example. The Declaration is presented explicitly as "not a legal" but a "political document".[128] In addition to expressing normative principles for dealing with the past and promoting development in "all phases of conflict transformation, including mediation, post-conflict peacebuilding, development, and the promotion of transitional justice and the rule of law", it states that:

> "Mediators['] commitment to the core principles of the international legal order has to be beyond doubt. They should promote knowledge among the parties about the

[126] *Building Peaceful States and Societies: A DFID Practice Paper* (n 40) 18. See also *USAID Policy Framework 2011-2015* (United States Agency for International Development 2011); *Democracy, Human Rights, and Governance Strategic Assessment Framework* (United States Agency for International Development 2014).

[127] *A New Deal for Engagement in Fragile States* (International Dialogue on Peacebuilding and Statebuilding 2011).

[128] *Nuremberg Declaration on Peace and Justice, Annex to the Letter Dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations Addressed to the Secretary-General (19 June 2008) UN Doc A/62/885*.

> normative framework, including international human rights standards and humanitarian law, and available options for its implementation, so that the parties can make informed choices."[129]

Finally, 19 national human rights institutions and organisations adopted the Kyiv Declaration in 2015 expressing their views on the inclusion of human rights in conflict resolution processes, including in the negotiation of peace agreements.[130]

2.1.3. Domestic law(s)

Another category within the normative framework of a peace process is the domestic legal framework, particularly the constitution, of the state party to the conflict and peace negotiations. Although some agreements pave the way for a new post-conflict constitution, many peace agreements are concluded and implemented within the framework of an existing constitution.[131] Therefore, negotiating parties need to ensure that constitutional amendments or implementing laws rooted in a peace agreement comply with the constitution both procedurally in terms of their adoption process and substantively.[132] If a peace agreement foresees implementation through legal means that are hierarchically inferior to ordinary legislation, it also needs to be negotiated in compliance with such legislation.

Domestic laws of third state peace facilitators, e.g. providing mediation, financial support or technical assistance in a peace process, also become part of the normative framework. Although such norms are only binding on the actors from such third states and not on the negotiating parties, they may indirectly affect the negotiation terms if third state facilitators condition their support to the peace process on the observation of the relevant norms. In Switzerland, for example, the normative commitments in peace facilitation are codified in legislation and public officials engaging in such tasks abroad are under an

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[129] ibid 1.2.

[130] 'The Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations (21-22 October 2015)'.

[131] 118 peace agreements concluded after intra-state armed conflicts in the post-1989 period contain constitutional reform provisions and %65 of those that provide for some form of constitutional reform contain a commitment to amend the respective existing constitution, see United Nations and University of Cambridge (n 1).

[132] See Chapter 3, Section 3.4.1 on domestic legal challenges that may follow from peace agreement-based legal or constitutional reforms that contravene the constitution. See also *Guidance Note of the Secretary-General on United Nations Assistance to Constitution-Making Processes* (United Nations 2009) 3 (Drawing attention to the constitutional implications of peace agreements and such limitations to their implementation).

obligation to respect them.[133] Domestic legal norms that do not directly address peace facilitation, such as counter-terrorism laws, may also bear relevance to the involvement of public or private, for example influential individual mediators or peace mediation organisations, external actors in foreign peace processes. For example, several domestic legal systems criminalise certain forms of engagement with members or leaders of armed groups that are listed as terrorist organisations. As further explained in Chapter 4, counter-terrorism laws that proscribe engagement with persons or groups designated as terrorists may lead the nationals of the relevant third state either to abstain from involvement with a foreign peace process, or to try to exclude the designated persons or groups from peace negotiations.

2.1.4. The case-specific normative framework created by the parties

Each peace process sees the conclusion of a series of agreements, ranging from pre-negotiation and ceasefire agreements to comprehensive agreements and post-agreement implementation agreements.[134] Before reaching a comprehensive peace agreement, negotiating parties will have often established a framework that lays out both process- and content-related norms to govern the negotiations.[135] It is also a common practice to confirm the continuing relevance of previously reached agreements in case of a second or later round of peace negotiations in a conflict, which has seen repeated cycles of violence and negotiations.[136]

As agreements with AOGs, which do not enjoy treaty-making capacity in international law except for national liberation movements, such agreements lack international legal status but constrain future negotiations as political agreements or, if already incorporated, domestic law.[137] Naturally, such agreements may be revised by future

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[133] Bundesgesetz über Massnahmen zur zivilen Friedensförderung und Stärkung der Menschenrechte (Switzerland) 2004 (Stating that the federation aims to promote democratic processes, the strengthening of human rights by promoting the civil, political, economic, social and cultural rights of individuals or groups of persons, and respect for international humanitarian law in conflict prevention, confidence-building, mediation and peace-building activities).

[134] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4) 56 et seq.

[135] See e.g. Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords) (Israel, Occupied Palestinian Territory), 13 September 1993; Acuerdo General para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Colombia), 26 August 2012.

[136] See e.g. Memorandum of Understanding (Angola) (n 68) Chapter 1, Art 2.2 (Confirming the continuing validity of the 1994 Lusaka Protocol).

[137] Further discussed in Chapter 3.

agreements with the consent of all parties, and any resulting changes would need to be reflected in the relevant domestic laws.

2.1.5. Organisational policy documents, guidelines and codes of conduct, and non-binding resolutions

As explained in Chapter 1, international and regional organisations, international financial institutions and non-governmental organisations have increasingly adopted policies relevant to conflict resolution and codes of conduct governing their involvement in such processes. Primarily aiming to guide the conduct of these actors themselves and addressing their representatives instead of negotiating parties, the policies and norms articulated in these instruments may ultimately shape the negotiation process and content of a peace process.[138] These instruments, firstly, provide evidence for the legalisation of peace-making by reflecting the views of the respective actors as to the applicability of international law to peace-making. However, they also point to a broader normativisation of the field, as they urge compliance with additional "normative expectations", "normative and policy frameworks" or "global standards".

Before an exploration of these documents, classified below according to the author organisation, it must be noted that these documents do not only contain references to international legal and other types of norms applicable in peace-making. They also provide operational principles, best practices or lessons learned. In accordance with the scope and aims of the dissertation, the focus in this chapter is on explicit references to law or other types of norms, which may also be supported by best practices or lessons learned.

2.1.5.1. The United Nations

The UN Charter provides the legal framework for the UN's role in the pacific settlement of disputes, including the provision of good offices, and the SC action with respect to threats to the peace, breaches of the peace and acts of aggression.[139] Since the end of the Cold War, particularly in the past two decades, the UN has further adopted several guidelines on peace negotiations, in addition to landmark policy documents pertaining to various relevant fields, including conflict resolution, peacekeeping, peacebuilding,

[138] Wittke (n 89) 18.

[139] See Charter of the United Nations (n 8), Chapters VI and VII.

constitution-making, electoral assistance, transitional justice and rule of law reform (see Table 1 below). Moreover, in addition to binding and non-binding resolutions addressing particular peace processes, the SC has adopted a series of thematic resolutions as part of the Women, Peace and Security (WPS) and Youth, Peace and Security (YPS) agendas (see Table 2 below). These documents set out operational principles such as preparedness, coordination and complementarity in peace mediation and normative principles such as local ownership, inclusivity, and 'compliance with international law and normative frameworks'.[140]

Table 1: UN Mediation Guidelines for Peace Negotiations/Agreements
1996/2006 Guidelines on Certain Aspects of Negotiations for Conflict Resolution
2008 Guidance Note of the Secretary General: United Nations Approach to Rule of Law Assistance
2010 Guidance Note of the Secretary General: United Nations Approach to Transitional Justice
2012 Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements (UN Department of Political Affairs)
2012 United Nations Guidance for Effective Mediation
2013 Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court
2015 Natural Resources and Conflict A Guide for Mediation Practitioners (United Nations Department of Political Affairs and United Nations Environment Programme)
2017 Guidance on Gender and Inclusive Mediation Strategies (UN Department of Political Affairs)
Undated Guidelines for UN Mediators - Terrorism

2.1.5.2.Regional organisations

Following in the footsteps of the UN, regional organisations have recently set out to develop organisational conflict resolution and mediation guidelines. The 2014 African Union

[140] See e.g. *United Nations Guidance for Effective Mediation* (n 60).

Mediation Support Handbook,[141] the 2009 EU Concept on Strengthening EU Mediation and Dialogue Capacities and the 2015 EU Policy Framework on Support to Transitional Justice,[142] the 2013 OSCE Guidance Note on Enhancing Gender-Responsive Mediation and the 2014 OSCE Reference Guide on Mediation and Dialogue Facilitation[143] are among the major documents.[144] The IGAD has also committed to enhancing its "*normative* and institutional capacity in preventive diplomacy, mediation and peace building".[145] As with the IGAD, all regional organisations have aimed to develop normative guidelines for their mediators affirming international law as a normative framework for peace-making, in addition to operational principles.

Table 2: Thematic SC Resolutions Referring to Peace Negotiations	
Women's Inclusion in Peace-making	Resolution 1325 (2000) Resolution 1889 (2009) Resolution 2122 (2013) Resolution 2242 (2015)
Addressing Conflict-related Sexual Violence in Peace Agreements	Resolution 1820 (2008) Resolution 1888 (2009) Resolution 1960 (2010) Resolution 2106 (2013)
Youth's Inclusion in Peace Processes and Conflict Resolution	Resolution 2250 (2015)
Conflict Prevention and Resolution	Resolution 2171 (2014)

[141] *African Union Mediation Support Handbook* (n 77).

[142] *Concept on Strengthening EU Mediation and Dialogue Capacities* (Council of the European Union 2009); *The EU Policy Framework on Support to Transitional Justice* (n 76). For a comprehensive analysis of the policy and practice of the EU in the field of peace mediation, see Laura Davis, *EU Foreign Policy, Transitional Justice and Mediation* (Routledge 2014).

[143] *Mediation and Dialogue Facilitation in the OSCE* (n 30); *Enhancing Gender-Responsive Mediation: A Guidance Note* (n 78).

[144] *ASEAN Political-Security Community Blueprint* (ASEAN Secretariat 2009); *Regional Strategy 'Protection of Arab Women: Peace and Security'* (General Secretariat of the League of Arab States, Arab Women Organization, UN Women 2012).

[145] *IGAD Regional Strategy Volume 1: The Framework* (Intergovernmental Authority on Development 2016) 78 [Emphasis added].

2.1.5.3.International financial institutions

As the joint World Bank-United Nations Report on the Pathways for Peace acknowledges, financial support to the processes of peace agreement negotiation and implementation is a significant leverage tool for international actors aiming to ensure compliance with their normative commitments in peace agreements.[146] Furthermore, international financial institutions develop their own operation guidelines, or policy agendas, that condition their involvement on certain normative principles.[147] Overall, along with Western states, they are referred to as "normatively constrained donors".[148]

Table 3: Mediation Guidelines of Regional Organisations
2009 (ASEAN) Political-Security Community Blueprint
2009 (EU) Concept on Strengthening EU Mediation and Dialogue Capacities
2013 (OSCE) Enhancing Gender-Responsive Mediation: A Guidance Note
2014 (AU) African Union Mediation Support Handbook
2014 (OSCE) Mediation and Dialogue Facilitation in the OSCE: Reference Guide
2015 (EU) The EU's Policy Framework on Support to Transitional Justice
2016 (IGAD) Regional Strategy Volume 1: The Framework

[146] *Pathways for Peace* (n 16) 263.

[147] See e.g. *World Development Report 2011: Conflict, Security, and Development* (The World Bank 2011); The World Bank, *World Development Report 2017: Governance and the Law* (The World Bank 2017); *The World Bank Operations Manual* (The World Bank 2014); *A New Deal for Engagement in Fragile States* (n 127).

[148] Christine Bell, 'What We Talk about When We Talk about Political Settlements: Towards Inclusive and Open Political Settlements in an Era of Disillusionment' [2015] University of Edinburgh, Global Justice Academy, PSRP Working Paper 10, 14.

2.1.5.4.Non-governmental organisations

Non-governmental organisations active in conflict resolution range from international and national non-governmental organisations to independent institutions, law firms, religious organisations and networks of peacemakers. These organisations typically develop codes of conduct, handbooks and toolkits that articulate their understanding of the normative framework of peace negotiation.

Organisations providing mediation support adopt codes of conduct or policy papers stipulating their normative commitments. For example, the International Alert, "an independent international peacebuilding organization", urges "the inclusion of effective provisions for the observance of human rights and international humanitarian law and principles in proposed peace agreements".[149] These organisations also adopt common frameworks of conduct through professional networks. In 2013, the Network for Religious and Traditional Peacemakers pronounced that the "normative guidelines of the network are based on UN resolutions".[150] Notably, the Mediation Support Network, a "global network of primarily non-governmental organisations that support mediation in peace negotiations", produced a commentary on the 2012 UN Guidance for Effective Mediation.[151] Evidencing the normative ambitions of the Guidance, the Commentary notes that one of the advantages of the development of the Guidance is that "mediators can point out that peace agreements that do not satisfy minimal international legal standards will not be supported by the international community: if parties want international support for implementation, they will need to meet certain standards".[152]

The Public International Law & Policy Group, which self-identifies as a "global *pro bono* law firm", has adopted handbooks on drafting ceasefire and peace agreements. The Peace Agreement Drafter's Handbook emphasises that peace agreements must include a bill

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[149] *Code of Conduct: Conflict Transformation Work* (International Alert 1998) (Stating the aim of the code as 'to provide an ethical framework for conflict transformation work').

[150] The Network for Religious and Traditional Peacemakers, 'Vision, Mission and Objective' <https://www.peacemakersnetwork.org/about-us/vision-mission-objectives/>.

[151] Miguel Alvarez and others, *Translating Mediation Guidance into Practice: Commentary on the UN Guidance for Effective Mediation by the Mediation Support Network* (Mediation Support Network 2013).

[152] ibid. Cf. 'Use the Potential for Prevention and Expand the Space for Mediation!: Joint Letter to the Incoming UN Secretary-General from Members of the Mediation Support Network' (2016) <https://peacemaker.un.org/sites/peacemaker.un.org/files/MSN-JointLetterSG-PreventionMediationSpace.pdf> (Warning the Secretary-General regarding the limitations that laws and regulations that criminalise engagement with armed groups present to mediators and advocating that 'mediation support actors should be able to operate free from undue political and legal constraints').

of human rights, make provision for the incorporation of human rights provisions into domestic law and establish human rights monitoring bodies.[153] The Peacemaker's Toolkit on Internal Displacement, prepared by the United States Institute of Peace, states that peace agreements should include a reference to Guiding Principles on Internal Displacement and other relevant international, regional and national human rights instruments.[154]

These organisations also try to shape the terms of peace agreements through their advocacy work as norm entrepreneurs in conflict-affected settings. A notable example is the long-standing opposition of the Human Rights Watch and Amnesty International to the adoption of amnesties in peace agreements for international crimes and human rights violations during peace negotiations in various jurisdictions.[155]

2.1.6. Domestic foreign assistance guidelines

Domestic institutions in states that frequently engage with foreign peace processes as mediators, guarantors or donors also develop guidelines for such engagements as part of their foreign policies. In addition to emphasising the obligations of the state under international law, these policy guidelines promote other peace-making norms, particularly the participation of women, indigenous groups, or other historically excluded groups in official peace negotiations.[156]

2.1.7. Normative commitments of armed opposition groups

In addition to the obligations imposed on them in international law, some armed opposition groups (AOGs) undertake commitments to respect international humanitarian law and international human rights law through special agreements concluded as per Article

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[153] *Peace Agreement Drafter's Handbook* (Public International Law & Policy Group 2012).

[154] Gerard Mc Hugh, *Integrating Internal Displacement in Peace Processes and Agreements* (United States Institute of Peace 2010).

[155] See e.g. Human Rights Watch, 'U.N. Role in Sierra Leone Peace Deal Condemned' (8 July 1999); Human Rights Watch, 'Selling Justice Short: Why Accountability Matters for Peace' (7 July 2009); Amnesty International, 'Colombia: Peace Agreement Must Open the Door to Justice' (1 December 2016).

[156] See e.g. *Building Peaceful States and Societies: A DFID Practice Paper* (n 40) 25; *USAID Policy Framework 2011-2015* (n 126) 31. See also Javier Fabra-Mata and Anette Wilhelmsen, *A Trusted Facilitator: An Evaluation of Norwegian Engagement in the Peace Process between the Colombian Government and the FARC, 2010–2016* (Norwegian Agency for Development Cooperation 2018) 32 (Stating that "Norway's overall goal in the Colombian peace process was to assist the parties in reaching an accord that would combine peace with justice, in accordance with international law and Colombia's legal obligations.").

3 common to the 1949 Geneva Conventions[157] or unilateral declarations, including the 'Deeds of Commitment' developed by the Geneva Call[158]. Such commitments to, for example, protecting children in armed conflict, ensuring participation of women in decision-making processes, or to holding perpetrators of gender-based violence accountability[159] may be seen as part of the normative framework of peace negotiations, as they bear on the position of the AOGs during the negotiation of the relevant matters. However, as further explained in Chapter 3, the normative commitments of AOGS, deriving from unilateral declarations, special agreements or peace agreements, do not enjoy international legal status.

2.1.8. Sub-state (local and indigenous) norms

International organisations, international financial institutions and non-governmental organisations active in the field of peace mediation increasingly acknowledge the significance of sub-state normative frameworks, i.e. local or indigenous norms, to peace-making. For example, the 2004 report of the UN Secretary-General states that "due regard must be given to indigenous and informal traditions for administering justice or settling disputes … in conformity with both international standards and local tradition".[160] The 2012 UN Guidance on Effective Mediation further instructs the mediators to "where appropriate, draw on indigenous forms of conflict management and dispute resolution.[161] Article 40 of the UN Declaration on the Rights of Indigenous Peoples explicitly mentions that "the customs, traditions, rules and legal systems of the indigenous peoples concerned" need to be given due consideration in the resolution of conflicts and disputes.[162] Depending on the domestic legal system, sub-state norms may be given legal recognition. However, they are not of international legal nature or status *per se*.

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[157] See Chapter 3 Part 3.2.4 on special agreements.

[158] See Geneva Call, 'Deed of Commitment' <http://www.genevacall.org/how-we-work/deed-of-commitment/>.

[159] See e.g. ibid; 'Statement by the JEM and SLM-Unity to the Geneva/Darfur Humanitarian Dialogue' (11 July 2008).

[160] 'Report of the UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (23 August 2004) UN DOC S/2004/616' para 36.

[161] *United Nations Guidance for Effective Mediation* (n 60). See also UNSC Res 2250 (9 December 2015) UN Doc S/RES/2250 (Calling on all relevant actors, including when negotiating and implementing peace agreements, to take into account "measures that support local youth peace initiatives and indigenous processes for conflict resolution").

[162] United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UNGA Res 61/295 UN Doc A/RES/61/295, Art 40.

2.1.9. Proliferation and plurality of normative sources in peace-making

The first part of this chapter charted the sources of the normative framework applicable to the negotiation of a peace agreement for three main purposes. Firstly, the mapping exercise is to identify the sources of the peace-making norms cited in the next sections. Secondly, it establishes that there has been a proliferation of normative guidelines adopted by international, regional and non-governmental organisations and states engaged in peace facilitation roles. Lastly, it draws attention to the plurality of normative sources in peace-making. As will be explained below, plurality of normative sources brings with it the possibility of norm conflicts at various levels - between legal and non-legal norms, between domestic and international legal norms, and between international legal norms – and necessitates the clarification of the normative natures of different norms. Overall, the mapping exercise in this section provides a foundation for the analysis of the normative nature of peace-making norms in the next section.

2.2. Towards an international law of peace-making?

Although each peace process takes place within a particular normative framework that comprises of the different categories of sources charted above, there is growing acceptance in international policy and international legal scholarship that there is an emerging common normative framework of peace-making. In international policy, in addition to the statements that peace negotiations and outcome agreements must be consistent with international law, there is increasing reference to the relevance of other international norms to peace-making. The 2012 UN Guidance on Effective Mediation notes that although "not all norms are equally applied in different national contexts and there can be different interpretations within a given society", there exists "a growing international consensus on some norms".[163] The OSCE Consultation held before the development of the organisation's mediation guidance similarly notes the emergence of "new international norms" in the field of peace-making.[164] A 2016 Background Note on Peace Mediation by the European External Action Service notes that "those mediating in conflicts today are faced with clearer, more comprehensive, but also more complex, international legal and normative

[163] *United Nations Guidance for Effective Mediation* (n 60) 16.

[164] *Developing Guidance for Effective Mediation* (n 125).

frameworks that attempt to define what is (and what is not) acceptable in negotiations to end armed violence".[165]

Against the backdrop of the proliferation of normative guidelines in peace-making and references to international law in peace negotiations and outcome agreements, in international legal scholarship, some scholars identify a new 'law'[166] of peace-making. Firstly, the proposed 'law' of peace-making draws on existing international law with a view to tailoring the relevant legal norms to the peace-making context.[167] However, a new law of peace-making would differ from the general applicability of international law to peace agreements in that it functions as an overarching legal framework that is to guide all peace processes. The analysis of a peace agreement from an international law perspective, on the other hand, takes each particular peace agreement as its starting point. In other words, depending on the issues raised by a particular peace agreement, existing international law may be relevant to peace-making regardless of an applicable law of peace-making.

Secondly, the new 'law' of peace-making is construed as deriving from the norms identified as commonly accepted norms in the practice of peace-making and from the norms promoted by international, regional and non-governmental organisations and states engaged in peace facilitation roles. Bell, for example, argues that the *lex pacificatoria* "can be gleaned from an eclectic set of sources: novel interpretations of human rights and humanitarian law that respond to peace agreement dilemmas, new soft law programmatic standards, the convergent practices of peace-makers as contracted to legalized peace agreements, and ad hoc standard setting with relation to specific conflicts".[168] Similarly, Saliternik contends that an "international peace-making regime" can be derived from the relevant international treaties, resolutions of international organisations, organisational codes of conduct of international and non-governmental organisations, and national foreign assistance guidelines.[169] Other scholars do not mention an emerging law or regime but state the emergence of peace-making norms. Kastner, for example, identifies "normative trends"

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[165] European External Action Service (n 57) 2.

[166] I use the word law in single quotation marks when referring to the 'law' of peace-making, as the majority of scholars who argue for a new body of peace-making norms admit that most of the norms do not qualify as international law proper. Yet, they still refer to them as "new law", "legal norms" or "obligations". Therefore, I refer to these projects as proposing or identifying a new 'law' of peace-making, which is attached a peculiar normative nature. See for example Bell, 'Of Jus Post Bellum and Lex Pacificatoria - What's in a Name?' (n 88); Kastner (n 4).

[167] Bell, 'Of Jus Post Bellum and Lex Pacificatoria - What's in a Name?' (n 88) 192.

[168] ibid 192–3.

[169] Saliternik (n 4) 236–243.

across peace processes that point to "emerging obligations" promoting, for example, the participation of women and civil society in peace negotiations and the inclusion of transitional justice mechanisms in peace agreements.[170] He adds that a "normative wheel" consisting of such normative trends and guiding the involvement of mediators in negotiations migrates across peace processes.[171] Wählisch suggests that a "Repertory of Practice of Peacemaking to distill and develop *normative directions* for peace negotiations", including "universal principles" of peace-making, prepared through the International Law Commission.[172]

Before exploring the content and normative nature of the proposed 'law' of peace-making, the next section presents the main roles existing international law plays in the negotiation of peace agreements.

2.2.1. Application of existing international law to the negotiation of peace agreements

The international law of peace-making can be conceptualised as an umbrella term within which the existing international legal norms relevant to peace-making can be brought. Conceptualising the law of peace-making in this way may bring congruence to legal analyses and be useful as a frame to attract attention to the legalisation of peace-making. However, it would not have additional normative value in terms of tailoring the legal norms to the peace-making context, or suggesting new legal norms of peace-making.[173]

At any rate, the overlap between the matters regulated by international law and the matters addressed in peace negotiations has increased as a consequence of the expansion of the scope of peace agreements. As a result, international law sets certain constraints on negotiations and provides a reference framework for negotiation and interpretation. However, as the following discussion shows, both roles of international law appear to be fairly limited.

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[170] Kastner (n 4) 130–131, 182–187.

[171] ibid 129.

[172] Wählisch (n 86) 265. [Emphasis added].

[173] See also Eric De Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept' (2010) 43 Vanderbilt Journal of Transnational Law 119.

2.2.1.1. International law as a reference framework for negotiation and interpretation

Chapter 1 explained the increasing legalisation of peace negotiations in the sense that political disputes are framed by reference to legal concepts, rules and principles in peace negotiations. The 2014 Mediation Support Handbook of the AU identifies as one of the roles of international law in peace negotiations that some norms of international law "can provide a useful starting point" for negotiations.[174] International legal norms concerning political participation rights, internal self-determination, right to return of refugees and internally displaced persons, or human rights relevant to the administration of justice may provide starting points for peace negotiations. Parties may refer to the relevant international law in framing their demands not necessarily with a view to incorporating a specific outcome into the agreement but to initiate negotiations on a topic.

Although the text of a peace agreement does not fully reflect the contents of preceding negotiations, it still provides evidence for how the parties refer to international law during the negotiation and drafting of a peace agreement. As mentioned in Chapter 1, peace-making parties typically refer to international law in their peace agreements in relation to four issue-areas: human rights, transitional justice, return of refugees and internally displaced persons, and gender inclusion. References in the area of human rights range from promises to ratify or respect already ratified international or regional human rights treaties to commitments to respect specific human rights.[175] As to transitional justice, parties refer to international law in granting amnesties for political crimes[176] or committing to criminal accountability for international crimes and human rights violations.[177] Lastly, peace agreements refer to international law, and more specifically to the CEDAW, in their provisions on accountability for violence against women during conflict and women's rights in the post-agreement legal order.[178] Arguably, such references demonstrate how

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[174] *African Union Mediation Support Handbook* (n 77) 155.

[175] See Sahla Aroussi and Stef Vandeginste, 'When Interests Meet Norms: The Relevance of Human Rights for Peace and Power-Sharing' (2013) 17 International Journal of Human Rights 183 (Classifying the references to human rights, but not necessarily with an international law dimension, in the texts of peace agreements).

[176] Arusha Peace and Reconciliation Agreement for Burundi (n 65).

[177] Libyan Political Agreement, 17 December 2015; Accord Pour la Paix et la Reconciliation au Mali - Issu du Processus d'Alger, 20 June 2015.

[178] Ceasefire Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan (JEM), 10 February 2013; Comprehensive Agreement on Human Rights (Guatemala), 19 March 1994; Final Agreement to End the Armed Conflict (Colombia) (n 18).

international law can provide starting points and inform positions of the parties on the negotiation of the issues of human rights, transitional justice or women's inclusion.[179]

Legalisation of peace negotiations, i.e. framing of positions by reference to the mentioned norms of international law, does not always reflect an accurate reading of positive international law. In this respect, Turner distinguishes between the "normative" and "symbolic" roles of international law in peace negotiations.[180] A good example for the contrast between the symbolic references to international law by negotiating parties and the normative reach of the relevant norms is the rejected submission of the parties before the Philippine Supreme Court in the case concerning the constitutionality of the 2008 Memorandum of Agreement on Ancestral Domain (MOA-AD) between the government and the Moro armed group MILF.[181] The Government contended that the terms of the agreement on the territorial autonomy and self-governance of the Bangsamoro region were in line with the customary international law of self-determination, which forms part of the law of the land according to the Constitution of the Philippines.[182] Contrary to the submission of the Government, the Supreme Court held that the right to self-determination in international law does not require states to "guarantee indigenous peoples their own police and internal security force", "control over aerial domain and atmospheric space", "the near-independent status of an associated state", all of which, according to the Court, were promised in the peace agreement under review.[183] Such references to international law may be considered as seeking "ultracompliance" with international law, whereby the "real world effects of international law" reach beyond its actual requirements.[184] Be that as it may, such "ultracompliance" is not required by international law. Although parties may symbolically refer to international law in framing their positions and demands, the law may not substantively support these.

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[179] Diane Orentlicher, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1 The International Journal of Transitional Justice 10, 14 (Mentioning that "international obligations in support of prosecutions could enlarge a fledgling democracy's political space for confronting past violators").

[180] Catherine Turner, 'Editorial Comment: Law and Negotiation in Conflict: Theory, Policy and Practice' (2016) 7 Global Policy 256, 258–9 (Referring to the 'symbolic' and 'normative' roles of international law in peace negotiations).

[181] See *The Province of North Cotabato v The Government of the Republic of the Philippines Peace Panel on Ancestral Domain, GR No 183591 (14 October 2008), Supreme Court of the Philippines*.

[182] Constitution of the Philippines (1987).

[183] *The Province of North Cotabato* (n 181).

[184] Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Matters' [2010] New York University Public Law and Legal Theory Working Papers 1, 27.

International law may also provide a reference framework for interpretation. Dajani refers to this role of international law as gap-filling.[185] Such references are neither a requirement of international law nor constitutive of new international obligations but by reaching out to international law, negotiating parties are able to not craft detailed arrangements during negotiations or settle disputes by reference to international law in the implementation phase. For example, peace agreements cite international human rights or refugee law treaties as sources of interpretation and guidance for the implementation of bill of rights or the return of refugees and IDPs.[186] Such references to international law are also seen in new constitutions made in transitional societies. Notably, the South African interim and final constitutions required the interpretation of the bill of rights and other legislation, whenever possible, in accordance with international law.[187]

Another issue-area, where international law can function as an interpretation source, is boundary delimitation. Just as inter-state peace treaties which contain clauses on boundary delimitation in accordance with international law, peace agreements providing for intra-state territorial or maritime boundary delimitation may also refer to the applicability of the relevant international law. The recourse to international arbitration for the delimitation of intra-state boundaries may also lead to international law being considered. For example, during the peace negotiations between the government of Sudan and the Sudan People's Liberation Army/Movement (SPLA/M), the demarcation of the oil-rich Abyei area proved to be a sticking point. Following the failure of the Abyei Boundary Commission, which was created by the 2005 Comprehensive Peace Agreements, to produce an outcome acceptable to both parties, the dispute over the Commission's report was referred to the Permanent Court of Arbitration.[188] Article 3(1) of the Abyei Arbitration Agreement stipulated the applicable law as comprising "the provisions of the [Comprehensive Peace Agreement], particularly the Abyei Protocol and the Abyei Appendix, the Interim National Constitution of the Republic of Sudan, 2005, and general principles of law and practices as the Tribunal

[185] Omar M Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks' (2007) 32 Yale Journal of International Law 61, 105–6.

[186] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15); Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan (n 67).

[187] Constitution of South Africa (1996), Arts 39, 233; Interim Constitution of South Africa (1993), Art 35.

[188] See Comprehensive Peace Agreement of Sudan (n 26); *In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army of Delimiting Abyei Area, Final Award, 22 July 2009*.

may determine to be relevant".[189] The Tribunal, therefore, considered the general principles and practices of international law as relevant and reached its award accordingly.[190]

2.2.1.2. International legal constraints in peace-making

Another role for international law in peace negotiations identified in the 2014 AU Mediation Support Handbook is setting "outer limits".[191] The *jus cogens* norms of international law preclude the parties from agreeing on certain deals. The Fact Sheet published by the German Federal Foreign Office and the Initiative Mediation Support Deutschland list among the "mandatory rules of international law" the prohibition of discrimination, apartheid, slavery, refoulement, and amnesties for certain international crimes and violations of human rights as such mandatory rules relevant to peace agreements. Applying the insights from bargaining and contract theories to the Israeli-Palestinian peace negotiations, Dajani also argues that the *jus cogens* norms of international law can be instrumental in "defin[ing] a zone of lawfulness for negotiations".[192] However, he notes that the indeterminacy regarding which norms are of *jus cogens* status and the content of such norms may hinder the role of international law in delineating the zone of lawful negotiation.[193]

Peace agreements do not contain manifest violations of established *jus cogens* prohibitions of apartheid or slavery. However, certain common peace-making practices have raised questions regarding their compliance with international law. It suffices for the purposes of this dissertation to point out the major practices that have raised questions regarding their compliance with international law, instead of attempting to provide an exhaustive list of all peace-making practices that may implicate international law. The promise of general amnesties in peace agreements and powersharing arrangements that prioritise group recognition over individual human rights emerge as two practices that have been judicialised, in addition to being denounced in policy and scholarship as non-compliant with international law. Moreover, as to amnesties and administration of justice in the post-

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[189] *Abyei Final Award* (n 188).

[190] ibid 427–435. See also *Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area (Award) (14 February 1997)* [76–77].

[191] *African Union Mediation Support Handbook* (n 77) 155.

[192] Dajani (n 185) 70.

[193] It must be mentioned that he concludes the discussion on a rather positive note that the core precepts of even indeterminate international legal norms would be helpful in determining non-negotiable deals. See ibid 77.

agreement phase, some peace agreements show that the negotiating parties are aware of the constraints presented by international law (as they interpret it), for example, by excluding certain international crimes and serious violations of human rights from the scope of amnesty provisions by explicit reference to international law[194] and stipulating that courts or alternative justice mechanisms shall operate in accordance with international law[195].

The legality of the two practices in international law is evaluated in more detail in Chapter 5, which focuses on the issue-areas of transitional justice and human rights. Two points can be made here. Firstly, the arguments that all general amnesties or powersharing practices that restrict individual human rights are always impermissible are each based on one interpretation of international law. These interpretations tend to overlook, or misinterpret, that the implicated norms of international law are not of *jus cogens* status and are subject to exceptions, according to which some of the peace-making practices may be justified. Powersharing practices, which restrict individual human rights, may also be justified on grounds of recognised exceptions to rights and by an analysis of their proportionality and necessity. Overall, as further analyses in Chapters 4 and 5 will show, it appears that existing international law bears (limited) relevance to peace negotiations as a framework for negotiation and interpretation or as a source of constraints. However, it does not stipulate precise requirements for inclusion of actors or issues, respectively, in the negotiation process or contents of peace agreements. Nor does it recognise, as argued in Chapter 3, peace agreements with armed opposition groups as international agreements governed by international law.

However, both the international policy documents mentioned above and international legal scholarship suggest a broader role for international law in the field of peace-making and for new peace-making norms that are not claimed to be part of hard international law but as international norms with a soft law nature. In addition to tailoring the existing relevant international legal norms to the context of peace-making, a more extensive constitutive role is attributed to international law in the negotiation of peace agreements instead of solely providing for outer limits to what the parties can agree on. The next section introduces how a new 'law' of peace-making is conceptualised and theorised.

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[194] Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (n 66), Art III(8).

[195] Agreement on the Resolution of the Conflict in South Sudan, 17 August 2015, Chapter V, Part 3.

2.2.2. Beyond the existing international law: Conceptions and theories of a new 'law' of peace-making

The following objectives appear to shape the scholarly accounts of the new 'law' of peace-making: (i) Tailoring the existing norms of international law to the context of peace-making in order to accommodate some of the pragmatic peace-making solutions; (ii) clarifying the implications of the relevant international legal norms in the context of peace-making to provide clearer guidance to peace-making actors; (iii) developing new norms of peace-making given the limits of existing international law in regulating peace-making issues, i.e. in the face of a presumed normative gap in international law, and (iv) creating a flexible, albeit legal, 'law' of peace-making in terms of departing from the law-making rules of international law and recognised addressees of international legal obligations.

Despite the commonalities in objectives, there is no uniform understanding of the sources, normative nature and contents of the new 'law' of peace-making in scholarship. This section introduces the notable scholarly projects in this regard with a view to highlighting how the 'law' is theorised and with which content it is associated. In addition to the seminal projects of *jus post bellum* and *lex paxificatoria*, other scholarly proposals for a body of peace-making norms are also introduced.

Jus post bellum is put forward as a normative framework to govern transitions from conflict to peace and thus fill the purported systemic gap left by the *jus ad bellum* and *jus in bello*. International legal scholarship has yet to reach consensus on which situations the *jus post bellum* is applicable, what it is comprised of, and what its legal nature is. However, as de Brabandere also identifies, *jus post bellum* is conceived in two main ways in international legal scholarship.[196] Firstly, drawing on the just war theory and with a focus on post-conflict reconstruction in the aftermath of inter-state wars, international territorial administrations or occupations, *jus post bellum* is suggested to provide for a framework that attributes post-conflict reconstruction responsibilities to the foreign actor(s) engaged in the use of force.[197] The implication of the *jus post bellum* in this conception for peace negotiations has not been explored in this scholarship. However, any implications would be limited to the legal basis for and limitations to the conduct of foreign actors during the negotiation and

[196] De Brabandere (n 173).

[197] Carsten Stahn, '"Jus Ad Bellum", "jus in Bello" ... "Jus Post Bellum"? - Rethinking the Conception of the Law of Armed Force' (2006) 17 European Journal of International Law 921, 932–3.

implementation of peace agreements or post-conflict constitutions in situations of international territorial administration or occupation. This conception of *jus post bellum* has been rightly criticised for posing a risk to the neutrality of international law towards the internal order of states, the principle of sovereignty and the collective security system[198], as well as for misreading a normative gap into international law despite the applicability of international law, including the law of occupation, international humanitarian law and human rights law, to such transitions.[199]

In a different conception, *jus post bellum* is construed as a legal framework for peacebuilding, regardless of the type of conflict and post-conflict situation. The *jus* contains normative parameters for peace agreements or post-conflict constitutions and rules on the conduct and accountability of foreign actors during the transition. Boon, for example, argues that foreign actors should act in "bounded discretion" guided by a set of process-related rules aiming to increase the participation of local actors and "non-negotiable" substantive rules deriving from international human rights, humanitarian and criminal law that any transitional instrument and structure must respect.[200] Easterday, on the other hand, urges a broader understanding of *jus post bellum*, not as "rigid legal rules", but as legal norms and "*normative practices* of non-state actors and organisations" brought under the umbrella of *jus post bellum* that functions as an interpretative framework and discourse.[201] The emphasis of this second strand of *jus post bellum* also remains largely on the responsibility of foreign actors to bring about the desired procedural or substantive outcomes and their accountability during doing so.

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[198] De Brabandere (n 173); Nehal Bhuta, 'New Moders and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation' (2010) 60 University of Toronto Law Journal 799; Robert Cryer, 'Law and the Jus Post Bellum: Counseling Caution' in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012).

[199] De Brabandere (n 173); Antonia Chayes, 'Chapter VII½ : Is Jus Post Bellum Possible?' (2013) 24 European Journal of International Law 291. Cf. Guglielmo Verdirame, 'What to Make of Jus Post Bellum: A Response to Antonia Chayes' (2013) 24 European Journal of International Law 307 (Mentioning that the existing law governs the key aspects of the relationship between the defeated and victors but arguing that there is an analytical and moral case for a lex ferenda obligation to re-construct).

[200] Boon (n 82).

[201] Easterday, 'Peace Agreements as a Framework for Jus Post Bellum' (n 24) (But cautioning against bringing peace agreements within the framework of jus post bellum as this may attach a sense of "illegitimacy and imposition" to them). [Emphasis added]. See also Eric De Brabandere, 'The Concept of Jus Post Bellum in International Law' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 137–8; James Gallen, 'Jus Post Bellum' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) (Suggesting that jus post bellum can be construed as a set of interpretive principles or standards, namely proportionality, accountability and trusteeship).

Bell suggests that the existing norms and regimes of international law cannot adequately accommodate the novel features of intra-state peace agreements, which require the balancing of accountability and peace, inclusion of broader segments of the society in the process, and involvement of international actors in various phases of peace-making and peacebuilding.[202] Nevertheless, she observes an emerging *lex pacificatoria*, the law of peacemakers, in the practice of peace agreements and developments in international law, e.g. adoption of new international binding or soft law instruments on various matters of domestic governance, establishment of the International Criminal Court, and increasing transnational interactions between actors in the field of peace-making.[203] The *lex pacificatoria*, accordingly, has six main and two other potential pillars pertaining to hybrid self-determination; gender and broader inclusion; return of refugees and displaced persons; transitional justice, international intervention; accountability of international interveners; post-conflict reconstruction; and the process of peace negotiation.[204] Despite referring to it at times as a "new law", Bell ultimately contends that the *lex pacificatoria* is not a fully-fledged legal regime but a "developing law … articulating broad normative parameters".[205] She points out the difficulties of achieving international consensus on the creation of a new legal regime, such as *jus post bellum*, to govern peace-making and the undesirability of a new legal regime with rigid legal rules due to the need for context-based tailoring and flexibility in peace negotiations.[206]

Chinkin and Kaldor, on the other hand, find sufficient, yet scattered, bases in international law to comprise a "new law of peace", drawing on international human rights law, international criminal law, international humanitarian law, refugee law and principles on internal displacement.[207] However, they argue that these bases are dispersed across legal regimes and lack a common objective. Thus, they argue for a reconceptualisation of this

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[202] Bell, 'Peacebuilding, Law and Human Rights' (n 59) 250.

[203] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[204] Bell, 'Of Jus Post Bellum and Lex Pacificatoria - What's in a Name?' (n 88) 184–191.

[205] ibid 182.

[206] Bell, 'Of Jus Post Bellum and Lex Pacificatoria - What's in a Name?' (n 88).

[207] Chinkin and Kaldor (n 82) 565. See also Christine Chinkin and Hilary Charlesworth, 'Building Women into Peace: The International Legal Framework' (2006) 27 Third World Quarterly 937, 942 Where the authors argue that the 'law of peacebuilding' includes "the principles and rules deriving from human rights law; international humanitarian law; international criminal law; prohibition of the use of force in international relations; the right to economic and social rights and to sustainable development; the obligation for the peaceful settlement of disputes; the emerging law of transitional justice; refugee law; and the principles on internal displacement" .

legal framework centring on the policy agenda of human security.[208] The reconceptualised, new law of peace requires an inclusive political settlement process to accompany the conclusion of peace agreements between warring parties, which need to be 'marginalised' instead of being legitimised by international mediators.[209] They assert that a focus on human security, reform of economic and social conditions, gender mainstreaming of the process and outcomes, and pursuit of criminal justice for international crimes and serious violations of human rights are indispensable in peace and post-conflict rebuilding processes.

Two other projects, those of Kastner and Saliternik, focus on the process-related norms of peace-making, which promote "procedural justice" in peace negotiations. Rejecting the understanding of law as a prescriptive and monolithic body of rules, Kastner advocates that international law may have an emancipatory potential through processual norms of peace-making, for example the inclusion of women or civil society in peace negotiations or the inclusion of the issue-area of transitional justice in negotiations, that do not stipulate specific outcomes but allow for "procedural justice" in negotiations.[210] He emphasises the open-ended and processual nature of the peace-making norms he identifies. With a similar focus on process-related norms, Saliternik identifies three normative principles as core components of the "procedural regulation" of peace negotiations: participation, transparency and reason giving.[211] As mentioned above, she argues international treaties, resolutions of international organisations, organisational codes of conduct of international and non-governmental organisations, and national foreign assistance guidelines are the sources of the "international regime" that governs peace negotiations.[212] Saliternik notes that, except for international treaties, these are sources of "soft international norms", on which, she adds, further international lawmaking efforts should focus due to the possibility of their flexible application in face of "pragmatic concerns about peace prospects associated with the international regulation of peacemaking".[213]

In sum, the new law of peace-making is conceptualised broadly in two ways. In some accounts, such as in the work of Chinkin and Kaldor, a new law of peace-making is construed as a re-conceptualisation and re-interpretation of the relevant norms and regimes of

[208] Chinkin and Kaldor (n 82) 527–566.

[209] ibid 439.

[210] Kastner (n 4).

[211] Saliternik (n 82) 623.

[212] ibid 236–243.

[213] Saliternik (n 4).

international law around the central theme of peace-making. Other accounts, such as those of Easterday, Bell, Kastner and Saliternik, aim to make the case for a non-positivist vision of international law to overcome the lack of fit between the peace agreements and positivist criteria for sources of international law, between the position of armed opposition groups in a peace process and their limited recognition in international law, and between the emerging norms of peace-making in non-legal instruments and the law-making rules of international law. The alternative visions, it is argued, can recognise peace agreements as international agreements or as sources of international obligations, provide for a greater degree of equality between the negotiating parties by recognising the norm-creating capacity of armed opposition groups, and allow for the development of norms of peace-making to guide and shape peace negotiations even if they do not fulfil the positivist criteria. Moreover, the new 'law' of peace-making, according to such alternative visions of international law, allow for the articulation of peace-making norms not only as addressing states but also armed opposition groups, other domestic actors, and external peace facilitation actors.[214]

2.2.3. Preserving the boundary between international law and non-legal norms in peace-making

The field of peace-making is undergoing a process of normativisation, whereby references to international law and other peace-making norms become more common in the practice of peace agreements, peace-making policy, and scholarship on peace agreements. Moreover, peace agreements themselves have increasingly assumed legalistic features and some even claim legal force. Such developments have been interpreted by some scholars as pointing to the emergence of a new 'law' or legal norms of peace-making. However, if one adopts a formalist approach and takes the doctrine of sources of international law as the starting point in the analysis of the normativisation of peace-making, its manifestations in international law seem more limited.

The next three chapters of this dissertation examines in detail the current state of international law in relation to the legal status, negotiation process, and contents of peace agreements, respectively, from a formalist perspective. This section will sketch out three general objections to common assumptions in the international legal scholarship on peace agreements from the perspective of the rules of international law-making. Firstly, certain interpretations of international law that underlie the re-conceptualisation of existing law as

[214] Saliternik (n 82); Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

a law of peace-making seem to go beyond interpretation to the assertion of new legal norms. Legal arguments that derive a prohibition of all amnesties from the existing duties to prosecute certain international crimes and human rights violations, or that read a duty to include women in official peace negotiations into the under-specified political participation rights in international law are cases in point.

Secondly, new norms of peace-making articulated in international policy documents, organisational codes of conduct and mediation guidelines, or non-binding thematic resolutions may generate consensus as international norms, but such norms are not by definition part of international law. Finnemore and Sikkink state that a norm is "a standard of appropriate behavior for actors with a given identity".[215] They further distinguish between international or regional and domestic norms and explain the "life cycle" of an international norm as consisting of three stages: norm emergence, norm cascade, and internationalisation.[216] Accordingly, a norm emerges as a result of the efforts of norm entrepreneurs, which include for example international organisations like the UN or the World Bank, non-governmental organisations and inter-governmental organisations at the international level.[217] A norm enters the stage of norm cascade when it reaches the "tipping point, at which a critical mass of relevant state actors adopt the norm", which is estimated to correspond to one-third of all states.[218] However, they do not claim that this equates to the "normativity threshold, i.e. the line of transition between the nonlegal and the legal".[219] Many norms, but not all of them, become part of international law; others may be reflected in the rules of multilateral organisations, foreign policies or acts of transnational networks.[220] Some of the non-legal norms, which do not meet the formalist criteria of sources in positive international law, are further referred to as soft law as distinct from other non-legal norms.[221]

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[215] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887. See also Peter J Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press 1996) (Defining norms broadly as "collective expectations about proper behavior for a given identity").

[216] Finnemore and Sikkink (n 215).

[217] ibid.

[218] ibid.

[219] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 American Journal of International Law 413.

[220] Finnemore and Sikkink (n 215).

[221] Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 Leiden Journal of International Law 313.

Most peace-making norms, for example the norm of inclusion of certain actors in peace negotiations or norms promoting the inclusion of human rights in peace agreements appear to be moral or political norms or expressions of best practices that do not meet the threshold of international law. Their normative character may be acknowledged. For example, the WPS agenda of the SC is referred to as a "powerful normative instrument".[222] The 2012 UN Guidance for Effective Mediation is considered by some actors in the field as the "procedural soft law" of peace mediation.[223] Overall, among the categories listed in the first part as components of the normative framework of a peace process, namely bilateral normative frameworks established by negotiation parties; non-binding international instruments; organisational policy documents, codes of conduct or mediation guidelines, and non-binding resolutions; domestic foreign assistance guidelines; normative commitments of armed opposition groups; and sub-state norms fall on the non-legal end of the spectrum.

As D'Aspremont notes, norms of soft law are non-legal, yet relevant to international law as legal facts: "[T]hey can partake in the *internationalization of the subject-matter*, provide guidelines for the interpretation of other legal acts, or pave the way for further subsequent practice that may one day be taken into account for the emergence of a norm of customary international law."[224] The non-legal norms of peace-making may also play such functions. For example, non-binding resolutions of international organisations, for example the WPS or YPS resolutions of the SC, are nonetheless significant for the evolution of international law, as shared expectations formulated in such resolutions may shape state practice and reflect *opinio juris*.[225]

Thirdly, some scholars treat the collective practice of peace agreements as a source of new norms of peace-making without elaborating on the rules governing the creation of such legal norms. Bell, for example, admits that the *lex pacificatoria* is not part of positive international law but, in a legal pluralist tone, argues that "peace agreements have produced practices of legalisation marked by some consistency across widely varying peace processes [and t]his legalisation can be argued to constitute an emerging *lex*".[226] Kastner further argues that peace negotiations are norm-generating processes and identifies certain 'emerging legal

[222] Federer and Gasser (n 96) 5.

[223] Initiative Mediation Support Deutschland Gestaltung (n 73) 4.

[224] Jean D'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011).

[225] Michael Bothe, 'Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?' [1983] Netherlands Yearbook of International Law 65; Weil (n 219).

[226] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

obligations' in "areas of current normative consensus".[227] As any reference to the rules on the identification customary international law is missing in this literature with a pluralist bent, questions regarding the uniformity of the said practices, existence of accompanying *opinio juris*, and the effect of the involvement of non-state actors in these practices are unaddressed.

Peace agreements may contribute to the formation or evidencing of rules of customary international law. Although it remains the dominant position in international law that practice of non-state armed groups is not creative, or expressive, of customary international law, peace agreements are adopted also by state actors and thus constitute 'state practice'.[228] The customary international humanitarian law study undertaken under the auspices of the ICRC, for example, lists several peace agreements and special agreements as "instruments other than treaties" as part of the practice compilation. What needs to be ascertained in relation to peace agreements is whether the conduct of adopting an agreement or a component of it is accompanied by the acceptance of it as *international* law. For example, a peace agreement may stipulate a voluntary right to return for refugees and IDPs but whether this counts as conduct affirming a voluntary right to return as part of customary international law depends on such acceptance. References to international law in the text of such articles or during the negotiations may be indicatory of such *opinio juris*. As the next three chapters will demonstrate, however, the practice of peace negotiations and agreements do not yet indicate clear uniformity or *opinio juris* as to the emergence of new legal norms or evolution of existing legal norms on the matters pertaining to the negotiation process, contents or legal status of peace agreements.

2.3. Conclusion

This chapter has expounded on the process of legalisation and broader normativisation of peace-making since the end of the Cold War. It identified the different

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[227] Kastner (n 4) 183.

[228] 'International Law Commission, Identification of Customary International Law: Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading (17 May 2018), UN Doc A/CN.4/L.908']. (Adding that conduct of other entities than states and international organisations may have an "indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law [opinio juris] by States and international organizations"). Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5, 18; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 The Yale Journal of International Law 107, 151 (Arguing in favour of the recognition of the conduct of armed groups in the identification of customary international humanitarian law).

categories formal sources of norms in a peace process and a common normative framework emerging in the international peace-making policy. The process of normativisation has been interpreted by some scholars as signalling the emergence of a new 'law' or a set of legal norms of peace-making. Explaining how a 'law' of peace-making, which entails positive obligations for the design of the negotiation process and contents of a peace agreement, as well as the recognition of their internationally binding force, differs from the application of existing international law to the negotiation of peace agreements, this chapter argued for the preservation of the boundary between international law and other types of normativities in peace-making. It further stated that the developments towards the normativisation of the field have not necessarily amounted to changes to the relevant international law.

Preserving the distinction between law and other normative orders in the context of peace-making is important, not only due to legal, but also due to policy reasons. Clarifying the nature and status of peace-making norms, i.e. whether they are legal or non-legal norms, is a first step towards the resolution of norm conflicts. From a legal perspective, an important consequence is that the existence of a non-legal norm stipulating a requirement that clashes with a legal norm on the same subject-matter does not amount to a justification for departures from a legal norm. Hence, for example, the caveats in the instruments cited above recognising the significance of indigenous or local peace-making norms and methods that they would be given due consideration only to the extent that to do so is in conformity with international law. Secondly, if two norms are determined to be international legal norms, the conflicts between them would be (ir)resolved according to the conflict of norms rules in international law.[229]

Beyond the resolution of norm conflicts, determining the nature and status of peace-making norms is also crucial for delineating the peace-making space, in which negotiating parties and mediators can strike a deal without legal constraints. For this reason, both peace-making practitioners and states engaging in capacity-building in the field seek guidance as to the nature and status of the peace-making norms.[230] The non-observance of a legal norm, e.g. on who must be involved in peace negotiations or what promises cannot be made in a peace agreement, entails legal consequences for state parties. On the other hand,

[229] On irresolvable norm conflicts in international law, see Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford University Press 2017).

[230] See e.g. Alvarez and others (n 151) (Stating that '[c]larity with regard to legal status, as well as the understanding and prioritization of norms and expectations in a given case, is vital for clarifying what is acceptable and legitimate in the respective setting'); Initiative Mediation Support Deutschland Gestaltung (n 73) 12.

disrespecting a non-legal norm, e.g. stemming from an organisational code of conduct, does not lead to such consequences. It would rather have significant disciplinary consequences for the representatives of the organisation, e.g. for the UN mediator who deviates from the organisation's guidelines, and political costs for the negotiating parties, e.g. loss of the UN's support to agreement implementation if the non-legal "normative expectations" of the UN are not met.[231]

The next three themed-chapters, focusing respectively on the legal status, negotiation process, and content of peace agreements, expands on these arguments and provides a comprehensive analysis of the relevant international law and normative developments.

[231] The UN guidelines listed above acknowledge the non-legal character of some of the norm promoted by referring to 'legal matters and normative expectations' separately, see e.g. *United Nations Guidance for Effective Mediation* (n 60) 17.

Chapter 3: The Legal Status of Peace Agreements in International Law

3.1. Introduction

The legal status of any agreement reached is a complex issue that negotiating parties aiming to end an intra-state armed conflict typically address in peace negotiations. Signed by armed opposition groups (AOGs) and negotiated outside the legally established channels of domestic law, peace agreements often do not meet the formal criteria of sources either in domestic or international law. As their stand-alone status as legal documents is open to question, the predominant method of legalisation of peace agreements is incorporation into domestic law, as new constitutions, constitutional amendments, or ordinary legislation.[232]

The suitability of the domestic legal realm to accommodate a peace agreement, however, has been questioned for several reasons. Firstly, peace agreements are often concluded in a context of distrust in the domestic legal order, which may itself be among the root causes of an intra-state armed conflict. Therefore, for AOGs, which would be excluded from the process of incorporation, the promise of legalising peace agreement commitments merely in domestic law may not be a sufficient incentive to conclude an agreement. Furthermore, depending on the constitutional order, incorporation into domestic law may require public, parliamentary and/or judicial approval. Obtaining such approval may prove difficult in the divisive and precarious moments of peace-making, particularly as regards peace agreements that require significant departures from existing laws and constitution.[233] Arguably, the challenges of accommodating a peace agreement within a domestic legal order may be overcome by the making of a new constitution. Many peace agreements, however, do not require such fundamental re-writing of the domestic legal order. Moreover, constitution-making as a peace-making method is being questioned as peace negotiations tend to be dominated by conflicting parties and pragmatic compromises required for the achievement of negative peace.[234]

Another feature of contemporary peace agreements that place them at odds with the domestic legal order is the significant international involvement in their negotiation and

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[232] Arist Von Hehn, *The Internal Implementation of Peace Agreements after Violent Intrastate Conflict* (Martinus Nijhoff 2011) 56.

[233] ibid 56–57.

[234] Hallie Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 University of Pennsilvania Journal of International Law 239; Cheryl Saunders, 'Constitutional Review in Peace Processes Securing Local Ownership' [2014] Accord 56.

implementation.[235] Peace agreements are deemed to be procedurally internationalised due to the presence of international guarantors and witnesses during their conclusion. They are also substantively internationalised, as their comprehensive scope brings them increasingly within the prescriptive reach of international law. Peace agreements also contain references to international law and delegate implementation roles to international actors. However, whether such internationalisation necessarily denotes, or requires, a change in the legal characterisation of a peace agreement is open to question and will be examined in this chapter.

In light of the challenges of accommodating peace agreements within the domestic legal order and the international aspects to peace agreements, some peace-making parties have asserted that peace agreements are sources of international obligations and can be implemented as such. The parties to the 2016 Final Peace Agreement of Colombia, for example, explicitly claimed that the agreement was concluded as "a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions, as per its international standing".[236] Kallon, a commander in the Revolutionary United Front (RUF), which fought against the government of Sierra Leone until 2002, argued before the Special Court for Sierra Leone that the Lomé Agreement was binding on the government and governed by the 1969 Vienna Convention on the Law of Treaties.[237] Moreover, regardless of an explicit claim to international legal status, almost all peace agreements assume treaty-like features. They are concluded in written form, mimic legal language, and include provisions on the entry into force, or amendment of the agreement, as typical of international treaties. Secondly, parties often seek the endorsement of the Security Council (SC) or the incorporation of peace agreement obligations into a SC resolution.[238] Lastly, some intra-state peace agreements, such as the 1991 Comprehensive Political Settlement for Cambodia[239] and 1995 General Framework Agreement for Peace in Bosnia and Herzegovina[240], are signed by third states as

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[235] On international involvement in the negotiation and implementation of peace agreements see G Sjoberg, 'Third Party Involvement in the Negotiation and Implementation of Intrastate Peace Agreements' in M Boltjes (ed), *Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace* (2007); F Vendrell, 'The Role of Third Parties in the Negotiation and Implementation of Intrastate Agreements: An Experience-Based Approach to UN Involvement in Intrastate Conflicts' in M Boltjes (ed), *Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace* (2007).

[236] Final Agreement to End the Armed Conflict (Colombia) (n 18).

[237] *Prosecutor v Morris Kallon and Brima Buzzy Kamara (Decision on Challenge to Jurisdiction) SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (13 March 2004)* [Hereinafter the Kallon case].

[238] See Final Agreement to End the Armed Conflict (Colombia) (n 18); Lomé Peace Agreement (n 15).

[239] Framework for a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991.

[240] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15).

signatories, rather than merely as guarantors in an attempt to internationalise and thus legalise the agreement, within which AOGs' commitments would be locked in.[241] Despite the attempts of peace-making parties and the proposals of some scholars to fashion peace agreements as international legal instruments, domestic and international courts have declined to attach international legal status to peace agreements to date.[242]

Against this backdrop, this chapter provides a comprehensive account of the modalities and challenges of the legalisation of peace agreements with a focus on whether they have international legal status. Accordingly, Part 3.2 introduces the requirements for a peace agreement to be considered an international agreement, namely, the treaty-making capacity of the AOG party(ies) and the intention of the parties to create an internationally binding agreement. Part 3.3 then examines whether AOGs have treaty-making capacity under international law, taking into account the domestic and international judicial decisions and the Security Council practice regarding peace agreements. It discusses four main views on the treaty-making capacity of AOGs. Part 3.4 considers whether peace agreements manifest an intention to be binding as international law, or even as law, regardless of whether AOGs have treaty-making capacity. Having found that peace agreements, with the noted exceptions, lack international legal status, Part 3.5 probes the legal and practical consequences of this conclusion and briefly explores a number of alternative modalities for the legal implementation of peace agreements.

3.2. Do peace agreements constitute international agreements?

Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT) defines a treaty within its scope as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[243] The Convention was adopted as confined to treaties between states, as the International Law Commission (ILC) did not follow the approach it adopted in the 1962 Draft Articles on the Law of Treaties that broadened the scope of the definition to include agreements "concluded between two or more States or other subjects of international law" and amendment proposals

[241] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

[242] See Section 3.2.4.1.

[243] 1969 VCLT (n 118).

to the same effect were rejected at the Vienna Conference.[244] Therefore, peace agreements signed between governments and AOGs are not international treaties falling under the scope of the 1969 VCLT.

As to international agreements that are not treaties within the meaning of the Convention, Article 3 clarifies that "international agreements concluded between States and other subjects of international law or between such other subjects of international law" or "international agreements not in written form" shall retain their legal force and continue to be subject to rules of international law independently of the Convention.[245] The determination of whether an agreement is an international agreement, then, firstly, relies on the identification of the "other subjects of international law". In its Commentary on Article 1 of the 1962 Draft, the ILC explained that:

> "The phrase "other subjects of international law" is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties."[246]

Furthermore, in the 1966 'Draft articles on the law of treaties with commentaries', the ILC emphasised that the narrow definition of 'treaty' in the Convention was not "intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties".[247]

Although Article 3 of the 1969 VCLT does not enumerate or give examples of other subjects of international law, the reference to insurgent groups in the earlier work of the ILC has been cited by scholars as support for the treaty-making capacity of AOGs.[248] In the period preceding the 1949 Geneva Conventions, insurgency and belligerency were two provisional statuses that may be accorded to armed groups, by parent or third states, to trigger the operation of a set of international legal rules specific to the situation of armed conflicts.[249] Insurgency was an interim status in situations of internal armed conflict falling short of a

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[244] Humphrey Waldock, 'First Report on the Law of Treaties (26 March 1962) YB ILC 1962/II, 27'. See also Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 168.

[245] 1969 VCLT (n 118).

[246] Waldock (n 244).

[247] Revised Draft Articles (13 and 14 July 1966) YP ILC 1966/II, 112 188.

[248] See e.g. Sheeran (n 90) 432–434; Roberts and Sivakumaran (n 228) 145.

[249] Jordan Paust, 'Armed Opposition Groups' in Math Noortman, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 279–283.

recognised belligerency.[250] It was commonly held that recognition by a third state that a state of insurgency exists in another country served only for practical purposes of neutrality and protection of nationals and assets and did not bestow legal personality on the armed group.[251] For insurgents to be accorded belligerent status, the rebel group must "a) possess control of some part of the territory in which they operate; b) exercise *de facto* administrative control over that territory; c) possess an armed force subject to military discipline; and d) conduct their armed activities in accordance with the laws of armed conflict."[252] As opposed to insurgency, belligerency bestowed rights and obligations on the insurgent group and elevated its status to that of an international legal person with limited treaty-making capacity. Accordingly, belligerents had the capacity to enter into agreements with the recognising state(s) in relation to armed conflict-related practical matters such as consular or trade relations.[253]

The concepts of belligerency and insurgency have not been invoked by states since the 20th century and are accepted to have fallen into desuetude.[254] Moreover, they lack a clear grounding in international law. In addition to the ambiguity regarding the continuing relevance of the concepts, it is also unclear whether the term 'insurgent' used in the 1962 and 1966 Drafts of the ILC can be as broadly understood to include all AOGs, as opposed to the traditionally narrower scope of the term. Although the terms insurgency and armed conflict have come to be used interchangeably[255], it is notable that the 1962 Draft refers to insurgents as "international entities", which seems to allude to the historical concepts of insurgency and belligerency, where recognition by parent or third states played a constitutive role. However, today states remain unlikely to recognise AOGs as international entities despite agreeing to negotiated settlements with them. Article 3 of the 1969 VCLT, to conclude, is under-specified to settle the question of the treaty-making capacity of AOGs.

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[250] Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 101.

[251] But cf. Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 12–13 (Contending that 'unrecognised insurgents ... may be admitted to various forms of intercourse with outside States. Such intercourse, which involves the application of international law by and in relation to insurgents, may include the conclusion of agreements, ...').

[252] Emily Crawford, 'Insurgency', *Max Planck Encyclopedia of Public International Law* (2012).

[253] Fortin (n 250) 97.

[254] Malcolm Shaw, *International Law* (Cambridge University Press 2008) 1149; Crawford, 'Insurgency' (n 252). Cf. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 20 (Stating that a state may in the future lawfully recognise a situation as a belligerency).

[255] See e.g. Paust (n 249) 282–3.

The debate regarding Article 3 and the treaty-making capacity of non-state actors has mostly concentrated on the concept of subjectivity/personality without differentiating between the different capacities that personality entails. Although the extent of it remains contested, it is increasingly accepted today that, having acquired rights and obligations under international law, AOGs have some form of international legal personality.[256] Legal personality, however, has come to be detached from treaty-making capacity. This view is in line with the ICJ's opinion in the *Reparations for Injuries* that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the Community."[257] The distinction between international legal personality and the various capacities it entails also features in the Reports of the ILC Special Rapporteurs during the drafting of the 1969 VCLT, despite not being reflected in the final draft. In 1962, for example, Waldock proposed a definition of "international agreement" as an agreement "… between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties".[258] Scholars also contend that even if non-state actors acquire legal personality owing to their international rights and obligations, this does not necessarily denote that they enjoy law-making, including treaty-making, capacity.[259] Clapham further suggests focusing on the "capacity" of non-state actors rather than their subjectivity, or personality, to account for their rights and obligations under international law.[260] In this way, he argues, the discussion can be saved from the "mysteries" of subjectivity and the concerns attached to the "expansion of the possible authors of international law".[261] The next Part, therefore, does not discuss whether AOGs have international legal personality but concentrates on the

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[256] See Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 International and Comparative Law Quarterly 416; Andrew Clapham, *Human Rights Obligations of Armed Groups* (Oxford University Press 2006); Fortin (n 250). But cf. Article 3 common to the 1949 Geneva Conventions, see e.g. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31.

[257] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) ICJ Rep 1949, 174* 178.

[258] Waldock (n 244) 31.

[259]See Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 173 (Explaining the formal conception of international legal personality, according to which 'the capacity to create international law does not follow from personality'); Jean D'Aspremont, *Epistemic Forces in International Law* (Edward Elgar 2015) 122 et seq; Eva Kassoti, 'The Normative Status of Unilateral Ad Hoc Commitments by Non-State Armed Actors in Internal Armed Conflicts: International Legal Personality and Law- Making Capacity Distinguished' (2017) 22 Journal of Conflict and Security Law 67, 12–14.

[260] Clapham (n 256) 68–69. Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia 2001).

[261] Clapham (n 256) 59. On page 80, he explicitly states that non-state actors may acquire various rights and obligations under international law except for 'treaty making, diplomatic relations, and immunity before the courts'.

question of their treaty-making capacity, which remains valid even if it is assumed that the personality of AOGs is established in international law.[262] This prevents the debate from becoming a "tautological exercise", whereby law-making, including treaty-making, and subjectivity are equated.[263]

3.3. Treaty-making capacity of AOGs in international law

Four main views on the treaty-making capacity of AOGs expressed in relation to the legal status of peace agreements can be identified in international practice and scholarship. Firstly, some scholars seek the basis for a limited treaty-making capacity for AOGs in the conclusion of a peace agreement. The procedural and substantive internationalisation of peace agreements and the practice of the Security Council exhortations to parties to comply with peace agreements are emphasised in this regard.[264] The second view suggests that some AOGs acquire treaty-making capacity by virtue of the state of armed conflict and their exercise of effective control over a territory.[265] Thirdly, some scholars argue for moving beyond the traditional focus on subjectivity, law-making capacity and sources of international law, towards a more functionalist and pluralist approach to law-making. They contend that the legal normativity of peace agreements may be found in the needs of the international community[266], participation of AOGs in the law-making process[267], or the

[262] This analysis in this chapter is confined to AOGs. On the role of non-state actors in international law-making in general, see e.g. Math Noortman, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015); Jean D'Aspremont, 'The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes' in Hélène Ruiz-Fabri, Ruediger Wolfrum and Jana Gogolin (eds), *Select Proceedings of the European Society of International Law, Volume 2, 2008* (Hart Publishing 2010); Jordan Paust, 'Nonstate Actor Participation in International Law and the Pretense of Exclusion' (2011) 51 Virginia Journal of International Law 977; Jose E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2006); Christine Chinkin and others, 'Wrap-Up: Non-State Actors and Their Influence on International Law' (1998) 92 Proceedings of the Annual Meeting (American Society of International Law) 380. International Law Association, 'Third Report of the Committee on Non-State Actors' (Washington Conference, 2014) <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1207&StorageFileGuid=e100e0f3-96d7-45ce-b05c-e1fe669328a4>.

[263] See Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

[264] See e.g. Cindy Daase, 'The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions' (2011) 3 Göttingen Journal of International Law 23; Sheeran (n 90); Jann K Kleffner, 'Peace Treaties', *Max Planck Encyclopedia of Public International Law* (2011); Gregory H Fox, Kristen E Boon and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law' 67 American University international law review 649.

[265] See e.g. Antonio Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty' (2014) 2 Journal of International Criminal Justice 1130.

[266] Roberts and Sivakumaran (n 228).

[267] Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden Journal of International Law 477; Ezequiel Heffes and Marcos D Kotlik, 'Special Agreements as a Means of Enhancing

acceptance of agreements as law by the parties[268]. The last view, which remains dominant in international law, rejects the treaty-making capacity of AOGs and therefore the international legal status of peace agreements. As will be explained in the next section, domestic and international courts have to date adopted this view and refused to accord international legal status to agreements concluded by AOGs. The next four sections examine these views in turn and conclude that the last approach remains reflective of international law and that the contrary state practice is insufficient to suggest the emergence of a rule of customary international law recognising the capacity of AOGs to enter into internationally binding peace agreements.

3.2.1. Recognition of the treaty-making capacity of AOGs through a peace agreement

The most common view among the proponents of the attribution of international legal status to peace agreements is that AOGs acquire a limited treaty-making capacity by virtue of becoming a party to a peace agreement. There seems to be two separate lines of reasoning within this view. Firstly, it is argued, the source of the treaty-making capacity may be seen as the combated government's entry into an agreement with an AOG, i.e. the consent of the state party. A second view is that in the case of an internationalised peace agreement, which is signed by the representative of a third state or international organisation, the agreement gains international character by virtue of the AOGs intercourse on the international plane.[269] The common element of both views is that an AOG may gain treaty-making capacity, albeit limited to the duration of the agreement, *ipso facto* by being a party to an internationalised peace agreement.

3.2.1.1.Recognition by the combated state

By entering into peace agreements with AOGs, do combated states implicitly confer a limited treaty-making capacity to them? The international legal system has evolved to recognise the capacity of states to delegate treaty-making capacity to international organisations through their constituent documents[270] or to sub-state entities through the

Compliance with IHL in Non-International Armed Conflicts : An Inquiry into the Governing Legal Regime' (2014) 96 International Review of the Red Cross 1195.

[268] Kastner (n 4); Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

[269] See Fortin (n 250) 88 (Explaining the effect of intercourse on international plane for various conceptions of international legal personality).

[270] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986) 25 ILM 543 Art 6.

domestic legal system[271]. Therefore, some scholars suggest that states can be assumed to confer limited treaty-making capacity to AOGs by entering into agreements with them.[272] Corten and Klein emphasise that even if it is assumed that states confer treaty-making capacity to AOGs in such cases, it ultimately depends on their intention to create an internationally binding agreement. [273] However, even if such intention can be identified, it remains disputed whether a single state can confer treaty-making capacity to an AOG and therefore elevate an agreement to the status of an international agreement, which generates international legal consequences, have implications for third states, and may contribute to the identification of customary international law. In the *Kallon* decision, the Special Court for Sierra Leone (SCSL) stated that "what is a treaty or an international agreement is not determined by the classification of a transaction by a State, but by whether the agreement is regarded as such under international law and regulated by international law".[274]

Until state practice amounts to a customary approval of the treaty-making capacity of AOGs, therefore, the conclusion remains that a single state cannot attribute this capacity to AOGs and thus grant international legal status to peace agreements. Moreover, even if it is accepted that a peace agreement with an AOG may carry international legal force *inter partes*, due to its being accepted so by the combated state, this basis for the legal status of peace agreements falls short of mitigating the concerns directed at the view that peace agreements lack international legal status in that it too leaves the determination of the legal status of an agreement to the discretion of the state.[275] Therefore, it would not provide sufficient guarantees of compliance and equality between parties to convince AOGs to conclude peace agreements.

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[271] See Duncan B Hollis, 'Why State Consent Still Matters -Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley Journal of International Law (It must be noted that this concerns the treaty relations of sub-state entities with third states, not with parent states).

[272] See e.g. Roberts and Sivakumaran (n 228) 120.

[273] Corten and Klein (n 89) 4. See also Luisa Vierucci, '"Special Agreements" between Conflicting Parties in the Case-Law of the ICTY' in Bert Swart, Alexander Zahar and Goran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press 2011) paras 411–2 (Arguing that AOGs and agreements with AOGs derive their international legal status from the content of the agreement and intention of the parties).

[274] *Prosecutor v. Morris Kallon* (n 237) [44]. See also Kirsten Schmalenbach, 'Article 3' in Olivier Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 60.

[275] See e.g. Vierucci, '"Special Agreements" between Conflicting Parties in the Case-Law of the ICTY' (n 273) 412.

3.2.1.2.Recognition by virtue of an 'internationalised' peace agreement

The 1994 Lusaka Protocol between the Angolan government and UNITA, co-signed by the Special Representative of the UN Secretary-General in the presence of the representatives of the US, Portugal and Russia, is one of the many examples of the 'internationalised' peace agreements.[276] Reviewing the Protocol, Kooijmans contended that an armed group has some form of international legal personality, which is by its nature limited to the duration of the implementation of the peace agreement, not because it is a party to an internal armed conflict, a *de facto* regime, or a target of the UNSC measures, but only due to its part in the internationalised peace agreement.[277] He explains:

> "If a settlement is reached which is co-signed by the Secretary-General's representative, the non-state entity must be assumed to have not only committed itself to its counterpart, (the Government) but also the United Nations. If the latter interpretation is correct then the contractual bond must necessarily have an international law character since such an agreement is by definition governed by public law."[278]

Daase adopts a similar approach when referring to the Lomé and Accra Agreements as internationalised peace agreements, and she also claims that armed groups commit themselves both to their counterparts and to "the UN, in particular the SC, as a mediator and *de facto* guarantor for the implementation of the agreement and the peace process".[279]

Kooijmans' argument was also adopted by the Defence Counsels in the *Kallon* case and by the respondents in a case brought before the Supreme Court of the Philippines against the 2008 Memorandum of Agreement on Ancestral Domain (MOA-AD) between the government and the Moro Islamic Liberation Front (MILF) on grounds of unconstitutionality.[280] However, both courts rejected the argument. The SCSL opined that:

> "The role of the UN as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and the mediation efforts of the Secretary-

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[276] Lusaka Protocol (Angola) 15 October 1994.

[277] PH Kooijmans, 'The Security Council and Non-State Entities as Parties to a Conflict' in K Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff 1998) 338 et seq. See also Nico Krisch, 'Article 39' in Bruno Simma (ed), *UN Charter: A Commentary* (Oxford University Press 2012) 1270 (Mentioning that NSAs gain partial international legal personality by being recognised by an internationalised peace agreement).

[278] Kooijmans (n 277) 338.

[279] Daase, 'The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions' (n 264) 65.

[280] *Prosecutor v. Morris Kallon* (n 237); *The Province of North Cotabato* (n 181).

> General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party."[281]

The Supreme Court of the Philippines further emphasised that the obligations assumed by the Philippines in the MOA-AD were not addressed to third states or international organisations but only to the MILF.[282] The Court held that "the mere fact that in addition to the parties to the conflict, the peace settlement is signed by representatives of states and international organizations does not mean that the agreement is internationalized so as to create obligations in international law."[283]

It is also notable that the text of the Lusaka Protocol, notwithstanding Kooijmans' interpretation, suggests that the Secretary-General's representative signed the agreement only in the capacity of mediator and the parties to the agreement remained the government and signatory AOG.[284] Therefore, when third states or international organisations sign peace agreements as witnesses, guarantors or mediators, such signature does not result in these actors assuming legal obligations under the peace agreement.[285] Nor does it transform the peace agreement into an international agreement. In its 2014 Report, the ILA Committee on Non-State Actors also came to the conclusion that "the practice pertaining to peace agreements signed by AOGs, despite a significant element of internationalization, remains too inconclusive to conclude that they constitute a new source of obligations for these groups".[286] However, a number of peace agreements are explicitly concluded as treaties, whereby third states assume international obligations, despite the presence of AOG-signatories. The next section examines the legal status of such peace agreements with a double character.

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[281] *Prosecutor v. Morris Kallon* (n 237) [39].

[282] *The Province of North Cotabato* (n 181).

[283] ibid.

[284] See Lusaka Protocol (Angola) 15 October 1994 (n 276).

[285] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2007) 80.

[286] International Law Association (n 262) 8. See also Michael Wood, 'The Law of Treaties and the UN Security Council: Some Reflections' in Enno Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 245; Eric De Brabandere, 'The Responsibility for Post-Conflict Reforms : A Critical Assessment of Jus Post Bellum as a Legal Concept' (2010) 43 Vanderbilt journal of transnational law 119 (Stating that the 2001 Bonn Agreement of Afghanistan is not an international treaty but an internal roadmap of the different political and ethnical factions).

3.2.1.3.Peace agreements with a double character: Third states as signatories

Some intra-state armed conflicts have been brought to an end with the conclusion of agreements that have been signed by a combination of more than one state and one or more AOGs. A prominent example is the General Framework Agreement for Peace in Bosnia and Herzegovina of 1995, commonly referred to as the Dayton Peace Agreement.[287] It is concluded in the form of an international treaty but used a special formulation to include non-state entities within its framework. The main agreement is signed by three states, the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. However, twelve annexes attached to this main agreement are signed by varying matches of the three states and the sub-state entities, the Republika Srpska and the Federation of Bosnia and Herzegovina. Other examples include the Minsk Agreement I and II on the conflict in eastern Ukraine signed by Ukraine, Russia and the two self-declared republics in the region,[288] the Agreement on Further Development of Georgian-Ossetian Peaceful Settlement Process signed by Georgia, Russia, the South Ossetian party and the North Ossetian party[289], and the Lusaka Ceasefire Agreement signed by Angola, the DRC, Namibia, Rwanda, Uganda, and Zimbabwe, as well as two Congolese rebel organisations[290].

Peace agreements with a double character may be considered as international treaties as between the state parties depending on whether they are intended to create international obligations for them. In its order of provisional measures in *Ukraine v Russian Federation*, the International Court of Justice (ICJ) reminded the parties that the Security Council endorsed the Minsk II Agreement and stated that it "*expects* the Parties, through individual and joint efforts, to work for the full implementation of this "Package of Measures" in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine".[291] The Court indicated its expectation of implementation of the Agreement as "an additional

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[287] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15).

[288] Package of Measures for the Implementation of the Minsk Agreements (Ukraine), 12 February 2015; Protocol on the results of consultations of the Trilateral Contact Group (Minsk Agreement) (Ukraine), 5 September 2014.

[289] Agreement on Further Development of Georgian-Ossetian Peaceful Settlement Process and on Joint Control Commission, 31 October 1994.

[290] Lusaka Ceasefire Agreement (Angola, Democratic Republic of Congo, Namibia, Uganda, Rwanda and Zimbabwe), 10 July 1999.

[291] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russia) (Request for the Indication of Provisional Measures)* [104] [Emphasis added to higlight the shift in the language from 'must' in the operative paragraphs of the Order to 'expects'].

measure aimed at ensuring the non-aggravation of the dispute between the Parties" after the operative paragraphs of the Order.[292] Although non-implementation of the Agreement may be deemed as aggravation of the dispute by the Court, it is difficult to infer from the relevant paragraph whether the Court considers the Agreement as a source of international obligations.[293] However, any conclusion that the Minsk II Agreement is not a binding international agreement between states parties would be due to the lack of requisite intention on the part of the states rather than the existence of non-state actor signatories.[294]

The *Armed Activities* case, where the ICJ considered whether the Lusaka Ceasefire Agreement "constituted consent to the presence of Ugandan troops on the territory of the DRC" against the allegations of the acts of aggression perpetrated by Uganda, is more helpful in determining the Court's view on peace agreements with a double character.[295] The Lusaka Ceasefire Agreement was signed on 10 July 1999 by representatives of Angola, the DRC, Namibia, Rwanda, Uganda, and Zimbabwe and witnessed by representatives from Namibia, the OAU, the United Nations, and Southern African Development Community (SADC).[296] Two of the Congolese rebel organisations, MLC and RCD also signed the agreement. Notably, the Court did not consider the existence of armed group signatories as detracting from the international legal force of the agreement as it applied to state parties. Hence, in the order concerning provisional measures of 1 July 2000, the Court affirmed that Lusaka Agreement "constitutes an international agreement binding upon the Parties".[297]

Some scholars, however, have argued that the Court downplayed the legal force of the Agreement in the Judgment by treating it as a "modus operandi" or merely as a political

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[292] ibid 103.

[293] According to Article 38(1) of the ICJ Statute, the Court's "function is to decide in accordance with international law such disputes as are submitted to it", see Statute of the International Court of Justice (26 June 1945) 33 UNTS 933. Therefore, it may be argued that the Court considered the Minsk II Agreement as an international treaty. However, this conclusion is weakened by the fact that the Court did not refer to the Agreement in the settling of the dispute before it but as the basis of a provisional measure to prevent the non-aggravation of the dispute.

[294] It must be noted that, contrary to Ukraine's position that Russia incurs obligations under the Minsk Agreements, Russia insists that it has signed the Agreements only as a mediator, see 'Zakharova: Russia Is Not Subject to the Minsk Agreements, so It Is Not Obligated to Release Savchenko' *UAWire* (28 March 2016).

[295] *Armed Activities On The Territory Of The Congo, (Democratic Republic of the Congo v Uganda) (Judgment) ICJ Rep 2005, 168* [92].

[296] Lusaka Ceasefire Agreement (Angola, Democratic Republic of Congo, Namibia, Uganda, Rwanda and Zimbabwe), 10 July 1999 (n 290).

[297] *Armed Activities on the Territory of the Congo (DRC v Uganda) (Request for the Indication of Provisional Measures: Order) ICJ Rep 2000, 111* [37].

instrument.[298] The Agreement includes a calendar for the orderly withdrawal of all foreign forces from the territory of the DRC, and it was the contention of Uganda that the relevant provisions constituted consent to the presence of its troops in the territory of Congo from the date of the conclusion of the Agreement. The Court, however, held that:

> "The provisions of the Lusaka Agreement thus represented an agreed modus operandi for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this modus operandi the DRC did not "consent" to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion."[299]

Apart from that, the Court did not make any pronouncements on the legal status of the Agreement. The judgment does not suggest that the Court downgraded the legal status of the agreement and the Court refers to the Lusaka Ceasefire Agreement explicitly as a "treaty".[300] The Court merely interpreted the agreement in a way that led to the dismissal of Uganda's claim that the Lusaka Agreement constituted consent to Uganda's presence in the DRC. It confined its ruling to the issue of consent and to the inter-state aspects of the Lusaka Ceasefire Agreement. The Court's opinion that the withdrawal calendar does not constitute consent but only provides for the solution of a reality on the ground does not detract from the legal force of the Agreement.[301] Lastly, with regard to the intention of the parties, it is noteworthy that both parties relied on the provisions of the Lusaka Ceasefire Agreement before the Court, referring to it as a treaty, and did not challenge its legal force.

Although peace agreements with a double character can be sources of international legal rights and obligations as between their state parties, the same cannot be said for the obligations assumed by the state parties towards the AOGs under such an agreement and vice versa. The legal status of such obligations remains disputed under international law as in the case of peace agreements between only a state and an AOG. It can be said that the "contrived treaty form" may enhance compliance by demonstrating a formalised commitment to the agreement by state parties and by 'locking' AOGs within a formal

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[298] See 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' (2007) 2 IILJ Emerging Scholars Paper 1.

[299] Case Concerning Armed Activities On The Territory Of The Congo (n 63) [99].

[300] ibid 105.

[301] Forlati, 'Coercion as a Ground Affecting the Validity of Peace Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011).

document.[302] However, beyond this symbolic effect, the treaty form of the peace agreements with a double character does not affect the legal status of the agreement as between the states parties and the AOG(s).

Two peace agreements, the 1991 Comprehensive Peace Agreement of Cambodia and the 1998 Belfast Agreement regarding the conflict in Northern Ireland, are also notable in this context. The 1991 Comprehensive Peace Agreement of Cambodia was adopted at the Paris Peace Conference along with three other documents, the Final Act of the Paris Conference on Cambodia, the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia, and the Declaration on the Rehabilitation and Reconstruction of Cambodia.[303] The parties to the documents are the nineteen states[304] that participated in the conference in the presence of the then United Nations Secretary-General: hence, the two documents named as agreements gained the status of international treaties. The Agreement transformed commitments to various principles of internal governance including Cambodia's commitment to "liberal democracy, on the basis of pluralism" into international obligations.[305] What was an ordinary international treaty on the face of it, however, included a unique solution to involve the Cambodian parties. In addition to the then Phnom Penh government, three conflicting factions of Cambodia, the United National Front for an Independent, Neutral, Peaceful and Cooperative Cambodia, the Khmer People's Liberation Front, and the Party of Democratic Kampuchea, also known as the Khmer Rouge, were present at the conference. These parties agreed to form "a Supreme National Council as the unique legitimate body and source of authority in which, throughout the transitional period, the independence, national sovereignty and unity of Cambodia is embodied".[306] The Comprehensive Peace Agreement is thus signed by the Council on behalf of Cambodia, and Article 28 of the Agreement provides that this signature "shall commit all Cambodian parties and armed forces to the

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[302] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89), at 389-391.

[303] Framework for a Comprehensive Political Settlement of the Cambodia Conflict (n 239).

[304] Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Socialist Republic of Vietnam, Zimbabwe and Yugoslavia representing the Non-Aligned Movement in turn.

[305] Ratner (n 90) 27–28.

[306] UNSC Res 668 (20 September 1990) UN Doc S/RES/668. Ratner regards the Supreme National Council 'sui generis as a matter of international law' and states that it is given international recognition as a government by the community of nations, see Ratner (n 90) 10–11.

provisions of this Agreement". Armed groups, in this case, were given a status within the domestic order by taking part in the transitional government and signed the treaty indirectly in this role.

The 1998 Belfast Agreement, on the other hand, is composed of two agreements, an internal settlement between multiple parties in Northern Ireland and an international treaty between Ireland and the United Kingdom annexed to the multi-party settlement.[307] In Article 2 of the Treaty, two governments affirmed their commitment to support and implement the Belfast Agreement. The British-Irish Treaty is different from the 1991 Agreement regarding Cambodia, as it did not directly entrench the internal settlement within an international treaty. Rather, in this case, Ireland and the UK committed to enacting the constitutional reforms required to implement the internal settlement in Northern Ireland as international obligations owed to each other rather than to the parties in Northern Ireland.[308] Although unique in their signatory constellation, these two agreements are distinct from the above-cited agreements with a double character. The 1991 Comprehensive Peace Agreement of Cambodia and the 1998 Treaty between Ireland and the United Kingdom are international treaties proper. The multi-party settlement, to which the latter was annexed, however, remains an agreement without an international legal status.

3.2.2. Treaty-making capacity and effective control over a territory

Another approach is to recognise the inherent treaty-making capacity of AOGs by virtue of the state of armed conflict and effective territorial control. The International Commission of Inquiry on Darfur stated that "all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts".[309] The Commission further opined that two AOGs that operate in Darfur, the SLM/A and JEM, "possess under customary international law the power to enter into binding international agreements".[310] The view that AOGs acquire treaty-

[307] Northern Ireland Peace Agreement (The Good Friday Agreement), 10 April 1998.

[308] For a more detailed analysis of the inter-state dimensions of the Good Friday Agreement, see Colin Harvey, 'On Law, Politics and Contemporary Constitutionalism' (2003) 26 Fordham International Law Journal 996; CRG Murray, Aoife O'Donoghue and Ben TC Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform'' [2017] Irish Yearbook of International Law.

[309] Report of the Independent Commission of Inquiry on Darfur to the Secretary-General (25 January 2005) Attached to UN Doc S/2005/60 (1 February 2005) para 172.

[310] ibid 174 Although the SCSL has been criticed by scholars, who consider its assessment of the legal status of the Lome Peace Agreement cursory, the Commission's conclusion, which is hastier than the Kallon

making capacity upon becoming a party to an armed conflict and establishing *de facto* control over a territory also finds support in the literature.[311] Arguing that the 1999 Lomé Peace Agreement is an international treaty, for example, Cassese holds that "insurgents in a civil war may acquire international standing and the capacity to enter into international agreements if they show effective control over some part of the territory and the armed conflict is large-scale and protracted."[312]

As to the scope of the treaty-making capacity of AOGs exercising effective control over territory, Kolb suggests that they can only conclude armed conflict-related agreements, e.g. in relation to exchange of prisoners or armistices.[313] Schmalenbach, on the other hand, claims that their treaty-making capacity is limited to the conclusion of agreements with third states in relation to matters arising from control over a territory and conduct of armed conflict, and cites examples of agreements between third states and belligerents from the pre-UN Charter period.[314] However, she adds that the treaty-making capacity does not extend to the conclusion of agreements beween AOGs and the combated government, including special agreements, which remain of non-international character.[315]

This view, even if considered accurate, is limited in its explanatory scope to the legal status of peace agreements concluded with AOGs that have established effective control over territory and does not provide a general theory for the legal status of peace agreements. Furthermore, it entails a more radical departure from the dominant conception of original treaty-making capacity as limited to states, as compared to the above-explored approach taking conferral of treaty-making capacity to AOGs by other subjects of international law as the decisive criterion. Therefore, it remains more unlikely to be accepted by states, as arguably demonstrated by the lack of supporting state practice.[316]

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decision's, has been cited as practice in support of the treaty-making capacity of AOGs. Cf. Roberts and Sivakumaran (n 228).

[311] AD McNair, *The Law of Treaties* (Cambridge University Press 1961) 680; Vierucci, '"Special Agreements" between Conflicting Parties in the Case-Law of the ICTY' (n 273); Cassese (n 265).

[312] Cassese (n 265) 1134.

[313] Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 18.

[314] Schmalenbach (n 274) 77.

[315] Schmalenbach (n 274).

[316] Roberts and Sivakumaran (n 14) 121 (Also warning that recognising the treaty-making capacity of AOGs that exercise territorial control may indirectly incentivise more violence to establish such control). See also Hollis (n 37) 151 (Stating that the legal status of unauthorised sub-state arrangements with third-states remain ambiguous and citing Canada's rejection of the binding character of a number of agrseements between Quebec and France).

3.2.3. Functionalist and pluralist approaches to the role of AOGs in law-making

Some scholars advocate for more flexibility and inclusivity in the international legal system by allowing non-state actors to have a role in law-making. For example, Roberts and Sivakumaran propose that the law-making role of a non-state actor should be recognised and delineated according to "the needs and interests of the international community as a whole".[317] They further contend that hybrid treaties "between subjects with recognized lawmaking capacities (states and international organizations) and ones without (armed groups)" should be recognised to be as obligatory as treaties proper to increase compliance with international humanitarian law or to accommodate the international elements of peace agreements.[318] Such functionalist approaches to law-making[319] refer to the ICJ's dictum in the *Reparations for Injuries* opinion that:

> "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the Community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities, which are not States."[320]

Although this allows for a degree of flexibility and inclusivity in terms of both admitting the role of non-state actors in the international legal system and recognising the plurality of capacities attached to subjectivity, the ICJ's dictum falls short of indicating that non-state actors may acquire original treaty-making capacity should international life so require, but emphasises the continuing centrality of states in opening up the legal system to non-state actors. In the functionalist approach of Roberts and Sivakumaran, states retain their central role in that they decide to enter into agreement with an AOG or not.[321] In the context of peace-making, a pitfall of this approach is that states will have to clarify their position, e.g.

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[317] Roberts and Sivakumaran (n 228) 125.

[318] ibid 144–6. It must be noted that the authors do not clarify whether peace agreements would be binding to the extent that they relate to international humanitarian law, as their argument centres on the creation, development and application of international humanitarian law.

[319] Noortman (n 262); Ruth Wedgwood, 'Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System' in R Hoffmann and N Geissler (eds), *Non-State Actors as New Subjects of International Law: International Law – from the Traditional State Order Towards the Law of the Global Community* (Duncker & Humblot 1999).

[320] *Reparation for Injuries Suffered in the Service of the United Nations* (n 257).

[321] Roberts and Sivakumaran (n 228) para 146 (It must be noted that the authors extend their functionalist appraoch to the role of non-state actors in law-making to attach legal status to unilateral acts of AOGs as well, which may be harder to reconcile with the states' central role in awarding law-making capacity to non-state actors).

through the language used in a peace agreement, as to whether they intend to enter into an internationally binding agreement with an AOG or not. In fragile peace-making settings, where constructive ambiguity and silence play a crucial role in reaching agreements[322], this may place an additional burden on negotiators.

With a similarly functionalist yet more pluralist bent, other scholars have tried to move the discussion away from formalist concepts such as subjectivity, law-making capacity, or sources of international law, to acknowledge the role of non-state actors in international law-making. For example, by reference to Higgins, Heffes and Kotlik argue that instead of attempting to classify them into the categories of sources in international law, agreements with AOGs "can be understood as creating international law through an authoritative decision made by relevant actors that interact within the realm of international relations and with the intention to bind themselves to a set of rules designed to regulate such interaction".[323]

Another notable theory in this regard is Bell's *lex pacificatoria*. To explain the legal nature of peace agreements, Bell resorts to the concept of legalisation, according to which the legalisation of a norm or institution is assessed by reference to the three elements of obligation, precision and delegation.[324] The degree of legalisation varies depending on whether parties demonstrate an intention to be bound (obligation), craft rules with precise commitments (precision), and delegate authority to third parties to implement the agreement (delegation).[325] Applying this analytical framework to peace agreements, Bell explains that peace agreements become legalised instruments, where they take a form that demonstrates binding character, contain precise commitments and include internationalised implementation mechanisms.[326] However, she emphasises that the legalisation of peace agreements cannot be accounted for merely by reference to such formalist criteria and needs to take into account the functions that legal form plays in agreement conclusion and

[322] Stephen John Stedman, 'Introduction' in SJ Stedman, D Rothchild and EM Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner 2002) 10; FO Hampson, *Nurturing Peace: Why Peace Settlements Succeed or Fail* (United States Institution of Peace 1996) 221.

[323] Heffes and Kotlik (n 267) 1218.

[324] On the concept of legalization, see Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 401.

[325] ibid.

[326] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

implementation.[327] Peace agreements contain a mixture of contractual obligations between the conflicting parties, constitutional arrangements for the post-agreement legal and political order, and internationalised mechanisms for the implementation of the agreement. Therefore, the legal status of a peace agreement should accommodate the multidimensional obligations it generates. Thus, she contends that the legalisation of peace agreements is situated beyond the domestic-international dichotomy, as they function as hybrid internationalised constitutions.[328] She classifies peace agreements neither as international agreements nor domestic legal or political instruments, but as *lex pacificatoria*.[329]

Lex pacificatoria grounds its detachment from the rigid categorisations of domestic and international law in its rationale of facilitating the conclusion and implementation of peace agreements. However, for that detachment, it lacks other functions that law plays, including legal certainty, and the institutional, interpretive and enforcement mechanisms of (international) law.[330] Moreover, if one assumes a pluralist approach to legal normativity and establishes that a peace agreement is intended to be law, it would still need to be established how and why international law is deemed relevant to such normativity. As the next section elaborates, most peace agreements do not reflect a clear intention to be a source of international legal obligations and the link between their purported legal-normativity and international law has not been sufficiently supported by empirical evidence to date.

3.2.4. Rejection of the treaty-making capacity of AOGs

Despite the vast scholarship arguing that AOGs acquire treaty-making capacity in certain conditions, or that international law should evolve towards the recognition of the role of AOGs in law-making in general, the current state of international law does not seem to

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[327] Cf. Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 International Organization 743.

[328] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89). See also Kastner (n 4) (Arguing that peace agreements derive their normativity from the obligations generated and internalised by negotiation parties and that most peace agreements reach beyond the domestic realm and reveal the intention of parties also to be bound in international law).

[329] Although she does not clarify this, Bell seems to attach three distinct meanings to the term *lex pacificatoria*. Firstly, it is the body of legal norms and other normative expectations, which governs peace negotiations. Secondly, it is a sort of rule of recognition, which attaches the status of *lex* to peace agreements. Thirdly, it is a legal category like 'treaty', 'contract' or 'constitution'. See Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[330] Lang (n 298) 27; Aoife O'Donoghue, 'Book Review: "On the Law of Peace: Peace Agreements and the Lex Pacificatoria" by Christine Bell, Oxford: Oxford University Press' (2009) 9 International Criminal Law Review 867, 871 (Querying whether lex pacificatoria could be better identified as a subset of international law).

attribute treaty-making capacity to AOGs or international legal status to peace agreements concluded between governments and AOGs. Given the absence in the 1969 VCLT of a clear basis for the treaty-making capacity of AOGs, this section considers whether customary international law has evolved to provide for the international legal status of peace agreements. The few relevant decisions of international courts and tribunals addressing the question to date have not affirmed the emergence of such a rule of customary international law. As to state practice, this section reviews the practice of peace agreements and domestic court decisions. It also explores the practice regarding the conclusion of special agreements as per Article 3 common to the 1949 Geneva Conventions and the Security Council practice on peace agreements. Lastly, it looks at whether the treaty-making capacity of specific AOGs, i.e. armed wings of indigenous peoples and national liberation movements, are recognised in international law, despite the absence of a general acceptance of the treaty-making capacity of AOGs.

3.2.4.1.Judicial and arbitral decisions and state practice regarding peace agreements

The Permanent Court of Arbitration pronounced, albeit very briefly, on the legal status of a peace agreement and held that the 2005 Comprehensive Peace Agreement of Sudan is not a treaty as defined by the 1969 VCLT but an agreement between the government of a sovereign state and a political movement, which "may - or may not - govern over a sovereign state in the near future".[331] The Tribunal further refers to the CPA as part of the *lex specialis* prescribed by the parties as applicable to the dispute apart from international law, which clarifies that the CPA was not regarded as an international agreement either.[332]

The *Kallon* decision of the SCSL, where the Court had to decide on whether the amnesty granted by virtue of the 1999 Lomé Agreement constituted a bar to its jurisdiction, reaches the same conclusion following a more elaborated reasoning.[333] Article 9 of the Lomé Peace Agreement provides that "the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991, up to the signing of the present Agreement."[334] Opposing

[331] *Abyei Final Award* (n 188) [427].

[332] ibid 434.

[333] *Prosecutor v. Morris Kallon* (n 237).

[334] Lomé Peace Agreement (n 15).

the jurisdiction of the SCSL, the Defence Counsels submitted that the Lomé Peace Agreement was a binding international agreement and that allowing prosecution of the alleged crimes covered by the Lomé amnesty would constitute an abuse of process.[335] Upholding its jurisdiction, the Court unequivocally held that the Lomé Peace Agreement "cannot be characterised as an international instrument" and that "[t]he RUF had no treaty-making capacity so as to make the Lomé Agreement an international agreement".[336] In reaching this conclusion, the Court also evaluated whether insurgent groups like the RUF was vested with international personality owing to their obligations under international humanitarian law. It found that insurgent groups were bound by international humanitarian law by virtue of Article 3 common to the Geneva Conventions without acquiring international personality, adding that the most plausible theory is that AOGs are obliged "as a matter of international customary law".[337] Lastly, the Court emphasised that the government of Sierra Leone entered into an agreement with the RUF regarding it "only as a faction within Sierra Leone" and that the agreement may create binding obligations and rights in municipal law.[338]

The *Kallon* decision has been criticized by some scholars, mainly on two grounds. Firstly, the proponents of the approaches that recognize the treaty-making capacity of AOGs have taken issue with the Court's view on the international legal personality and treaty-making capacity of AOGs. Cassese, for example, firmly asserts that the RUF had the capacity to enter into international agreements and that the Lomé Peace Agreement was an international treaty.[339] Kleffner contends that focusing on international legal personality to determine the legal status of peace agreements is of little guidance and suggests that the criterion should be the intention of the parties.[340] Admittedly, the Court's reasoning suffers from a degree of circularity, as it treats treaty-making capacity and international legal personality as following from each other, and it could have limited its evaluation to the treaty-making capacity of AOGs. Furthermore, the Court could have engaged in a review of the state practice and Security Council practice as to whether peace agreements are treated

[335] *Prosecutor v. Morris Kallon* (n 237) [22–31].

[336] ibid 42, 48.

[337] ibid 45–47.

[338] ibid 47–49. The Agreement was already incorporated into the domestic law of Sierra Leone through the 1999 Lomé Peace Agreement Ratification Act.

[339] Cassese (n 265) 1134.

[340] Kleffner (n 264) para 24. Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

as internationally binding or not. Nevertheless, the Court's finding that AOGs lack treaty-making capacity seems to remain reflective of the current state of international law. [341]

Secondly, both Cassese and Bell argue that the Court could have reached the same conclusion that the amnesty granted by the Lomé Peace Agreement did not constitute a bar to the jurisdiction of the Court by ruling the amnesty, to the extent that it covered international crimes and serious violations of human rights, unlawful under international law or by deciding that the agreement was terminated due to material breaches as per Article 60 of the VCLT. [342] Had it done so, they suggest, the Court would have avoided complicating the issue of the legal status of agreements concluded by AOGs with its allegedly tautological and circular reasoning. However, adopting the second reasoning suggested, that the Agreement was terminated due to material breaches, would have required an implicit acceptance in the first place that the Agreement was governed by the VCLT, rather than allowing the Court to avoid dealing with the issue of the legal status of the Agreement altogether. The first reasoning suggested, that the amnesty provided by the Agreement did not constitute a bar to the jurisdiction of the Court due to the nature of the crimes covered, suffers from the non-justification of the conflation of procedural (jurisdiction) and substantive (*jus cogens* nature of the crimes over which jurisdiction is claimed) issues.[343] Therefore, if the primary concern is the upholding of the Court's jurisdiction in face of an amnesty that covers international crimes and serious violations of human rights rather than the avoidance of the rejection of the international legal status of the Agreement, the most viable strategy for the Court was indeed to hold that the Agreement could not be a bar to its jurisdiction due to its domestic legal nature.

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[341] Proponents of the recognition of the treaty-making capacity of non-state actors, including AOGs often make particular reference to 'internationalised' state contracts (also referred to as corporate concessionary contracts) and the *Texaco/Calasiatic v Libya* arbitral ruling that they can be sources of international obligations, see e.g. Fortin (n 250) 109–10; *Texaco/Calasiatic v Libya [1977] 53 ILR 422 (Arbitral Tribunal) (19 January 1977)*. However, as Kassoti and Portmann also explain, the decision has been criticised in literature and has not been followed in later awards or ICJ rulings, see Kassoti (n 259) 12–14; Portmann (n 259) 124–5.

[342] Cassese (n 265); Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89).

[343] For a similar argument regarding an alleged conflict between the rules on immunity and jus cogens status of the implicated crimes see Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, 2012 I.C.J. Rep 99, [92–97]. The more fundamental questions that arise from the suggested reasoning is whether the said crimes enjoy *jus cogens* nature in international law and, if so, whether the *jus cogens* nature of the prohibitions extends to the duty to prosecute the said crimes. However, it is not necessary for the purposes of the argument made here to address these questions in full, as it is established that the Court would have retained its jurisdiction even if the duty to prosecute the said crimes was of *jus cogens* status.

Despite these objections, as mentioned above, the Court's finding that AOGs lack treaty-making capacity seems to remain reflective of the current state of international law. The review of the state practice regarding peace agreements does not point to the emergence of a rule of customary international law that accords treaty-making capacity to AOGs. Only a small number of peace agreements explicitly claim legal status, with only one of them claiming international legal status.[344] Furthermore, domestic court decisions have so far refused to attach international status to peace agreements. The Supreme Court of the Philippines cited the *Kallon* decision when it held that the Memorandum of Agreement on the Ancestral Domain between the Government of the Republic of the Philippines and the MILF would not be an international agreement, were it to be signed, due to the lack of treaty-making capacity of the MILF.[345] Ruling on a special agreement concluded between the government and an AOG, the Colombian Constitutional Court also held that such agreements "are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law".[346]

In a case brought before the Constitutional Court of Burundi, the Court had to consider whether the 2000 Arusha Peace and Reconciliation Agreement had supra-constitutional force in order to decide whether the terms of the Agreement on presidential terms prevail over the Constitution.[347] The Agreement, incorporated into domestic law, explicitly limited presidential terms to two.[348] The 2005 Constitution, drafted on the basis of the parties' commitments in the Agreement to make a new constitution, however, led to ambiguities regarding presidential term limits, leading to the 2015 crisis in Burundi when President Nkurunziza sought a third term.[349] The legal argument of the Government was that Article 302 of the Constitution created an exceptional post-transition "first President of the Republic" position, which was not subject to the two-term limit reaffirmed in Article 96

[344] See Section 3.3.1.

[345] *The Province of North Cotabato* (n 181).

[346] *Decision C-225/95 of 1995, Constitutional Court of Colombia*; Translation in Marco Sassòli and Antoine Bouvier (eds), *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross 1999) 1112.

[347] *Decision RCCB 303 (2015), Constitutional Court of the Republic of Burundi*.

[348] Arusha Peace and Reconciliation Agreement for Burundi (n 65).

[349] Stef Vandeginste, 'Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi' (2016) 51 Africa Spectrum 39, 39–63.

of the Constitution.[350] The Constitutional Court limited its analysis to whether the Agreement had supra-constitutional force over the Constitution and did not pronounce on the legal force of the Agreement *per se*. The Government, however, asserted that the Agreement was a "political agreement" and could not take precedence over the Constitution.[351] The US Special Envoy to the Great Lakes Region of Africa emphasised the relevance of the Agreement to the settlement of the crisis, by urging the Government "to ensure that the upcoming elections are consistent with the Arusha Accord" yet added that the US was "not making a legal argument here".[352]

3.2.4.2.Peace agreements: Special agreements as per Article 3 common to the 1949 Geneva Conventions?

Especially following the conclusion of the 2016 Final Peace Agreement of Colombia, which was signed by the parties expressly as a special agreement, the question of whether the legal force of peace agreements can be traced back to Article 3 common to the 1949 Geneva Conventions came to prominence.[353] Firstly, this depends on whether peace agreements can be classified as special agreements in terms of their contents. Common Article 3 encourages parties to armed conflicts to enter into special agreements with a view to bringing into force other provisions of the Geneva Conventions, which are not otherwise applicable in a non-international armed conflict.[354] Therefore, the aim and contents of a special agreement are confined to the sphere of international humanitarian law. The ICRC commentary on the 1949 Geneva Conventions provides that:

> "A peace agreement, ceasefire or other accord may also constitute a special agreement for the purposes of common Article 3 […] if it contains clauses that bring into existence further obligations drawn from the Geneva Conventions and/or their Additional Protocols […] such as the granting of an amnesty for fighters who have carried out their operations in accordance with the laws and customs of war, the release of all captured persons, or a commitment to search for the missing. **[…]** Likewise, an agreement may contain obligations drawn from human rights law and

[350] 'Speech of His Excellency Ambassador Albert Shingiro, Permanent Representative of Burundi to the United Nations at the Meeting of Burundi Configuration of the United Nations Peacebuilding Commission' (2015).

[351] ibid.

[352] 'Sustained American Attention to the Great Lakes Region of Africa: Remarks (as Prepared) by U.S. Special Envoy Russ Feingold' (2015).

[353] Luisa Vierucci, 'The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks'; Laura Betancur Restrepo, 'The Legal Status of the Colombian Peace Agreement' (2016) 110 AJIL Unbound 188.

[354] Convention for the Amelioration of the Condition of the Wounded and Sick (n 256).

> help to implement humanitarian law. For instance, it may aim to make the obligation to conduct fair trials more precise or may draw on IHRL in another way."[355]

Many peace agreements contain provisions relating to issues regulated by international humanitarian law. However, for example, the 2016 Final Peace Agreement (Colombia) includes lengthy sections on non-IHL related matters ranging from land reform to the political participation of the former rebel group FARC.[356] As the ICRC Commentary affirms, such an agreement may constitute a special agreement only to the extent that it aims to implement international humanitarian law, including the relevant rules of international human rights law.[357]

This raises the second question of whether a peace agreement gains international legal status to the extent that it constitutes a special agreement, i.e. whether special agreements are regarded as sources of international obligations. Notwithstanding the proviso in Common Article 3 that the application of its provisions, including the conclusion of special agreements, "shall not affect the legal status of the Parties to the conflict", could it be argued that the article attaches legal status to special agreements? In literature, some scholars argue that special agreements are treaties proper[358] or sources of international obligations regardless of their formal classification[359]. However, although many states have concluded special agreements with AOGs as per Common Article 3, there is not sufficient evidence to suggest that these are considered as international agreements.[360] A 1994 agreement between the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG) demonstrates the hesitation that governments may have in concluding special agreements formally classified as such, despite the dominant view that

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[355] International Committee of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Cambridge University Press 2017) paras 850–1.

[356] Final Agreement to End the Armed Conflict (Colombia) (n 18).

[357] International Committee of the Red Cross (n 355) para 851. See also Part 3.4.1.1 on the reasons behind the strategy of the Colombian parties to attach purported special agreement status to the entire peace agreement.

[358] Vierucci, '"Special Agreements" between Conflicting Parties in the Case-Law of the ICTY' (n 273); Roberts and Sivakumaran (n 228); Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002). Cf Kassoti (n 259) 2 (Maintaining that these views have not prevailed so far); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 71 (Arguing that special agreements do not generate international obligations but may be sources of domestic legal obligations).

[359] Heffes and Kotlik (n 267); Sassòli (n 228) 27.

[360] See the special agreements listed in International Committee of the Red Cross, 'Other Instruments' (*Customary International Humanitarian Law Database*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/src_iiotin> It should be pointed out that the ICRC study lists these agreements among 'other instruments' intead of among 'treaties'.

they do not confer treaty-making capacity or legal personality to AOGs. The parties explicitly state that the agreement does not "constitute a special agreement, in the terms of article 3 (Common), paragraph 2, second subparagraph of the Geneva Conventions of 1949", although in objective terms the agreement includes guarantees stemming from international humanitarian law.[361]

Proponents of the view that special agreements are binding *qua* international law further refer to the case-law of the ICTY, particularly the Tadić appeal judgment and the Blaškić and Galić trial judgments, in which the Tribunal referred to the special agreements concluded between the parties to the conflict in Bosnia and Herzegovina.[362] In these judgments, the Chambers relied on special agreements principally to establish its jurisdiction on the basis of certain provisions of the 1949 Geneva Conventions, or the Additional Protocols, by virtue of the special agreement concluded between the parties to that effect.[363] Special agreements were thus accorded legal force only in relation to bringing into application international humanitarian law. However, as Vierucci also emphasises, the Trial Chamber treated a special agreement as an autonomous source of international obligations only in the Galić trial judgment, yet without elaborating on its reasoning, to establish its jurisdiction *ratione materiae* over the crime of spreading terror among the civilian population.[364] The Appeals Chamber, on the other hand, held that the crime of terror was part of customary international humanitarian law and did not rely on the special agreement or treaty law. Therefore, it did not discuss whether the special agreement in question was binding *qua* international law.

The case-law of the ICTY, as subsidiary means for the determination of rules of international law, remains scant and ambiguous for providing guidance on the legal status of special agreements. Given also the lack of evidence in support of their binding force in the relevant state practice, it seems premature to conclude that peace agreements may gain international legal force to the extent that they constitute special agreements.

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[361] Comprehensive Agreement on Human Rights (Guatemala) (n 178).

[362] See e.g. Roberts and Sivakumaran (n 228) 145.

[363] Prosecutor v. Blaskić (Judgment) ICTY-95-14-T (3 March 2000); *Prosecutor v Galić (Judgment) ICTY-98-29-A (30 November 2006)*; *Prosecutor v Tadic (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-I (2 October 1995)*.

[364] *Prosecutor v. Galić* (n 363) [96]. For a detailed discussion of the judgments and other uses of special agreements in the case-law of the ICTY, see Vierucci, '"Special Agreements" between Conflicting Parties in the Case-Law of the ICTY' (n 273).

3.2.4.3.Security Council practice regarding peace agreements

The Security Council has been significantly involved in the resolution of intra-state armed conflicts, including by urging the conclusion of, and compliance with, negotiated settlements. It has urged conflicting parties to enter into a ceasefire or peace agreement[365], welcomed[366] or endorsed peace agreements,[367] called for/demanded/encouraged/invited compliance with peace agreement commitments,[368] characterised non-compliance with peace agreements as threats to peace,[369] deplored or condemned non-compliance,[370] and imposed sanctions in case of non-compliance with a peace agreement[371]. Surveying the practice of the SC in relation to 46 non-international armed conflicts active during the 1990-2013 period, Fox, Boon and Jenkins find that the SC has "ordered" AOGs to abide by peace agreements in 83% of the conflicts where a peace agreement was concluded and established sanctions to induce compliance in situations including Liberia, Rwanda, Sierra Leone, Cotê d'Ivoire and DR Congo.[372] The SC has also established the basis for the UN's mediation services in intra-state conflicts,[373] authorised peacekeeping missions to support the implementation of peace agreements,[374] and established transitional administration and peace building operations in exceptional cases such as Bosnia and Herzegovina, Kosovo and East Timor.

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[365] See e.g. UNSC Res 942 (23 September 1994) UN Doc S/RES/942; UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.

[366] See e.g. UNSC Res 2366 (10 July 2017) UN Doc S/RES/2366 Preamble.

[367] UNSC Res 2202 (17 February 2015) UN Doc S/RES/2202; UNSC Res 1464 (4 February 2003) UN Doc S/RES/1464; UNSC Res 1383 (6 December 2001) UN Doc S/RES/1383.

[368] See e.g. UNSC Res 851 (15 July 1993) UN Doc S/RES/851; UNSC Res 999 (16 June 1995) UN Doc S/RES/999; UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270; UNSC Res 1334 (22 December 2000) UN Doc S/RES/1334; UNSC Res 1346 (30 March 2001) UN Doc S/RES/1346; UNSC Res 1527 (4 February 2004) UN Doc S/RES/1527; UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528; UNSC Res 1572 (15 November 2004) UN DS/RES/1572 (2004); UNSC Res 1765 (16 July 2007) UN Doc S/RES/1765.

[369] See e.g. UNSC Res 864 (15 September 1993) UN Doc S/RES/864.

[370] See e.g. UNSC Res 851 (15 July 1993) UN Doc S/RES/851 (n 368); UNSC Res 1572 (15 November 2004) UN DS/RES/1572 (2004) (n 368); UNSC Res 1545 (21 May 2004) UN Doc S/RES/1545; UNSC Res 1602 (31 May 2005) UN Doc S/RES/1602.

[371] See e.g. UNSC Res 1127 (28 August 1997) UN Doc S/RES/1127; UNSC Res 1306 (5 July 2000) UN Doc S/RES/1306; UNSC Res 1521 (22 December 2003) UN Doc S/RES/1521.

[372] Fox, Boon and Jenkins (n 264) 677.

[373] See e.g. UNSC Res 1181 (13 July 1998) UN Doc S/RES/1181.

[374] See e.g. UNSC Res 1270 (n 368); UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509. See also Michael Tiernay, 'Which Comes First? Unpacking the Relationship between Peace Agreements and Peacekeeping Missions' (2015) 32 Conflict Management and Peace Science 135.

It is hard to adduce any evidence from the SC welcome or endorsement as to the international or binding character of a peace agreement. Nor is it possible to assert a correlation between the imposition of sanctions in case of non-compliance with peace agreement obligations and their legal status, as the former does not necessarily require the determination of a violation of international law.[375] On the other hand, some scholars argue that the Security Council's practice of exhorting peace agreement parties, including AOGs, to comply with their undertakings provides evidence for the existence of a rule that peace agreements between states and AOGs to end intra-state armed conflicts may be binding as a matter of customary international law.[376] However, it is difficult to support this argument for methodological and substantive reasons.

First of all, this argument assumes that the SC resolutions can be evidence of customary international law in themselves, i.e. as resolutions of an international organisation, rather than as means by which the practice and/or *opinio juris* of member states can be identified, e.g. by reference to their votes or statements during debates.[377] It is beyond the scope of this chapter to fully examine this argument. However, it suffices to mention that it does not find clear support in the current state of international law. Conclusion 12, para 2 in the Draft Conclusions on Identification of Customary International Law, adopted by the ILC in 2018, provide that "[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development."[378] The Commission clarifies in the commentary to Conclusion 12 that "[a]lthough the resolutions of organs of international organizations are acts of those organs, in the context of the present draft conclusion what matters is that they may reflect the collective expression of the views of States members of such organs".[379] Therefore, it does

[375] Tom Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Edward Elgar 2017).

[376] Fox, Boon and Jenkins (n 264) 674–9. See also Daase, 'The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions' (n 264) 62 (Arguing that "by addressing the non-state parties to an agreement directly and by holding them responsible for their non-compliance with the terms of the peace agreement, and by fostering the implementation of sanctions, the SC seems to acknowledge an internationalized status of the ICPA [internationalized comprehensive peace agreement] under consideration").

[377] See Gregory Fox, 'Security Council Resolutions as Evidence of Customary International Law' *EJIL:Talk!* (1 March 2018).

[378] 'Inetrnational Law Commission, Identification of Customary International Law' (n 228).

[379] Report of the International Law Commission, Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016), UN Doc. A/71/10 107.

not consider the resolutions as the practice of the SC contributing to the identification of customary international law.[380]

Secondly, and more importantly for the purposes of this chapter, regardless of whether the SC resolutions are considered as practice of the international organisation evidencing custom or as means of identifying the views of member states, a closer review of the SC resolutions addressing compliance of the parties with peace agreements does not lead to an unequivocal conclusion that the SC, or its member states, regards peace agreements as sources of binding international obligations. The SC has invited, urged, emphasised the necessity of, called for or demanded compliance with peace agreements in several situations.[381] For example, in relation to the situation in Angola, the SC condemned UNITA for continuing use of military violence and demanded that they "abide fully by the 'Acordos de Paz'", concluded in 1991.[382] Upon UNITA's continued failure to cease military action, in 1993 the SC determined the situation in Angola constituted a threat to international peace and security.[383] In 1997, the SC demanded UNITA's compliance with the Lusaka Protocol of 1994 and acting under Chapter VII, it decided on a range of measures to be taken against UNITA by the member states.[384] It further expressed "its readiness to consider the imposition of additional measures, such as trade and financial restrictions, if UNITA does not fully comply with its obligations under the Lusaka Protocol …".[385] Although the SC attached clear significance to a negotiated solution to the conflict in Angola, through the implementation of the Acordos de Paz and the Lusaka Protocol,[386]

[380] See also Niels Blokker, 'International Organizations and Customary International Law' (2017) 14 International Organizations Law Review 1, 9–10.

[381] See supra footnote 368. If one adopts the position that only the verb 'decide' indicates binding character in SC resolutions, then the range of verbs used by the SC regarding compliance with peace agreements do not indicate binding character. However, even if it is assumed that the verb 'demand' also indicates binding character, the legal source of the parties' obligation to comply with a peace agreement would be the SC resolution and not the peace agreement. There also remains the question of whether AOGs are bound by such obligations, see Christian Henderson and Noam Lubell, 'The Contemporary Legal Nature of Un Security Council Ceasefire Resolutions' (2013) 26 Leiden Journal of International Law 369; Pini Pavel Miretski, 'Delegitimizing or Evolving? The Legality of UN Security Council Resolutions Imposing Duties on Non-State Actors by Pini Pavel Miretski' (2009); Ezequiel Heffes, Marcos D Kotlik and Brian E Frenkel, 'Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?' (2014) 18 Max Planck Yearbook of United Nations Law 32.

[382] UNSC Res 851 (n 368).

[383] UNSC Res 864 (n 369).

[384] UNSC Res 1127 (n 371).

[385] ibid 9.

[386] The nature of the Lusaka Protocol remains ambiguous also because the parties referred to it as a "legal instrument" and as a "political-juridical instrument" later on, see Section 3.3.1.

its pronouncements do not suggest that it considered the obligations under these agreements as of international legal nature.[387]

Another noteworthy example is found in the SC engagement with the situation in Darfur. In Resolutions 1769 and 1828, the SC demanded that "the parties to the conflict in Darfur fulfil their *international obligations and their commitments* under relevant agreements, this resolution and other relevant Council resolutions".[388] The wording does not clarify whether the SC characterised the obligations under the 2006 Darfur Peace Agreement[389] as international or referred to them as 'commitments'. According to the preamble of Resolution 1769, the relevant agreements in this context include, in addition to the Darfur Peace Agreement, the 2006 Tripoli Agreement and proceeding bilateral agreements between Sudan and Chad addressing the conflict in Darfur. Therefore, it can be argued that the phrase 'international obligations' refers only to the obligations under the inter-state agreements and SC resolutions but not to the commitments under the peace agreement.

Although the SC has similarly referred to the commitments, obligations or responsibilities of the parties under the relevant peace agreements in several situations, it has not characterised these as international or even as legal undertakings. Therefore, the practice of the SC remains inconclusive as to the emergence of a rule recognising the treaty-making capacity of AOGs, who are parties to a peace agreement, or the legal status of such agreements otherwise.[390] The emphasis of the SC on seeking negotiated settlements to armed conflicts and on complying with peace agreements can be explained more convincingly by reference to the potential of negotiated settlements in the maintenance or restoration of

[387] In some resolutions where the Security Council makes a determination of a violation of international human rights or humanitarian law, it emphasises that those responsible must be brought to justice, see UNSC Res 1865 (27 January 2009) UN Doc S/RES/1865, Preamble; UNSC Res 1791 (19 December 2007) UN Doc S/RES/1791 para 7. However, the SC has not made similar statements regarding violations of peace agreements. The resolutions do not suggest that the SC makes a determination of a violation of international law in the resolution on peace agreement violations but only a threat to peace.

[388] UNSC Res 1769 (31 July 2007) UN Doc S/RES/1769; UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828 [Emphasis added].

[389] Darfur Peace Agreement (Sudan), 5 May 2006.

[390] The ILA Committee on Non-State Actors also reached the same conclusion in this matter, see International Law Association (n 262) 7.

international peace and security, as the SC has gradually broadened its interpretation of a 'threat to peace' to also include intra-state armed conflicts.[391]

3.2.4.4.Treaty-making capacity of AOGs of indigenous peoples or national liberation movements

Some peace agreements are signed with AOGs that represent an indigenous people. The 1996 San Andrés Larráinzar Agreements between the Zapatista Army of National Liberation and Mexico[392] and the 1997 Chittagong Hill Tracts (CHT) Peace Accord between the United People's Party of the Chittagong Hill Tracts and Bangladesh[393] are among the notable examples. Do such agreements gain international legal status by virtue of being signed by an indigenous people? As opposed to the pre-nineteenth understanding, the current dominant viewpoint asserts that indigenous peoples do not have international treaty-making capacity.[394] Indigenous groups are accorded the right to autonomy or self-governance by a number of international instruments.[395] Therefore, international legal arguments may have a special role in peace negotiations with indigenous groups to facilitate the design of peace agreements as a means of realising their entitlement to autonomy. However, the rights accorded to indigenous groups do not in themselves alter their treaty-making capacity and the legal status of the peace agreements.

Peace agreements with national liberation movements, representing a people entitled to the right to self-determination and pursuing national liberation, on the other hand, may carry international legal force if they are concluded in written form and the parties intended them to be binding. Crawford contends that in practice these movements have the capacity to conclude binding international agreements with other international legal persons, and this legal capacity is also reflected in the observer status of these movements granted by the

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[391] For a similar conclusion see Corten and Klein (n 89) 19–20. On the concept of 'threat to peace' see Krisch (n 277).

[392] Agreement Regarding the Joint Proposals between the Federal Government and the EZLN (Mexico), 16 February 1996 (This agreement and the three other agreements concluded on the same day constitute the San Andrés Larráinzar Agreements).

[393] Chittagong Hill Tracts Accord (Bangladesh), 2 December 1997.

[394] United Nations Economic and Social Council, 'Final Report of the Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations by Miguel Alfonso Martinez, Special Rapporteur' (1999) paras 110–6; Schmalenbach (n 274) 71.

[395] See ILO Convention No. 169: Indigenous and Tribal Peoples Convention (76th ILC Session Geneva 27 June 1989); UN Declaration on the Rights of Indigenous Peoples (13 September 2007) UNGA Res 61/295.

United Nations General Assembly.[396] For Shaw, the question of the legal status of liberation movements is not settled; the observer status granted by the organs of the UN is not conclusive of the issue and the crucial test, which must be applied in every single case, is the actual state practice as to the unilateral or multilateral recognition of the liberation movement.[397] However, it is mostly accepted today that state practice is in favour of the view that a liberation movement has the capacity to conclude treaties, provided that it has a right to self-determination.[398] It must be noted that this treaty-making capacity is functionally limited to the conclusion of agreements with a state against which it is fighting and concerning the right to self-determination.[399]

In the specific context of peace agreements, the legal status of the agreements signed between Israel and the Palestine Liberation Organization (PLO), especially of the Declaration of Principles on Interim Self-Government Arrangements (commonly referred to as the Oslo Accords), has been subject to debate. Many authors recognise that the PLO is a national liberation movement with treaty-making capacity and that the Accords are international agreements.[400] Quigley considers the treaty-making capacity of the PLO threefold; as the representative of a territory under belligerent occupation, as an entity with a claim to statehood due to its control over certain territory, and as a national liberation movement.[401] Notably, in his separate opinion in the Wall Advisory Opinion, Judge Elaraby referred to several obligations undertaken by Israel through the Camp David Accords, the

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[396] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2008) 123–4.

[397] Shaw (n 254) 246; Malcolm Shaw, 'The International Status of National Liberation Movements' (1983) 5 Liverpool Law Review 19, 32.

[398] See e.g. Yves le Bouthillier and Jean-Francois Bonin, 'Article 3 (1969)' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 73; Schmalenbach (n 274) 68.

[399] Nguyen Quoc Dinh, Patrick Daillliet and Allain Pellet, *Droit International Public* (The Librairie générale de droit et de jurisprudence 2002) 190 footnote 116; Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff 2004) 264 (Mentioning that "[n]ational liberation movements have not been accepted as parties to multilateral treaties, even when they have been invited to participate in the conference at which a given treaty was concluded").

[400] Eyal Benvenisti, 'The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement' (1993) 4 European Journal of International Law 542; Geoffrey R Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000); Peter Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law' (1996) 7 European Journal of International Law 485.

[401] John Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' (1997) 30 Cornell International Law Journal 717, 740.

Oslo Accords and the Israeli-Palestinian Interim Agreement as "contractual and … legally binding on Israel".[402]

3.2.5. Summary

The analysis in this part shows that peace agreements are non-international agreements due to the lack of treaty-making capacity of AOGs, except for peace agreements with NLMs. Peace agreements with a double character, i.e. signed by more than one state and AOGs, may constitute international agreements but only as between states parties. This conclusion raises the question of whether peace agreements reflect an intention to be legally binding at the international level but fail to be so merely due to the formal obstacle of law-making capacity of AOGs. Therefore, the next section addresses the question of whether peace agreements are drafted as (international) legal instruments or as political agreements.

3.3. Intention to create international obligations under a peace agreement

The drafting process of the 1969 VCLT and the reports of the International Law Commission indicate that the element of "intention to create obligations under international law" is embraced in the phrase "governed by international law".[403] Accordingly, it is accepted that a non-formal criterion, intention of the parties as to whether the agreement is binding under international law, is sought in the identification of an international agreement.[404] Many objective factors, such as the requirement of ratification of a treaty, provisions regarding entry into force, inclusion of compulsory judicial settlement mechanisms, international registration, the actual terms of the agreement, the choice of language and the circumstances of its conclusion, need to be considered for the determination of the intention of the parties.[405] It is within this context that the subject matter of the treaty may also be indicative of its legal status.[406] Indication of international law as

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[402] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep 2004, 131* [2.4] (Judge Elaraby, Separate Opinion).

[403] Report of the International Law Commission, Eighteenth Session (4 May - 19 July 1966), UN Doc A/6309/Rev.1 para 6.

[404] Jean D'Aspremont, 'Formalism Versus Flexibility in the Law of Treaties' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmerman (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014); M Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 British Yearbook of International Law 141, 160.

[405] Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff 1996) 75 et seq; Crawford, *Brownlie's Principles of Public International Law* (n 396) 369; Fitzmaurice (n 404) 165 et seq.

[406] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening) (Merits) ICJ Rep 2002, 202* 263: 'The Court considers that the

the applicable law to a contract or agreement, on the other hand, does not suffice to consider it an international agreement governed by international law.[407]

As for peace agreements, three main factors have been particularly noted in literature as signalling an intention to create international obligations: (i) Formal features (e.g. provisions regarding entry into force, international registration, use of legal language, precision of obligations), (ii) international aspects of the subject-matter and references to international law, and (iii) international involvement in agreement monitoring, implementation, enforcement and dispute settlement. The existence of these factors should be examined on a case-by-case basis but it is discussed here whether these features are commonly found in peace agreements and whether they necessarily denote an intention to create international obligations. Although it is argued in this chapter that peace agreements ending intra-state armed conflicts, except for the noted types of agreements,[408] do not constitute sources of international law, due to the lack of treaty-making capacity of AOGs, it is worth considering whether the agreements manifest an intention to create international obligations both to buttress the argument of the chapter and to address the scholarly views to the contrary.

3.3.1. Formal features of peace agreements

Only in the case of a small number of peace agreements, the parties explicitly indicate the legal nature of the agreement. The parties to the 1994 Lusaka Protocol, for example, reiterated their acceptance of it among the "relevant legal instruments" to the resolution of the Angolan conflict, along with the relevant Security Council Resolutions.[409] The later 2002 Luena Agreement of Angola rather ambiguously reaffirmed the continuing validity of the 1994 Lusaka Protocol as a "political-juridical instrument".[410] Similarly ambiguous is the acceptance of the parties to the 2015 Algiers Agreement in Mali that the "annexe as well as the Declaration of the Parties to the Algiers Process … form an integral part of the

Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. l)'.

[407] Portmann (n 25) 122 (Explaining that the sole arbitrator Dupuy's decision in *Texaco/Calasiatic v Libya* that the choice of international law as the applicable law amounted to the conferral of limited treaty-making capacity to the non-state signatory has not been accepted in proceeding scholarship or case-law).

[408] See section 3.2.4.4.

[409] Lusaka Protocol (Angola) (n 276) Annex I.

[410] Memorandum of Understanding (Angola) (n 68).

Agreement and have the same legal status as the other provisions in the body of the text", despite previously undertaking to "take the necessary measures to adopt the regulatory, legislative and constitutional measures needed to implement the provisions of the present Agreement".[411] It is open to argument whether the implementing legal measures are intended to give legal force to the peace agreement or to elaborate on and complement it. Nor is there any indication that the claimed legal status is of international character. As mentioned-above, the 2016 Final Peace Agreement (Colombia) is a rare example that elucidates its "international standing" as "a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions".[412] However, arguably as an indication of the parties' hesitation about the purported international standing of the Agreement, they have also requested the incorporation of the agreement into a SC resolution as well as into the Colombian constitution.[413]

Although peace agreements rarely pronounce on their legal status, almost all agreements mimic legal form and language, e.g. using words such as "shall" or "agree", in formulating obligations.[414] Corten and Klein find the wording of some peace agreements too general and unspecific to reflect an intention to be legally bound.[415] However, imprecise and general wording can also be found in binding legal agreements and do not necessarily detract from their legal status.[416] Peace agreements also contain provisions on their entry into force, amendment, and implementation in good faith as typical of international treaties. Some are deposited before international organisations or actors. The 2005 Comprehensive Peace Agreement of Sudan is, for example, lodged with the United Nations, the African Union, IGAD Secretariat in Djibouti, the League of Arab States and the Republic of Kenya.[417] The 2016 Final Peace Agreement of Colombia is registered with the Swiss Federal

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[411] Accord Pour la Paix et la Reconciliation au Mali (n 177).

[412] Final Agreement to End the Armed Conflict (Colombia) (n 18) Preamble and Section 6.1.8.

[413] ibid.

[414] See United Kingdom Foreign and Commonwealth Office, 'Treaties and MOUs: Guidance on Practice and Procedures' (2013) 15–16.

[415] Corten and Klein (n 89) 13.

[416] Oscar Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 American Journal of International Law 296, 298; D'Aspremont, 'Formalism Versus Flexibility in the Law of Treaties' (n 404) 14–16 (Explaining that treaties that do not contain any obligations can still be considered as international treaties and that, in its judgment on the preliminary objections in the Oil Platforms the ICJ treated the treaty clause providing that 'there shall be firm and enduring peace and sincere friendship' as an international rule despite holding that it did not contain any obligation). See also Richard Reeve Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 International and Comparative Law Quarterly 549.

[417] Comprehensive Peace Agreement of Sudan (n 26).

Council in Bern.[418] Lastly, many peace agreements are submitted to the Secretary General to be "circulated as a document of the Security Council".[419]

These legalisation and internationalisation techniques may be used by peace-making parties to enhance compliance with the agreement, both by underlining the parties' commitment to their obligations and increasing the reputational costs of reneging on those commitments. However, unless parties explicitly attach international legal status to the agreement, as in the case of the 2016 Final Peace Agreement of Colombia, the mimicking of treaty language and form may not be conclusive as to the parties' intention to commit to international, let alone legal, obligations.

3.3.2. References to international law and to matters regulated by international law in a peace agreement

Peace agreements frequently contain references to international law. Such references range from general commitments of parties to respect international law[420] to specific international rules or instruments[421]. Many issues regulated by peace agreements, for example elections, autonomy and self-governance in sub-state regions or human rights, are also relevant to the rules and principles of international law, even in the absence of explicit references by the parties. It has been suggested that such explicit or implicit references to international law are indicative of the parties' intention to enter into a binding international agreement.[422] However, as Corten and Klein also note, such references often function as a re-statement of the state party's commitment to its existing obligations under international

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[418] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Colombia), 24 November 2016 (n 18).

[419] Letter dated 9 December 1994 from the Permanent Representative of Angola to the United Nations Addressed to the President of the Security Council, S/1994/1441.

[420] See e.g. Final Agreement to End the Armed Conflict (Colombia) (n 18) Preamble: '... the parties, always and at every stage, have upheld the spirit and scope of the rules of the National Constitution, the principles of international law, international human rights law, international humanitarian law (its conventions and protocols), the stipulations of the Rome Statute (international criminal law), the decisions of the Inter-American Court of Human Rights concerning conflicts and conflict termination, and other resolutions of universally recognised jurisdictions and authoritative pronouncements relating to the subject matters agreed upon ...'

[421] See e.g. Ceasefire Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan (n 178) (Prividing that 'In accordance with the UNSC Resolution 1325 [2000], the Commission shall ensure that all forms of violence that specifically affect women and children are heard and redressed in a gender sensitive and competent manner'); Agreement on Identity and Rights of Indigenous Peoples (Guatemala), 31 March 1995 (Whereby parties undertake to 'Promote the dissemination and faithful implementation of the Convention on the Elimination of All Forms of Discrimination against Women').

[422] See e.g. Katherine W Meghan, 'The Israel-PLO Declaration of Principles: Prelude to a Peace?' (1994) 34 Vanderbilt Journal of International Law 435, 490; Kastner (n 4) 178.

law and are commonly found also in domestic legal instruments.[423] Moreover, regardless of whether a state commits to respecting its existing international obligations or to ratifying international treaties in a peace agreement, the legal status of such commitments themselves are not transformed by virtue of the international character of their subject-matter.

On the other hand, such references to international law in a peace agreement may have a role in the identification of customary international law. Although it remains the dominant position in international law that practice of AOGs is not creative or expressive of customary international law, peace agreements are adopted also by state actors and thus constitute 'state practice'.[424] The customary international humanitarian law study undertaken under the auspices of the ICRC, for example, lists several peace agreements and special agreements as "instruments other than treaties" as part of the practice compilation.[425] What needs to be ascertained in relation to peace agreements is whether the conduct of adopting an agreement or a component of it is accompanied by the acceptance of it as *international* law. References to international law in the text of such articles or during the negotiations may be indicatory of such *opinio juris*.

3.3.3. International monitoring, implementation, and dispute settlement

Peace agreement parties often delegate important roles to international actors, ranging from international and regional organisations to third states, in the implementation of peace agreements, including peacekeeping, agreement monitoring and verification, assistance (e.g. electoral, constitutional, or technical assistance), territorial administration, and dispute settlement.[426] Some scholars argue that the delegation of such roles to international actors, particularly the submission of disputes to international dispute

[423] Corten and Klein (n 89) 13. Arusha Peace and Reconciliation Agreement for Burundi (n 65).

[424] ILC. Text of the draft conclusions provisionally adopted by the Drafting Committee during the sixty-sixth (2014), sixty-seventh (2015) and sixty-eight (2016) sessions of the Commission, Draft Conclusion 6[9]. (Adding that conduct of other entities than states and international organisations may have an "indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (opinio juris) by States and international organizations"). Cf. M. Sassoli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law', (2010) 1 J Int'l Humanitarian L Studies 5, at 18; Roberts and Sivakumaran, at 151. (Arguing in favour of the recognition of the conduct of armed groups in the identification of customary international humanitarian law.)

[425] See International Committee of the Red Cross (n 360).

[426] The Language of Peace database allows the search of peace agreement provisions on each of the mentioned roles, see United Nations and University of Cambridge (n 1).

settlement, demonstrate the intention of parties to create an internationally binding peace agreement.[427]

To date, only the peace agreements in Sudan and Bosnia provided for the arbitral settlement of disputes between the parties. In the Comprehensive Peace Agreement and the Abyei Protocol, the parties to the North-South Sudan conflict agreed on the establishment of the Abyei Boundary Commission to issue a binding decision on the definition and delimitation of the oil-rich Abyei region, which has been a critical area throughout the history of the conflict.[428] In 2008, following a disagreement between the parties as to whether the Boundary Commission exceeded its mandate in its decision, the parties agreed to resort to an arbitration tribunal.[429] Consequently, the Permanent Court of Arbitration decided on the issue.[430] A similar arrangement was reached by the parties to the Dayton Peace Agreement, whereby they agreed to refer the dispute over the inter-entity boundary in the Brcko district to an arbitration tribunal.[431]

Delegation of implementation roles to international actors in a peace agreement, or submission of disputes to international arbitration, does not necessarily denote that the agreement is of international character. It could nevertheless be argued that such provisions may be sources of international obligations between the state party to the peace agreement and third states or international organisations that are accorded implementation roles, regardless of the legal status of the agreement in its entirety, if they are formulated as such.[432]

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[427] See e.g. Meghan (n 422) 452; Kleffner (n 264). See also *Texaco/Calasiatic v Libya* (n 341) (Where the sole arbitrator Dupuy considered the submission of contractual disputes to international arbitration as a factor indicating intention to create international obligations).

[428] On the Abyei conflict and the Abyei arbitration, see Cindy Daase, 'International Arbitration: A New Mechanism to Settle Intra-State Territorial Disputes between States and Secessionist Movements?' (2011) 28 Osgoode Comparative Research in Law and Political Economy Research Paper Series.

[429] Roadmap for Return of IDPs and Implementation of Abyei Protocol (Sudan), 8 June 2008.

[430] *Abyei Final Award* (n 188).

[431] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15). For an analysis of the Brcko arbitration, see Michael G Karnavas, 'Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries' (2003) 97 American Journal of International Law 111.

[432] Nonetheless, such provisions may prevent the conflict parties from invoking the principle of non-interference in internal affairs when international actors fulfil the requested or authorised roles as per a peace agreement, see Vierucci, 'The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks' (n 353). See also Bothe (n 225).

However, such provisions often take the form of invitations, requests or authorisations by conflict parties, rather than as obligations undertaken by external actors.[433]

In lieu of peace agreements as the legal framework for their involvement, external actors enter into separate international agreements with host/recipient states or, in case of international and regional organisations, enact resolutions in order to establish a legal framework for the implementation of the roles delegated to them by a peace agreement. For example, as to peacekeeping support to agreement implementation, peace agreements provide the basis for consent, whereas the subsequent SC resolution and Status of Forces Agreements with host states establish the legal framework for a peacekeeping mission. External actors may enter into agreements also for the provision of technical or financial assistance to agreement implementation and post-conflict reforms. In Liberia, for example, the 2003 Accra Comprehensive Peace Agreement called for the assistance of the International Contact Group on Liberia (comprised of members from the United Nations, ECOWAS, African Union, World Bank, United States, Ghana, Nigeria, United Kingdom, Germany and Sweden) in agreement monitoring and post-conflict rehabilitation and reconstruction.[434] Following consultations between the National Transitional Government of Liberia and the International Contact Group on the implementation of the Agreement, the parties signed an agreement establishing the Governance and Economic Management Assistance Programme, whereby the parties undertake to cooperate in the reform of economic and fiscal governance in Liberia.[435] Such agreements may also be of non-legal nature like the Afghanistan Compact of 2006 concluded by the participant states and international organisations of the International Conference on Afghanistan.[436]

To conclude, the treaty-like form, references to international law or provision for international monitoring, implementation, and dispute settlement in a peace agreement do not necessarily indicate an intention to create international obligations. These may be more convincingly associated with negotiating parties', or involved international actors', desire to enhance the credibility of an agreement and its implementation record. Peace agreements

[433] Agreement Implementing Governance Transition in Yemen, 1 July 2011; Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium (Erdut Agreement), 12 November 1995; Bougainville Peace Agreement (Papua New Guinea), 30 August 2001 2001.

[434] Peace Agreement (Liberia) (n 15).

[435] Governance and Economic Management Assistance Programme (National Transitional Government of Liberia, UN, EY, ECOWAS, AU, US, IMF, WB), September 2005. Welcomed by the SC in UNSC Res 1626 (19 September 2005) UN Doc S/RES/1625.

[436] The Afghanistan Compact (31 January-1 February 2006).

between governments and AOGs that aim to end an intra-state armed conflict appear to be non-international political agreements that function as internal roadmaps for post-agreement legal and political reforms.

3.4. The (lack of) international legal status of peace agreements: (Why) does it matter?

This chapter has so far explained that peace agreements ending intra-state armed conflicts with AOGs lack international legal status, both as AOGs are not accorded treaty-making capacity in international law, with the noted exception of national liberation movements, and as peace agreements rarely demonstrate an intention to create international obligations. Although the negotiation and implementation of peace agreements are internationalised with the involvement of international actors assuming various roles and compliance with agreements is urged by the Security Council, these do not in themselves alter their legal status. As a result, domestic and international courts have to date not recognised peace agreements as international agreements. However, there is a clear doctrinal trend in favour of the recognition of peace agreements as sources of international legal obligations. This position centres around the legal and practical consequences and functions of international legal status in the conclusion and implementation of peace agreements.[437] The final part of this chapter thus identifies and scrutinises the legal and practical consequences and functions international legal status is assumed to deliver in peace-making.

The main legal consequence of the characterisation of a peace agreement as an international agreement is being governed by international law, most importantly by the law of treaties and the law of state responsibility. The applicability of the law of treaties could bring clarity in respect of agreement interpretation, conflict with other international legal norms, including peremptory norms, or agreement termination, whereas the applicability of the law of state responsibility would provide a framework for the consequences of agreement violations. In the context of peace agreements with AOGs, however, the question of how the responsibility of such groups can be conceptualised and established in international law would remain troubling.

[437] This inclination may also be partly driven by doctrinal agendas of construing peace negotiations and agreements as new objects of study, providing new evidence for a pluralist or cosmopolitan turn in international law, and establishing the relevance of international legal scholarship to peace agreements. For a general exploration of such rationales in relation to the study of non-state actors in international law, see D'Aspremont, 'The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes' (n 262).

The doctrinal inclination towards the recognition of the international legal status of peace agreements, however, seems not to be driven merely by such direct legal consequences, but rather concentrates on the role legal status plays in facilitating the conclusion of an agreement by the parties, enhancing its compliance, and upholding it before domestic and international courts. Assessing the legal status of the 2005 Comprehensive Peace Agreement of Sudan, for example, Sheeran contends that the question of the international legal standing of the Agreement is to do with "legal as well as practical reasons" and is a "question of efficacy and realities".[438] Bell further argues that the recognition of 'peace agreement' as a distinct legal category, i.e. as *lex pacificatoria*, is in itself a "conflict resolution project", as "peace agreements' use of legal form is driven by the need to design a set of legal obligations that will best lock a range of state, nonstate and international actors into a set of future relationships capable of implementing the peace agreement".[439] The objectives of enhancing compliance with agreement and invoking it before domestic and international courts also appear to be behind the invocation of international legal status by parties to or benefiters of peace agreements, e.g. in the case of the 2016 Final Peace Agreement of Colombia or the defence submission of the RUF commander Kallon in the *Kallon* case. As to the former example, Betancur Restrepo states that, in referring to the peace agreement as a special agreement as per its international standing, the Colombian government and FARC aimed to use international law as a "tool that will help guarantee peace and promote legal security to parties torn apart by war and mutual distrust".[440] In the latter example, the Defence challenged the jurisdiction of the SCSL by arguing that the defendant benefited from an amnesty granted by a peace agreement that was internationally binding. The next two sections examine whether international legal status may in fact function as an incentive to conclude and comply with a peace agreement and as a shield from domestic and international judicial challenges.

3.4.1. International legal status as a shield from domestic and international judicial challenges?

It has been argued that the recognition of international legal status of peace agreements matters because legal status carries legal weight before courts and tribunals.[441]

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[438] Sheeran (n 90) 437–8.

[439] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[440] Betancur Restrepo (n 353) 192.

[441] Fox, Boon and Jenkins (n 264) 678.

This section examines whether international legal status, if it is assumed to be accorded to peace agreements, can shield a peace agreement from domestic and international judicial challenges that have been and are likely to be directed at a peace agreement or law and practices stemming from it.

3.4.1.1. Domestic judicial challenges

In the domestic sphere, international legal status may shield an agreement or implementing laws from judicial challenges depending on the role domestic legal system accords to international law. In Colombia, for example, the strategy of the parties to claim international standing for the 2016 Final Peace Agreement was driven by the need to shield implementing constitutional amendments and laws from unconstitutionality challenges before the Colombian Constitutional Court.[442] According to the doctrine of constitutionality block, certain rules or instruments of international law are accorded with constitutional status. 443 As a result, they become part of the framework against which the Constitutional Court assesses the constitutionality of constitutional amendments or laws.[444] However, the strategy of the parties to incorporate the peace agreement into the constitutional block was forestalled by the Constitutional Court, which ruled that the peace agreement would not be automatically included in the constitution and the result of the plebiscite on the peace agreement would only be binding on the President and not on all state authorities.[445] Rejected in the plebiscite, the agreement was re-negotiated by the parties as to stipulate, *inter alia*, that the agreement would not be part of the constitution or the constitutionality block, but only a parameter for the interpretation of the implementing laws for three Presidential terms.[446] The parties retained the reference to special agreement status in the re-negotiated

[442] See 'Intervención Del Jefe de La Delegación Del Gobierno, Humberto de La Calle, En La Corte Constitucional, 26 May 2016'. Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[443] Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press 2017).

[444] ibid.

[445] *Decision C-379 of 2016, Constitutional Court of Colombia*.

[446] Office of the High Commissioner for Peace (Colombia), 'Notes on the Changes, Adjustments and Precisions of the New Final Agreement To End the Armed Conflict and Build a Stable and Lasting Peace, 13 November 2016' 21–22 <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Changes_New_Peace_Agreement.pdf>.

agreement, but arguably merely for symbolic purposes to emphasise the partly international and humanitarian nature of the agreement.[447]

As constitutions are accorded primacy over ratified international treaties and constitutional courts are granted the competence to review the constitutionality of ratified international treaties in many jurisdictions[448], even if peace agreements were to be accepted or signed as international treaties, they would not survive an unconstitutionality challenge where they do not conform to the procedural rules of law-making or constitutional change or to the substantive, unamendable rules of a constitution.[449] In the Philippines, the MOA-AD between the Government and the MILF was brought before the Supreme Court on several grounds of alleged unconstitutionality.[450] One of the grounds put forward by the petitioners was that the Government's Peace Panel committed grave abuse of discretion by committing to amending the Constitution and existing laws to ensure their conformity with the MOA-AD without following the amendment procedure established by the Constitution. In this context, the Court also addressed the concern of the petitioners that the Government may have assumed an obligation under international law to amend the Constitution by signing the MOA-AD. As explained above, the Court held that the MOA-AD was not a binding agreement under international law but what is notable is the Court's further statement that "guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion" as the Government usurped the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves, by the Philippine Constitution. Therefore, regardless of whether the peace agreement had international legal status or not, promise of constitutional amendment without following the procedure to do so was found unconstitutional.

To conclude, attaching international legal status to a peace agreement may shield the agreement from domestic judicial challenges, particularly stemming from a potential constitutionality review of the agreement, only if the respective domestic legal system accords primacy to ratified international treaties over the constitution or excludes ratified

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[447] Vierucci, 'The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks' (n 353).

[448] Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice' (2017) 15 International Journal of Constitutional Law 84, 95.

[449] Cf. *Decision of the French Constitutional Council (22 January 1999) FRA-1999-1-002 (CODICES)* (Holding that the Rome Statute was incompatible with the constitution and that the constitution had to be amended to conform to the Rome Statute).

[450] *The Province of North Cotabato* (n 181).

international treaties from the scope of constitutional review. In such cases, if it is assumed for the sake of the argument that peace agreements may be international agreements, the agreement needs to be ratified as per the relevant domestic procedure, which may itself prove difficult to secure.

3.4.1.2. International judicial challenges

At the international level, peace agreements have been invoked before international criminal tribunals or international human rights courts. Such challenges do not entail the abstract judicial review of peace agreements but concern laws and practices stemming from peace agreements. The first issue is whether an amnesty or immunity granted by a peace agreement can be invoked before international criminal tribunals, the ICC, or national courts in order to shield an alleged perpetrator from their jurisdiction.[451] The second is whether a peace agreement can be invoked before a human rights court in justification for a measure that *prima facie* violates human rights law.[452]

As to international criminal tribunals or the ICC, the significant question in this context is whether an amnesty granted by a peace agreement constitutes a bar to the jurisdiction of the court, as was the main issue in the *Kallon* decision of the SCSL. Domestic amnesties do not preclude the jurisdiction of foreign or international courts, where such courts can validly assert jurisdiction under international law over the prosecution of crimes covered by the amnesty. What if the said amnesty is provided through an international agreement? In the *Kallon* case although the SCSL upheld its jurisdiction by finding that the Lomé Agreement is not an international agreement and could not be a bar to its jurisdiction, it is notable that it did not preclude the challenge that an amnesty grounded in an international agreement could bar the jurisdiction of an international criminal tribunal.[453] However, even if the Lomé Agreement were an international agreement, it would still not necessarily prevail

[451] Whether the ICC can defer to an amnesty based in a peace agreement is discussed in detail in Chapter 5.

[452] Hypothetically, a peace agreement may also be invoked before an arbitral tribunal to justify a *prima facie* violation of a bilateral investment treaty or free-trade agreement if the underlying measure stemming from the peace agreement is argued to be in the state's essential security and if there is an essential security exception clause in the relevant treaty. For an exploration of this issue in the context of the 2016 Final Peace Agreement of Colombia, see Rene Urueña, 'The Colombian Peace Negotiation and Foreign Investment Law' (2016) 110 AJIL Unbound 199.

[453] *Prosecutor v. Morris Kallon* (n 237) [73, 86]. See also Roman Boed, 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Abuses' (2000) 33 Cornell International Law Journal 297.

over the Statute of the SCSL, as the parties to the two treaties were not identical.[454] A similar issue also arose before the ICTY. One of the challenges put forward by Karadzic against the jurisdiction of the ICTY was an alleged agreement between him and mediator Holbrooke during the negotiations preceding the conclusion of the 1996 Dayton Peace Agreement that he would not be prosecuted by the ICTY in return for withdrawal from public life.[455] Upholding the dismissal of the challenge by the Trial Chamber, albeit with slight differences in reasoning, the Appeals Chamber held that "the alleged Agreement, without a ratification of the alleged Agreement by a UNSC resolution, could not limit the jurisdiction of the Tribunal", as "the Statute of the Tribunal can only be amended or derogated by means of UNSC resolution".[456] These examples point out that even if a peace agreement is hypothetically assumed to be an international agreement, an amnesty rooted in the agreement cannot be raised before international criminal courts, as it cannot in and of itself amend or derogate from the founding instrument or the statute of the court unless the instrument or statute provides grounds for this. Moreover, amnesties only promise non-prosecution before domestic courts of the state party and does not extend to foreign or international courts.[457] Therefore, cooperation of a state party to a peace agreement that promises amnesty with foreign or international courts may be against the spirit of a peace agreement but would not equate to a violation of the amnesty provision. As a result, even attributing international legal status to a peace agreement may not ensure its valid invocation before foreign or international criminal courts merely because of its international status.

International human rights courts may also receive cases concerning a peace agreement, as norm conflicts between a peace agreement and a human rights treaty may arise due to amnesty provisions or exclusionary powersharing arrangements that implicate equality and non-discrimination guarantees. Had the powersharing arrangement at the heart of the Dayton Agreement not been incorporated into the Bosnian constitutional and legal system, for example, the ECtHR would have had to consider the norm conflict between the Dayton Agreement's powersharing arrangement that bars non-members of constituent

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[454] Roger O'Keefe, *International Criminal Law* (Oxford University Press 2015) 145.

[455] Antonio Cassese and others, *International Criminal Law: Cases & Commentary* (Oxford University Press 2011) 97.

[456] *Prosecutor v Karadzic (Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement) (12 October 2009)* [35–38].

[457] For this reason, the LRA in Uganda sought the inclusion of an explicit provision that the government would seek a SC deferral of the LRA cases for 12 months as per Article 16 of the Rome Statute, see Barney Afako, 'Negotiating in the Shadow of Justice' [2010] Accord: An International Review of Peace Initiatives 21, 23.

peoples from candidature to certain political positions and the non-discrimination guarantee of ECHR and right to free elections under Article 3 Protocol I.

It is doubtful as to whether a conflict between a peace agreement and a human rights treaty would be resolvable.[458] It is likely that there would be an "unavoidable and unresolvable norm conflict"[459] between a peace agreement and the ECHR even if the former were an international agreement. The existence of such a norm conflict would not affect the validity or the presumed international legal status of an agreement but it would mean that international legal status would not necessarily prevent the relevant state from incurring state responsibility for a violation of international law stemming from a peace agreement commitment. To conclude, international legal status may fail to shield peace agreements from international judicial challenges in many potential scenarios.

3.4.2. International legal status as an incentive to conclude and comply with a peace agreement?

The classification of a peace agreement as a source of international obligations may have implications for the prospects of parties for entering into peace negotiations and concluding a peace agreement; it may be an incentive for AOGs to sign an agreement, but a disincentive for the state party. Firstly, international agreement status has symbolic significance for AOGs, which aim to gain a degree of equality with the state party.[460] For the same reason, however, states have been reluctant to attribute international legal personality or treaty-making capacity to AOGs and may hesitate to sign a peace agreement with international legal status.

Secondly, binding force, particularly at the international level, may function as a confidence-building measure between the parties and incentivise them to conclude an agreement, whose violations would be sanctioned by law.[461] The increased cost of non-

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[458] Cf. *Soering v the United Kingdom (1989) Series A 161*; *Matthews v the United Kingdom ECHR 1999-I 251* (In both cases, the Respondent state was found responsible for violating the ECHR irrespective of its conflicting international obligations arising from a bilateral treaty).

[459] Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69.

[460] Sujit Choudhry, 'Civil War, Ceasefire, Constitution: Some Preliminary Notes' 33 Cardozo Law Review 1907.

[461] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89). Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 7: '[T]he very act of making commitments entrenched in an international agreement changes the

compliance with legal obligations may also enhance compliance with agreements.[462] Lang further argues for the embedding of peace agreements within "established categories of international law", adding that downgrading "the legal nature and effects of peace agreements in the perception of the relevant actors might turn the scale towards war and against peace".[463] Watson also refers to the challenges the lack of legal status of a peace agreement may create and emphasises that it may make states disinclined "to bargain with sub-state entities, since existing states would have no assurance of return performance".[464] Therefore, he argues that international law should recognise peace agreements between states and sub-state entities as a "new species of binding international agreement".[465]

Although international legal status may increase the costs of non-compliance, it is important to note that the connection between legal status and compliance also depends on the context. De Waal emphasizes that "the validity of a formal agreement depends on the parties' acceptance of it as final and binding. In turn this requires a political order with a high level of institutionalisation, which … is especially rare in countries prone to protracted and complicated insurgencies."[466] Another proviso regarding the role international status can play in enhancing compliance with agreements is the weakness of international enforcement mechanisms that could be triggered in case of agreement's violation.[467]

To recapitulate, from a policy perspective, attributing international legal status to a peace agreement may hypothetically enhance compliance due to the legal consequences of the violation of international obligations and increased international reputational costs. However, depending on the context, it may also diminish a state's willingness to conclude

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calculus at the compliance stage., if only because it generates expectations of compliance in others that must enter into the equation.'

[462] *African Union Mediation Support Handbook* (n 77) 156; Kimana Zulueta-Fülscher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools* (International Institute for Democracy and Electoral Assistance 2015) 11.

[463] Lang (n 298) 36.

[464] Watson (n 400) 92.

[465] Watson (n 400).

[466] Alex de Waal, 'Violence and Peacemaking in the Political Marketplace' [2014] Accord 17. See also Tilmann Altwicker and Oliver Diggelmann, 'How Is Progress Constructed in International Legal Scholarship?' (2014) 25 European Journal of International Law 425, 436 footnote 36 (Emphasising that the significance of legal norms for the process of conflict resolution depends on the law-centredness of a culture).

[467] Von Hehn (n 232) 56.

an agreement with an AOG and hinder public approval if it is construed as an attempt to bypass constitutionally established procedures of legal change.[468]

3.5. Conclusion

Peace agreements aiming to end intra-state armed conflicts between governments and AOGs have become more comprehensive, formal and internationalised during the last three decades. They are concluded in written form and drafted with language and features similar to international treaties. Moreover, they are negotiated and concluded in the presence of international witnesses; their content is informed by international law; and they delegate significant implementation roles to international actors. However, such legalisation and internationalisation techniques do not suffice to render peace agreements sources of international obligations in the absence of the treaty-making capacity of AOG parties and an intention to create international legal obligations.

The lack of international legal status, however, does not relegate peace agreements to 'scraps of paper'. As non-international political agreements, they still contain commitments that are binding in a political sense.[469] As Schachter notes, although in the context of nonbinding international agreements between states, "[t]here is no *a priori* reason to assume that the undertakings are illusory because they are not legal".[470] He argues that nonbinding international agreements contain political and moral commitments that generate internal and external consequences: Internally, they lead to legislative and administrative consequences; externally, they transform the subject-matter from being exclusively within the reserved domain of one party to a bilateral matter and entitle the parties to monitor each other's conduct.[471] Peace agreements, too, generate significant internal and external consequences as political agreements.

Internally, peace agreements often generate consequences within the domestic legal and political system. These range from the conduct of parties directed at implementing the agreement to formalised commitments in peace agreements for the adoption of a constitution

[468] See e.g. Betancur Restrepo (n 353) para 188 (Arguing that one of the reasons behind the plebiscite defeat of the 2016 Final Peace Agreement of Colombia was the parties' attempt to fashion it as an international legal agreement and bypass constitutional rules of legal change).

[469] See Bothe (n 225); Frieder Roessler, 'Law, de Facto Agreements and Declarations of Principle in International Economic Relations' (1978) 21 German Yearbook of International Law 27.

[470] Schachter (n 416) 304.

[471] ibid 303–4.

or incorporation of the agreement into domestic law. Despite the difficulties of achieving the necessary public, parliamentary and/or judicial approval, the process of incorporation into domestic law may enhance the democratic credentials and respect for rule of law of a peace agreement. Moreover, it also allows the involvement of the public and political actors beyond the negotiating parties in the legalisation of the agreement. Therefore, the design of the legalisation and implementation modalities of a peace agreement carries crucial weight. Where feasible, respect for domestic legal change procedures and approval of an agreement through a referendum or parliamentary procedures may be sought in the design of a peace agreement.[472]

Externally, peace agreements transform the matter of ending a conflict from a unilateral effort to a bilateral process. Monitoring and dispute resolution mechanisms in peace agreements entitle parties to react to and request changes in each other's conduct. Such mechanisms also function as "built-in safeguards" for agreement implementation.[473] Monitoring mechanisms collect information about parties' implementation records and flag violations of an agreement. Dispute resolution mechanisms in turn may facilitate dealing with such violations or disputes regarding the interpretation of an agreement.

Another external consequence of committing to a peace agreement is that external actors, who are delegated roles in agreement implementation, and the SC, which may act if non-implementation of an agreement poses a threat to international peace and security, can also exhort the parties to comply with the agreement. Many peace agreements delegate implementation roles to external actors and request the oversight of the UN during its implementation. Such international involvement, particularly the oversight of the SC over a peace agreement, does not depend on an agreement's legal status and may contribute to the credibility of an agreement and its implementation record. The SC may also give legal effect to some or all provisions of a peace agreement through a binding resolution.

To conclude, enhancing the credibility of a peace agreement is crucial for its conclusion and implementation.[474] The mechanisms and institutions to do so may be found beyond the supposed guarantees of international legal status, which peace agreements

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[472] See Christopher Thornton and Felix Tusa, *To Seal the Deal: Mechanisms for the Validation of Political Settlements* (Centre for Humanitarian Dialogue 2017). Neophytos Loizides, 'Negotiated Settlements and Peace Referendums' (2014) 53 European Journal of Political Research 240.

[473] Joshi, Lee and Mac Ginty (n 97).

[474] Barbara F Walter, 'Bargaining Failures and Civil War' (2009) 12 Annual Review of Political Science 243.

between governments and armed opposition groups are not yet accorded. Despite the lack of legal status of peace agreements in international law, existing or emerging norms of international law may still affect the negotiation process or content of agreements. The next section focuses on the former and examines the extent to which international law regulates the negotiation process of peace agreements by assessing the potentially relevant international law and the legal status of the emerging process-related peace-making norms.

Chapter 4: The Negotiation Process of a Peace Agreement and International Law

4.1. Introduction

The scholarship on peace agreements, particularly the legal literature, has predominantly focused on their content and assessed whether certain substantive outcomes should (not) be included in peace agreements. However, there is an emerging interest in the role of norms in the negotiation process of peace agreements. In international legal scholarship, a number of recent studies explore whether inclusion of women, civil society actors or other actors affected by the conflict in peace negotiations can find a legal basis in international law.[475] In peace and conflict studies, scholars have similarly started approaching the questions related to the decision to negotiate an agreement and the design of the negotiation process from a normative perspective.[476] This is in contrast to the earlier occupation in the field with understanding in which conditions parties opt for a negotiated settlement, what factors lead to the design of a process in a particular way, and what the consequences of preferring negotiations over conflict or design of a process are. The proliferation of the academic interest in the negotiation process of peace agreements follows from the increased attention to process-related norms in international peace-making policy, for example in the peace-making policy and guidelines of international, regional and non-governmental organisations and domestic foreign assistance guidelines.[477]

Overall, scholars and policy-makers have identified or proposed three broad norms concerning the process of peace negotiations: a norm of negotiation that requires negotiated settlements to conflicts instead of military victories; a norm of inclusion that requires the direct or indirect participation of women, civil society, youth, indigenous groups, children, and other affected groups in peace negotiations; and a counter-norm of non-negotiation that urges the exclusion of alleged perpetrators of international crimes or terrorist offences from negotiations. The case for these norms are often made on both normative and effectiveness grounds, the latter implying that respect for such norms enhances the prospects for achieving

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[475] See Bell and O'Rourke (n 81); Kastner (n 4); Saliternik (n 82).

[476] See Lanz (n 96); See e.g. Thania Paffenholz, 'Civil Society and Peace Negotiations : Beyond the Inclusion – Exclusion Dichotomy' (2014) 30 Negotiation Journal 69; Miriam J Anderson, *Windows of Opportunity: How Women Seize Peace Negotiations for Political Change* (Oxford University Press 2016); Federer and Gasser (n 96); Jan Pospisil and Alina Rocha Menocal, 'Why Political Settlements Matter: Navigating Inclusion in Processes of Institutional Transformation' (2017) 29 Journal of International Development 551; Christine Bell and Jan Pospisil, 'Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettlement' (2017) 29 Journal of International Development 576.

[477] See Chapter 2 for more information on these instruments in the field of peace-making.

a settlement and/or its durability. The questions of whether these putative norms have found any manifestation in international law and whether the effectiveness claims are supported by sound empirical evidence are at the focus of this chapter.

4.2. The norm of negotiation: Is there a duty to negotiate peace in intra-state armed conflicts?

As negotiated settlements to intra-state armed conflicts have become increasingly common since the end of the Cold War, international relations and political science scholars have identified a "norm of negotiation" reflecting the desired mode of civil war termination by the influential actors in the international scene, particularly the Western states and the UN.[478] The case for the "norm of negotiation" is made on grounds of both effectiveness and normativity. As to effectiveness, political solutions to intra-state armed conflicts through negotiated means is favoured over military means, both in scholarship and international policy, in respect to the durability of resultant peace.[479] Normatively, negotiated settlements have been considered as the "morally superior" alternative to military victory, as well as gaining an emerging ground in international law.[480] In international legal scholarship, some have determined an emerging legal manifestation of the "norm of negotiation", i.e. a duty to negotiate peace, grounded in an emerging intra-state jus ad bellum, the right to peace or the principle of self-determination. However, the norm of negotiation remains contested on both grounds. Several empirical studies challenge the effectiveness of negotiated settlements in bringing about durable peace.[481] More importantly for the purposes of this dissertation, as demonstrated in the following sections, it does not find sufficient support in international law.

4.2.1. Intra-state jus ad bellum

Jus ad bellum is conventionally understood as applicable to inter-state use of force. However, there have been scholarly calls for the extension of the prohibition of the use of

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[478] See Howard and Stark (n 12) (Also noting the partial demise of this norm in the post-9/11 period); Lanz (n 96) 282 (Mentioning an emerging 'peacemaking norm').

[479] See e.g. *Report of the High-Level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnership and People (17 June 2015) UN Doc A/70/95– S/2015/446*, para 43.

[480] *IACtHR: Case of the Massacres of El Mozote and nearby places v El Salvador Merits, Reparations and Costs Judgment of October 25, 2012 Series C No 252* (Concurring Opinion, Judge Garcia-Sayán).

[481] See e.g. Monica Duffy Toft, 'Ending Civil Wars' (2010) 34 International Security 7, 35–36; Roy Licklider, 'The Consequences of Negotiated Settlements in Civil Wars, 1945-1993' (1995) 89 The American Political Science Review 681; Alexander B Downes, 'The Problem with Negotiated Settlements to Ethnic Civil Wars' (2004) 13 Security Studies 230 (Limiting the argument to ethnic conflicts).

force in Article 2(4) of the UN Charter to intra-state conflicts, which would include the corollary obligation to resolve conflicts peacefully through negotiated settlements, and for the recognition of a set of exceptions to the prohibition.[482] Going beyond proposals regarding the future direction of international law, some scholars further point at evidence for the emergence of the prohibition of intra-state use of force or a separate duty to negotiate peace.

Firstly, according to Fox, Boon and Jenkins, a *jus ad bellum* for NIACs is emerging in the SC practice, which suggest that intra-state use of force is prohibited except for situations of self-defence, furthering democratic legitimacy, halting mass violations of human rights, and anti-terrorist actions.[483] The Security Council has called on or demanded the parties to cease hostilities in the vast majority of intra-state armed conflicts with which it engaged. The SC has also repeatedly stated that "there can be no military solution to the conflict" in many situations. However, this appears to be a factual statement rather than a normative evaluation.

Secondly, surveying peace agreements concluded in intra-state armed conflicts, Wählisch claims that the "incorporation of provisions … calling for an end to hostilities and a ceasing of armed force indicates that the idea of the 'prohibition of the use of force' is also treated as a sincere principle in internal affairs".[484] As the author refers to the prohibition as an 'idea' and a 'sincere principle', it is unclear whether he suggests that *jus ad bellum* extends to intra-state armed conflicts as a matter of law. However, the burgeoning practice of committing to peaceful methods of settlement and denouncing violence via peace agreements does not necessarily suggest that there is sufficient state practice and *opinio juris* towards an emerging prohibition of intra-state use of force or duty to negotiate peace.

A comparison of the terms of inter-state and intra-state ceasefires is illuminating in this respect. With regard to ceasefire provisions, in most inter-state peace treaties, the parties declare a permanent peace to follow the termination of military hostilities and renounce the use or threat of force in their relations, reaffirming their commitment to the relevant

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[482] See e.g. Ruth Wedgwood, 'Limiting the Use of Force in Civil Disputes' in David Wippman (ed), *International Law and Ethnic Conflict* (Cornell University Press 1998); Kirsti Samuels, 'Jus Ad Bellum and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone' (2003) 8 Journal of Conflict and Security Law 315; Eliav Lieblich, 'Internal Jus Ad Bellum' (2010) 67 Hastings Law Journal 687.

[483] Fox, Boon and Jenkins (n 264) 683–692.

[484] Martin Wählisch, 'Peace Settlements and the Prohibition of the Use of Force' in Marc Weller (ed), *Oxford Handbook on the Prohibition of the Use of Force* (Oxford University Press 2015) para 963.

principles of international and the principles and purposes of the UN Charter.[485] There may also be an explicit commitment to settle future disputes by peaceful means and in accordance with international law. [486]

Ceasefire provisions in peace agreements ending intra-state conflicts tend to be more detailed than their counterparts in interstate peace treaties. Unlike inter-state peace or ceasefire treaties, they do not cite Article 2(4) of the UN Charter. Furthermore, they often also clarify which military actions are prohibited and which are permitted during the ceasefire period. For example, among the prohibited actions listed in the 1995 Ceasefire Agreement for Bosnia and Herzegovina are "all offensive operations", "patrol and reconnaissance activities forward of friendly positions", "the laying of additional mines", and "the creation of additional barriers or obstacles".[487] The 2002 Ceasefire for Sudan extends the list to include the acts of "occupying new areas", "supplying (…) weapons and ammunition", "violence or other abuse on the civilian population", and even "media wars and propaganda".[488] Further examples of actions that are deemed violations of a ceasefire regime include "violations of human rights, humanitarian law and obstruction of freedom of movement", "espionage, sabotage, and acts of subversion", "recruitment of child soldiers", "pillage and all sorts of trafficking", and "statements calling for hatred, discrimination, division, and violence".[489] On the other hand, self-defence, defensive or protective actions, or other actions such as training and refresher training may be permitted by the parties.[490]

The extensive scope of prohibited military and other hostile actions in peace or ceasefire agreements aiming to end intra-state armed conflicts suggest that they are not intended as an application of the prohibition of the use of force in international law. Violations of ceasefire provisions, therefore, would trigger the consequences stipulated in a

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[485] Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 18 June 2000; Agreement on Bilateral Relations between the Government of India and the Government of Pakistan (Simla Agreement), 2 July 1972.

[486] General Peace Treaty between the Republics of El Salvador and Honduras, 17 April 1980.

[487] Ceasefire Agreement for Bosnia and Herzegovina, 5 October 1995.

[488] Memorandum of Understanding on Cessation of Hostilities Between the Government of the Sudan and the Sudan People's Liberation Movement/Army, 15 October 2002.

[489] Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of the Sudan and The Sudan Peoples Liberation Movement/Sudan Peoples Liberation Army during the Pre-interim and Interim Periods, 31 December 2004; Accord de cessez-le-feu (Côte d'Ivoire), 3 May 2003; Lomé Peace Agreement (n 15).

[490] Implementing Operational Guidelines of the GRP-MILF Agreement on the General Cessation of Hostilities (the Philippines), 14 November 1997; Agreement on Permanent Ceasefire and Security Arrangements (Sudan) (n 489).

peace agreement but not amount to a violation of international law.[491] The practice remains insufficient to provide evidence for the emergence of an intra-state *jus ad bellum*.

4.2.2. Right to peace

It has also been argued that international law embodies a right to peace and an obligation of the States to achieve it. [prohibition of use of force only one part of it] For example, in his concurring opinion joined by four other judges in the *El Mozote* decision of the IACtHR, Judge Garcia-Sayán asserted that:

> "States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it."[492]

This argument does not go as far as to referring to negotiated settlements as the legally prescribed method of achieving peace but only as the "morally and politically superior alternative" to pacification.

Article 23(1) of the ACHPR recognises that "[a]ll peoples shall have the right to *national* and international peace and security".[493] However, the obligations imposed on states parties regarding the realisation of the right to peace only concern the prevention of subversive activities by individuals enjoying the right of asylum and of the use of their territories as bases for subversive or terrorist activities against the people of any other state party.[494] Therefore, it does not stipulate a duty to settle intra-state armed conflict by peaceful means. Nor does the right to peace recognised in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 10 of the Protocol affirms that "[w]omen have the right to a peaceful existence and the right to participate in

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[491] Surveying ceasefire provisions in a selection of peace agreements, Corten and Klein also conclude that the vast majority of the agreements go beyond the prohibition of the use of force in Article 2(4) of the UN Charter in terms of the prohibited acts and do not evidence a belief that the ceasefire regime established is in application of Article 2(4). However, they contend that the prohibitions of military or other hostile action in a peace agreement may be international obligations depending on the intention of the parties, see Corten and Klein (n 89) 6–11.

[492] *Case of the Massacres of El Mozote and nearby places v. El Salvador* (n 480) (Concurring Opinion, Judge Garcia-Sayán).

[493] African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217 (ACHPR).

[494] ibid, Art 23(2).

the promotion and maintenance of peace". The right entails the right of women to participate in "the structures and processes for conflict prevention, management and resolution", however, falls short of suggesting an obligation of states to settle an intra-state armed conflict by peaceful means.

A right to peace is also formulated in non-binding international instruments and UN General Assembly resolutions.[495] It is understood not as a new right but rather as a bundle of individual human rights, legal principles, and soft law, including the right to life, the prohibition of the use of force, the principle of self-determination, and to duty to prevent to prevent wars, genocide and other acts of mass violence causing arbitrary loss of life, as well as individual human right to life.[496] However, even in its soft law versions, the right to peace does not encapsulate a duty to settle intra-state armed conflicts by peaceful means, particularly through negotiation. To the extent that it is recognised in domestic laws or regional human rights treaties, the right to peace can be balanced against the duty to prosecute or punish human rights violations or the right to truth in the assessment of the legality of laws and practices stemming from a peace agreement.[497]

4.2.3. Right to self-determination

It has been argued that a negotiation imperative emerges when an intra-state armed conflict is driven by a claim to the right to self-determination. At the international level, it has been argued that the right to internal self-determination entails a right to be heard or a duty of states to negotiate with sub-state entities, groups or individuals. Klabbers argues for a proceduralised interpretation of the right as "a right to be taken seriously", which aims to ensure the participation of affected groups in decision-making processes.[498] This does not encompass a right to veto or a right to direct participation in decision-making but ensures

[495] See e.g. 'Final Act of the Conference for Security and Cooperation in Europe (1 August 1975) [1975] 14 ILM 1292'; 'Final Document, International Peace Research Institute and Institute of Human Rights: Conference on Peace and Human Rights = Human Rights and Peace (20–22 December 1978) [1979] 10 Bulletin of Peace Proposals 224–28'. See also 'Declaration on the Right of Peoples to Peace (12 November 1984) UNGA Res 39/11 UN Doc A/RES/39/11'; 'Declaration on the Right to Peace (2 February 2017) UNGA Resolution 71/189 UN Doc A/RES/71/189'.

[496] See 'UN Human Rights Committee, General Comment No 6: The Right to Life (Article 6) (30 April 1982) [2003] UN Doc HRI/GEN/1/Rev.6, 127'. See also Philip Alston, 'The Legal Basis of a Right to Peace' (1991) 3 Peace Review 23.

[497] See also Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069, 132.

[498] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186.

that the voices are consulted and given consideration. Bell also argues that the right to self-determination is undergoing a transformation towards a process-related entitlement to be heard, a substantive entitlement to mechanisms ensuring participation in the new political order, and a right to "dislocated statehood", whose modes of implementation range from external self-determination to international supervision of territory.[499] However, these scholarly views do not yet find equivocal support in state practice and international case-law.[500] In a case brought against Cameroon alleging a violation of self-determination, for example, the African Commission "*recommend[ed]* that the Respondent State, inter alia, enters into dialogue with the Complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievance which could threaten national unity".[501] In addition to its recommendatory language and status, the formulation of the duty to enter into dialogue as a duty of means not of result must be noted.

Outside general international law, a duty to negotiate can also be created bilaterally among the parties to a negotiation process. The agreements between the PLO and Israel, for example, have been interpreted to be based on the recognition of a certain degree of international legal personality of the PLO and to create a bilateral duty to negotiate binding at the international level.[502] A duty to negotiate with sub-state groups can also be found within a domestic constitutional order. In *Reference re Secession of Quebec*, for example, the Supreme Court of Canada held that, by virtue of the principles of federalism and democracy, there was "a reciprocal obligation on all parties to Confederation to negotiate constitutional changes" when a sub-state entity has an express claim of external self-determination.[503] Notably, the obligation in this case is considered as binding, not only on the parent state, but also on the sub-state party. The Supreme Court of the Philippines has also pronounced on a duty of the Government to consult with the local government units and communities affected by the peace process before the signing of a peace agreement.[504] This

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[499] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[500] Cf. Boshko Stankovski, 'Is There an Obligation to Negotiate Secession in International Law? From Reference Re Secession of Quebec to Kosovo Advisory Opinion and Beyond' [2015] ESIL Conference Paper Series (Arguing that there is an emerging duty of entities with nascent statehood to negotiate with their parent states before pursuing secession).

[501] *African Commission on Human and Peoples' Rights, Case No 266/03 (2009): Kevin Mgwanga Gumme et al/Cameroon* [Emphasis added].

[502] For a detailed analysis of the bilateral negotiation imperative in this case, see Robert P Barnidge, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine* (Bloomsbury Publishing 2016).

[503] *Reference Re Secession of Quebec [1998] 2 SCR 217, Supreme Court of Canada* [88].

[504] See *The Province of North Cotabato* (n 181).

duty, however, falls short of a negotiation imperative and is owed not to the armed group party to the conflict and peace process but to the affected local administrative units and groups.

4.2.4. Summary

This section explored whether there is an emerging duty to negotiate in intra-state armed conflicts grounded in an emerging intra-state *jus ad bellum*, the right to peace, or the right to self-determination. Although international human rights law and, if the violence reaches the threshold of armed conflict, international humanitarian law place restrictions on the use of force within states, the analysis undertaken shows that international law does not impose an obligation on states to negotiate with AOGs to end armed conflicts. However, negotiated settlements to intra-state armed conflicts are encouraged in international peace-making policy and in the practice of the SC over military means to diminish human suffering in conflict conditions and threats to regional and international peace and security.

4.3. The norm of inclusion: Participation in peace negotiations

Peace agreements aiming to end intra-state armed conflicts often lead to profound changes in the domestic law, constitution, and political order of a state. In addition to bringing peace agreements within the sphere of domestic, regional and "transnational"[505] norms of constitutional change, this raises the issue of the legitimacy of peace negotiations, which are elite-level negotiations held partly in secrecy.[506] In response to concerns regarding the legitimacy of peace negotiations and the durability of any outcome agreements, local ownership, inclusivity and public participation have become major themes in peace-making practice, policy, and scholarship, with an emphasis both on the inclusivity of the peace settlement and the negotiation process. The norm of inclusion can be viewed as a particular

[505] Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 International Journal of Constitutional Law 606.

[506] Although the issues of inclusivity and procedural legitimacy are assessed only in relation to intra-state peace negotiations, such concerns are not entirely irrelevant to inter-state peace negotiations. Putnam conceptualises international negotiations as two-level games: While Level 1 negotiations are held between representatives of states, Level 2 negotiations refer to domestic political negotiations about the subject of Level 1 negotiations and efforts of governments to convince their domestic constituencies. Procedural legitimacy in such negotiations can then be enhanced through public involvement, transparency and reason-giving. See Robert D Putnam, 'Politics and Domestic Diplomacy the Logic of Two-Level Games' (1988) 42 International Organization 427, 434.

manifestation of the principle of local ownership[507] in the context of peace-making and resonates with the evolution of the principle from its original focus on the reform of formal state institutions to the primacy of politics and local agency in conflict resolution and development. [508]

In 2017, the UN adopted its Guidance on Gender and Inclusive Mediation Strategies and called for inclusion in mediation processes of women, youth, organised civil society, professional organisations, and social, demographic, religious and regional minorities.[509] The Guidance builds on the 2012 UN Guidance for Effective Mediation, whereby inclusivity is understood as "the extent and manner in which the views and needs of parties to conflict and other stakeholders are represented, heard and integrated into a peace process" and therefore, denotes the inclusivity of both the negotiation process and substantive outcomes.[510] The New Deal for Engagement in Fragile States, which has been endorsed by 47 countries and organisations including the UN, EU, OECD, and the World Bank, also includes inclusive conflict resolution as one of its five goals of peacebuilding and statebuilding.[511]

Gender inclusion has been the most accentuated dimension of the norm of inclusion in terms of the normativisation of peace-making. As early as in 2000, the SC adopted Resolution 1325 on women, peace, and security.[512] As a milestone in the trend towards normativising a gender perspective in peace-making, the SC urged states in Resolution 1325 to ensure increased representation of women at all levels of decision-making in peace processes. As of September 2018, 76 UN Member States adopted National Action Plans for

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[507] Sarah BK von Billerbeck, *Whose Peace? Local Ownership and United Nations Peacekeeping* (Oxford University Press 2016) 35 (Explaining that the discourse of local ownership emerged as the anti-thesis of increased international involvement in intra-state conflicts and development processes).

[508] See Sue Unsworth, 'It's the Politics! Can Donors Rise to the Challenge?', *A Governance Practitioner's Notebook: Alternative Ideas and Approaches* (OECD 2015) 48; Hanna Leonardsson and Gustav Rudd, 'The "Local Turn" in Peacebuilding: A Literature Review of Effective and Emancipatory Local Peacebuilding' (2015) 36 Third World Quarterly 825, 827. See also *Report of the High-Level Independent Panel on Peace Operations* (n 479) para 43.

[509] UN Department of Political Affairs (n 38). See also *Mediation and Dialogue Facilitation in the OSCE: Reference Guide* (n 30) 56–58.

[510] *United Nations Guidance for Effective Mediation* (n 60) 11.

[511] *A New Deal for Engagement in Fragile States* (n 127). See also *Building Peaceful States and Societies: A DFID Practice Paper* (n 40).

[512] UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.

the implementation of Resolution 1325.[513] The AU, EU, OSCE, ASEAN and IGAD have also incorporated the principle of gender inclusion into their mediation guidelines.[514]

Beyond being a policy goal, inclusivity is considered as a 'norm' in the scholarship.[515] It is framed as a process-related norm, which aims to ensure more comprehensive peace agreements through broader participation in peace negotiations but without stipulating specific substantive outcomes. As opposed to the requirement of the inclusion of women in formal peace negotiations[516], the direct participation of other actors, whose inclusion is promoted, is not necessarily required and consultations with them suffice.[517] For example, in relation to youth, Resolution 2250 (2015) has for the first time called on all peace-making actors "when negotiating and implementing peace agreements, to take into account, as appropriate, the participation and views of youth".[518]

The development of the norm of inclusion centres on arguments of normativity and effectiveness. Normatively, it has been considered a moral obligation, if not a legal requirement.[519] Particularly in relation to women, it has been argued that a legal norm of inclusion is emerging in the context of the SC's WPS resolutions and resultant national action plans.[520] Furthermore, some scholars claim that the norm of inclusion is a requirement following from political participation rights, the right to self-determination or emerging norms of constitutional change. In terms of effectiveness, the dominant assumption in international policy is that inclusive processes generate agreements that are more durable.[521]

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[513] Women's International League of Peace and Freedom United Nations Office, 'Member States' (2018) <https://www.peacewomen.org/member-states>.

[514] *Enhancing Gender-Responsive Mediation: A Guidance Note* (n 78); *African Union Mediation Support Handbook* (n 77) 75; *Concept on Strengthening EU Mediation and Dialogue Capacities* (n 142) s 7; *Asean Political-Security Community Blueprint* (n 144); *IGAD Regional Strategy Volume 1: The Framework* (n 145).

[515] See e.g. Burg (n 96); Federer and Gasser (n 96); Timothy Donais and Erin McCandless, 'International Peace Building and the Emerging Inclusivity Norm' (2017) 38 Third World Quarterly 291.

[516] UN Department of Political Affairs (n 38).

[517] *United Nations Guidance for Effective Mediation* (n 60) 11.

[518] UNSC Res 2250 (n 161).

[519] Anthony Wanis-St John and Darren Kew, 'Civil Society and Peace Negotiations: Confronting Exclusion' (2008) 13 International Negotiation 11, 18.

[520] Bell and O'Rourke (n 81) 943.

[521] *Pathways for Peace* (n 16) 195. But cf. William Evans, 'A Review of the Evidence Informing DFID's "Building Peaceful States and Societies" Practice Paper: Paper 1: Political Settlements, Peace Settlements, and Inclusion' (2012); Tatiana Carayannis and others, 'Practice Without Evidence: Interrogating Conflict Resolution Approaches and Assumptions' [2014] The Justice and Security Research Programme Paper 20–22 (Both studies highlight the mixed empirical results regarding inclusive processes and durability of outcome settlements).

On the other hand, reaching an agreement in the first place may prove more difficult in such circumstances where actors other than conflict parties participate in negotiations.[522]

Taking also into account such effectiveness considerations, the next section first explores three potential legal bases for inclusivity in peace-making in general: Political participation rights, right to self-determination, and emerging norms of constitutional change. It then assesses the normative developments regarding the inclusion of specific actors in peace negotiations and whether they find support in international law.

4.3.1. Potential legal bases for the norm of inclusion

4.3.1.1. Political participation rights

In the context of transitions from conflict to peace, reference has been made to an international normative entitlement to democratic standards, both as to procedural and substantive aspects of democracy.[523] Commitments to free and fair periodic elections and to guarantee political participation in the post-settlement political order is commonly found in peace agreements. An often followed pattern in this regard is the establishment of a transitional power-sharing government until the holding of post-conflict elections, which are often internationally monitored.[524] Peace agreements also contain commitments to certain substantive aspects of democracy, such as the rule of law and respect for human rights.[525] Arguably, normative standards of democracy and democracy promotion activities of international organisations have made an impact on the contents of peace agreements. [526]

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[522] Lanz (n 96).

[523] Catherine Barnes, 'Democratizing Peace-Making Processes: Strategies and Dilemmas for Public Participation' (2002) 13 Accord: An International Review of Peace Initiatives 6. See Gregory H Fox, 'Democracy', *Max Planck Encyclopedia of Public International Law* (2011) (Introducing the procedural and substantive aspects of democracy). On international law and the emerging right to democratic governance, see Thomas M Franck, 'The Emerging Right to Democratic Governance ?' (1992) 86 The American Journal of International Law 46; Susan Marks, 'What Has Become of the Emerging Right to Democratic Governance?' (2011) 22 European Journal of International Law 507; Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 European Journal of International Law 549.

[524] Lomé Peace Agreement (n 15); Ouagadougou Political Agreement (Côte d'Ivoire), 04 March 2007.

[525] As to the substantive aspects of democracy, see Fox (n 523).

[526] However, the vastness of electoral elements in peace settlements may not be attributable to a normative commitment to democracy. In a series of interviews with 22 mediators and mediation experts, mediators expressed criticism towards the inclusion of elections in the post-conflict transition agenda in a 'cut-and-paste fashion' without due regard to the conditions on the ground. See Hellmüller, Palmiano Federer and Zeller (n 58).

As to the negotiation process of peace agreements, an issue that remains underexplored is whether a normative basis for democratic peace-making processes could be found in the rights of political participation. Various regional and international human rights treaties provide for the right to political participation, however, the analysis here will be limited to the International Covenant on Civil and Political Rights (ICCPR) due to the broad scope of the right to political participation enshrined in the Covenant. Article 25(a) of the ICCPR guarantees the right of every citizen 'to take part in the conduct of public affairs, directly or through freely chosen representatives'.[527] The conduct of public affairs is usually broadly construed as to include the exercise of political power regarding all aspects of administration and policy-making.[528] General Comment No. 25 of the United Nations Human Rights Committee sheds some light on the modalities of participation in the conduct of public affairs. According to the Committee, citizens can take part in public affairs directly by being elected to political office, participating in popular assemblies or consultative bodies, or by casting their votes in a referendum or another electoral process, or indirectly through their elected and accountable representatives or simply by influencing decision-making "through public debate and dialogue".[529] It has been argued that the participation of specially affected groups and the broader public in peace processes can be based on such political participation rights under international law. Even though there is no explicit reference to peace-making in the relevant articles, it would come within the broad scope of 'conduct of public affairs'. Yet, this does not suggest the existence of guidance in terms of what participation means. If the General Comment 25 is taken as an authoritative interpretation, it would be apparent that the right to participation does not necessarily entail a right to direct participation in peace talks or a right to be consulted. Moreover, even if the peace negotiations are held behind closed doors solely with the main conflict parties at the table, if the resultant agreement is entrenched into domestic law in accordance with its own procedures or approved in a referendum, that would satisfy the requirements of participation rights. Therefore, political participation rights may at most be the basis of a thin requirement of popular participation in peace-making.

Concerns regarding democratic legitimacy and political participation are central to the normative developments regarding democratic governance but they are also relevant in

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[527] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[528] 'UN Human Rights Committee, General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7'.

[529] ibid.

the context of self-determination.[530] The next section therefore explores whether inclusivity in peace negotiations can be grounded in the right to self-determination.

4.3.1.2. Right to self-determination

In the post-UN era, the normative status of self-determination underwent a transformation from a political to a legal principle and to its articulation as a human right.[531] The conventional, and possibly identical customary, right has been commonly defined as the right of peoples to freely determine their political status and to pursue their economic, social and cultural development.[532] Yet, the definition does not clarify the scope of the right and leaves important questions, as to what 'people' means, who the duty-bearer is, what the modalities of exercising the right are, and what limitations to it exist, unanswered.

The implications of the right in the decolonisation context is relatively straightforward. The right to self-determination allows a change in state boundaries, albeit in line with the principle of *uti possidetis*, and entails a right to declare independence from the metropolitan power. [533] Although almost all authoritative international sources on self-determination refer to the right of self-determination of 'all peoples', the implications of the right in the post-colonial era are not identical to (and not as clear as) those in the decolonisation context. [534] Outside the colonial context, the principle of territorial integrity limits the right of self-determination and elides secession as a modality of exercising the right.[535] Thus, the right to self-determination can only be exercised internally, that is to say,

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[530] ibid; Jure Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 Human Rights Law Review 239.

[531] See James Crawford, 'The Right of Self-Determination in International Law: Its Developments and Future' in Philip Alston (ed), *Peoples' Rights* (Oxford University Press 2001); Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 Human Rights Law Review 609; Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 European Journal of International Law 111.

[532] ICCPR (n 527), Art1(1); International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR), Art 1(1); 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (24 Oct 1970) UNGA Res 2625 (XVVI)'. See also *legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) ICJ Rep 1971, 16.*

[533] 'Declaration on Principles of International Law Concerning Friendly Relations (n 532); 'UNGA Res 1541 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) UN Doc A/RES/1514(XV)'.

[534] Crawford, therefore, states that the right of self-determination is *lex ferenda* and even *lex obscura* to some extent. See Crawford, 'The Right of Self-Determination in International Law: Its Developments and Future' (n 531) 10.

[535] *Reference Re Secession of Quebec* (n 503) [135–6] (Mentioning the possibility of recourse to external self-determination "as a last resort" if means of internal self-determination is denied but states that "it

within the boundaries of a state.[536] The right to internal self-determination has thus been linked to the concepts of representativeness of government[537] and respect to human rights.[538] As mentioned above, some scholarly interpretations of the right suggest that it has certain implications for the procedural legitimacy of internal political decision-making. Klabbers argued for a proceduralised interpretation of the right as "a right to be taken seriously", which aims to ensure the participation of affected groups in decision-making processes.[539] Writing in relation to peace negotiations, Bell further argues that the right to self-determination is undergoing a transformation and includes a procedural entitlement to be heard of actors affected by the conflict and its settlement.[540]

However, neither the legal sources of the principle of self-determination nor the relevant practice provides precise guidance as to the inclusivity of domestic decision-making processes, let alone peace negotiations. Internal self-determination requires certain substantive guarantees in the constitutional order, such as the protection of individual and collective human rights, and only a thin procedural entitlement to political participation via elections or referenda. The Human Rights Committee, for example, referred to the right to self-determination in the context of post-conflict constitution-making as part of the internationally mediated peace process in Congo but found the organisation of general elections a satisfactory mechanism enabling the citizens "to participate in the process of reconstruction of the country".[541] Bhuta, therefore, claims that internal self-determination is "under-specified as a source of rules for the design of a constitutional order or the means and manner of instituting popular sovereignty" and that at most, the so-called Safeguard Clause of the Friendly Relations Declaration provides for a "right of racial groups to participate in governmental processes".[542] Dann and Al-Ali similarly state that the right to

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remains unclear whether this … position actually reflects an established international law standard"). See also the 'safeguard clause' in Declaration on Principles of International Law concerning Friendly Relations (n 58). See also James Crawford, 'State Pratice and International Law in Relation to Secession' (1999) 69 British Yearbook of International Law 85.

[536] *Reference Re Secession of Quebec* (n 503) [122].

[537] See Declaration on Principles of International Law concerning Friendly Relations (n 58): 'States ... possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

[538] *Opinion No 2 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 ILM 1497.*

[539] Klabbers (n 498).

[540] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4).

[541] 'UN Human Rights Committee, Concluding Observations on the Second Periodic Report of the Republic of the Congo (25 April 2000) UN Doc CCPR/C/79/Add.118' para 20.

[542] Bhuta (n 198).

self-determination is not precise enough to outline effective criteria for the process of drafting a constitution.[543]

Lastly, it must be noted that the concern regarding democratic legitimacy is not peculiar to the interpretation of the right to internal self-determination in the post-colonial era.[544] The traditional conception of the right also emphasised the legitimacy of the decision-making process. The formulation of the right in Resolution 1541 and 2625 and the decolonisation era practice of independence referenda under UN supervision are telling in this regard.[545] Both resolutions emphasise that all peoples are entitled to determine their political status "without external influence". The Trusteeship Council and General Assembly recommended measures to enhance the democratic credentials of the plebiscites in territories transitioning from colonial rule to their preferred mode of future political status and adopting constitutions in order to ensure freedom from external domination and inter-polity representativeness.[546] However, in the colonial context, the democratic legitimacy concern was largely confined to the making of the constitutive decision determining the political status without external influence, rather than the substantive features of or political decision-making in the post-independence constitutional order.[547] This procedural aspect of the right may shed light on the interpretation of the right to internal self-determination in the context of peace negotiations as setting limits on the involvement of external actors, for example in relation to guarantees against the imposition of substantive outcomes on negotiation parties by mediators or donors, but is not of guidance as to the inclusivity of peace negotiations.

4.3.1.3. Are there emerging international legal norms of constitutional change?

Regardless of whether constitutional change is explicitly promised, almost all peace agreements aiming to end an intra-state armed conflict implicate the constitutional order as

[543] Zaid Al-Ali and Philipp Dann, 'The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor' (2006) 10 Max Planck Yearbook of United Nations Law 423.

[544] Bhuta (n 198).

[545] 'UNGA Res 1541 (n 533); 'Declaration on Principles of International Law Concerning Friendly Relations (n 532).

[546] For an overview of the UN supervision of the decolonisation process, see Thomas M Franck and Arun K Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in Laurel E Miller and Louise Alcon (eds), *Framing the State in Times of Transition* (United States Institution of Peace 2010).

[547] Bhuta (n 198). But cf. Turner (n 180) 271.

"constitutions in embryo". [548] Moreover, many agreements explicitly stipulate constitutional change.[549] For negotiating parties and other local actors, constitutional change emerges as a potential means of entrenching the recognition of their political causes in the constitutional order.[550] International peace facilitators consider constitutional change, particularly the making of new constitutions, as a condition for "a new beginning" and sustainable peace.[551] Broadly categorising the modalities, firstly, a number of peace agreements contain or are concluded in the form of final constitutions.[552] Another group of agreements sets the procedural and/or substantive framework for the making of a new constitution.[553] These agreements often function as interim constitutions or transitional political arrangements until the new constitution comes into effect.[554] Lastly, some parties effect or promise amendment to the existing constitution through a peace agreement.[555] Overall, due to their partially constitution-like character, peace agreements are sometimes referred to as 'peace agreement constitutions'.[556]

As a result of the increased frequency of constitution-making and constitutional change through peace agreements, the debate regarding whether there are existing or emerging international legal norms on constitution-making and constitutional change also became relevant to peace-making. Some scholars argue that there are existing and emerging

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[548] Sujit Choudhry, 'Civil War, Ceasefire, Constitution: Some Preliminary Notes' 33 Cardozo Law Review 1907, 1917 (Explaining that all peace and ceasefire agreements "set down constitutional baselines" and function as "constitutions in embryo").

[549] 118 of the peace agreements concluded in intra-state armed conflict settings and compiled in the Language of Peace database contain provisions for some form of constitutional reform United Nations and University of Cambridge (n 1).

[550] Ludsin (n 234) 242.

[551] See Lakhdar Brahimi, 'State Building in Crisis and Post-Conflict Countries', *7th Global Forum on Reinventing Government: Building Trust in Government* (2007) (Considering constitutional reform as a key element of statebuilding in post-conflict countries); United Nations, 'Repertoire of the Practice of the Security Council, 2004-2007' (Stating that "fundamental rewriting of an existing constitution or the elaboration of a new constitution" as a requirement for post-conflict reconciliation).

[552] General Framework Agreement for Peace in Bosnia and Herzegovina (n 15); Constitution of Iraq (2005).

[553] See for example Constitution of the Republic of South Africa, Act 200 of 1993; Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 4 August 1993; Arusha Peace and Reconciliation Agreement for Burundi (n 65).

[554] For a mapping of how peace agreements, other transitional instruments and constitution-making are sequenced see Christine Bell and Kimana Zulueta-Fülscher, 'Sequencing Peace Agreements and Constitutions in the Political Settlement Process'.

[555] See for example Lomé Peace Agreement (n 15); Bougainville Peace Agreement, 30 August 2001; The Good Friday Agreement (n 307); Framework Agreement (Ohrid Agreement), 13 August 2001.

[556] Bell, 'Peace Agreements: Their Nature and Legal Status' (n 89); Jennifer S Easterday, 'Jus Post Bellum, Peace Agreement and Constitution Making' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014); Azin Tadjdini, 'The Constitutional Dimension of Peace' in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (Oxford University Press 2015).

rules of international law concerning the substance and amendment procedure of constitutions. [557] Others suggest that international law has become part of the normative framework of constitution-making in conflict and post-conflict settings.[558]

Among the norms identified in this scholarship, inclusivity of constitution-making processes, as part of a peace agreement or not, is relevant for the purposes of this chapter. This putative norm has been predominantly linked to the right to political participation under international human rights law and the right to internal self-determination.[559] Thus, the above discussions in relation to political participation rights and internal self-determination are also relevant in the context of constitution-making and will not be repeated here, except for a brief analysis of the developments specific to the application of the right to participation in constitution-making.

In General Comment 25, the Human Rights Committee explicitly mentioned 'choosing or changing a constitution' as a conduct of public affairs but has seemingly found it a satisfactory modality of participation to do so through a referendum. [560] Yet, this is by no means a spelling out of a requirement to submit constitutional changes to popular approval and falls short of providing for a right to directly participate in constitution-making. The Committee ruled out the possibility of an entitlement to have a seat at the constitution-making table under Article 25 in a case that came before it a decade before the publication of the General Comment. In *Marshall v Canada,* the application concerned the refusal to grant a seat at the constitutional conferences to representatives of the Mikmaq tribal society, one of the aboriginal peoples in Canada, and whether this constituted a violation of the right to self-determination or the right to political participation.[561] Such constitutional conferences

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[557] See Lech Garlicki and Zofia A Garlicka, 'External Review of Constitutional Amendments? International Law As a Norm of Reference' (2009) 44 Israel Law Review 343, 357–67; Stephen J Schnably, 'Emerging International Law Constraints on Constitutional Structure and Revision : A Preliminary Appraisal' (2008) 62 University of Miami Law Review 417; Franck and Thiruvengadam (n 546); Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E Miller and Louise Alcon (eds), *Framing the State in Times of Transition* (United States Institution of Peace 2010). But cf. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 102; Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 Stanford Law Review 1863, 1875–6 (Pointing out that even when such limitations are accepted to be in place, their purchase is always ultimately contingent upon international law's "domestic anchoring") .

[558] See Ruti G Teitel, *Transitional Justice* (Oxford University Press 2001); Catherine Turner, 'Transitional Constitutionalism and the Case of the Arab Spring' (2015) 64 International and Comparative Law Quarterly 267, 271–74; Emily Hay, 'International(Ized) Constitutions and Peacebuilding' (2014) 27 Leiden Journal of International Law 141, 145.

[559] See e.g. Franck and Thiruvengadam (n 546); Hart (n 557).

[560] 'UN Human Rights Committee, General Comment 25 (n 528).

[561] *UN HRC: Marshall et al v Canada (3 December 1991) UN Doc CCPR/C/43/D/205/1986.*

are convened by the Prime Minister of Canada, who may invite representatives of the aboriginal peoples of Canada before any constitutional amendment that would affect them is made. The Committee, first, confirmed that constitutional conferences constituted conduct of public affairs.[562] However, the Committee was of the view that "article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs" and that the refusal to permit representation for the Mikmaqs was not a violation of any provisions of the Covenant. Similarly, in relation to another case, the Supreme Court of Canada held that 'the questions as to whom federal and provincial governments ought to meet with and consult during the development of constitutional amendments were political questions for which there are no legal or constitutional principles to guide a court in its decision'.[563]

In the face of the lack of explicit reference to constitution-making or to specific modalities of taking part in constitution-making in the relevant provisions of general or group-specific human rights treaties, based on a survey of state practice, some scholars have argued that there is a global trend or even a customary international law norm of public participation in constitution-making processes.[564] According to a survey of 194 instances of constitution-making between 1975 and 2002, in 83% of the cases the citizens elected the constitution-makers; in 41.5%, there was a referendum on the draft constitution, and in 36%, negotiations with various specifically-affected groups within the society were held.[565] Even though the results suggest that there is indeed a trend in favour of some sort of public participation in constitution-making processes, they are far from denoting a global acceptance of direct participation of the public or certain groups in such processes. It is also unclear whether such practices are required by the procedural domestic rules of constitutional change in the various countries or whether they are accompanied by a sense of legal obligation at all.

Process-related norms of constitutional change are also articulated by the Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law (hereafter, the Venice Commission). Even though the Venice Commission is

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[562] ibid.

[563] *Native Women's Association of Canada v Canada [1994] 3 SCR 627, Supreme Court of Canada*.

[564] Hart (n 557); Franck and Thiruvengadam (n 546).

[565] Hart (n 557).

part of the institutional structure of the Council of Europe, it has become an internationally recognized authority on constitutional matters, which is evinced by the expanding geographical reach of the membership and work of the Commission.[566] While responding to assistance requests by the member states on jurisdiction-specific constitutional matters or producing various documents on general 'transnational issues', the Commission has been developing a set of criteria of 'good constitutionalism' that covers both substantive and procedural aspects of constitutional change.[567] As to the processes of constitutional change, the Commission has stated that the key requirements of a democratic constitution-making process are transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues.[568] Accordingly, for example, the Commission criticised the 2011 Hungarian constitution-making process for its lack of transparency, the inadequate consultation of the Hungarian society, and 'its tight time-limits and restricted possibilities of debate of the draft by the political forces, within the media and civil society'.[569] Such criteria may be applied to constitutional change through peace agreements, should a situation be reviewed by the Venice Commission in future. However, the opinions of the Venice Commission are merely advisory, its involvement in specific constitutional change processes is consent-based, and the standards developed are not claimed to be legal standards.

Overall, it may be increasingly unacceptable to make constitutional changes, be it in the form of an amendment to an existing constitution or of the adoption of an interim constitution as part of a peace process, without an element of public participation. [570] However, there are no hard and fast rules of international law that provide guidance as to a

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[566] With the 2002 amendment to the Statute, non-European states are allowed to become full members of the Venice Commission. As of September 2018, the Commission has 61 member states including countries from Africa, the Americas, Central Asia, East-Asia, and the Middle East. For the full list of member of the Commission, Council of Europe Venice Commission, 'Members of the Venice Commission' <https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN>. For an analysis of the role of the Commission in process of constitutional change, see Maartje De Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' (2015) 63 The American Journal of Comparative Law 963.

[567] Christine Bell, 'What We Talk About When We Talk About International Constitutional Law' (2014) 5 Transnational Legal Theory 241.

[568] 'European Commission for Democracy Through Law (Venice Commission) Opinion 614/2011 Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, Doc CDL-AD(2011)001 (25-26 March 2011)'.

[569] 'European Commission for Democracy Through Law (Venice Commission) Opinion 621/2011 on the New Constitution of Hungary, Doc CDL-AD(2011)016 (17-18 June 2011)'.

[570] Such norms may be considered as norms of "transnational constitutionalism", see Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 International Journal of Constitutional Law 606.

possible application of the right to political participation in the context of constitution-making in a way that requires participation of the public or certain actors throughout the process.[571] Nor does the right to self-determination, as discussed above, contain criteria for a legitimate constitution-making process or provide for a right to direct participation.

Lastly, another development that is relevant to the inclusivity, democratic character, and openness of constitution-making processes is the attempt to outlaw unconstitutional regime changes. The notion of 'unconstitutional constitutional change' has been developed in the regional treaties and declarations in the Americas and particularly in Africa.[572] The Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government states that "a military *coup d'etat* against a democratically elected Government, intervention by mercenaries to replace a democratically elected Government, replacement of democratically elected Governments by armed dissident groups and rebel movements, and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections" are situations of unconstitutional change of government.[573] Article 23 of the African Charter on Democracy, Elections and Governance further adds to this list "any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government".[574] The Lomé Declaration also includes a commitment to the adoption of democratic constitutions, whose 'preparation, content and method of revision should be in conformity with generally acceptable principles of democracy'.[575] These norms are relevant to constitutional amendment provisions in peace agreements or conclusion of peace agreements in the form of interim or final constitutions. There is an explicit, although vague in terms of what the 'generally accepted principles of democracy' are and what specific modalities of implementation they require, emphasis on the democratic legitimacy of governmental or constitutional change processes in line with the domestic constitutional rules engrained in these norms. However, given that the Lomé Declaration is legally non-binding and the

[571] See also Franck and Thiruvengadam (n 546); Choudhry (n 548).

[572] See Charter of the Organization of American States (30 April 1948); Inter-American Democratic Charter (11 September 2001); Constitutive Act of the African Union (11 July 2000) OAU Doc. CAB/LEG/23.15 (2001); Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (hereinafter Lomé Declaration) of the Organisation of African Unity (later AU), no AHG/Decl.5 (10 July 2000); African Charter on Democracy, Elections and Governance (30 January 2007).

[573] Lomé Declaration (n 572).

[574] AU African Charter on Democracy, Elections and Governance (n 572).

[575] Lomé Declaration (n 572).

African Charter has not yet entered into force due to the lack of the required number of ratifications, these developments have not yet become part of international law.

To conclude, even if it is assumed that the emerging norms of constitutional change are of international legal nature rather than political or moral norms, such norms do not yet find support in international law. Existing norms of international law, on the other hand, not seem to provide precise process-related requirements for peace negotiations in the absence of directly applicable rules to peace-making. Having established that a general legal norm of inclusion in peace negotiations cannot be grounded in political participation rights, right to self-determination or any emerging legal norms of constitutional change in this section, the next section turns to the normative developments in relation to the inclusion of specific actors in peace negotiations and the practical implications of such inclusivity.

4.3.2. Actor-specific norms of inclusion in peace negotiations

4.3.2.1. Armed opposition groups

Inclusivity of a peace process is often only understood in terms of public participation and increasing the public buy-in of the ultimate settlement. Ensuring inclusivity at the level of the conflict parties, on the other hand, is equally, or perhaps even more, important as to the durability of a ceasefire and the peace agreement to follow.[576] The two most problematic scenarios in this regard are when a government refuses to negotiate with an AOG, and when a government and an AOG sign a peace agreement by excluding other AOGs that are also parties to the conflict.

Governments have traditionally been cautious about both the legal ramifications of officially engaging with the representatives of AOGs and the societal backlash it may cause. Therefore, they have been reluctant to recognise AOGs or negotiate with them. On the other hand, the widespread practice of negotiating agreements with AOGs has been invoked by some of the representatives of AOGs as the basis of an argument that "international law grants them a right to participate in a peace process".[577] Yet, there is no general legal rule

[576] Ludsin (n 234).

[577] Kastner (n 4) 71.

that forbids engagement with armed opposition groups, or that compels governments to negotiate with them.[578]

The second scenario is when a government and one or more AOGs sign a peace agreement following negotiations that were either closed to or not conducive to the participation of other conflict parties. Even though the best policy would depend on the specific circumstances of an intra-state armed conflict and the resolution of certain aspects of a conflict may require tailored arrangements, a general suggestion is that the exclusion of some of the armed opponents may lead to the recurrence of conflict and undermine the stability of the settlement.[579] Also, it may lead to a lack of representation of the societal groups that support the AOG when substitutive measures, such as separate negotiations with the excluded group or engaging with civil society representatives of the relevant constituency, are not taken either.

Holding separate negotiations with different groups as a result of an opponent-selective approach to a peace process may have its own drawbacks as it may result in a piecemeal approach to the solution of the underlying causes of a conflict. For example, the Sudanese government engaged in three distinct peace processes in relation to the North-South conflict, the Darfur conflict, and the Eastern conflict. The three processes have culminated in various different peace agreements, some parts of which pertained to similar or identical governance issues. An additional layer of complexity was added by the non-comprehensive agreements, i.e. agreements that are not signed by all or most of the major parties to an armed conflict, signed within the specific peace processes. In addition to creating obstacles to durable and inclusive peace-making, such fractured peace processes may also lead to legal uncertainty as agreements would inevitably include contradicting components or require different implementation steps.[580] Therefore, to the extent that it is feasible and pertinent, inclusivity at the level of conflict parties should also be on the agenda of peace-making policy.

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[578] Cf. Geneva Convention Relative to the Treatment of Prisoners of War (n 120), Common Article 3 (Encouraging parties "to bring into force, by means of special agreements, all or part of the other provisions of the present Convention ").

[579] Alina Rocha Menocal, *Inclusive Political Settlements: Evidence, Gaps, and Challenges of Institutional Transformation* (International Development Department, University of Birmingham 2015) 10.

[580] See Sarah MH Nouwen, 'Sudan's Divided (and Divisive?) Peace Agreements' (2007) 19 Hague Yearbook for International Law 113.

4.3.2.2. Civil society

The 2004 Report of the UN High-Level Panel on Threats, Challenges and Change called for enhanced involvement of "important voices from civil society" in peace processes.[581] The SC has also encouraged states and mediators to seek the involvement of civil society in in peace processes.[582]

There can be arguments for and against the inclusion of representatives of civil society in negotiations. Civil society may enhance the democratic credentials of a peace process and contribute to the development of a sense of local ownership by representing the interests of the broader public. Notably, it has been suggested that inclusion of civil society may alleviate concerns, especially in case of negotiations between unelected elites, not only in terms of making the process more democratic but also by bringing certain issues like accountability, which may be overlooked by the main parties, to the table.[583] Civil society representatives would also provide expertise on local context, as mediators would often lack such first-hand knowledge.[584] Also, it may be a moral duty to ensure civil society participation, as civilians bear the brunt of war and must be heard in a peace process.[585]

Most of these arguments assume that civil society is representative of the broader society, however, this can be contested. In some societies, the only existing civil society organisations may be the ones who support the main parties. Therefore, their inclusion may be redundant, if not risky, as they might wittingly spoil the process in collaboration with a main party when the costs of insisting on an issue or leaving the table is too high for the latter.[586] Moreover, even in the absence of such links, the democratic credentials of civil society organisations may be doubtful. Chinkin has voiced this concern by emphasising that "NGOs are often non-democratic, self-appointed, may consist of only a handful of people, and determine their own agendas and priorities with a missionary-like or elitist zeal".[587]

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[581] UN High-Level Panel on Threats Challenges and Change (n 43) para 103.

[582] See e.g. UNSC Res 1721 (1 November 2006) UN Doc S/RES/1721 para 18.

[583] Anthony Wanis-St. John, 'Peace Processes, Secret Negotiations and Civil Society: Dynamics of Inclusion and Exclusion' (2008) 13 International Negotiation 1; Kastner (n 4) 142; Levitt (n 94) 36.

[584] Paffenholz (n 476) 78.

[585] Paffenholz (n 476).

[586] Wanis-St. John (n 583).

[587] Christine Chinkin, 'Human Rights and the Politics of Representation: Is There a Role for International Law?' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2001).

Lastly, the empirical evidence is contradictory. Some studies have found that civil society participation increased the durability of agreements, whereas some point to the possibility that civil society involvement may damage peace processes.[588]

Despite these concerns, the scholarship and policy of peace-making promote the norm of inclusion of civil society in peace processes. Kastner argues that the UN has "internalised" a "legal-normative" obligation to ensure civil society participation in peace processes and that this cannot be, and has not been, ignored by other mediators, but he recognises the challenges inherent in the implementation of the obligation.[589] As with the participation of other groups, the decision to include civil society organisations in a peace process and the selection of those who should be engaged is highly dependent on the context. As alluded to above, there are limits to an inclusive policy. Peace talks are often fruitless, if not damaging, when the setting of the peace table does not correspond to the military and political reality on the ground. In the Rwandan peace process, for example, many small groups were given leverage that was disproportionate to their military and representative power, which led to the further marginalisation of extremist groups, which eventually carried out the genocide.[590] Therefore, it is difficult to formulate precise rules regarding the design of peace talks. The norm of inclusion of civil society in peace negotiations can be considered as a moral and political norm, or as a policy goal, however, it has not gained the status of a legal norm. Where the exisgencies of a peace process so require, peace-making actors can depart from the norm.

4.3.2.3. Women

In 2000, the SC adopted Resolution 1325 on women, peace, and security. The resolution has been considered as a milestone towards the normativisation of a gender perspective in peace-making.[591] The Resolution addresses conflict prevention and resolution comprehensively, and promotes the inclusion of women in the political space and the adoption of a women's agenda.[592] As to the participation of women in peace processes, the

[588] Wanis-St. John (n 583).

[589] Kastner (n 4) 148.

[590] Christopher Clapham, 'Rwanda: The Perils of Peacemaking' (1998) 35 Journal of Peace Research 193, 205. See also Aoife O'Donoghue, 'How Does International Law Condition Responses to Conflict and Negotiation?' (2016) 7 Global Policy 272.

[591] UNSC Res 1325 (n 512).

[592] See Laura McLeod, 'Gender and Peace Settlements from a Quantitative Perspective: A Global Survey' [2014] University of Manchester, Working Papers in Gender and Institutional Change, No. 2 13 (Explaining that women may be involved in formal peace negotiations in various capacities: As mediators, delegates of

SC urged Member States to ensure increased representation of women at all levels of decision-making in peace processes.[593] The SC adopted various other resolutions on women, peace, and security.[594] In resolution 1889 (2009), the SC urged Member States to take measures to improve women's participation during all stages of peace processes and to support women's organisations to that end.[595] In resolution 2122 (2013), the Council requested the Secretary-General to include gender experts in UN mediation teams and to support the inclusion of women at senior levels within the UN mediation teams.[596]

The WPS Resolutions are not legally binding. Some scholars, however, suggested that Resolution 1325 might have legal authority, as the Council adopted it unanimously and it uses a language indicative of legal obligations.[597] Unanimous adoption or use of obligatory language are not sufficient to give legal force to the Resolution, and the answer to the question of whether the requirements of the Resolution have transformed into customary law obligations remain at best uncertain, if not negative. Yet, the Resolution led to a significant mobilisation among Member States and other domestic, regional or global actors involved in conflict prevention and resolution processes. As mentioned above, as of September 2018, 76 UN Member States adopted National Action Plans for the implementation of Resolution 1325.[598]

International human rights provisions regarding the prohibition of discrimination on grounds of gender, the equality of men and women, and the right to political participation and representation may also be relevant in promoting a gender perspective in peace processes. Yet, their impact is limited, as these are not obligations that specifically address peace processes. CEDAW provides for a general right of women to participate in the public and political life of the country.[599] However, in 2013, the Committee on the Elimination of

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the negotiating parties, signatories, witnesses, representatives of women's civil society, in a parallel forum or movement, as gender advisors, and as members of technical committees or working groups).

[593] UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325 (n 512).

[594] The Security Council adopted 7 further Resolutions on women, peace, and security, see UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888; UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889; UNSC Res 1960 (16 December 2010) UN Doc S/RES/1960; UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106; UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122; UNSC Res 2242 (13 October 2015) UN Doc S/RES/2015.

[595] UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889 (n 594).

[596] UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122 (n 594).

[597] See, e.g., Bell and O'Rourke (n 81).

[598] Women's International League of Peace and Freedom United Nations Office (n 513).

[599] Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) 1249 UNTS 13, Art 7.

Discrimination against Women adopted a recommendation, whereby it elaborated on the means of applying Article 7 in conflict prevention and resolution.[600] The Committee recommends to state parties, both on whose territory the conflict has occurred and which participate in conflict-resolution processes as third-party peace facilitators, to include "a critical mass of women" in peace negotiations. The Committee specifically emphasises the participation of women in the negotiation and design of certain institutions and mechanisms that affect women significantly, such as disarmament, demobilisation and reintegration programmes, transitional justice mechanisms, constitution-drafting processes, and programmes on the return of refugees and the internally displaced persons. The Recommendation is important as it outlines specific obligations of state parties in conflict and post-conflict processes, and elaborates on the possible modalities of ensuring compliance with them. Yet, it must be noted these remain as recommendations of the Committee and are not legally binding on the state parties.

Notwithstanding the international and scholarly support, and the enthusiasm of the Member States of the UN to adopt National Action Plans to implement Resolution 1325, the calls for gender-balanced peace negotiations has not been transformed into a strong trend in practice yet.[601] A 2012 UN Women (the United Nations Entity for Gender Equality and the Empowerment of Women) report surveying 31 major peace processes that took place since 1992 found that only two per cent of chief mediators, four per cent of witnesses and signatories, and nine per cent of negotiators were women.[602] Although there is progress in the overall participation of women in peace processes, it remains incremental.[603]

A more important question about the impact of the normative developments is the correlation between the participation of women in peace negotiations and the adoption of a gender perspective in the resultant peace agreement. A simplistic yet important way of analysing this correlation is to look at the references to women in the text of the peace agreements, which were concluded in peace processes where women were included in. A

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[600] 'UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations (1 November 2013) UN Doc CEDAW/C/GC/30'.

[601] See Kastner (n 4) (Stating that the normative consensus on a women perspective in peace processes does not yet suggest "a particular modus operandi").

[602] United Nations Entity for Gender Equality and the Empowerment of Women, 'Women's Participation in Peace Negotiations: Connections between Presence and Influence' (2012) 3–5.

[603] *Preventing Conflict Transforming Justice Security the Peace: A Global Study on the Implementation of United Nations Security Resolution 1325* (UN Women 2015) 45.

2011 study that surveyed 112 peace negotiations between 2000 and 2008 shows that almost 60% of the agreements that were results of UN mediated peace processes made reference to women.[604] Where women were present in the negotiations, almost 80% of the peace agreements included references to women. More importantly, references to women, in these agreements, went beyond tokenism to address conflict-related sexual violence and increase women's presence in the post-conflict political space.[605] Overall, the 2015 Global Study on the Implementation of Resolution 1325 found that only 1 per cent of peace agreements made reference to women prior to 2000, whereas this number rose to 27% after the adoption of the Resolution.[606]

Two of the peace processes in Sudan provide striking examples to discuss the relationship between presence and influence. In the North/South peace process between the government and the SPLM/A, women had direct access to the formal peace process, as there were female members in the delegation of the SPLM/A.[607] However, there was no specific women's agenda as part of the broader negotiation agenda that could make the presence of women influential. In Darfur, on the other hand, women only had indirect access to the formal peace process, and there were no women negotiators, mediators, or signatories. Yet, women had an indirect and influential role through the involvement of the UNIFEM, UN and AU, and the resultant agreement dealt with women-related issues extensively.[608] As well as the difference in their gender-related contents, the implementation histories of the two agreements have also been strikingly different. The Comprehensive Peace Agreement between the government and the SPLM/A has been implemented, whereas the Darfur Peace Agreement failed to prevent the recurrence of violence. The failure of the latter is often attributed to the lack of ownership of the parties over the agreement, as the agreement was mostly drafted by the mediators and imposed upon the parties.[609] In the North/South peace process, on the other hand, the parties adopted a firm stance against proactive mediation and designed the agreement themselves. Therefore, the two peace processes in Sudan give

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[604] See McLeod (n 592) 27.

[605] *Preventing Conflict Transforming Justice Security the Peace: A Global Study on the Implementation of United Nations Security Resolution 1325* (n 603) 45.

[606] ibid.

[607] Kara Ellerby, 'The Tale of Two Sudans : Engendered Security and Peace Processes' [2012] USIP Case Studies in Conflict Management and Peacebuilding Series.

[608] ibid.

[609] ibid.

weight to the criticism that imposed normative agendas may alienate the parties, which may hold back the conclusion of an agreement or hinder its implementation.

4.3.2.4. Refugees and internally displaced persons

Displacement of persons in armed conflicts, especially during internal conflicts, occurs either as a consequence of security concerns or when forcible displacement through human rights violations is used as a warring tool by the parties to the conflict.[610] This makes the negotiation of issues relating to return of refugees and internally displaced persons (IDPs) to their original places of residency, resettlement, reparation, and necessary safeguards to ensure repatriation imperative in a peace process. This raises the question of whether these groups should be involved in the decision-making process.

Refugee populations in neighbouring and third parties emerge as a result of most internal armed conflicts. To ensure that the issues of return, resettlement, or reparation are addressed and in design of such provisions, as a matter of good practice, there may be a case for engagement with refugee populations and the states that host them in a peace process. The existing international refugee law, however, does not provide refugees with a right to participate or to be consulted in decisions that affect them. The normative basis of inclusion of refugees may be found in the parties' negotiation agreements. In the peace process in Sudan, for example, the Sudanese refugees in Uganda had been consulted.

Principle 28 of the UN Guiding Principles on Internal Displacement stipulates that "[s]pecial efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their resettlement and reintegration".[611] The Council of Europe has also emphasised the need to inform and also consult IDPs when a decision that may affect them is at issue.[612] It must be noted though that these principles and recommendations are not binding but are seen as 'soft law'.[613] According to these standards,

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[610] International Council on Human Rights Policy (n 93) 55.

[611] 'UN High Commissioner for Refugees, Guiding Principles on Internal Displacement (11 February 1998), UN Doc E/CN.4/1998/53/Add.2'.See also Walter Kälin, 'Hardening Soft Law: Implementation of the Guiding Principles on Internal Displacement' (2008) 102 Proceedings of the American Society of International Law 187; Walter Kälin, *Guiding Principles on Internal Displacement: Annotations (Studies in Transnational Legal Policy No 38)* (The American Society of International Law and The Brookings Institution 2008).

[612] Council of Europe, Council of Ministers, Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons.

[613] Kälin, *Guiding Principles on Internal Displacement: Annotations (Studies in Transnational Legal Policy No 38)* (n 611).

IDPs should at least be consulted when the negotiators decide on their future as part of a peace process. A consultative mechanism may be more appropriate also when their direct participation raises spoiling concerns.[614]

4.3.2.5. Minority groups and indigenous peoples

The domination of peace negotiations by armed groups has led to concerns that interests of non-violent minorities and indigenous peoples may be overridden by conflicting parties.[615] The World Bank Operation Manual and the UN Development Programme both emphasise the need to consult with or include affected indigenous groups in the development of projects, some of which are designed as part of peace-making and peacebuilding.[616] In relation to matters that affect them, these groups may be consulted, or their consent may be sought, not as a requirement of international law, but in line with soft law and good practice.[617]

4.3.2.6. Affected third states and external populations

Beyond the states in which they take place and its population, an intra-state armed conflict may also affect the neighbouring or third states and external populations. The Israeli-Jordanian peace treaty, for example, made a negative impact on the water rights of Palestinians and was concluded without consulting them.[618] As political participation rights are limited to citizens as beneficiaries, foreign persons would not be able to invoke human rights in order to participate in decision-making processes that concern them. Nonetheless, Saliternik seeks a remedy in international law and argues that "disregard of affected interests undermines the right of those affected to "external" self-determination", as a foreign decision

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[614] *Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building* (The Brookings Institution—University of Bern 2007).

[615] Ludsin (n 234).

[616] *The World Bank Operations Manual* (n 147).World Bank Operation Manual; UNDP Policy of Engagement.

[617] United Nations Declaration on the Rights of Indigenous Peoples (n 162), Arts 5, 8, 32. (Art 5 and 18 of the UN Declaration on the Rights of Indigenous Peoples provide that indigenous peoples have the right to participate in political life and decision-making when their interests are at stake. Moreover, Article 32 of the Declaration requires of States to obtain the free, prior and informed consent of indigenous peoples in relation to development projects that affect them.) As to minorities, UN Declaration on Minorities guarantees the right to participate in political decision-making. See also Benedict Kingsbury, 'Indigenous Peoples', *Max Planck Encyclopedia of Public International Law* (2011).

[618] Saliternik (n 82) 620.

affects their right to determine their own political status.[619] Relying partly also on the right to self-determination, Benvenisti claims that states have an emerging "obligation to take others' interests into account" when making domestic decisions.[620]

In and outside the context of decolonisation, the right to external self-determination has been associated with a change in the political status of a people. The question of whether the right can be exercised externally in other forms should be examined, in order to ascertain a legally protectable link between a foreign people's stakes in a matter that takes place entirely within another state's borders. Firstly, even outside the colonial context, all peoples have a right to self-determination against 'alien subjugation, domination and exploitation'.[621] A peace agreement arrangement may hypothetically undermine the right to external self-determination, if it affects a foreign people to this extent. However, even if it is assumed that the right to external self-determination of a people may be violated by a foreign state's acts as part of a peace agreement, a procedural norm of participation of external stakeholders in a peace process would not necessarily follow from the right. If the negotiating parties give due consideration to such interests, a violation can be avoided. Also, the right of self-determination of the external stakeholder and the right of self-determination of the internal stakeholders in a peace process would need to be balanced and the priority should be given to the internal stakeholders.[622]

Secondly, moving beyond the dichotomy between external and internal self-determination and the conceptualisation of self-determination as an individual right, McCorquodale suggests that the principle of self-determination can "operate across states" and refers to the involvement of the Irish government in the negotiation of peace agreements concerning Northern Ireland.[623] Thus, if consolidated in future, the practice of peace-making and the involvement of third states in peace processes as stakeholders could contribute to the development of the principle of self-determination in this regard under international law.

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[619] ibid.

[620] Eyal Benvenisti, 'Sovereign as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 The American Journal of International Law 314.

[621] Declaration on Principles of International Law concerning Friendly Relations (n 58).

[622] On the 'rights of others' as a limitation on the exercise of the right of self-determination, see Robert McCorquodale, 'Rights of Peoples and Minorities' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010). Benvenisti, for example, emphasises that the obligation to take others' interests into account is an obligation to give due respect but not a duty to submit to such interests. See Benvenisti (n 620).

[623] McCorquodale (n 622).

4.3.3. Summary

Inclusivity of the negotiation process of a peace agreement has become a central concern in the field of peace-making and a key element of the putative law of peace-making. However, as the analysis in this section demonstrates neither the general norm of inclusion nor specific norms stipulating the participation of certain actors in peace negotiations gained the status of international legal norms. International soft law guarantees the right of internally displaced persons, minorities and indigenous peoples to be consulted in the making of decisions that may affect them. Arguably, the strongest normative consensus is generated in relation to the participation of women in official peace negotiations. For state parties to the Convention on the Elimination of Discrimination against Women (CEDAW), this may be grounded in the right to political participation of women. Moreover, the case can be made for an emerging customary international legal norm in light of the unanimous support for WPS resolutions of the SC and the high number of National Action Plans to implement them. However, neither state practice nor the practice of international and regional organisations have so far lived up to their policy commitments. This in turn weakens the case for the crystallisation of a customary international legal norm of women's inclusion in peace negotiations.

In addition to the propositions regarding the legal status of the norm of inclusion, the effectiveness-related assumptions in favour of inclusivity in peace negotiations are also contested. It is generally assumed that an inclusive process may generate a greater sense of ownership over the settlement and contribute to its durability. [624] Regardless of the impact of the process on the outcome and its reception, an inclusive process is also advocated on the basis that it would have greater democratic legitimacy and would be an educative process in the promotion of a culture of democracy among citizens.[625] Even when a settlement is reached, empirical evidence is not consistent in affirming that inclusive processes lead to inclusive and/or durable settlements.[626] Public participation in post-conflict constitution-making has not always succeeded in preventing recurrence of violence in many cases.[627] It is even questionable whether a culture of democracy would emanate from participatory

[624] Ludsin (n 234); Barnes (n 523).

[625] Lanz (n 96) 283; Kastner (n 4) 145.

[626] Evans (n 521).

[627] Jennifer Widner, 'Constitution Writing and Conflict Resolution' UNU-WIDER Research Paper No 2005/51; Jennifer Widner, 'Constitution Writing in Post-Conflict Settings: An Overview' (2008) 49 William and Mary Law Review 1513.

processes in all contexts, as, for example, a study on Uganda found that citizens who participated in the constitution-making process felt further alienated from the political system as a result of witnessing its faults.[628]

There are also other effectiveness considerations at play. Many scholars have cautioned that having more stakeholders at the table may hinder the achievement of a settlement.[629] This may be so as there would be more issues to address and interests to accommodate, as well as inviting the problem of spoilers.[630] Moreover, negotiating parties may be disinclined to broaden participation in peace negotiations. Lastly, as a practical matter to be considered, security situation during an ongoing conflict or in the immediate aftermath of it often hinder the participation of certain groups in peace negotiations. In Iraq, for example, among other reasons, security concerns prevented the public participation in the constitution-making process, and some members of the constitution-drafting panel faced intimidation.[631] In summary, as persuasive as the theoretical case for inclusive peace negotiations may be and despite the existence of empirical evidence suggesting that a positive correlation between inclusivity and legitimate and durable peace-making, any attempt to design a normative framework should take into account these opposing views and evidence.

4.4. The norm of non-inclusion: Exclusion from peace negotiations

A counter-norm of non-negotiation with (alleged) perpetrators of international crimes and terrorist offences have also emerged in the policy and practice of peace negotiation and mediation, particularly due to the War on Terror that gave prominence to military means and the questioning of the suitability of negotiated solutions to the resolution of the so-called new wars.[632] Similar to the norm of negotiation, there are effectiveness and

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[628] Devra C Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (University of Michigan Press 2008).

[629] In the context of participation in constitution-making, see David Landau, 'Constitution-Making Gone Wrong' (2013) 64 Alabama Law Review 923.

[630] See Wanis-St. John (n 583) 3–4 (Mentioning the dilemma between "the exclusion needed to make peace and the inclusion needed to embed the peace in society" but also flags the possibility that exclusion may need to the emergence of spoilers). On the problem of spoilers in peace processes in general, see Stephen John Stedman, 'Spoiler Problems in Peace Processes' (1997) 22 International Security.

[631] Ludsin (n 234).

[632] Julia Palmiano Federer, 'We Do Negotiate with Terrorists: Navigating Liberal and Illiberal Norms in Peace Mediation' [2018] Critical Studies on Terrorism 1; Howard and Stark (n 12) (Identifying a norm of non-inclusion in negotiations with terrorist groups); Jean-Marie Guehenno, 'The United Nations & Civil Wars' (2018) 147 Daedalus 185; Hellmüller, Palmiano Federer and Zeller (n 58) 9 (Referring to an 'unsettled' norm of mediation that proscribes talks with indicted individuals).

normativity considerations are at play. As to the former, it is questioned whether negotiations with perpetrators of international crimes and terrorist offences can yield durable peace agreements.[633] Normatively, negotiations with groups designated as terrorist organisations by the Security Council, other international organisations, or states have been discouraged as a policy[634] or in domestic laws[635]. Moreover, contacts with individuals targeted by arrest warrants are discouraged by the ICC and the UN unless they are essential to the UN mandate.[636] The 2012 UN Guidance for Effective Mediation recognises that:

> "Arrest warrants issued by the International Criminal Court, sanctions regimes, and national and international counter-terrorism policies also affect the manner in which some conflict parties may be engaged in a mediation process. Mediators need to protect the space for mediation and their ability to engage with all actors while making sure that the process respects the relevant legal limitations."[637]

As the following sections demonstrate, there is no general prohibition in international law outlawing negotiations with perpetrators of international crimes or members of proscribed terrorist organisations. Moreover, from a policy perspective, the norm of non-negotiation may clash with the norm of inclusion if it results in the exclusion of the views of a segment of the society from the peace negotiations. It may further be incompatible with effectiveness considerations if the excluded conflict actors possess the power to affect the continuation or end of a conflict.

4.4.1. Perpetrators of international crimes and serious violations of human rights

Exclusion of the perpetrators of international crimes and serious violations of human rights from peace negotiations is often argued to be a necessity for the conclusion of a peace agreement compliant with the requirements of international law regarding transitional justice and for ensuring a post-agreement political order, in which perpetrators of international crimes are barred from public office.[638] Such exclusion may also arise as a consequence of

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[633] Chinkin and Kaldor (n 82) 439.

[634] See e.g. *Guidelines for UN Mediators - Terrorism (Undated)* (United Nations).

[635] See e.g. *Holder v Humanitarian Law Project, 561 US 1 (2010), 130 SCt 2705.*

[636] *Guidance on Contacts with Persons Who Are the Subject of Arrest Warrants or Summonses Issued by the International Criminal Court (8 April 2013) UN Doc A/67/828-S/2013/210*; ICC-OTP, 'Prosecutorial Strategy: 2009-2012' 1. But cf. *Report of the High-Level Independent Panel on Peace Operations* (n 479) para 44 (Emphasising the importance for the UN to be open to impartial dialogue with all states and non-state actors).

[637] *United Nations Guidance for Effective Mediation* (n 60) 11.

[638] Chinkin and Kaldor (n 82) 439.

investigations into war crimes and serious human rights violations by domestic or international criminal tribunals, particularly if government officials or members of AOGs are targeted by arrest warrants.[639] An ICC intervention may potentially affect the timing, location, participants and substantive agenda of peace negotiations.[640] As to participation, the dilemma of proceeding with peace negotiations at the expense of international criminal proceedings or *vice versa* had surfaced in the Bosnian peace process and led to the exclusion of the Bosnian Serb leader Karadžić and the military commander Mladić, who were indicted by the International Criminal Tribunal for the former Yugoslavia, from the official peace talks in Dayton.[641] The dilemma continues to be critical in other peace processes and gained notoriety specifically following the intervention of the ICC in Northern Uganda and Sudan during ongoing conflicts and fragile peace processes.[642]

From a legal perspective, when one or some of the representatives of a party to a conflict and the accompanying peace process is eventually subjected to an arrest warrant, this leads to concerns regarding how other negotiating parties and peace practitioners should respond to this situation in relation to the negotiations. The Office of the Prosecutor (OTP) of the ICC urged the States to "eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court" and if the contact is essential, "to interact with individuals not subject to an arrest warrant" in order to marginalise the suspects and achieve their arrest/surrender.[643] The OTP also declared its willingness to enter into dialogue with peace mediators in order to ensure that the Guidelines would be followed in their mediation efforts.[644] Parallel to the OTP's Guidelines, a 2013 UN Guidance on Contacts with Persons Subject of Arrest Warrants or Summonses Issued by the ICC states that United Nations officials, as a general rule, should not have meetings with persons who are the subject of arrest warrants, as this would undermine the authority of the Court.[645] However, if contact

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[639] Bell, 'What We Talk About When We Talk About International Constitutional Law' (n 567).

[640] See Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press 2016), Chapter 3.

[641] Anthony D'Amato, 'Peace vs. Accountability in Bosnia' (1994) 88 American Journal of International Law 500; Gaeta (n 90).

[642] See Snyder and Vinjamuri (n 56); Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) 31 Human Rights Quarterly 624; Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 22 European Journal of International Law 1161; Kersten (n 640).

[643] ICC-OTP, 'Prosecutorial Strategy: 2009-2012' (n 636) para 48.

[644] ibid 49.

[645] *Guidance on Contacts with Persons Who Are the Subject of Arrest Warrants* (n 626). However, the UN officials can engage with persons subject of summonses to appear insofar as they continue to cooperate with the Court.

is essential and the alternative of engaging with other individuals from the same group or party is not possible, officials may exceptionally interact with a subject of an arrest warrant "where this is an imperative for the performance of essential United Nations mandated activities".

For State parties to the Rome Statute, the obligation to cooperate with the Court would require handing in persons subject to arrest warrants and the Guidelines suggest avoiding non-essential contacts with them, whereas for non-state parties there are no such restraints on any kind of contact.[646] As to mediators and donors, except for the UN mediators who would need to comply with the 2013 Guidance Note, there is no duty to refrain from interaction with persons subject to arrest warrants deriving from a legal or organisational regulation. Even in the case of the state parties to the Rome Statute or UN mediators, interaction with persons subject to arrest warrants would be permissible as essential contacts when such persons are senior members of either governments or AOGs involved in peace negotiations.

In relation to the Darfur peace process in Sudan, the then prosecutor Moreno-Ocampo's made the following statement in an interview: "We need negotiations, but if Bashir is indicted, he is not the person to negotiate with. Mr. Bashir could not be an option for [negotiations on] Darfur, or, in fact, for the South. I believe negotiators have to learn how to adjust to the reality. The court is a reality."[647] After the issuance of an arrest warrant for President Bashir in 2009, Darfuri rebel groups had declared that they would not negotiate with the Sudanese government.[648] However, their strong stance against 'negotiating with war criminals' changed with the deterioration of their military and political position, and the Doha peace talks started in the second half of the 2009 leading to the conclusion of various peace process agreements and partial peace agreements between the Justice and Equality Movement, one of the major armed opposition groups in Darfur, and the Sudanese government in 2010.[649] Throughout the process, the UN and European officials met with other Sudanese government officials and, when considered essential, with President

[646] See Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, Arts 86, 89, 93. See also Kenneth A Rodman, 'Justice as a Dialogue between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding' (2014) 12 Journal of International Criminal Justice 437, 458.

[647] Elizabeth Allen, 'Seven Questions: Prosecuting Sudan' *Foreign Policy* (12 February 2009).

[648] Nouwen and Werner (n 642) 957.

[649] Rodman (n 646) 457.

Bashir.[650] In summary, there seems to be neither a strong normative case nor empirical support for a firm trend towards excluding those who have (allegedly) committed international crimes from peace talks.

From a policy perspective, the potential benefits of adopting an inclusive stance, rather than barring the perpetrators of international crimes from peace talks should be explored. The practice of peace-making includes examples of pragmatic inclusion. In Cambodia, "irrespective of [its] democratic or human rights credentials", Khmer Rouge became a party to the Paris Accords, which were signed by various third states and took the form of a binding international treaty, and was part of the transitional government.[651] In the Bosnian peace process, a midway path was taken; the indicted Serbian leader Karadžić was not allowed to join the official Dayton talks but the US mediation team had to interact with him before the talks.[652] Such pragmatic inclusion is crucial given that the implicated groups may have considerable military and political leverage and their exclusion may hinder the prospects for peace.[653]

4.4.2. Perpetrators of domestic or international terrorist offences

The pragmatic need to negotiate with members of AOGs proscribed as terrorist groups clashes with the domestic and international efforts to curb terrorism via counter-terrorism laws and terrorist listing.[654] At the international level, the EU and UN listing regimes do not entail an explicit no-contact policy and rather focus on, *inter alia*, travel bans and asset freezes.[655] However, there can be divergence in group-specific measures. In 2007, for example the Middle East Quartet (comprising the United Nations, the United States, the

[650] ibid 458.

[651] Bhuta (n 198).

[652] Cindy Daase, 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking' (2012) 1 Cambridge Journal of International and Comparative Law 107, 118.

[653] Clapham (n 590) 205; Menocal (n 579) 25.

[654] On the interaction between practical and normative concerns regarding negotiations with terrorists, see Lanz (n 96) 282. On the impact of counter-terrorism laws on the peacebuilding work of non-governmental organisations, see Sophie Haspeslagh and Teresa Dumasy, *Proscribing Peace: The Impact of Terrorist Listing on Peacebuilding Organisations* (Conciliation Resources 2016).

[655] The Council of the European Union Common Position of 27 December 2001 on the application of specific measures to combat terrorism 2001/931/CFSP; The Council of the European Union Framework Decision of 13 June 2002 on combating terrorism; The Council of the European Union Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.See also UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

European Union and Russia) adopted a policy of no-contact with Hamas.[656] Beyond such policy decisions, there is no prohibition in international law on contacts with members of terrorist groups. Moreover, negotiations with such actors remains a reality in practice.[657] However, sanctions regimes can "complicate negotiations by creating (or not removing) obstacles to participation in negotiations".[658]

The recent international focus on countering violent extremism has further complicated the issue. The 2015 UN Plan of Action on Preventing Violent Extremism lists prolonged and unresolved conflicts among the factors that contribute to the surge of violent extremism and highlight the importance of early dialogue and engagement initiatives with and between the opposing parties in order to bring the conflicts to an end.[659] The Plan is silent as to negotiations or contact with violent extremists. The silence may signify a categorical rejection of the UN to engage with violent extremists or be simply due to the presumed redundancy of attempting to negotiate with such actors. The main concern relates to the lack of a definition of violent extremism in the Plan of Action and its relation to the concept of terrorism. Various warring parties who fight against their governments without engaging in unlawful acts under international humanitarian law or international laws on terrorism may fall within the scope of this concept depending on how it is perceived.[660] Such distinctions are important in order to understand the normative framework that governs the activities of peace practitioners who engage with members of various AOGs and to preserve the 'peace-making space'.[661]

Legal obstacles to negotiating with members of proscribed terrorist groups rather emanate from domestic laws. Several domestic legal systems criminalise certain forms of engagement with members or leaders of armed groups that are listed as terrorist organisations. The extent of criminalisation varies. In the US, any material support to a listed foreign terrorist organisation, even without the intention to support terrorist activities, is

[656] Haspeslagh and Dumasy (n 654).

[657] Palmiano Federer (n 632) 2.

[658] Biersteker and Hudáková (n 96) 3.

[659] 'Report of the UN Secretary-General on the Plan of Action to Prevent Violent Extremism (n 36).

[660] Naz Modirzadeh, 'If It's Broke, Don't Make It Worse: A Critique of the U.N. Secretary-General's Plan of Action to Prevent Violent Extremism' *Lawfare Blog* (23 January 2016).

[661] Lanz (n 96); Mirko Sossai, 'The Internal Conflict in Colombia and the Fight against Terrorism' (2005) 3 Journal of International CriminalJustic 253.

outlawed.[662] In *Holder v Humanitarian Law Project*, the US Supreme Court upheld the so-called federal material support statute, which establishes the provision of "any … service, … training, [or] other specialized knowledge" to designated Foreign Terrorist Organisations as a federal crime.[663] The plaintiff in this case was the Humanitarian Law Project, an NGO that provides expert assistance regarding conflict resolution to the Kurdistan Workers' Party (an AOG fighting against the Turkish government) and the Liberation Tigers of Tamil Eelam (an AOG fighting against the Sri Lankan government), both of which are designated as terrorist organisations by the State Department.[664] According to the Chief Justice Roberts, writing for the majority, the law was not "unconstitutionally vague" and applied to "coordinated advocacy on behalf of a terrorist organization and training such organization's members *to use international law to resolve disputes* and to petition the United Nations and other similar entities for relief".[665]

In the UK, the Government provided guidance as to the scope of the counter-terrorism legislation and made clear that, as per its interpretation, the 2000 Terrorism Act did not criminalise "genuinely benign meetings … at which the terrorist activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in a peace process".[666] Such legal clarification in domestic laws as to the permissibility of negotiations and contact with listed terrorist groups is needed, as rules of exclusion have significant implications for peace-making and peacebuilding efforts, as well as humanitarian activities.

To conclude, international law does not prohibit negotiations with perpetrators of international crimes and serious human rights violations or with members of proscribed terrorist groups. The decisions (not) to negotiate with such actors need to be, and often is in practice, taken through a case-by-case assessment of the prospects for success of such negotiations in reaching an agreement and, thus, negative peace.

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[662] U.S. Code § 2339B - Providing material support or resources to designated foreign terrorist organizations (Notably the law provides for extraterritorial jurisdiction on the basis of, inter alia, active personality principle and, hence, extends its reach to any training offered to such groups outside the US by US nationals).

[663] *Holder v. Humanitarian Law Project* (n 625). See also Nigel Quinney and A Heather Coyne (eds), *Talking to Groups That Use Terror* (United States Institute of Peace 2011) (Noting that the Holder v Humanitarian Law Project decision raises legal complexities for mediators based in the US).

[664] See US Department of State, 'Foreign Terrorist Organizations' <https://www.state.gov/j/ct/rls/other/des/123085.htm> accessed 23 August 2018.

[665] *Holder v. Humanitarian Law Project* (n 625) [Emphasis added].

[666] Operating within counter-terrorism legislation (Guidance Note) 2016.

4.5. Conclusion

To recapitulate, the norms of negotiation, inclusion and non-inclusion have to date not found support in positive international law. To refer back to the three objections to the assumptions about a new 'law' of peace-making presented in Chapter 2, arguments that fashion process-related norms in peace-making as international legal norms seem to (i) be based on far-reaching interpretations of existing international law, (ii) treat the norms articulated in peace-making policy as *lex feranda* or even *lex lata*, and (iii) consider the collective practice of peace agreements as a source of new norms of peace-making without an examination of the consistency of state practice and the accompanying *opinio juris*.

However, firstly, the relevant rules and principles of international law do not provide precise guidance in the context of peace negotiations. Secondly, norms formulated in non-binding international instruments, peace-making guidelines or SC resolutions have not generated consistent state practice for their transformation into customary law and are not necessarily formulated as potential legal norms. Lastly, the practice of the negotiation of peace agreements does not fully support the normative claims that it manifests an internalisation of process-related norms, although this argument needs to be cautiously taken due to the limitedness of existing empirical studies on peace negotiations. Despite the significant increase in the numbers of peace agreements, states continue to pursue military means against AOGs. Where peace negotiations take place, it remains difficult to state that the majority of them are inclusive of civil society, women or other groups that may be affected by the negotiations in any meaningful way. Lastly, although there are political, practical and domestic legal challenges to negotiating with perpetrators of international crimes or members of proscribed terrorist groups, states, international organisations, non-governmental organisations or other independent organisations continue to negotiate with such actors where necessary for humanitarian or peace-making purposes.

Nonetheless, particularly the norm of inclusion remains at the centre of attention in international peace-making policy and there seems to be a limited yet visible commitment to inclusivity in practice. If the norm of inclusion becomes part of international law, this would create a political space for actors beyond the negotiating parties to exert influence on negotiations and resultant peace agreements. Moreover, as a norm that does not stipulate substantive outcomes to be adopted in an agreement, it may prove less challenging to be accommodated in international law.

Any attempt to legalise the norm of inclusion would need to be supported by more rigorous empirical evidence regarding its impact on the achievement of an agreement and its contribution to the desired substantive outcomes, in light of the mixed empirical results obtained by scholars so far, and take into consideration pragmatic and realist concerns. Broadening participation in negotiations may negatively affect the prospects for the achievement of a settlement. Moreover, ensuring inclusivity in fragile conflict or post-conflict conditions may prove challenging. Instead of imposing a procedural normative framework on peace negotiations, a better policy may be to invest in a contextualised long-term process of inclusion, consultation and self-determination in the broader peacebuilding process.[667]

[667] de Waal (n 466) 20.

Chapter 5: Content of Peace Agreements and International Law - Transitional Justice and Human Rights

5.1. Introduction

The analyses of the role of international law in the determination of the content of peace agreements predominantly concern what legal constraints it sets on negotiations.[668] The legality of certain peace-making practices, for example the grant of general amnesties and powersharing arrangements that restrict individual human rights or assign public office to alleged perpetrators of international crimes, have been questioned by courts, policy- and law-makers, and scholars. In addition to what peace agreements must not include, a more constitutive role is often also attributed to international law in determining what must be included in peace agreements. It is argued, for example, that peace agreements should include guarantees of criminal accountability for international crimes and for the protection of human rights post-conflict. Many peace-making guidelines, codes of conduct and policy documents further stress that peace agreements should address a range issues, which include "human rights, gender, child protection, refugees and internally displaced persons, security arrangements, constitution-making, elections, power-sharing, rule of law, transitional justice, and wealth-sharing",[669] and that they should be inclusive of "the views, needs and interests of all conflict stakeholders and sectors of society" [670].

Among the substantive issues, whose inclusion is encouraged, transitional justice and human rights seem to be the most normativised issue-areas in the peace-making policy, often by reference to international law.[671] As to transitional justice, the 2010 Guidance Note of the UN Secretary-General on the UN Approach to Transitional Justice, for example, urges the UN officials involved in peace processes to encourage negotiating parties to include transitional justice commitments in peace agreements.[672] Pillay, the then UN High Commissioner for Human Rights, stated in 2009 that her office also advocates for the

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[668] See *African Union Mediation Support Handbook* (n 77) 155 (Stating that international law determines the 'outer limits' of peace negotiations).

[669] *Report of the UN Secretary-General on Enhancing Mediation* (n 31).

[670] *Mediation and Dialogue Facilitation in the OSCE: Reference Guide* (n 30) 74. See also *United Nations Guidance for Effective Mediation* (n 60) 11.

[671] Chandra Lekha Sriram, 'Beyond Transitional Justice: Peace, Governance, and Rule of Law' (2017) 19 International Studies Review 53.

[672] *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (United Nations 2010) 10.

inclusion of the issue of transitional justice in peace negotiations.[673] In addition to the provision of criminal accountability mechanisms, acknowledgement of gender-based violence,[674] violence against children,[675] and violations of economic, social and cultural rights[676] in peace agreements is urged. Not only in policy, but also in the scholarly accounts of a new 'law' or legal norms of peace-making, inclusion of transitional justice guarantees, particularly provision for criminal prosecutions, in peace agreements is a key element.[677]

Inclusion of human rights guarantees in peace agreements too appear as an area of consensus in international peace-making policy. The inclusion of mechanisms to ensure respect for human rights, women's rights, minority and indigenous rights, and the principle of non-discrimination in peace agreements are encouraged.[678] In addition to the peace-making policy documents, the 2015 Kyiv Declaration adopted by the representatives of national human rights institutions also provides that the institutions are required to "[t]ake steps to ensure human rights are placed at the center of negotiations between the conflicting parties, including in peace agreements, and monitor their implementation".[679] The PILPG, for example, in its Peace Agreement Drafter's Handbook, emphasises that "[p]eace agreements *must* also call for the incorporation of human rights provisions into domestic law. The peace agreement *must* establish one or more monitoring bodies to ensure that human rights violations do not reoccur and to deal with past abuses."[680] Addressing the return of refugees and IDPs,[681] rule of law reform, constitutional or legal reform, and judicial reform are also encouraged in some of the documents.[682] The 2014 OSCE Mediation

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[673] 'Address by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights at the UN Approach to Transitional Justice' (2 December 2009).

[674] *Guidance for Mediators Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements* (United Nations 2012); *The EU Policy Framework on Support to Transitional Justice* (n 76).

[675] *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672) 10.

[676] *Transitional Justice and Economic, Social and Cultural Rights* (United Nations Human Rights Office of the High Commissioner 2014) 53; *The EU Policy Framework on Support to Transitional Justice* (n 76).

[677] Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4); Kastner (n 4); Chinkin and Kaldor (n 82).

[678] *African Union Mediation Support Handbook* (n 77); 'Address by Ms. Navanethem Pillay United Nations High Commissioner for Human Rights at the UN Approach to Transitional Justice' (n 673); *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672); Report of the Secretary-General, 'Report of the UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All (26 May 2005) UN Doc A/59/2005/Add.3'.

[679] 'The Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations' (n 130).

[680] *Peace Agreement Drafter's Handbook* (n 153) [Emphasis added].

[681] *Concept on Strengthening EU Mediation and Dialogue Capacities* (n 142).

[682] 'Report of the UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (23 August 2004) UN DOC S/2004/616' (n 160) para 64.

Reference Guide, for example, provides that a peace agreement "should recognize and express respect to all relevant international humanitarian, human rights and refugee laws, as well as recognized democratic standards and the rule of law" in addition to addressing the key issues particular to a conflict.[683]

Arguments as to what the substance of peace agreements should, or should not, comprise are supported, not only by normative, but also by effectiveness considerations. It is argued that comprehensive peace agreements that address the root causes of a conflict, all aspects of the relationship between the parties, and the views and needs of other affected actors in a society bring about more sustainable conditions of peace.[684] Another example for the blending of the two sets of arguments is the statement in the 2012 UN Guidance for Effective Mediation that "[c]onsistency with international law and norms contributes to reinforcing … the *durability* of a peace agreement".[685]

Against this backdrop, this chapter explores whether international law stipulates any positive obligations as to the inclusion of transitional justice, or human rights guarantees, in peace agreements and any constraints as to how they are regulated. The four main sections of the chapter focus respectively on the following four sets of questions identified on the basis of commonly made arguments in policy and scholarship as to what must (not) be included in peace agreements:

I. Is there a duty to guarantee criminal accountability for international crimes and serious violations of human rights in peace agreements? Are certain types of amnesties prohibited in international law?
II. Can non-criminal justice mechanisms be adopted in lieu of criminal accountability in peace agreements? Does international law provide for any guarantees that such mechanisms should respect?
III. Is there a duty to include human rights guarantees in peace agreements?
IV. Does international law rule out certain types of powersharing arrangements that may be in tension with the legal requirements of transitional justice and human rights?

Before moving on, a short note on why transitional justice and human rights in peace agreements are examined together in this chapter is in order. The two issue-areas are considered as complementary policies: Commitments to respect human rights and dealing

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[683] *Mediation and Dialogue Facilitation in the OSCE: Reference Guide* (n 30) 74.

[684] ibid; *United Nations Guidance for Effective Mediation* (n 60) 11; Ramzi Badran, 'Intrastate Peace Agreements and the Durability of Peace' (2014) 31 Conflict Management and Peace Science 193.

[685] *United Nations Guidance for Effective Mediation* (n 60) 16.

with past human rights violations in peace agreements are often promoted as part of transitional justice policies.[686] Providing for transitional justice in turn is regarded as a step towards a post-conflict legal and political order, in which respect for human rights in engrained.[687] From a legal perspective, this structural choice is also justified due to the cross-cutting legal considerations at play. For example, the putative general prohibition of amnesties for international crimes does not only implicate the negotiation of the issue of transitional justice, but also indirectly affects the powersharing arrangements in an agreement, as assigning public office to alleged perpetrators of international crimes may constitute an impediment to subjecting them to criminal prosecutions. Another example is that the inclusion of human rights guarantees in a peace agreement may be considered a guarantee of non-repetition as a consequence of state responsibility for acts that also constitute international crimes and serious violations of human rights and, thus, becomes part of the transitional justice component of a peace agreement.

5.2. Is there a duty to provide for criminal accountability in peace agreements?

According to the 2004 Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, transitional justice "comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[688] The definition encapsulates a broad range of responses in dealing with the past including "judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof"[689] without suggesting in and of itself a hierarchy between the different responses.[690] However, a blueprint for transitional justice that prioritises criminal accountability has emerged in the

[686] See e.g. *Guidance Note of the Secretary-General on United Nations Approach to Rule of Law Assistance* (United Nations 2010) 10.

[687] Sriram (n 671).

[688] ' The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 160) para 8.

[689] ibid. See also Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1; *The EU Policy Framework on Support to Transitional Justice* (n 76) (Both documents identify the four essential elements of transitional justice as criminal justice, truth, reparations and guarantees of non-recurrence).

[690] See also 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 160) paras 25–26 (Commenting that 'the international community has rushed to prescribe a particular formula for transitional justice, emphasizing either criminal prosecutions or truth- telling, without first affording victims and national constituencies the opportunity to consider and decide on the proper balance' but adding in the next paragraph that truth commissions can positively complement criminal tribunals).

UN practice and more broadly in international peace-making policy, supported by scholarly interpretations of the relevant international law.

The key elements of the transitional justice blueprint for peace agreements can be identified as a putative duty to provide for guarantees of criminal accountability in peace agreements and a prohibition of amnesties for international crimes and serious violations of human rights.[691] Consequently, the blueprint relegates non-criminal measures of transitional justice to complementary status and stipulates that where adopted, such measures must conform to international law.[692] Bell's articulation of the "new law of transitional justice", which forms a pillar of *lex pacificatoria*, exemplifies this blueprint. According to Bell, under the 'new law':

> "1. Blanket amnesties that cover serious international crimes are not permitted.
> 2. Some amnesty, however, is required as conflict-related prisoners and detainees must be released, demilitarised, demobilised, and enabled to reintegrate.
> 3. Mechanisms should be creatively designed aimed at marrying the normative commitment to accountability, to the goal of sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreement. The following approaches may be used:
> (a) Quasi-legal mechanisms which deliver forms of accountability other than criminal law processes with prosecution, such as truth commissions.
> (b) A bifurcated approach whereby international criminal processes for the most serious offenders, coupled with creatively designed local mechanisms aimed at a range of goals such as accountability and reconciliation, for those further down the chain of responsibility, and general amnesty at the lowest level.
> 4. Where new mechanisms are innovated, they should be designed with as much consultation with affected communities as is possible.
> 5. Should any party evidence lack of commitment to the peace agreement, and in particular return to violence, any compromise on criminal justice is void and reversible through the use of international criminal justice."[693]

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[691] *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 673) 10; 'Address by Ms. Navanethem Pillay' (n 674). See also Roht-Arriaza (n 92) paras 62–64 (Mentioning an 'obligation to deal with the past after conflict'); Kastner (n 4) para 163 (Claiming that a duty to set up transitional justice mechanisms in peace agreements is implicit in the prohibition of amnesties for and duty to prosecute international crimes).

[692] See e.g. *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 673) 2; 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 160) 12; *The EU Policy Framework on Support to Transitional Justice* (n 76).

[693] For an oppposite understanding of lex pacificatoria in relation to transitional justice, see Claus Kress and Leena Grover, 'International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character' in Morten Bergsmo and Pablo Kalmanovitz (eds), *Law in Peace Negotiations* (Torkel Opsahl Academic EPublisher 2010) 83: [T]he categorical preference for amnesty for war crimes in the lex pacificatoria of classical international law has not been replaced by the opposite solution of a comprehensive duty to prosecute crimes under international law.

The blueprint for transitional justice that priorities criminal accountability in all circumstances, even in the context of a negotiated settlement to an intra-state armed conflict, stands in contrast to the origins of transitional justice, which were essentially developed against the regime changes in Latin America, Eastern Europe and Africa from the 1980s to early 1990s.[694] The exceptionality of transitional justice and the justice mechanisms devised in these transitions was born out of the clash between the legal norms of accountability for the large-scale abuses committed during the old regimes and the goal of a stable transition to liberal democracy.[695] In Latin America, amnesties and alternative accountability mechanisms, such as truth commissions, were deemed suitable to address human rights violations while preserving post-transition stability, while in Eastern Europe a mixture of lustration, high-level trials and opening of secret police files were put in place.[696] In some of the early African transitions, such as in South Africa and Mozambique, truth and/or reconciliation were pursued instead of criminal accountability for crimes committed during the decades-long civil wars.[697] This early practice demonstrated an exceptional notion of justice that aimed to accommodate the goals of accountability, transition to liberal democracy, reconciliation, and legal and institutional reform.

The understanding of transitional justice as a particular and exceptional conception of justice has gradually faded away with the turn to criminal justice in the anti-impunity agenda.[698] Speaking on the UN approach to transitional justice, then High Commissioner for

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[694] Not only has the definition of transitional justice but also the historical accounts of its emergence been controversial. The two most influential historical accounts of transitional justice have been developed by Jon Elster and Ruti Teitel. A broader definition of political transition, which for example sees the ancient Athenian restoration of democracy similar to the Latin American transitions in the 1980s, underlies Elster's account, see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspetive* (Cambridge University Press 2004).. Teitel, on the other hand, argues that transitional justice originates from the post-WWII trials. According to Teitel, this first phase was characterised by international, yet exceptional, criminal justice, whereas the second phase transitions in the post-Cold War era have embraced a local and restorative turn and the final and current phase, which has started with the 21st century, has seen the 'normalisation' of transitional justice. See Ruti G Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69. Cf. Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321 (Criticising the former as anachronistic and the latter as masking the normativity in the categorisation of different transitional justice phases. Arthur, then, pins the 1980s and early 1990s as the period when transitional justice has essentially developed as a concept and field.).

[695] Arthur (n 694) 355.

[696] Bronwyn Anne Leebaw and others, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 Human Rights Quarterly 95, 99.

[697] Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurena (eds), *Transitional Justice in the Twenty-First Century Beyond Truth versus Justice* (Cambridge University Press 2006).

[698] See Engle (n 497); Line Engbo Gissel, 'Contemporary Transitional Justice: Normalising a Politics of Exception' (2017) 31 Global Society 353, 359 (Arguing that the peace versus justice debate ended with the acceptance that peace was conditioned upon justice).

Human Rights Navanethem Pillay stated that "transitional justice is not a particular conception of justice" and "is rather a technical approach to exceptional challenges".[699] The identified blueprint for transitional justice emerges as a result of such normalisation of transitional justice and may diminish the peace-making space necessary to settle intra-state armed conflicts through negotiated means. Firstly, negotiating parties in intra-state peace negotiations are themselves often implicated in the commission of crimes during conflict and, thus, disinclined to commit to criminal accountability guarantees in peace agreements. Encouraging such parties to commit to an agreement may require compromise justice promises. Secondly, the insistence on criminal justice may be at odds with local, non-criminal approaches to dealing with the past and, therefore, a peace agreement that prioritises criminal accountability may lack local support and "empirical legitimacy".[700]

The following sections aim to demonstrate that this blueprint does not find full support in international law. To do so, it examines the permissibility of amnesties in international law, whether the potential involvement of the International Criminal Court (ICC) renders the inclusion of criminal accountability guarantees in peace agreements necesssary, and what room is left in international law for accommodating compromise justice modalities and for sequencing peace and justice.

5.2.1. Permissibility of amnesties in international law

Freeman defines amnesty as "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law".[701] Amnesties can be general, i.e. blanket, or limited in their scopes. The former may cover any crime, whereas the latter excludes international crimes or gross violations of human rights from its scope. A distinction can also be made between unconditional and conditional amnesties, the latter

[699] 'Address by Ms. Navanethem Pillay' (n 674). See also Juan E Mendez, 'Editorial Note' (2009) 3 International Journal of Transitional Justice 157"[T]he quality of justice we strive to achieve through TJ is no different from the ideal of justice to be pursued in 'normal' times".

[700] See Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice : A Pluralist Process Approach' (2010) 32 Michigan Journal of International Law 1.

[701] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press 2009) 13.

referring to amnesties granted in exchange for truth, cooperation with local justice mechanisms, reparations, or disarmament.

There is no express prohibition of any type of amnesty in international treaty law. Inclusion of a provision on amnesties was discussed in the context of the drafting of the Rome Statute and the Convention on Enforced Disappearances but did not eventually find support.[702] On the other hand, the instrument establishing the Special Court for Sierra Leone (SCSL) included a provision stipulating that an amnesty adopted in domestic law could not be a bar to the jurisdiction of the court.[703] However, this is merely a restatement of the fact that international courts or the courts of a third state are not bound by an amnesty granted by a state. Therefore, the provision in the Statute does not necessarily reflect the position that amnesties are prohibited in international law. The same argument applies to the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) that an amnesty adopted in domestic law in relation to the crime of torture "would not be accorded international legal recognition".[704]

In addition to the absence of an express conventional prohibition of amnesties, it must be noted that Article 6(5) of Additional Protocol II to the 1949 Geneva Conventions encourages the grant of "the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" at the end of hostilities.[705] The Commentary of 1987 provides that "[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided" and does not exclude any crime from the scope of the provision.[706] However, Rule 159 of the ICRC Customary IHL Study asserts that it does not allow the grant of amnesties to "persons suspected of, accused of or sentenced for war crimes" and that the treaty norm has become a norm of customary international law applicable in non-international armed conflicts.[707] It is commonly accepted today that the provision encourages the grant of

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[702] 'Report of the International Law Commission, Sixty-Ninth Session (1 May-2 June and 3 July-4 August 2017), UN Doc. A/72/10' 87, para 10.

[703] Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 145, Art 10.

[704] *Prosecutor v Furundzija, ICTY judgement of Dec 10, 1998* [155].

[705] Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II) (n 120).

[706] 'Commentary of 1987 to the Additional Protocol II to the Geneva Conventions' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

[707] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press 2009) 611–614.

amnesties for permissible acts of war and political offences, such as treason or rebellion, but not international crimes.[708]

The absence of an exhortation to grant amnesties for international crimes does not, however, equate to a prohibition of amnesties. Determining the permissibility of amnesties in international law requires an inquiry of whether a prohibition of amnesties can be derived from conventional or customary duty to prosecute in respect of certain crimes in international criminal law, from international human rights law, or from other rules of international law.

5.2.1.1. Treaty crimes

In international criminal law, certain crimes are subject to an obligation to punish or an obligation to prosecute or extradite (*aut dedere aut judicare*) under treaties. Only in respect of the crime of genocide and the 'grave breaches' regime of the 1949 Geneva Conventions applicable in international armed conflicts[709] does treaty law provide for a duty to punish perpetrators. Therefore, amnesties for these crimes are inconsistent with the signatory states' conventional obligations.

It has been argued that a duty to prosecute genocide, war crimes and crimes against humanity flows from the Rome Statute.[710] Much weight has been attached in this regard to the preambular statement of the Statute that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[711] However, in addition to the fact that the majority of the provisions of the Rome Statute addresses the Court rather than the states parties, a mere recital in the preamble of a treaty cannot impose obligations on states parties in the absence of express consent.[712] Nor does it provide sufficient evidence for treating it as a recognition of a customary duty to prosecute the said crimes.[713] Secondly, the principle of complementarity has been interpreted in a way that it imposes on states parties a duty to prosecute the international crimes listed in the Statute,

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[708] ibid 612–3.

[709] Despite the ICRC view that the duty to prosecute war crimes has gained customary status and is applicable also to crimes committed during non-international armed conflicts, scholars contest this view on the basis of inconclusive state practice, see ibid 607; Cf. Roht-Arriaza (n 92) para 41.

[710] See e.g. Priscilla Hayner, *Negotiating Justice: Guidance for Mediators* (Centre for Humanitarian Dialogue 2009) 14.

[711] Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90 (n 646).

[712] Jan Wouters, 'The Obligation to Prosecute International Law Crimes' 9, 4.

[713] O'Keefe (n 454) 474. Cf. Henckaerts and Doswald-Beck (n 707) 608.

even though it is in fact only relevant to purposes of admissibility.[714] However, as Nouwen notes, Article 17 of the Statute on the issues of admissibility guides the Court's complementarity assessment and does not create an obligation for the states parties to prosecute the crimes within the Court's jurisdiction.[715]

For treaty crimes subject to the obligation *aut dedere aut judicare*, in the usual formulation of the *judicare* element of the obligation, states parties are not under an obligation to prosecute as such, but instead to "submit the case to its competent authorities for the purpose of prosecution" and to ensure that the decision whether or not to prosecute is taken "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State".[716] Thus, states parties undertake a duty to submit a case to the relevant authorities for the purpose of prosecution, but not a duty to initiate proceedings or punish treaty crimes.[717] As O'Keefe points out, amnesties that cover such treaty crimes are likely to be in violation of the obligation *aut dedere aut judicare* either because the state would not submit the relevant cases to its competent authorities for the purpose of prosecution or, if it does so, because the decision to prosecute or not to prosecute would often not be taken "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State".[718] However, if a state enacts a general amnesty covering all crimes of equal gravity instead of only for conflict-related crimes or if the competent authorities decide not to prosecute the amnestied crimes "in the same manner as in the case of any ordinary offence of a serious nature", for example, by reference to the rules governing prosecutorial discretion in domestic law, the decision not to prosecute would not amount to a violation of the treaty obligation.[719] Nor does the suspension of sentences or application of reduced or alternative criminal sanctions, given that prosecution will have taken place. On the other hand, selective

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[714] Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 36–40.

[715] ibid.

[716] See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, Art 7; International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006) UNGA Res A/61/177 (2006), Art 11. See also O'Keefe (n 454) 474.

[717] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment) ICJ Rep 2012, 422* [90].

[718] O'Keefe (n 46) 475 (Emphasising that the impermissibility of certain amnesties does not flow from the duty to prosecute but rather from its specific formulation in such treaties that require the equal treatment of treaty crimes and domestic crimes of same seriousness for the purposes of the decision to prosecute) .

[719] *The Belfast Guidelines on Amnesty and Accountability* (University of Ulster, Transitional Justice Institute 2013) 11; O'Keefe (n 454) 475; Watson (n 400) 88 (In relation to the duty to prosecute terrorist offences prohibited in international treaties).

prosecution of the perpetrators of treaty crimes, which seems to be permissible for serious violations of human rights due to the challenges of prosecuting all perpetrators in transitional contexts as will be explained below, do not find support in the wording of the relevant treaty provisions.

Overall, depending on the design of amnesties and availability of domestic legal grounds for the exercise of prosecutorial discretion to stay the prosecution, amnesties for treaty crimes subject to the obligation *aut dedere aut judicare* may be amnestied. Blanket amnesties covering only the treaty crimes committed during the conflict and precluding the submission of cases to competent authorities for the purpose of prosecution, however, amount to a violation of the treaty obligations.

A recent amnesty provision that can be assessed in this context is that of the 2015 Minsk II Agreement concluded to end the conflict in eastern Ukraine, whereby Ukraine undertook to "[e]nsure pardon and amnesty by enacting the law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and Lugansk regions of Ukraine".[720] The general amnesty envisaged in this provision does not provide for any exceptions, including the shooting down of a commercial aircraft, Malaysia Airlines Flight MH17, over eastern Ukraine in July 2014 allegedly in connection with the ongoing armed conflict in the region.[721] The 1971 Montreal Convention establishes it as a treaty crime if a person "destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight"[722] Ukraine has ratified the Convention and is under an obligation to prosecute or extradite any alleged offender of the crime found in its territory.[723] Therefore, as the amnesty provision in the Agreement prohibits the prosecution of persons in connection with the events in the conflict regions, non-prosecution of the alleged offenders of the MH17 incident would constitute a violation of the treaty obligation. However, in a hypothetical conditional

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[720] Package of Measures for the Implementation of the Minsk Agreements (Ukraine), 12 February 2015 (n 288). See also 'On Peaceful Settlement of Situation in the Eastern Regions of Ukraine (Unilateral) (20 June 2014)' (President Poroshenko's unilateral peace proposal circulated to the UN Secretary-General only allowed a limited amnesty that excludes grave crimes. The omission of this limitation in the Minsk II Agreement indicates that the general amnesty provision was deliberately adopted so.).

[721] For an overview of the MH17 incident and its legal implications, see Marieke de Hoon, 'Navigating the Legal Horizon – Lawyering the MH17 Disaster' (2017) 33 Utrecht Journal of International and European Law 90.

[722] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (26 January 1971) 974 UNTS 178 (Montreal Convention), Art 1(b).

[723] ibid, Art 7.

amnesty scenario, where the Ukrainian authorities prosecute the offenders and decide to stay the prosecution "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State"[724], Ukraine would not be in violation of its obligations under the 1971 Montreal Convention. As Ukraine is a party to the European Convention on Human Rights, such a conditional amnesty may nonetheless be found in violation of the Convention, unless its conditionality on the disclosure of truth or reparations to victims is guaranteed. This aspect of the permissibility of amnesties will be further explored below.

5.2.1.2. Crimes under customary international law

Can a duty to prosecute crimes under customary international law and a corollary duty not to amnesty be nevertheless identified in customary international law? The existence of a customary duty to prosecute genocide is established.[725] Despite some pronouncements that a duty to prosecute has also crystallised in customary international law in relation to war crimes committed in non-international armed conflicts,[726] torture, or crimes against humanity,[727] these remain insufficiently supported in state practice.[728] Therefore, the prosecution of crimes under customary international law, except for genocide, remains non-mandatory. The above-cited Resolution 3074 of the General Assembly, stating that "war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and … [perpetrators] shall be subject to tracing, arrest, trial and, if they are found guilty, to punishment", or the 2006 Pact on Security, Stability and Development in

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[724] ibid, Art 7.

[725] Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, Art 31; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) ICJ Reports 1951, 15* [23].

[726] Henckaerts and Doswald-Beck (n 707) 607. See also Amichai Cohen and Yuval Shany, 'Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflict' (2011) 14 Yearbook of International Humanitarian Law 37, 42; Michael N Schmitt, 'Investigating Violations of International Law in Armed Conflict' (2011) 2 Harvard National Security Journal 31, 47.

[727] UNGA Res 2840 (XXVI) Question of the punishment of war criminals and of persons who have committed crimes against humanity (18 December 1971); UNGA Res 3074 (XXVIII) Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (3 December 1973). Note, however, the ILC work on crimes against humanity, which appears to extend beyond codifying customary international law in this regard, see 'Report of the International Law Commission, Sixty-Ninth Session (1 May-2 June and 3 July-4 August 2017), UN Doc. A/72/10' (n 702), Arts 2, 8, 9 (Providing that "[c]rimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish", in addition to the duty of a state to investigate and to 'submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal').

[728] Louise Mallinder, 'Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?' in Faria Medjouba (ed), *Building Peace in Post-Conflict Situations* (British Institute of International and Comparative Law 2012) 12.

the Great Lakes Region between the states in the region, whereby they undertake to "recognise that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and are crimes against people's rights which they undertake to prevent and punish" provide evidence for *opinio juris* of states.[729] However, state practice remains inconsistent to infer a customary duty to prosecute or a prohibition of amnesties for crimes under customary international law.

The state practice relevant to the identification of a customary duty to prosecute or a prohibition of amnesties for crimes under customary international law may include judicial proceedings for such crimes in the territorial or other states, national amnesty laws enacted outside a peace process, or peace agreements.[730] Only the practice of peace agreements concluded to end an intra-state armed conflict will be analysed here for the purposes of this chapter's focus. Among the 77 peace agreements concluded since 1990 that contain an amnesty provision, 20 provides for a limited amnesty that excludes certain international crimes[731], 13 provides for a limited amnesty for political crimes but without an express note as to whether international crimes are excluded, and 44 provides for a general amnesty.[732] Some of the general amnesties are unconditional, whereas the grant of some are conditioned upon disarmament or cooperation with a truth and reconciliation mechanism.

The year 2000 is often considered a milestone in the development of the UN's normativised approach to peace negotiations. In addition to the adoption of Resolution 1325 as the first step in the Women, Peace and Security Agenda, the year 2000 is also marked by the UN Secretary-General's explicit proviso attached to his signature that the general

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[729] Pact on Security, Stability and Development in the Great Lakes Region (Angola, Burundi, Central African Republic, Congo, Democratic Republic of the Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia) (15 December 2006) [2007] 46 ILM 173, Chapter III, Art 8. See also 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006), UNGA Res 60/147, UN Doc A/RES/60/147' III, para 4; *Nuremberg Declaration on Peace and Justice* (n 128) III, para 2.

[730] See Kress and Grover (n 693) 55 et seq. Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (2016) 65 International and Comparative Law Quarterly 645, 676 (Summarising the findings of the Amnesty Law Database and highlighting that many states continue to enact general amnesty laws).

[731] See e.g. Libyan Political Agreement (n 177), Art 11 (Excluding "war crimes, crimes against humanity and other crimes under international law"); Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23 (12 December 2013), Art 1.1. (Excluding "war crimes, crimes of genocide and crimes against humanity, including sexual violence, recruitment of child soldiers and other massive violations of human rights").

[732] This information is based on my survey of the intra-state peace agreements (excluding peace proposals, unilateral declarations, agreement between one party to a conflict and international organisations, etc.) compiled in United Nations and University of Cambridge (n 1).

amnesty promised in the Lomé Agreement of Sierra Leone "shall not apply to international crimes of genocide, crimes against humanity and other serious violations of international humanitarian law".[733] It is notable that 18 of the 20 peace agreements concluded after 2000 provided for limited amnesties excluding international crimes after this date. However, any implication of this for the ascertainment of a customary prohibition of amnesties for international crimes has to be weighed against the fact that 25 peace agreements provided for general amnesties in this period. The 2014 Framework Agreement on the Bangsamoro in the Philippines, the 2015 Nationwide Ceasefire Agreement in Myanmar and the above-mentioned 2015 Minsk II Agreement in relation to the conflict in eastern Ukraine are among the recent examples of general amnesties.[734]

It should also be mentioned that the state practice of adopting limited amnesties excluding international crimes and gross violations of human rights may not be accompanied by *opinio juris*. O'Keefe cautions that limited amnesties in peace agreements may be driven by the parties' desire to secure the UN's involvement in the negotiation and implementation rather than a belief that such limitations are required by international law.[735] For example, in relation to the negotiations of the Doha Peace Document for Darfur,[736] Nouwen points out that a limited amnesty clause excluding international crimes and gross violations of human rights was inserted into the Document only after the UN disapproved of the Chief Mediator's approval of the conclusion of earlier framework agreements that included a general amnesty between the parties.[737] Another example is from the Juba Talks aiming to end the conflict between the Ugandan government and the LRA. Afako, the lead legal advisor to the Chief Mediator, explains that to produce "a legally sound text that was consistent with the Rome Statute" had become the priority of the Chief Mediator.[738] The resultant Agreement between the government and the LRA includes a commitment of the government to amend the 2000 Amnesty Act in line with the agreement, which promises criminal accountability for "serious crimes or human rights violations [committed] in the course of the conflict".[739] However, it

[733] UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315, Preamble.

[734] The Comprehensive Agreement on the Bangsamoro (n 18); The Nationwide Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations, 15 October 2015; Package of Measures for the Implementation of the Minsk Agreements (n 288).

[735] O'Keefe (n 454) 473–4.

[736] Doha Document for Peace in Darfur (Sudan) (31 May 2011).

[737] Nouwen (n 714) 317–8.

[738] Afako (n 457) 21.

[739] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the LRA/M (29 June 2007) s 4.1.

is difficult to ascertain whether this commitment results from the state's belief that there is a customary duty to prosecute or not to amnesty the said violations, or rather from an urge to ensure consistence with the Rome Statute with a view to avoiding the prosecution of the alleged perpetrators by the ICC.

Turning to the UN practice of mediating or supporting the implementation of peace agreements, it becomes evident that the UN's policy commitment to the rejection of general amnesties in peace agreements[740] is not always borne out in practice.[741] In 2013, Hilde Johnson, the then Special Representative of the Secretary-General and Head of the United Nations Mission in South Sudan (UNMISS), welcomed a government decree issuing general amnesty to the leaders of six armed groups as "a very positive development for stability in the country".[742] More recently, the Security Council endorsed the Minsk Agreements aiming to terminate the armed conflict in Eastern Ukraine, which contains a general amnesty provision and no commitment to criminal accountability for conflict-related crimes.[743] The Council did so without any caveat regarding the scope of the amnesty, although the representatives of two member states expressed their concern that those responsible for the MH17 attack might benefit from the amnesty.[744] This clashes not only with the commitment of the UN not to broker or endorse peace agreements that contain general amnesties, but also with its recommendation that transitional justice mechanisms are included in peace agreements.

What is revealed from this analysis of state practice and *opinio juris* in relation to a customary duty to prosecute, and not to amnesty, international crimes is far from a consistent step away from amnesties. There may be an emerging duty to prosecute, and not to amnesty, international crimes but, as the SCSL held, it remains premature to conclude that the norm

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[740] ' The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 160) para 64; *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 673) 2. But cf. UNSC Res 1325 (n 512): "Emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions" [Emphasis added].

[741] See Mallinder, 'Peacebuilding, the Rule of Law and the Duty to Prosecute: What Role Remains for Amnesties?' (n 728) 42 (Reaching a similar conclusion regarding the discrepancy between the transitional justice policy and practice of the EU and its members states).

[742] 'South Sudan Has Made "Significant Strides" towards Consolidating Peace, Top United Nations Official Tells Security Council' (8 July 2013).

[743] UNSC Res 2202 (n 367).

[744] 'Unanimously Adopting Resolution 2202 (2015), Security Council Calls on Parties to Implement Accords Aimed at Peaceful Settlement in Eastern Ukraine' (17 February 2015).

has crystallised in customary international law.[745] Even if a customary duty to prosecute international crimes comes into being, as further explored in Section 5.2.3.2, the state practice in relation to amnesties may provide the basis for a peace-making exception in the context of negotiated transitions from conflict to peace for selective prosecution of those most responsible for the commission of such crimes or conditional amnesties.[746]

5.2.1.3. Human rights protected by international and regional treaties

Amnesties that are permissible under conventional or customary international criminal law should still comply with international human rights law. International or regional human rights treaties do not contain an explicit duty to investigate, prosecute or punish human rights violations or a prohibition of amnesties. However, the case-law of the Inter-American Court of Human Rights (IACtHR) and European Court of Human Rights (ECtHR), as well as the non-binding opinions, comments and recommendations of the UN Human Rights Committee, UN Committee against Torture (UN CAT), and African Commission on Human and Peoples' Rights (ACommHPR), found amnesties to be in violation of the right to an effective remedy, right to fair trial, or the positive duty to investigate, prosecute or punish that flows from the prohibitions of the underlying violations or from the general duty of states parties to ensure and guarantee the rights protected in the relevant instruments.[747] Starting with a brief account of the approaches of the UN HRC, UN CAT, and ACommHPR to amnesties, this section then focuses on the binding decisions of the IACtHR and ECtHR.

In General Comment 31, the UN HRC opined that "[a]s with failure to investigate, *failure to bring to justice* perpetrators of such violations [torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killing, and enforced disappearance] could

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[745] *Prosecutor v. Morris Kallon* (n 237) [82]. Cf *Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis in Idem and Amnesty and Pardon), Trial Chamber, 3 November 2011* [53]: 'Although state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them, this practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms. These norms further evidence a clear obligation on states to hold perpetrators of serious international crimes accountable ...'

[746] Kress and Grover (n 693); Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law 481.

[747] On the criminal turn in human rights protection, see Engle (n 497); Alexandra Huneeus, 'International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 The American Journal of International Law 1.

in and of itself give rise to a separate breach of the Covenant."[748] However, in General Comment 20, the Committee noted that "[a]mnesties are *generally* incompatible with the duty of States to *investigate* such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."[749] Read together with the Committee's decision in *Rodriguez v Uruguay* that an amnesty law that "effectively *excludes* in a number of cases the possibility of *investigation* into past human rights abuses … prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses"[750], the two statements suggest that the Committee considers amnesties that foreclose the investigation of serious violations of human rights as incompatible with the Convention rights but do not specify whether criminal prosecution of such violations is necessary in all circumstances unless the reference to "failure to bring to justice perpetrators" in the above-quoted General Comment 31 is considered as alluding to a duty to prosecute and not to amnesty.[751] On the other hand, the Committee against Torture has explicitly denounced amnesties as impediments to "prompt and fair prosecution and punishment of perpetrators of torture and ill-treatment" as "*no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction".[752] The legal reasoning of the Committee, however, relies on two contestable assumptions. Firstly, it conflates an amnesty that leads to a decision not to prosecute or punish with a justification for torture.[753] Secondly, it unconvincingly assumes that the duty to prosecute torture is non-derogable by virtue of the non-derogability of the prohibition of torture itself.[754]

The ACommHPR has also indicated, most elaborately in *Zimbabwe Human Rights NGO Forum*, that an amnesty law that "*foreclosed access to any remedy that might be available to the victims* to vindicate their rights, and without putting in place alternative

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[748] 'General Comment No. 31 The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 May 2004) CCPR/C/21/Rev.1/Add. 13' para 18. (Emphasis added.)

[749] 'General Comment No. 20 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (1992) UN Doc. HRI/GEN/1/Rev.7' para 15. (Emphasis added.)

[750] *UN HRC: Rodriguez v Uruguay (9 August 1994) UN Doc CCPR/C/51/D/322/1988* [12.4].

[751] The Office of the UN High Commissioner for Human Rights interpretes the jurisprudence of the Committee as rendering amnesties that foreclose criminal prosecution incompatible with the Covenant, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009) 20–22.

[752] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, CAT/C/GC/2, 24 January 2008' para 5. (Emphasis in the original.)

[753] O'Keefe (n 454) 469.

[754] See Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 Oxford Journal of Legal Studies 451, 2 (Pointing out the same flaw in the ECtHR's approach to the duty to prosecute torture as an absolute duty).

adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy" violates the right to effective remedy of victims.[755] Thus, the Commission considers amnesties that preclude the punishment of perpetrators as incompatible with the Convention and compensation or alternative remedies as complementary remedies. However, the amnesty law at issue was not adopted in the context of a negotiated settlement to an armed conflict and therefore, the decision cannot be taken as indicative of how the Commission may approach amnesties in such scenarios.

The IACtHR has pronounced on the compatibility of amnesties with the Convention in several cases.[756] In *Barrios Altos,* reviewing a self-amnesty granted to state officials in Peru, the Court made its landmark statement that:

> "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are *intended* to *prevent* the investigation and punishment of those responsible for *serious human rights violations* such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".[757]

Establishing a duty to investigate and to punish, the Court consistently rejected general and unconditional amnesties, which cover serious human rights violations and aim to prevent their investigation and punishment.[758] However, it acknowledged the compatibility with the Convention of amnesties that exclude international crimes and serious human rights

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[755] *African Commission on Human and Peoples' Rights, Case No 245/02 (2006): Zimbabwe Human Rights NGO Forum v Zimbabwe* [215]. (Emphasis added.)

[756] See Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German Law Journal 1203, 1208–1211; Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (n 730).

[757] *IACtHR, Case of Barrios Altos v Peru Merits Judgment March 14, 2001 Series C No 75* [41] (Emphasis added). The UN adopts a similar list of "serious violations of human rights" that are considered as outside the scope of permissible amnesties: 'torture, and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity', see *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672) 4, footnote 8.

[758] See *IACtHR, Case of Gomes Lund et al ('Guerrilha do Araguaia') v Brazil Preliminary Objections, Merits, Reparations, and Costs Judgment of November 24, 2010 Series C No 219* [175–175]; *IACtHR, Case Gelman v Uruguay Merits and Reparations Judgment of February 24, 2011 Series C No 221*; *IACtHR, Case of Almonacid Arellano et al v Chile Preliminary Objections, Merits, Reparations and Costs Judgment of September 26, 2006 Series C No 154*; *IACtHR, Case of La Cantuta v Peru Merits, Reparations and Costs Judgment of November 29, 2006 Series C No 162*; *Massacres of El Mozote and nearby places v. El Salvador* (n 480) [296, 299].

violations from their scope or of "transitional justice" laws[759] that provide for reduced or alternative criminal sanctions to such violations.[760]

Although the Court asserted in *Velásquez Rodríguez* that states are "obligated to *investigate* every situation involving a violation of the rights protected under the Convention"[761], the duty to prosecute is formulated in *Barrios Altos* as applicable to serious violations of human rights. Therefore, limited amnesties that exclude such violations from their scope remain permissible. It is less clear whether selective prosecution of those most responsible for such violations is also compatible with the Convention. In his concurring opinion in *Massacres of El Mozote*, Judge Garcia-Sayán notes that the amnesty law examined in the case was distinct from those the Court previously ruled on in that it was adopted "in the context of a process aimed at ending, through negotiations, a non-international armed conflict".[762] As the duty to prosecute serious violations of human rights is not an absolute duty, selective prosecution of those "who performed functions of high command and gave the orders" may be a justified, proportionate restriction of the duty and the underlying rights of the victims.[763]

Mindful of the "enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace", Judge Garcia-Sayán also points out that "[r]eduction of sentences, alternative punishments, direct reparation from the perpetrator to the victim, and public acknowledgment of responsibility are other ways that can be considered".[764] However, he emphasises that non-criminal transitional justice mechanisms are "complementary to the obligation of criminal justice", which is deemed indispensable for those most responsible for serious human rights violations.[765] As to reduced or alternative

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[759] See *IACtHR: Case of the Rochela Massacre v Colombia Merits, Reparations and Costs Judgment of May 11, 2007 Series C No 163* [184] (Referring to Law 975 of 2005 [Colombia] as 'a law relating to transitional justice').

[760] See Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (n 730) paras 661–8.

[761] *IACtHR: Case of Velásquez Rodríguez v Honduras Merits Judgment of July 29, 1988 Series C No 4*.

[762] *Massacres of El Mozote and nearby places v. El Salvador* (n 50) (Concurring Opinion, Judge Garcia-Sayán), paras 9-10.

[763] See ibid (Concurring Opinion, Judge Garcia-Sayan), paras 30-31, 38. Selective prosecutions also find support in scholarship as compatible with both human rights obligations and the duty to prosecute international crimes, see Diane F Orentlichert, 'Settling Accounts : The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 The Yale Law Journal 2537, paras 2601–3; Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws' (n 730) 677.

[764] *Massacres of El Mozote and nearby places v. El Salvador* (n 50) (Concurring Opinion, Judge Garcia-Sayan), para 31.

[765] ibid (Concurring Opinion, Judge Garcia-Sayan), para 36.

criminal sanctions, the judgment of the Court in *The Rochela Massacre*, is also noteworthy. The case concerned the 2005 Justice and Peace Law of Colombia, adopted during former President Uribe's administration as the legal framework for the demobilisation and reintegration of paramilitary groups and allowed for the imposition of reduced criminal sentences of five to eight years on the condition of confession of the crimes committed and cooperation with the demobilisation process.[766] Rejecting the applicants' view that the Law amounted to a "concealed amnesty", the IACtHR held that it only "grants juridical benefits ["alternative punishments"] in order to achieve peace".[767] However, the Court set forth conditions for the compatibility of alternative criminal sanctions with the Convention, including the proportionality of the sanctions to "the rights recognized by law and the culpability with which the perpetrated acted" and the issuance of the punishments by "a judicial authority".[768] Therefore, the-case law of the IACtHR to date suggests that limited and conditional amnesties, which allow the criminal prosecution of those most responsible for serious violations of human rights and, if the prosecution so requires, the application of proportionate reduced or alternative criminal sanctions issued by a judicial authority, are compatible with the Convention. This seems to rule out as impermissible limited amnesties that are conditioned on disarmament, truth, or reparations, for example, as overseen by a truth and reconciliation mechanism, but foreclose prosecution of those most responsible for serious violations of human rights.

The ECtHR, and previously the Commission, also dealt with a number of cases concerning the compatibility of the amnesties with the Convention.[769] Although the Court, similar to the IACtHR, established a duty to investigate and to punish serious violations of human rights, its position on amnesties remains less specified.[770] In *Dujardin v France*, the Commission opined that:

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[766] Law 795 (Colombia, 2005).

[767] Francesca Capone, 'From the Justice and Peace Law to the Revised Peace Agreement Between the Colombian Government and the FARC: Will Victim's Rights Be Satisfied at Last?' (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 125, 137–8.

[768] *The Rochela Massacre v. Colombia* (n 51) [191–196].

[769] The difference of the contexts in which the IACtHR and ECtHR dealt with amnesties must be noted. The cases before the former concerned the rights of victims, whereas the cases before the latter originated from the applications of perpetrators, who benefited from domestic amnesties, alleging violations of their right to fair trial.

[770] *Mocanu and Others v Romania (2015) 60 EHRR 19* (Partly Dissenting Opinion of Judge Wojtyczek), para 11: "The Court's precise position on the issues of limitation and amnesty has thus yet to be clarified". On the duty to investigate and to punish, see Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe 2007) 34 (Stating that the investigation required by Articles 2, 3, and potentially 4, of the Convention "must lead to the identification and punishment of the

> "The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law."[771]

Accordingly, the Commission held that "the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands" and that it maintained the requisite balance to be compatible with the right to life as protected by the Convention.[772]

More than a decade later, the Court's *obiter dictum* in *Ould Dah v France* implied a cautious change in its position regarding the permissibility of amnesties that extend to non-derogable rights. Admitting that the needs of societal reconciliation may clash with the duty to prosecute perpetrators, and pointing out that the case at issue did not concern a reconciliation process as such, the Court nonetheless stated that "[t]he obligation to prosecute criminals should not … be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law" placing emphasis on the *jus cogens* nature of the prohibition of torture.[773] Therefore, the Court seemed to have ruled out, albeit ambiguously, general amnesties that preclude prosecutions as permissible tools even in a transitional context.[774] Jackson demonstrates that the Court has set itself a "trap" by treating the duty to prosecute torture as an absolute duty, similar to the underlying prohibition itself, and thus outlawing all amnesties to the extent that torture, or other non-derogable human rights, are concerned.[775] However, he convincingly argues that there are legal and policy grounds for the Court to find that the duty to prosecute is not rendered absolute merely and that amnesties remain permissible in "exceptional situations, where the state is pursuing a compelling public interest in good faith".[776] The same reasoning applies to the prosecution and amnesty of other non-derogable human rights.

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persons responsible"). See also *Ali and Ayse Duran v Turkey ECtHR 8 April 2008*; *Case of Gäfgen v Germany, European Court of Human Rights, Grand Chamber, Application No 22978/05 (1 June 2010)*.

[771] *Dujardin and Others v France (Admissibility) ECtHR (1991) 72 DR 236* 244.

[772] ibid 243. Re-affirmed in *Tarbuk v Croatia ECtHR 11 December 2012* [50].

[773] *Ould Dah v France (Admissibility) (2013) 56 EHRR SE17* 16.

[774] See also Jackson (n 754) 12. Cf. Eva Brems, 'Transitional Justice in the Case Law of the European Court of Human Rights' (2011) 5 International Journal of Transitional Justice 282, 292.

[775] Jackson (n 754) 14.

[776] ibid 23.

However, in the most recent decision of the Court concerning amnesty laws the ambiguity in the Court's evaluation as follows has arguably tipped the scale in favour of the permissibility of amnesties as part of a reconciliation process:

> "A growing tendency in international law is to see such amnesties ["for acts which amounted to grave breaches of fundamental human rights such as the intentional killing of civilians and inflicting grave bodily injury on a child"] as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. *Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims*, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances."[777]

Despite this cautious caveat regarding reconciliation processes, it is hard to adduce the *Margus* statement in support of a conclusion that the Court would consider limited amnesties conditioned on disarmament, truth or reparation as permissible reconciliation tools in the absence of criminal prosecution. Cases likely to arise in relation to the amnesty provisions and transitional justice arrangements in the 2016 Final Agreement for Peace of Colombia and the 2015 Minsk II Agreement of Ukraine may present opportunities to the IACtHR and ECtHR, respectively, to develop and clarify their jurisprudence on the permissibility of amnesties in transitional contexts. Lastly, the personal scope of the duty to prosecute gross violations of human rights must be noted. It predominantly concerns the prosecution of state officials whose conduct caused the violation of the underlying prohibition. As to private actors, for example, acts of members of armed opposition groups, unless these are attributable to the state, the state of the duty to prosecute is ambiguous. Although the IACtHR and ECtHR have held that the duty to investigate or to punish applies to the violations stemming from the conduct of private persons, the case law on this issue remains scarce and inconclusive.[778]

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[777] *Margus v Croatia (2016) 62 EHRR 17* [139]. Cf. *Krastanov v Bulgaria (2005) 41 EHRR 50* [60] (Holding that payment of compensation to a torture victim without prosecuting the perpetrators would render the prohibition of torture ineffective).

[778] *IACtHR: Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4* (n 761) [176]; *Ergi v Turkey App no 66/1997/850/1057 (ECtHR, 28 July 1998)* [82]; *Aliyeva and Aliyev v Azerbaijan App no 35587/08 (ECtHR, 31 July 2014)* [69]. See also Kress and Grover (n 693) 53.

5.2.1.4. Violations of jus cogens norms and internationally wrongful acts

Apart from any primary duty to prosecute international crimes and gross violations of human rights, it has been argued that the duty to prosecute flows from the *jus cogens* nature of the prohibited crime or violation.[779] However, even if it is assumed that the international criminal prohibitions or human rights that are typically violated in intra-state armed conflicts enjoy *jus cogens* status, a duty to prosecute the perpetrators of the conduct does not necessarily flow from such status.[780] Nor does the *jus cogens* status, if established, render the duty to prosecute the violation equally of *jus cogens* status.[781] This reasoning finds parallels in the ICJ's conclusions in *Jurisdictional Immunities of the State* that substantive arguments about the *jus cogens* nature of the prohibitions of international crimes do not bear relevance to the procedural issue of immunity.[782]

Another potential basis for a duty to prosecute may be found in the law of state responsibility. States incur responsibility under international law for the violations of the conventional or customary obligations under international humanitarian law, international human rights law, and prohibition of genocide and torture in parallel to the respective criminal prohibitions binding on individuals.[783] State responsibility for such internationally wrongful acts imposes on the responsible state obligations of cessation, non-repetition, and reparation.[784] Although no express duty to prosecute internationally wrongful acts that amount to an international crime is contained in the ILC Articles on State Responsibility,[785] an appropriate modality for the duty of the responsible state to provide reparation may be

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[779] *Prosecutor v. Furundzija* (n 22) [155]; 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2 (n 44) para 5.

[780] O'Keefe (n 454) 476.

[781] See e.g. Jackson (n 754) (Arguing that the duty prosecute perpetrators of torture is not rendered absolute due to the absolute prohibition of torture in the European Convention of Human Rights).

[782] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment) ICJ Rep 2012, 99* [92–97].

[783] O'Keefe (n 454) 80–81.

[784] Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (12 December 2001) Annex to UNGA Res 56/83 UN Doc A/56/83, Arts 30, 31.

[785] Cf. Gaetano Arangio-Ruiz, 'Seventh Report on State Responsibility (9, 24 and 29 May 1995) UN Doc. A/CN.4/469, Add.1' 3. See also Christian J Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13 European Journal of International Law 1161, 1173–8 (Finding that the prosecution of individual perpetrators of an internationally wrongful act 'does not constitute a special consequence of serious breaches in the sense of Article 40').

the prosecution of the alleged perpetrators whose conduct caused the breach.[786] Where this is established, non-prosecution by reference to an amnesty ceases to be a lawful option.

With regard to state responsibility and the resultant duty to prosecute, the question of whether a state would be responsible for the breaches of international law by the members of an armed opposition group in case of a peace agreement that provides for a government of national reconciliation arises. Article 10(1) of the ILC Articles on State Responsibility states that the conduct of an insurrectional movement would be considered an act of that state if the former becomes the new government.[787] The commentary to the provision, however, envisages an exception to the rule: If the armed opposition group becomes part of the government "in the interests of an overall peace settlement", "the state should not be made responsible" for its conduct.[788] The issue is underexplored in scholarship and remains contested in the rare commentaries on the article.[789] Nor is there sufficient state practice to further the debate. The tentative conclusion seems to be that if an AOG becomes part of the post-agreement government in the interests of peace, the state would not be responsible for its conduct.

5.2.1.5. Summary

Peace-making in the aftermath of an intra-state armed conflict inherently relies on compromise.[790] In relation to the negotiation of the issue of transitional justice, amnesties often arise as a manifestation of such compromise. However, amnesties present legal, political and moral dilemmas. They may come into tension with domestic and international legal guarantees of investigation, criminal prosecution or remedying of victims; they determine who has access to the post-conflict political order (or not); and they may be perceived as compromising on moral justice principles. On the other hand, conditional

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[786] ILC Draft articles on Responsibility of States (n 74), Art 37(2): 'Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or *another appropriate modality*.' (Emphasis added). See also O'Keefe (n 454) 476.

[787] ILC Draft articles on Responsibility of States (n 74).

[788] ibid 51.

[789] Jean D'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 International and Comparative Law Quarterly 427, 437 (Arguing that "the exclusion of that rule of attribution [Art 10[1]] should be limited to hypotheses where such a national reconciliation or power-sharing agreement leads to national democratic elections which eventually bring the rebels to power").

[790] See Christine Bell and Jan Pospisil, 'Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettlement' (2017) 29 Journal of International Development 576, 583: 'The common elements of peacemaking reflect some common dynamics of intra-state conflict: the availability of compromise as often the only realistic vehicle for ending violence ...'

amnesties that aim to achieve disarmament, truth or reconciliation in lieu of criminal justice may ensure the access of conflict parties to the post-agreement political order, often facilitated through a powersharing arrangement, and may be considered as desirable for forgiveness and reconciliation from a moral perspective.

Depending on their design, conditional amnesties remain permissible in international law. To recapitulate the main findings of the above analysis, firstly, international law encourages limited amnesties that exclude international crimes and serious violations of human rights in transitions from conflict to peace. Secondly, despite the possibility of an emerging prohibition of amnesties for crimes under customary international law, prosecution of such crimes remains non-mandatory in *lex lata*, with amnesties remaining as lawful peace-making options. Thirdly, for treaty crimes subject to the obligation *aut dedere aut judicare*, amnesties that foreclose the submission of cases to competent authorities for the purpose of prosecution are in violation of the obligation. However, if there are legal grounds for prosecutorial discretion in domestic law that allow the suspension of prosecution, this option may be pursued by domestic authorities. Moreover, negotiating parties can agree on suspended, reduced or alternative criminal sanctions for treaty crimes. Lastly, serious violations of human rights should be investigated and cannot be unconditionally amnestied. The jurisprudence of the IACtHR further indicates a requirement of criminal prosecution but leaves room for the application of proportionate reduced or alternative criminal sanctions issued by a judicial authority. Outside the juridical space of the ACHR, however, conditional amnesties that provide for some form of investigation of the truth and/or reparations in case of serious violations of human rights may be considered satisfactory. Future state practice and ECtHR case-law will respectively determine whether the requirement of criminal prosecution will extend to crimes under customary international law and serious violations of ECHR-protected human rights.

To conclude, peace agreements must not provide for an amnesty that foreclose the submission of cases to criminal prosecution for treaty crimes subject to the obligation *aut dedere aut judicare* and that forego criminal prosecution for serious violations of ACHR-protected human rights. Such an amnesty may lead to violations of the treaty obligations of states parties, that is, if the amnesty is adopted in domestic law for the post-agreement practice of judicial authorities to follow suit. On a formalist reading, this conclusion does not equate to the confirmation of a duty to include guarantees of criminal accountability for the said crimes and human rights violations. However, inclusion of such guarantees would

increase the prospects for post-agreement (submission of cases to) prosecution. For crimes within the jurisdiction of the ICC, a further imperative to include criminal accountability guarantees in peace agreements arises if the negotiating parties desire to avoid the prosecutions by the ICC. The next section turns to this issue.

5.2.2. Negotiating transitional justice in the shadow of the ICC

The Rome Statute neither gives the ICC the authority to review domestic laws, e.g. legislation implementing a peace agreement or its transitional justice component, nor obliges the state parties to incorporate the Statute provisions into their domestic legal system except for making available the procedures necessary to cooperate with the Court as per Part IX of the Statute.[791] As explained above, the Statute does not impose an obligation on states parties to prosecute the crimes within the Court's jurisdiction. However, the potential intervention of the ICC in a situation creates a de facto imperative to include guarantees for criminal accountability in peace agreements to avoid triggering the Court's (further) involvement in a conflict situation. Thus, today peace negotiations are held in the 'shadow' of the ICC.[792]

The shadow effect extends in theory to all states, as the Security Council can refer situations in non-party states to the Court. However, it becomes more visible for peace negotiations in states who are under a preliminary examination or investigation.[793] Peace negotiations in Uganda (with the LRA)[794], Sudan (with the AOGs in Darfur)[795], Kenya (with

[791] Rome Statute of the International Criminal Court (n 647), Art 88.

[792] For an exploration of how the shadow of the ICC played out in the peace negotiations in Uganda and Colombia, see Afako (n 457); Jennifer Easterday, 'Beyond the "Shadow" of the ICC: Struggles over Control of the Con Flict Narrative in Colombia' (2015) 9 Contested Justice The Politics and Practice of International Criminal Court Interventions 432. For a conceptualisation of courts' role in private bargaining, see Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 The Yale Law Journal 950.

[793] See Line Engbo Gissel, 'Legitimising the Juba Peace Agreement on Accountability and Reconciliation: The International Criminal Court as a Third-Party Actor?' (2017) 11 Journal of Eastern African Studies 367, 379; Leslie Vinjamuri, 'The Distant Promise of a Negotiated Justice' (2017) 146 Daedalus 100, 319. (Gissel and Vinjamuri both argue that the impact of the ICC on the substance of a transitional justice agreement would be stronger at the stage of preliminary examination, before a referral or an indictment, which reduces the bargaining zone left for the parties.)

[794] Pål Wrange, 'The Agreement and the Annexure on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army/Movement -- a Legal and Pragmatic Commentary' (2008) 6 Uganda Living Law Journal 42; Gissel (n 793); Kenneth A Rodman and Petie Booth, 'Manipulated Commitments: The International Criminal Court in Uganda' (2013) 35 Human Rights Quarterly 271.

[795] See Gunnar M Sørbø, 'Pursuing Justice in Darfur' (2009) 27 Nordisk Tidsskrift For Menneskerettigheter 393.

opposition parties in the aftermath of electoral violence in 2007)[796], the Democratic Republic of the Congo (the negotiation of the 2009 Goma Agreement with Le Congres National pour la Defense du Peuple)[797], the Central African Republic (negotiation of the 2008 Global Peace Agreement)[798], and Colombia (with the FARC)[799] are all cases in point. Particularly in Colombia, the 2016 Final Peace Agreement was negotiated under the close scrutiny of the OTP. The Deputy Prosecutor mentioned at a conference speech that the OTP conveyed its interpretation of the Rome Statute to Colombian authorities during the negotiations "in view of the Government's stated interest in negotiating a peace agreement that was compatible with the Rome Statute".[800] The OTP continues to oversee the legislative implementation of the Agreement to such an extent that it pronounces on their "consistency or compatibility with customary international law and the Rome Statute"[801] The far-reaching oversight of the OTP in peace negotiations is striking as its mandate is neither to monitor states' compliance with customary international law nor with the Rome Statute except to the extent required for the assessment of complementarity.[802]

The shadow of the ICC in peace negotiations particularly stems from the evolving interpretation of the Office of the Prosecutor (OTP) of the principle of complementarity, which is now construed as entailing a second, positive principle in addition to an admissibility test. The complementarity test as formulated in Article 17 of the Rome Statute provides the Court with substantive criteria and procedural rules in deciding on whether the

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[796] See Stephen Brown and Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 African Affairs 244.

[797] Juan Méndez and Jeremy Kelley, 'Peace Making, Justice and the ICC' [2015] Contested Justice: The Politics and Practice of International Criminal Court Interventions 479, 487 (Stating that the limited amnesty provision in the Agreement was included following contacts between the OTP and mediators).

[798] ibid (Stating that the ICC Prosecutor briefed the participants in the political dialogue that produced the Agreement which contained a limited amnesty clause).

[799] See Easterday, 'Beyond the "Shadow" of the ICC: Struggles over Control of the Con Flict Narrative in Colombia' (n 792); René Urueña, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017' (2017) 111 American Journal of International Law 104; Helena Alviar García and Karen Engle, 'The Distributive Politics of Impunity and Anti-Impunity: Lessons from Four Decades of Colombian Peace Negotiations' in Karen L Engle, Zinaida Miller and Dennis Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016).

[800] James Stewart, 'Transitional Justice in Colombia and the Role of the International Criminal Court' (13 May 2015) 11.

[801] 'Report on Preliminary Examination Activities' (2017) para 144. See also the Amicus Curiae submission of the OTP to the Colombian Constitution Court, which reiterates this position ICC-OTP, 'Escrito De Amicus Curiae De La Fiscal De La Corte Penal Internacional Sobre La Jurisdicción Especial Para La Paz' 20.

[802] But cf. Marina Aksenova, 'The Emerging Right to Justice in International Criminal Law: A Case Study of Colombia' (2018) 31 (Arguing that the ICC has started and should continue to exercise functions akin to human rights courts and supervise compliance of states with the 'duty to exercise criminal jurisdiction over those responsible for international crimes').

Court must yield to national proceedings and decide a case inadmissible. As such, it is addressed to the Court itself rather than the states parties. However, complementarity has evolved to encompass a positive aspect, which the OTP defines as the encouragement by the Office of "genuine national proceedings where possible … relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance".[803] As a result, the OTP or the pro-ICC norm entrepreneurs advocate national proceedings that can render the respective cases inadmissible before the ICC.[804] The manifestation of the principle of positive complementarity for peace negotiations has been a policy of aiming to secure guarantees for domestic criminal accountability in peace agreements for crimes within the jurisdiction of the ICC or for cooperation with the Court.

Overall, the shadow of the ICC requires an assessment of the discretion left to states in adopting transitional justice arrangements in a peace agreement if they desire to avoid past, ongoing or potential cases to be inadmissible before the Court. Whether different types of amnesties adopted in peace agreements and accompanying transitional justice measures, if any, could allow states to achieve this aim needs to be assessed by reference to four potential legal grounds for the ICC to recognise a peace agreement in this sense: Complementarity; principle of *ne bis in idem*; Security Council deferral; and prosecutorial discretion.

As to complementarity, firstly, if an amnesty precludes the conduct of investigations into a case, i.e. if parties agree on a blanket amnesty, this renders the case admissible according to Article 17(1) of the Rome Statute due to the absence of national proceedings.[805] Secondly, if an amnesty allows criminal prosecution but a decision not to prosecute is made in practice due to a peace agreement compromise, the relevant case may still be considered admissible as the decision not to prosecute may demonstrate that the state is unwilling to prosecute.[806] Lastly, if an amnesty from criminal prosecution is granted in a peace agreement in exchange for cooperation with investigation by a non-criminal justice mechanism, for example a truth and reconciliation commission or local justice mechanism, cases are likely

[803] ICC-OTP, 'Prosecutorial Strategy: 2009-2012' (n 636) para 17.

[804] On positive complementarity, see Nouwen (n 714) 97–104.

[805] The decision of the ICC not to defer to an amnesty is not a decision about the legality of an amnesty under international law, see Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 Max Planck Yearbook of United Nations Law Online 553, 564. The legality of an amnesty under international needs to be assessed by reference to the sources explored in the previous section. See also Nouwen (n 714) 42.

[806] Rome Statute of the International Criminal Court (n 80), Art 17(1)(b).

to be admissible before the ICC even if the perpetrator has been brought before such non-criminal justice mechanisms. Scholars reach this conclusion by arguing either that the term 'investigation' in Article 17(1)(a) and (b) must be understood as criminal investigation or investigation that has the potential to lead to prosecution[807] or that such a decision not to prosecute will be the result of an "unwillingness" to prosecute.[808] Stahn contends that if a case has been subject to "quasi-judicial proceedings", it may be inadmissible before the ICC on the condition that "the possibility of criminal prosecution as an option of last resort" is retained in accordance "with an intent to bring the person to justice".[809] However, unless the person concerned is eventually prosecuted by a court, investigation by a non-criminal justice mechanism may not in and of itself render a case inadmissible as such a mechanism cannot decide to prosecute and can only recommend prosecution by courts.[810]

Neither would an investigation before a non-criminal justice mechanism trigger the application of the rule of *ne bis in idem*, as Article 17(1)(c) and 20(3) require the person to be "tried by another court". In cases where a person has been tried by a court but is later granted a pardon by a peace agreement, the case would be admissible before the ICC only if it is proven that the proceedings "were for the purpose of shielding the person concerned from criminal responsibility" or "were not conducted independently or impartially".[811] Proving these for proceedings conducted before the conclusion of a peace agreement would be difficult but if a peace agreement promises suspension or reduction of sentences and the

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[807] A O'Shea, *Amnesty for Crimes in International Law and Practice* (Kluwer Law International 2002) 126; Roht-Arriaza (n 92); Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507, 525. But cf. Seibert-Fohr (n 805) 569 (Arguing that the criterion of 'intent to bring a person to justice' in assessing unwillingness may be taken to allude to the possibility of 'alternative forms of accountability' as rendering a case inadmissible before the ICC); Sharon Williams and William Schabas, 'Art.17' in Ed Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Verlag CH Beck/Hart Publishing/Nomos 2008), marginal note 26: "Judges of the Court might consider that a sincere truth commission project amounts to a form of investigation that does not suggest 'genuine unwillingness' on the part of the State to administer justice, thereby meeting the terms of article 17 para. 1 (a) and (b)".

[808] John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', *The Rome Statute of the International Criminal Court - A Commentary Vol I* (Oxford University Press 2002) 702. Cf. Seibert-Fohr (n 805) 570 (Arguing that the waiver of prosecution by a non-criminal justice mechanism should not be necessarily interpreted as an unwillingness to prosecute but rather as an incentive to serve the greater objective of achieving peace).

[809] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 Journal of International Criminal Justice 695, 716. Stahn, 716.

[810] Sarah MH Nouwen and Wouter G Werner, 'Monopolizing Global Justice' (2015) 13 Journal of International Criminal Justice 157, footnote 62.

[811] Rome Statute of the International Criminal Court (n 647), Art 20(3). Cf. Seibert-Fohr (n 805) 565; Stewart (n 800) para 11 (Assuming that suspension of a sanction always results an intention to shield the responsible persons from criminal responsibility and therefore arguing that suspension of a sentence renders the case admissible before the ICC).

following proceedings reach this outcome, the intent of shielding from criminal responsibility could be established.[812]

Another potential modality of a negotiated justice compromise that needs to be assessed from the perspective of complementarity is alternative sanctions. The 'compatibility' of alternative sanctions with the Rome Statute came to prominence particularly in the context of the negotiations of the 2016 Final Peace Agreement in Colombia. The agreement provides for amnesty for political crimes and for the establishment of a judicial mechanism as part of the Colombian legal system, the Special Jurisdiction for Peace (the SJP), to deal with the most serious crimes committed in the context and by reason of the armed conflict.[813] The SJP may impose alternative criminal sanctions in the form of restraint of liberty for 5 to 8 years on perpetrators who confess to their crimes in an early fashion and prison sentences of up to 8 years for those who confess later but before a judgment. Those who fail to admit responsibility for the crimes committed may be convicted to prison sentences of up to 20 years. Earlier, the ICC Prosecutor had rejected the compatibility of alternative criminal sanctions without prison time with the Rome Statute. However, Deputy Prosecutor Stewart later asserted that alternative criminal sanctions that are proportionate to the gravity of the crimes committed would suffice for the purposes of complementarity.[814] Eventually, Prosecutor Bensouda welcomed the signing of the agreement and the exclusion of the crimes under the Rome Statute from the scope of the amnesty granted.[815] In 2017, the Prosecutor raised concerns regarding four aspects of the peace agreement, including "the implementation of sentences involving 'effective restrictions of freedoms and rights'" but did not question the compatibility of such alternative sanctions with the Rome Statute *per se*.[816]

To summarise, unless perpetrators of crimes within the jurisdiction of the ICC are criminally prosecuted in domestic courts, with the exception of cases where a genuine decision not to prosecute is made following criminal investigation, the relevant cases would be admissible before the Court. As Nouwen and Werner put it "[c]omplementarity in a legal

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[812] See also Nouwen (n 714) 66.

[813] Final Agreement to End the Armed Conflict (Colombia) (n 18).

[814] Stewart (n 800) 11.

[815] 'Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army' (1 September 2016).

[816] 'Report on Preliminary Examination Activities' (n 801) para 144.

sense thus creates space for an alternative forum of criminal jurisdiction to that of the ICC, but not to an alternative conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice."[817]

This conclusion regarding complementarity and *ne bis in idem* leaves two potential legal grounds for the ICC, or the OTP, to defer to the transitional justice arrangement in a peace agreement. Firstly, negotiating parties may request a decision from the SC to request the deferral of investigation or prosecution by the ICC.[818] As such deferral is limited to 12 months, however, and even if it is argued that the SC can renew the deferral request, the rule is not intended to create a permanent bar to investigation or prosecution by the ICC.[819] It may only create a negotiation window for negotiating parties to agree on domestic criminal accountability or give parties time to effect their promises to provide domestic criminal accountability in a peace agreement.

Secondly, the prosecutor may exercise prosecutorial discretion as per Article 53 of the Rome Statute not to initiate investigation, if he or she considers that there are "substantial reasons to believe that an investigation would not serve the interests of justice". It has been widely discussed in scholarship, particularly as part of the 'peace versus justice' debate, whether the Prosecutor can also take into account the interests of peace in deciding to investigate a case or not. A Policy Paper published by the OTP in 2007 states in this respect that the concept of the 'interests of justice' extends beyond criminal justice but cannot be interpreted as to embrace "all issues related to peace and security" and points out the possibility of a SC deferral request where investigation or prosecution may hinder the maintenance of international peace and security.[820] Some scholars, on the other hand, have argued that there is room in prosecutorial discretion as per the Rome Statute for considering the interests of peace when deciding on the issuance of arrest warrants during ongoing peace

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[817] Nouwen and Werner (n 810) 174.

[818] Rome Statute of the International Criminal Court (n 80), Art 16.

[819] See also Kress and Grover (n 693) 70.

[820] ICC-OTP, 'Policy Paper on the Interests of Justice' (2007) 8. See also Fatou Bensouda, 'International Justice and Diplomacy' *The New York Times* (19 March 2013) <https://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0> (Reaffirming the OTP position that "the ICC is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council"); Herbert Okun, 'Role of International Criminal Justice in Peace Negotiations, The' (2007) 25 Penn State International Law Review 779, 788 (Interviewed by Okun in this piece, Goldstone, the first chief prosecutor of ICTY, supports the OTP policy by arguing that the Prosecutor should not 'make political calls' in weighing peace and justice).

negotiations or deferral to a transitional justice arrangement in a peace agreement.[821] An informal expert paper published by the OTP provides that the Prosecutor may decide not to proceed with an investigation when conditional amnesties or alternative measures are adopted at domestic level taking into account certain factors that demonstrate that deferring to these measures would be in the interests of justice.[822]

Whether the Prosecutor in future exercises discretion to not initiate an investigation and defer to an alternative form of justice depends on the modification of the policy decision made in 2007 by re-interpreting Article 53 and the term 'interests of justice' as to extend to other forms of justice then criminal justice. Unless this policy decision is made, ensuring criminal accountability for crimes under the jurisdiction of the ICC is rendered mandatory for states that aim to avoid the involvement of the ICC during or after peace negotiations. Accordingly, a peace agreement should not include an amnesty or any other measure that precludes criminal investigation in a manner consistent with the intent to bring the persons concerned to justice. In addition to the absence of an obstacle to criminal accountability, and regardless of whether criminal accountability is promised in the agreement or not, cases must be investigated or prosecuted in practice for them to be inadmissible before the ICC.

5.2.3. Accommodating negotiated transitional justice in international law

The popular shorthand formulation that amnesties for international crimes and serious violations of human rights are not permissible does not accurately reflect the current state of international law in relation to amnesties. The putative prohibition is constructed by merging different legal arguments stemming from different legal regimes,[823] which cannot

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[821] Rodman (n 646) 467–469; Elizabeth B Ludwin King, 'Amnesties in a Time of Transition' (2010) 41 George Washington International Law Review 577, 581; Thomas Hethe Clark, 'Prosecutor of International Criminal Court, Amnesties, and the Interests of Justice: Striking a Delicate Balance' (2005) 4 Washington University Global Studies Law Review 389, 411; L Mallinder, 'Can Amnesties and International Justice Be Reconciled?' (2007) 1 International Journal of Transitional Justice 208, 228. But cf. Stahn (n 135) 718 (Arguing that the assessment of whether an investigation is in the interests of justice has to be carried out in relation to a specific case and that therefore the Prosecutor cannot take into account 'general interests of national reconciliation or objectives of peacemaking versus interests of accountability'); Seibert-Fohr (n 131) 579 (Contending that amnesties serve peace and security rather than justice).

[822] ICC-OTP, 'Informal Expert Paper: The Principle of Complementarity in Practice Contents' (2003) paras 71–74.

[823] See e.g. Bell, *On The Law of Peace: Peace Agreements and the Lex Pacificatoria* (n 4) 243: "Over time, a prohibition on blanket amnesty was 'holistically' derived from a diverse body of international law, comprising international criminal law (including the concept of crimes against humanity), human rights law, and humanitarian law. […] The difficulties of fitting transitional situations into any one regime were dealt with by understanding or reinterpreting the regimes as far as possible to be consistent. The gaps or ambiguities of one regime could be resolved by turning to another."

be assessed cumulatively. This construction overlooks, for example, that the scope of the human rights obligations of states to investigate or prosecute violations vary under different international and regional treaties; that the duty to prosecute absolute human rights is not an absolute duty itself; that *jus cogens* status of a norm does not bear relevance to the status of the duty to prosecute violations of such norms; or that the admissibility of cases involving persons, who are granted amnesties in domestic law, before the ICC does not mean that the amnesty itself is unlawful.

Therefore, contrary to what the blueprint for transitional justice suggests, international law does not require the prosecution and punishment of all international crimes and serious violations of human rights across different legal contexts. This conclusion leads to the question of to which extent negotiating parties in a peace process may avoid, if they so desire, providing for criminal accountability guarantees either in the agreement or in its implementation. The next sections identify and examine two modalities of balancing peace and justice: sequencing and non-criminal forms of accountability.

5.2.3.1. Sequencing peace and justice

The question of whether any room for peace-making practices symbolised by the "peace first, justice later" maxim is left in international law arises. Such practices aim to sequence peace-making and transitional justice through strategic silence, constructive ambiguity, and sunset clauses in peace agreements. For example, during the peace negotiations preceding the 2003 Peace Agreement of Liberia, the proposal of the mediator that the decision on the grant and scope of amnesty and provision for criminal trials should be postponed until the election of the new government was accepted by the negotiating parties.[824] As a result, the Agreement remained silent on these issues and only provided for the establishment of a truth and reconciliation commission.[825]

On a formalist reading, unless *de jure* guarantees of amnesty are included in a peace agreement, such practices would not *ipso facto* contravene the treaty obligations to submit cases to competent authorities for the purpose of prosecution or render cases before the ICC

[824] Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice* (Centre for Humanitarian Dialogue 2007) 15.

[825] Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement of Democracy in Liberia (MODEL) and the Political Parties, 18 August 2003 (n 15).

admissible. Therefore, if (submission to) prosecution of treaty crimes subject to the obligation *aut dedere aut judicare*, serious violations of human rights, and crimes within the jurisdiction of the ICC is ensured in the post-agreement phase, sequencing is not in and of itself ruled out as a lawful peace-making strategy.

As a policy, sequencing is promoted by some scholars, who argue that "[j]ustice does not lead; it follows".[826] However, sequencing has its shortcomings. Firstly, it does not provide any credible guarantee that transitional justice, in any form, would be pursued in the post-agreement phase. A logical consequence of this is that sequencing does not provide the actors implicated in the commission of international crimes and serious human rights violations with a guarantee of non-prosecution and, therefore, may fail to convince them to sign a peace agreement. Moreover, sequencing only postpones, if not overlooks, the need to compromise. In transition settings, selective prosecutions, alternative criminal sanctions or establishment of local justice mechanisms would often be necessary to accommodate the political, moral and cultural concerns about transitional justice. Therefore, it should be asked whether international law might accommodate a peace-making exception that allows for negotiated justice compromises that provide for some form of accountability.

5.2.3.2. A peace-making exception for non-criminal forms of accountability?

Can judicial authorities of a state decide not to prosecute treaty crimes subject to the obligation *aut dedere aut judicare* in order to respect a peace agreement? Would the provision of non-criminal accountability for serious violations of human rights and if not, reduced or alternative sanctions imposed by a judicial authority, fulfil the requirements of human rights obligations of a state? Lastly, can the ICC Prosecutor exercise discretion not to prosecute a case in the interests of justice, where a peace agreement guarantees non-criminal accountability?

Although international law in general seems to be inclined to a retributive approach to dealing with crimes and human rights violations, which is evinced, for example, by the treaty obligations *aut dedere aut judicare* for certain crimes and (quasi-)judicial pronouncements establishing a duty to prosecute serious violations of human rights, there is an increasing awareness of the need to recognise an exception to retributive justice with a

[826] Snyder and Vinjamuri (n 56) 6. See also Oskar NT Thoms, James Ron and Roland Paris, 'The Effects of Transitional Justice Mechanisms' [2008] CIPS Working Papers 11.

view to balancing peace and justice. It was indeed the recognition of the need to "harmonize criminal justice and negotiated peace" that prompted Judge Garcia-Sayán, and the judges who joined his concurring opinion in *Massacres of El Mozote*, to emphasise that:

> "in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace."[827]

A similar window for a peace-making exception to human rights obligations may also be found in the above-mentioned statement of the ECtHR in *Margus* that amnesties may be accepted as possible as part of a reconciliation process and/or a form of compensation to the victims.[828]

The practice of peace agreements demonstrate the use of conditional amnesties that forego prosecution on the condition of cooperating with a truth and reconciliation commission, or payment of reparations, to balance the demands of peace and accountability. As mentioned above, this practice may form an exception, even if a customary duty to prosecute, or prohibition of amnesties for, international crimes comes into existence.[829] Some scholars further argue that transitional justice agreements that fall short of providing for criminal accountability for international crimes and serious violations of human rights, but guarantee some form of accountability may be legitimised through democratic approval.[830] Although the legitimising effect of democratic approval cannot be denied, it must be noted that it does not in and of itself legalise an amnesty.

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[827] *Case of the Massacres of El Mozote and nearby places v. El Salvador* (n 480) (Concurring Opinion, Judge Garcia-Sayán).

[828] *Margus v Croatia* (n 110) [139]. See also Jackson (n 754) 23 (Explaining what reasoning the ECtHR may adopt in assessing a conflict between the duty to prosecute and considerations of achieving a negotiated settlement).

[829] See also Kress and Grover (n 693) (Arguing for the recognition of a 'limited necessity exception' to the customary duty to prosecute international crimes, where achieving negative peace necessitates a compromise). It must be noted that the suggested peace-making exception differs from force majeure and necessity as circumstances precluding wrongfulness in the law of state responsibility in that it does not require the respective requirements of applicability. See also Neil J Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume 1* (United States Institute of Peace 1995) 416.

[830] Ronald Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law' (2002) 43 Virginia Journal of International Law 173, 245; Vinjamuri (n 793) 110. For a

Accommodating a peace-making exception in international law is promising in several respects. Firstly, it creates a political space for the pursuit of accountability, but not necessarily criminal accountability, in peace negotiations. Secondly, it may incentivise conflict parties to enter into a negotiated settlement and thus end the conflict, while guaranteeing some form of accountability. Thirdly, it avoids the risk of imposing a narrow understanding of justice as criminal justice at the expense of alternative local conceptions and processes of justice. In the absence of the recognition of an exception for non-criminal justice in peace-making, the transitional justice blueprint relegates such justice mechanisms to complementary means. Moreover, regardless of whether they are considered as acceptable alternatives to criminal justice, or only as complementary means in the pursuit of transitional justice, non-criminal justice mechanisms are expected to comply with international law. The next sections explore these issues.

5.3. Beyond criminal justice: Restorative and socio-economic justice

In addition to criminal accountability guarantees, albeit to a much lesser extent, pursuit of restorative and socio-economic justice in peace agreements is also encouraged in international policy.[831] Restorative justice mechanisms include truth and reconciliation commissions, reparations, local justice mechanisms or practices, apologies, and reintegration of perpetrators into their societies.[832] These primarily seek reconciliation through direct participation of affected persons in a process of psychological confrontation and healing.[833] Socio-economic justice in the context of transitional justice is associated with a broad range of measures, which include the acknowledgement of the violations of economic, social and cultural rights (ESCR) that took place during the conflict, incorporating ESCR into the legal and institutional framework of the state, reparations, land reform, addressing food insecurity, and provision of health services.[834] The next sections explore the

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thicker conception of obtaining democratic support for an amnesty through grounding the process of the creation of transitional justice mechanisms in surveys of local populations, domestic moral traditions, and participation of moral leaders, see Ramji-Nogales (n 700).

[831] *The EU Policy Framework on Support to Transitional Justice* (n 76) Unnumbered page 1; *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672) 10.

[832] Carol Menkel-Meadow, 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual Review of Law and Social Science 161, 162.

[833] Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge University Press 2011) 11.

[834] See Amanda Cahill-Ripley, 'Reclaiming the Peacebuilding Agenda: Economic and Social Rights as a Legal Framework for Building Positive Peace - A Human Security Plus Approach to Peacebuilding' (2016) 16 Human Rights Law Review 223; Padraig McAuliffe, 'Dividing the Spoils: The Impact of Power Sharing

role of international law in the negotiation and inclusion of restorative and socio-economic justice in peace agreements, with a particular focus on the impact of the prioritisation of criminal justice in the transitional justice blueprint.

5.3.1. Restorative justice

In international policy and scholarship, inclusion of restorative justice mechanisms in peace agreements and in transitional justice policies in general is normatively grounded in the right to truth, right to reparation, and right to guarantees of non-recurrence.[835] This does not go as far as to suggest that the inclusion of such mechanisms in peace agreements is a particular obligation under international law, as opposed to the arguments to that effect in relation to the inclusion of criminal accountability provisions in peace agreements. However, international legal arguments shape the inclusion of restorative justice mechanisms in peace agreements in two main ways.

Firstly, restorative justice mechanisms are accommodated within the international blueprint for transitional justice and peace agreements only to the extent that they conform to international law. For example, the UN Guidance on Transitional Justice states that:

> "Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations."[836]

Truth commissions and local justice mechanisms are expected of incorporating certain procedural human rights guarantees into their operation. The Updated Set of principles for the protection and promotion of human rights through action to combat impunity, for example, provides for procedural guarantees including guarantees of independence, impartiality and competence, guarantees for persons implicated, and guarantees for victims

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on Possibilities for Socioeconomic Transformation in Postconflict States' (2017) 11 International Journal of Transitional Justice 197.

[835] *The EU Policy Framework on Support to Transitional Justice* (n 76), unnumbered page 6; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (n 689), Principles 2-5 (Right to truth); Principles 32-34 (Right to reparation); Principles 35-38 (Guarantees of non-recurrence). See also Jamie Pring, *From Transitional Justice to Dealing with the Past: The Role of Norms in International Peace Mediation* (swisspeace 2017) 10.

[836] *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672) 2.

and witnesses testifying on their behalf.[837] Similarly, the Secretary-General in his 2004 Report of the on the rule of law and transitional justice in conflict and post-conflict societies states that indigenous and traditional processes should conform to international standards.[838] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, a non-binding set of principles adopted by the African Commission on Human and Peoples' Rights, also stipulates that traditional courts must comply with the fair trial guarantees of the Banjul Charter.[839]

Guarantees of fair trial and due process in international human rights law are primarily applicable to courts and tribunals and not to informal, i.e. non-judicial, mechanisms, processes or practices such as truth commissions and local justice mechanisms.[840] Their incorporation into the mandates and operative frameworks of such mechanisms by analogy is encouraged to remedy some of their limitations. Truth commissions and local justice mechanisms have been particularly criticised for lack of due process guarantees or disregard for inclusion of women in the process or violence against women in the mandate.[841] However, insistence of conformity with international law or other normative standards may limit the potential of restorative justice mechanisms to contribute to truth, reconciliation, and local understandings of justice.[842] In *Azapo*, Judge Mahomed points out that the South African Truth and Reconciliation Commission provided a forum for victims "to unburden their grief publicly" by "sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective

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[837] Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (n 689), Principles 7, 9, 10.

[838] ' The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (n 160) 12.

[839] 'African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) DOC/OS(XXX)247' s Q.

[840] See ICCPR (n 527), Art 14; American Convention on Human Rights 'Pact of San Jose, Costa Rica' (22 November 1969) 1144 UNTS 123 (ACHR), Art 8; ACHPR (n 493), Art 7; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art 6.

[841] Chinkin and Kaldor (n 82) 446; Roger Mac Ginty, 'Indigenous Peace-Making versus the Liberal Peace' (2008) 43 Cooperation and Conflict 139, 155; Paul Gready and Simon Robinsy, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339, 349.

[842] See Shiri Krebs, 'The Legalization of Truth in International Fact-Finding' (2017) 18 Chicago Journal of International Law 83 (Demonstrating through case studies that the legalization of the findings of international fact-finding missions trigger emotional and cognitive biases against their perceived accuracy and fairness); Jennifer Balint, 'Law's Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime' in Emilios A Christodoulidis and Scott Veitch (eds), *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Hart Publishing 2001) (Arguing that the authority of law can trigger the process of reconciliation but the substance of reconciliation cannot be confined to the legal discourse); Mac Ginty (n 841) 158 (Arguing that the relationship between international standards and local justice mechanisms and practices is one of co-option rather than co-existence).

and corroborative evidence which could survive the rigours of the law."[843] Legal guarantees and procedures may limit the unearthing of the truth and achievement of reconciliation due to the inherent qualities of legal reasoning and requirements of the rules of evidence.

Secondly, restorative justice mechanisms are found insufficient by some commentators in respect of their contribution to accountability and the rule of law. As a result, they are envisaged as complementary means to criminal trials. According to the Human Rights Committee, for example, "truth-seeking processes, such as truth and reconciliation commissions, that investigate patterns of past human rights violations and their causes and consequences are important tools that can *complement* judicial processes".[844] Therefore, the international blueprint for transitional justice and peace agreements prioritises criminal justice and relegates restorative justice to complementary status.

This is reinforced by the role of the ICC in peace negotiations. Conformity with international criminal law, especially with the Rome Statute, becomes particularly significant for restorative justice mechanisms to render the cases covered inadmissible as per the complementarity test. This may lead to restorative justice mechanisms losing their non-judicial characteristics and resembling criminal justice mechanisms. Nouwen and Werner explain how this concern shaped the LRA delegation's position on regulating the local Acholi justice practices in the peace agreement using the "vocabulary of international criminal law" with a view to preventing the looming ICC prosecutions.[845] As a result, as Drumbl aptly argues:

> "… national institutions will model themselves along the lines of the ICC in order to maximize their jurisdiction. Complementarity, therefore, may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they

[843] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others CCT17/96 [1996] ZACC 16*. See also Emilios A Christodoulidis, 'Truth and Reconciliation as Risks' (2000) 9 Social & Legal Studies 179, 185–8 (Arguing that the Commission faltered both as a legal institution and a forum for reconciliation as its mandate and operational rules became legalised).

[844] 'UN Human Rights Council, Resolution: Human Rights and Transitional Justice (11 October 2012) UN Doc A/HRC/RES/21/15' para 3. See also *The EU Policy Framework on Support to Transitional Justice* (n 76), unnumbered page 6; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (n 689), Principle 5.

[845] Nouwen and Werner (n 810) 157.

> mete out. In the end, the content of local practices may be excluded regardless of the legitimacy with which these practices are perceived."[846]

Restorative justice processes which do not follow legal procedures or impose legal sanctions nevertheless contribute to accountability and the rule of law by addressing past injustices in a public forum.[847] Although the inclusion of certain guarantees of impartiality of the presiding members or against racial discrimination into their mandates and operative frameworks may be necessary to avoid restorative justice mechanisms collapsing into mob justice, excessive legalisation and approximation to criminal justice processes of restorative justice mechanisms may prove counterproductive for the goals associated with such processes.

5.3.2. Socio-economic justice

Although transitional justice has been conceptualised in different ways, there has been an emphasis, particularly in the peace-making and peacebuilding policy, on ensuring accountability for international crimes or violations of civil and political rights, as a result of which, socio-economic justice concerns has been marginalised.[848] However, both in scholarship and policy, there is increasing engagement with the inclusion of socio-economic justice issues in peace agreements, particularly with an emphasis on the violations of ESCR.[849] In 2014, the OHCHR published a report on Transitional Justice and Economic, Social and Cultural Rights setting out how violations of ESCR can be addressed in transitional justice processes by reference to the relevant international legal framework.[850] In addition to ESCR violations, attention is also drawn to reparations, which play a crucial role in adopting a socio-economic justice perspective in peace agreements. Notably, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles on the Right to a Remedy and Reparation) affirm

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[846] M Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 143.

[847] David A Crocker, 'Truth Commissions And Transitional Justice' (2000) 20 Report from the Institute for Philoshop and Public Policy 23, 26–27.

[848] See Dustin N Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 Harvard Human Rights Journal 149; Cahill-Ripley (n 834).

[849] *Guidance Note of the Secretary-General: UN Approach to Transitional Justice* (n 672) 10; *The EU Policy Framework on Support to Transitional Justice* (n 76) 11–12. See also Louise Arbour, 'Economic And Social Justice For Societies In Transition' (2007) 40 New York University Journal of International Law and Politics 1; Cahill-Ripley (n 834).

[850] *Transitional Justice and Economic, Social and Cultural Rights* (n 676).

the obligation to provide reparations to victims of conflict-related violations.[851] Overall, there is an acknowledgement that international law provides a reference framework for the negotiation and interpretation of ESCR and other forms of contributing to socio-economic justice during peace negotiations, without stipulating substantive outcomes to be included in a peace agreement.

In the peace-making practice, few peace agreements explicitly reference ESCR in the transitional justice, reconciliation, or accountability sections. The amnesty provision in the 2003 Linas-Marcoussis Agreement in Cote d'Ivoire excludes "serious economic violations and serious violations of human rights and international humanitarian law" from its scope.[852] The 2011 Doha Document for Peace in Darfur includes "violations of economic, social and cultural rights" within the mandate of the Truth and Reconciliation Committee.[853] The 2008 Kenyan National Dialogue also lists "major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence" as part of the mandate of the Truth, Justice and Reconciliation Commission.[854] Another truth commission that has dealt with violations of socio-economic rights is the Commission in Sierra Leone, which was established in implementation of the 1999 Lomé Agreement.[855] The parties to the Lomé Agreement also undertook to establish a special fund for the grant of reparations to war victims.[856] Lastly, the 2000 Arusha Agreement in Burundi and the 2001 Bougainville Peace Agreement emphasise the economic and social aspects of national reconciliation.[857] It must be mentioned that to the extent that ESCR violations amount to violations of civil and political rights, or to international crimes, transitional justice mechanisms in a peace agreement that deal with the latter theoretically also cover the former.[858] This, however, provides for a limited recognition of the socio-economic injustices committed before and during conflict,

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[851] 'Basic Principles and Guidelines on the Right to a Remedy and Reparation' (n 730). See also Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012).

[852] Linas-Marcoussis Agreement (Cote d'Ivoire), 23 January 2003, Annex, VII, 5.

[853] Doha Document for Peace in Darfur (n 737), Art 316.

[854] Acting Together for Kenya (n 113).

[855] Lomé Peace Agreement (n 15).

[856] ibid, Art XXIX.

[857] Arusha Peace and Reconciliation Agreement for Burundi (n 65); Bougainville Peace Agreement (n 433).

[858] See Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press 2015).

as many of them may not amount to violations of civil and political rights, or even of ESCR.[859]

Most peace agreements deal with economic, social and cultural issues as part of the development or powersharing arrangements instead of the transitional justice element of a peace agreement. The 2015 Algiers Agreement in Mali, for example, devotes its Section IV to "socio-economic and cultural development".[860] One of the six major components of the 2016 Final Agreement in Colombia concerns land reform but it is not part of the transitional justice component of the Agreement.[861] The 2005 Comprehensive Peace Agreement concluded in Sudan, the Lomé Peace Agreement concluded in Sierra Leone and the Comprehensive Peace Agreement on the Bangsamoro concluded in the Philippines contain detailed wealth sharing arrangements.[862] However, referring back to the definition of transitional justice in the 2004 report of the UN Secretary-General, these may also represent a "society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation", if the terms are broadly understood.

Despite the emerging calls for adopting a socio-economic justice perspective in the negotiation of peace agreements, some scholars advise caution. For example, McAuliffe questions the malleability of transitions to transformative justice agendas.[863] He argues that the practice and policy of transitional justice may be better off by focusing on accountability for physical violence in terms of committing to realistic goals.[864] From a conflict resolution perspective, Rogier points out that whether the root causes of a conflict can be addressed in a peace agreement without hampering the peace-making effort depends on the nature of the conflict and transition.[865]

Overall, the prioritisation of criminal justice in the transitional justice blueprint adopted by international peace-making actors and the institutionalisation of criminal justice

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[859] See also Engle (n 497) 52.

[860] Accord Pour la Paix et la Reconciliation au Mali (n 177).

[861] Final Agreement to End the Armed Conflict (Colombia) (n 18).

[862] Comprehensive Peace Agreement (Sudan) (n 26); Lomé Peace Agreement (n 15); The Comprehensive Agreement on the Bangsamoro (n 18).

[863] McAuliffe (n 39).

[864] ibid.

[865] Emeric Rogier, *Rethinking Conflict Resolution in Africa Lessons from the Democratic Republic of Congo, Sierra Leone and Sudan* (Clingendael, Conflict Research Unit 2004) 21.

at the international level, i.e. through the establishment of the ICC and the criminal turn in the case-law of human rights courts, is argued to have marginalised other conceptions of justice, including socio-economic justice, in peace-making.[866] García and Engle, for example, points out that the transitional justice component of the 2016 Final Agreement of Colombia was fiercely debated, whereas the land reform component was not seen as justice-related and escaped the attention of advocacy circles and public debate on transitional justice.[867] De Waal provides another important example from the peace negotiations for the resolution of the Darfur conflict. He explains that the Sudanese government rejected the demand of Darfuri armed opposition groups and representatives of civil society that the government apologise for the crimes committed in Darfur and provide victims with compensation, as the government argued that the former would amount to an admission of guilt and the latter would not render the cases inadmissible before the ICC.[868] Therefore, clarity as to what international law requires in relation to transitional justice element of peace agreements is required. The blueprint for transitional justice adopted in international policy treats criminal justice for international crimes and serious violations of human rights as indispensable even in the context of a negotiated settlement. As argued in the previous section, however, this blueprint does not find full support in international law. The next section turns to the issue-area of human rights in peace agreements.

5.5. Inclusion of human rights in peace agreements as a guarantee of non-repetition

International human rights law and human rights broadly understood to include moral and political norms and practices provide a "common vocabulary to frame and negotiate issues and articulate goals for cooperation, coordination, and goal setting".[869] In addition to its discursive role in peace negotiations, human rights also appear as a content-related issue. Almost all peace agreements include various human rights guarantees. The Language of Peace database classifies references to human rights in peace agreements as: general references to respect human rights, references to respect specific human rights (including civil and political rights; economic, social and cultural rights; non-discrimination; indigenous and minority rights, rights of marginalised groups, equality), ratification of

[866] See García and Engle (n 799); Nouwen and Werner (n 810).

[867] García and Engle (n 799).

[868] Alex de Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008).

[869] Bhuta (n 198) 851. See also Bell, 'Peace Settlements and Human Rights: A Post-Cold War Circular History' (n 63).

human rights treaties, establishment of human rights monitoring institutions, provision of human rights education and training, and references to human rights violations that took place during or before the conflict.[870] As explained in the introduction, inclusion of such human rights guarantees in peace agreements is encouraged in international peace-making policy. Putnam also observes that human rights has been considered as a constitutive element of peace agreements in the practice and policy of the UN, international financial institutions, and peace facilitator third states.[871]

It has been also argued that the inclusion of human rights guarantees, in addition to other rule of law and governance reforms, may have a legal basis in the law of state responsibility. In addition to the cessation of the wrongful act and to make full reparation for the injury caused, a responsible state is also under an obligation "to offer appropriate assurances and guarantees of non-repetition, if circumstances so require".[872] This form of responsibility bridges the backward-looking face of transitional justice to forward-looking, preventive measures. According to the Basic Principles, guarantees of non-repetition that concern human rights as broadly understood include:

> " (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
> (c) Strengthening the independence of the judiciary;
> …
> (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
> …
> (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
> (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law."[873]

Similarly, in his 2015 Report, Special Rapporteur De Greiff urged for the framing of transitional justice as to include institutional reforms and determines the primary areas of institutional interventions as security sector reform, right to legal identity, ratification of

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[870] United Nations and University of Cambridge (n 1). For examples, see Aroussi and Vandeginste (n 175).

[871] Tonya Putnam, 'Human Rights and Sustainable Peace' in Stephen J Stedman, Donald Rothchild and Elizabeth Cousens (eds), *Ending Civil War: The Implementation ofPeace Agreements* (CO: Lynne Rienner 2002) 237 et seq.

[872] Draft Articles on the Reponsibility of States for Internationally Wrongful Acts 2001 (n 785).

[873] 'Basic Principles and Guidelines on the Right to a Remedy and Reparation' (n 730).

international treaties, legal reform, judicial reform, constitutional reform and adoption of bills of rights.[874] Although the overall tone of the proposals remain policy-oriented, as to the legal basis of such institutional reform, De Greiff refers to Article 30 of the ILC Articles on State Responsibility.[875]

Article 30(b) provides that a state responsible for an internationally wrongful act is under an obligation "to offer *appropriate* assurances and guarantees of non-repetition, *if circumstances so require*".[876] This reflects a degree of ambiguity as to which circumstances require the provision of guarantees of non-repetition and which guarantees are appropriate. The commentary does not shed light on the scope of provision in relation to international crimes. De Hoogh argues that two categories of guarantees of non-repetition appear to be relevant in case of international crimes.[877] The first category includes "obligations regarding disarmament, dismantling of war industries, destruction of weapons, re-organization of the police, paramilitary or armed forces, and the admission of observation teams".[878] The second category, which relates to the organisation of a state, includes "the prohibition of specific political groups or parties, a change of government, constitutional changes, the holding of free elections, and respect for human rights".[879] Especially due to the scarcity of state practice in the context of international crimes committed in intra-state armed conflicts, it is doubtful whether such far-reaching measures can be considered as appropriate modalities of guarantees of non-repetition.[880] Nollkaemper points out two potential forums for measures similar to guarantees of non-repetition under the general law of state responsibility to be taken: the Security Council and human rights courts with compulsory jurisdiction and competence to order guarantees of non-repetition.[881] Alternatively, inclusion of human rights guarantees or provision for other constitutional, legal and institutional reforms in a peace

[874] Pablo de Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (7 September 2015) UN Doc A/HRC/30/42'.

[875] ibid.

[876] Draft Articles on the Reponsibility of States for Internationally Wrongful Acts 2001 (n 785).

[877] Andre De Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer Law International 1996) 195.

[878] ibid.

[879] ibid 196.

[880] See also Andre Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (2010) 8 Santa Clara Journal of International Law Article 313, 343.

[881] ibid 347–351.

agreement may be put forward as a condition for financial support by donors[882] or as a requirement for accession to a regional organisation[883].

However, international law does not contain a general requirement of inclusion of human rights or other constitutional, legal and institutional reforms in peace agreements. International actors should take seriously the warnings by some scholars that governance and rule of law reforms may in some circumstances undermine peace-making efforts.[884] Where feasible, these can be encouraged by international actors as a peace-making policy, prescribed by the Security Council, or may be incorporated into the broader peacebuilding process. More importantly, any reference to human rights in a peace agreement must be accompanied by credible implementation guarantees. After all, in most cases, human rights treaties cited in a peace agreement would have been in effect yet ineffective in practice during the conflict. It is not the absence of legal obligations and rules, but the lack of their implementation that characterises the violations that take place during armed conflicts.[885]

5.6. Powersharing: Tensions with transitional justice and human rights

Political, territorial, military and economic powersharing lies at the heart of the resolution of intra-state armed conflicts, as conflict parties need to share power in the absence of a military victory. It is beyond the scope of this chapter to explore the modalities of powersharing and to map the potential tensions between different modalities and international law.[886] However, in line with the focus of the chapter, two main legal arguments put forward in relation to the relationship between powersharing and human rights and transitional justice will be briefly explored here.

As to the relationship between powersharing and transitional justice, it has been argued that powersharing arrangements may function as *de facto* amnesties by assigning

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[882] Argued in Saliternik (n 4).

[883] Argued in relation to post-conflict constitutions in Andrew Arato, 'International Role in State-Making in Ukraine: The Promise of a Two-Stage Constituent Process' (2015) 16 German Law Journal 691, 702.

[884] See Sriram (n 671) 62.

[885] See e.g. James Sloan, 'The Dayton Peace Agreement: Human Rights Guarantees and Their Implementation James' (1996) 7 European Journal of International Law 207, 224: ' ... certain listed International Agreements have been in place in the territory of Bosnia and Herzegovina throughout the period of the war; an agreement like the International Covenant on Civil and Political Rights appears to have done little to safeguard the human rights guarantees contained in it'.

[886] For a more detailed analysis of powersharing in peace agreements from the perspective of international human rights law, see Christine Bell, 'Power-Sharing and Human Rights Law' (2013) 17 International Journal of Human Rights 204.

public office to (alleged) perpetrators of international crimes and serious violations of human rights and thus hinder the possibility of criminal trials.[887] Levitt further claims that "*pirates de la loi* and coupists are barred from holding public office during and after transitional peace processes".[888] If a powersharing arrangement leads to a *de facto* amnesty, i.e. absence of any form of accountability, this may amount to a violation of the state's obligations under conventional international criminal law or human rights treaties. The relevant case would also become admissible before the ICC. However, a prohibition of political participations does not flow from such obligations. In Colombia, political powersharing arrangements, which provide alleged perpetrators with the right to political participation, have come under criticism for their non-compliance with state obligations under international human rights law and international criminal law. However, in 2013, a group of international experts rightly opined before the Colombian Constitutional Court that there was "no source of international law that encourages or requires the application of a prohibition of political participation to members of a politically-motivated, non-state armed group on the basis of conflict-related international crimes that could be attributed to them".[889]

Secondly, powersharing arrangements within peace agreements may also be in tension with the requirements of international human rights law. A notable example is the 1995 Dayton Peace Agreement, which defines Bosniaks, Serbs, and Croats as 'constituent peoples' and stipulates that the right to be elected to the Presidency and the House of Peoples is confined to those affiliated with these peoples.[890] The arrangement, therefore, excludes other groups in Bosnia, such as Roma and Jews, from certain political posts. In 2009, the European Court of Human Rights ruled that the continuing application of this exclusion was in violation of the prohibition of discrimination (Article 14, ECHR and Article 1, Protocol No. 12) and the right to free elections (Article 3, Protocol No. 1).[891] The Court opined that the fragile security situation and the need to ensure the consent of the constituent peoples to achieve peace "could explain, without necessarily justifying, the absence of representatives

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[887] See Stef Vandeginste and Chandra Lekha Sriram, 'Power Sharing and Transitional Justice: A Clash of Paradigms' (2011) 17 Global Governance 489; Levitt (n 94); Chinkin and Kaldor (n 82) 452.

[888] Levitt (n 94) 36.

[889] 'Amicus Curiae Submission of the Institute for Integrated Transitions and Berghof Foundation to the Constitutional Court of Colombia Re Proceso de Constitucionalidad D-9808-9819 Acumulado Norma' (4 December 2013); see also Legislative Act 2 (2017, Colombia) (Incorporating the relevant peace agreement provision into the Colombian Constitution).

[890] General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), 21 November 1995 (n 15).

[891] *Sejdić and Finci v Bosnia and Herzegovina ECHR 2009-VI 273*.

of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society."[892] However, after noting the progress that has been made in Bosnia towards stable peace since the conclusion of the agreement, the Court held that alternative power-sharing mechanisms should be sought as the existing exclusionary power-sharing arrangement lacked "an objective and reasonable justification".[893]

The Court's decision led to concerns among scholars regarding the appropriateness of the judicial forum, i.e. as to whether an international court, instead of a domestic court, should assess the compatibility of a fundamental constitutional issue with human rights law, and of the perspective of individual human rights in evaluating group-based powersharing arrangements.[894] Overall, the decision was considered as an "an unfortunate development because it leaves future negotiators in places riven by potential or manifest bloody ethnic conflicts with considerably less flexibility in reaching a settlement".[895]

Similar concerns regarding the restriction of individual human rights through group-based powersharing arrangements have been raised before domestic courts. For example, in Bangladesh, the 1997 Chittagong Hill Tracts Peace Accord between the Bangladeshi Government and the United People's Party of the Chittagong Hill Tracts[896] and the implementing law 'Chittagong Hill Tracts Regional Council Act' became the subject of a case before the Supreme Court. The negotiating parties explicitly stated that the Accord was reached "under the framework of constitution of Bangladesh"[897] yet two petitions to the Court submitted that the Regional Council established in pursuance of the Peace Accord and special political participation rights accorded to the indigenous hill people were unconstitutional as the Council was in contravention with the state's unitary character, its establishment did not respect the constitutional procedure of establishing any local government, and special rights accorded to the hill people impinged upon the rights

[892] ibid 45.

[893] ibid 50.

[894] See Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations, or How Human Rights Courts May de-Stabilize Power-Sharing Settlements' (2013) 24 European Journal of International Law 477; Bell, 'Power-Sharing and Human Rights Law' (n 886); Jenna Sapiano, 'Courting Peace: Judicial Review and Peace Jurisprudence' (2017) 6 Global Constitutionalism 131.

[895] McCrudden and O'Leary (n 894) 477.

[896] Chittagong Hill Tracts Accord (Bangladesh), 2 December 1997 (n 393).

[897] ibid.

guaranteed by the Constitution to all citizens living in the region.[898] The Court upheld the petition and found the implementing law unconstitutional on both grounds, however, did not invalidate the Peace Accord by opining that "the CHT peace process to be sustainable must be informed by concerted innovative efforts at constant evaluation and reinvention".[899]

In interpreting the implications of *Sejdić and Finci* for powersharing arrangements elsewhere, a few points need to be taken into consideration. Firstly, the Court acknowledged that the exclusionary powersharing arrangement "pursued at least one aim which is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace".[900] Secondly, despite this acknowledgement, the Court refrained from an examination of whether the pursuit of peace to end an intra-state armed conflict could be considered as serving a "legitimate aim" for the purposes of a proportionality analysis of the resultant restriction on individual human rights. The reason behind this was a jurisdictional one. The Court did not have jurisdiction *ratione temporis* to examine the proportionality of the *adoption* of the exclusionary powersharing arrangement to end the conflict, as the Convention came into effect after the conclusion of the Dayton Peace Agreement, and thus limited its decision to the assessment of whether the *maintenance* of the exclusionary powersharing arrangement more than a decade after the conclusion of the peace agreement could satisfy the requirement of proportionality.[901] One may still take issue with the Court's assessment of the security situation in Bosnia and Herzegovina and consider it as unjustified judicial activism.[902] However, for the purposes of clarifying what the ECHR requires in relation to powersharing arrangements based in peace agreements, it must be noted that the margin of appreciation and the proportionality test remain as doctrinal options for the Court to take when examining powersharing arrangements stemming from a negotiated settlement to an intra-state armed conflict.[903]

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[898] *Mohammad Badiuzzaman Vs Bangladesh, Writ Petition No 2669 of 2000, reported in 7 LG (2010) HCD, Supreme Court of Bangladesh*.

[899] ibid. See also Ridwanul Hoque, 'The Judicialization of Politics in Bangladesh' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015); Mohammad Shahabuddin, 'Liberal Self-Determination , Postcolonial Statehood , and Minorities : The Chittagong Hill Tracts in Context' (2012) 2 77 (Considering the Supreme Court decision partially as a manifestation of the potenial normative incompatibility of liberal legal norms with effective responses to ethnic conflicts).

[900] *Sejdić and Finci v. Bosnia and Herzegovina* (n 224) [45].

[901] ibid 46.

[902] See e.g. McCrudden and O'Leary (n 894) 492.

[903] ibid 491.

5.7. Conclusion

What is (not) included in a peace agreement may affect its durability. A peace agreement that does not address the root causes of the conflict, or is not inclusive of the needs and demands of the affected groups in the society, may not yield sustainable peace in some circumstances. Moreover, in the absence of credible guarantees and incentives offered to conflict parties in an agreement, their commitment to it may be short-lived. These issues are typically addressed by scholars in peace and conflict studies with a view to understanding under which conditions certain substantive components are adopted and what contribution a substantive component makes to the durability of the agreement. Yet, such questions of design and content have also become increasingly legalised and normativised. In international peace-making policy and international legal scholarship, what must (not) be included in a peace agreement is being evaluated by reference to international law and other norms of peace-making. Not only the inclusion or exclusion of certain substantive outcomes are advised, but also express references to international law in the text of peace agreements are sought by international peace-making actors like the UN, EU and OSCE.

This chapter identified four main questions to explore whether the assumptions made about international law in the scholarship and policy and the proposed norms of peace-making find support in positive law. Firstly, it addressed the question of whether there is a duty to include criminal accountability guarantees in peace agreements as a result of a prohibition of amnesties or the potential of an ICC involvement in the situation. Although some types of amnesties are impermissible in international law, parties retain a degree of flexibility in balancing the demands of peace and justice in peace negotiations either by sequencing peace and justice, or by adopting non-criminal forms of accountability. A peace-making exception to the duty to prosecute or the involvement of the ICC, through the exercise of prosecutorial discretion, can be accommodated in international law to create more room for the adoption of non-criminal justice mechanisms in peace agreements and the exigencies of negotiating a peace agreement that relies on compromise. Secondly, the marginalising consequences of the prioritisation of criminal justice for other conceptions of justice in transitions, i.e. restorative and socio-economic justice, and the advantages and disadvantages of incorporating international legal standards into their operation are discussed. Overall, the prioritisation of criminal justice in the blueprint for transitional justice and peace agreements that emerges in the scholarship and policy does not find full support in international law. Yet, as the examples from peace processes mentioned in the

chapter show, the assumptions flowing from the blueprint have significantly shaped several peace negotiations, despite their (partially) questionable legal bases.

In addition to transitional justice, inclusion of human rights in peace agreements is also urged in international policy and scholarship. Although it may be considered as a guarantee of non-repetition, where it appears as an appropriate guarantee and if circumstances so require, the conclusion is weakened by the ambiguity inherent in the conditions of applicability and the scarcity of relevant state practice. However, such guarantees may be demanded by human rights court and the SC, either to be included in a peace agreement or to be secured in its implementation. Lastly, in relation to the relationship between powersharing arrangements and transitional justice, the chapter demonstrated that there is no prohibition of political participation applicable to perpetrators of international crimes and that powersharing arrangements that prioritise group recognition over individual human rights may be upheld, if there is an objective and reasonable justification stemming from the exigencies of a negotiated settlement.

In sum, what arises from the analysis undertaken in this chapter is that the determination of the content of peace agreements has become a normativised endeavour. Yet, this has not been fully translated into international law. Prescription of substantive outcomes to be included in a peace agreement by international law may present challenges to the necessity of compromise and local understanding of peace, justice and human rights. Such challenges need to be taken into account by law- and policy-makers. At any rate, it must be noted that the ICC, human rights courts, and the SC retain their oversight of transitions from conflict to peace. Through a combination of institutional restraint and rigorous legal arguments, such institutions can ensure that peace negotiations are not left to power politics, while preserving the peace-making space.

Conclusion and Outlook

6.1. Peace-making and international law: Where are we?

Since the end of the Cold War, intra-state armed conflicts have become the dominant form of violence in the world. Coupled with the surge in the number of peace agreements concluded to end intra-state armed conflicts, with some 600 peace agreements signed since 1990, this phenomenon led to the proliferation of international policy and scholarship on intra-state armed conflicts and their resolution. Chapter 1 introduced the three overall trends that characterised the field of peace-making in the post-Cold War period: expansion, internationalisation, and resultant legalisation of peace-making. Firstly, in addition to the increase in the numbers of peace agreements, their scope also expanded to issues of statehood, territory, identity, socio-economic and development issues, constitutional reform, human rights, and transitional justice. Secondly, both the landscape and subject-matter of peace-making became internationalised, with the increasing international involvement in the negotiation and implementation of peace agreements and the transformation of peace-making into a matter of international policy.

Thirdly, a process of legalisation, and broader normativisation, of peace-making has unfolded. This process is evinced by the increasing references to international law in peace negotiations and resultant agreements, the drafting of peace agreements in language that is typical of international treaties, the claim of legal force in some peace agreements, and the proliferation of normative guidelines adopted by the UN, regional organisations, international financial institutions, peace facilitator third states, and non-governmental organisations. The recognition of the relevance of international law and (non-legal) norms in the peace-making practice and policy, the appearance of peace agreements before domestic and international courts, and the establishment of the International Criminal Court and its involvement in situations of ongoing peace negotiations have altogether contributed to a wave of interest in peace-making in international legal scholarship. Within this context, Chapter 2 explored the conceptualisation and theorisation of a new ‘law’, or a set of legal norms, of peace-making by some scholars. The new ‘law’ is construed as entailing both the tailoring of existing international legal norms to the context of peace-making and the emergence of new norms to fill a supposed normative gap in relation to the *post bellum* phase.

This dissertation aims to provide a comprehensive examination of the relationship between peace agreements and international law with a view to clarifying what the existing international law says and whether the normative developments in the field of peace-making point to the emergence of a new law, or legal norms, of peace-making. To do so, the normative developments in the practice, policy and scholarship of peace-making are mapped onto the dissertation's framework for analysis that covers the legal status, negotiation process, and content of peace agreements. Focusing on the legal status of peace agreements aiming to end intra-state armed conflicts, Chapter 3 argued that international law does not recognise the agreements between governments and armed opposition groups as international agreements, as the latter lacks treaty-making capacity, except for the widely recognised exception of national liberation movements. This conclusion finds support in the relevant state practice, judicial and arbitral decisions, practice in relation to other agreements concluded between states and armed opposition groups, and the Security Council practice. Moreover, the chapter showed that, regardless of the question of the treaty-making capacity of armed opposition groups, most agreements do not reflect an intention to create legally binding obligations. Peace agreements rather appear to be non-international political agreements. The chapter also included a discussion of whether according international legal status to peace agreements may shield them from domestic or international legal challenges before courts, concluding that it would be so only in rare cases. Chapter 3 ended on the note that peace agreements generate moral and political obligations, as well as significant consequences for negotiating parties and international actors involved in its implementation.

Moving on to the examination of the role of international law in relation to the negotiation process of a peace agreement, Chapter 4 identified and examined the legal status of three process-related norms of peace-making: a norm of negotiation that requires negotiated settlements to conflicts; a norm of inclusion that requires the participation of women, civil society, youth, indigenous groups, children, and other affected groups in peace negotiations; and a counter-norm of non-negotiation that urges the exclusion of alleged perpetrators of international crimes or terrorist offences from negotiations. None of these norms flows from the existing legal norms or has gained the status of international law. Arguably, the strongest normative consensus is achieved in relation to the participation of women in peace negotiations. However, the basis of such a right in treaty law, i.e. CEDAW, remains ambiguous, whereas the state practice is not consistent and uniform enough to suggest the crystallisation of a customary international legal norm of women's inclusion in peace negotiations. The chapter concluded by emphasising that the empirical evidence cited

in support of the causal link between the respect for process-related norms of peace-making and the durability of outcome agreements is questioned in some studies. In addition to such empirical questions, the pragmatic and realist concerns in relation to whether process-related norms can be observed despite the disinclination of negotiating parties and the fragile security conditions during peace-making processes need to be taken into consideration by policy-makers.

Chapter 5 focused on the role of international law in relation to the content of peace agreements, with a focus on the issue-areas of transitional justice and human rights. It examined the legal accuracy of four main normative assumptions made in international policy and scholarship, namely, that (i) there is a duty to include criminal accountability guarantees in peace agreements, (ii) non-criminal justice mechanisms can only be complementary to criminal justice and must conform to international law, (iii) peace agreements must include human rights guarantees, and (iv) powersharing arrangements that hinder transitional justice and impinge on individual human rights are unlawful. As to the first issue, although some types of amnesties are impermissible in international law, parties retain a degree of flexibility in balancing the demands of peace and justice in peace negotiations either by sequencing peace and justice, or by adopting non-criminal forms of accountability. In the absence of criminal prosecution, such modalities are unlikely to render the relevant cases inadmissible before the ICC. However, where the interests of justice so require, the ICC Prosecutor may defer to a peace agreement and decide not proceed with an investigation. A peace-making exception to the duty to prosecute human rights violations can also be accommodated in the human rights treaties, as the recent case-law of the ECtHR and IACtHR signals. This in turn creates more room for adoption of non-criminal justice mechanisms in peace agreements and the chapter presents the advantages and disadvantages of incorporating international legal standards into their operation. As to the third issue, inclusion of human rights in peace agreements may be considered as a guarantee of non-repetition, where it appears as an appropriate guarantee and if circumstances so require. Such guarantees may also be demanded by the SC. Lastly, in relation to the relationship between powersharing arrangements and transitional justice, the chapter demonstrated that there is no prohibition of political participation applicable to perpetrators of international crimes. Moreover, powersharing arrangements that prioritise group recognition over individual human rights may be upheld, if there is an objective and reasonable justification stemming from the exigencies of a negotiated settlement. Overall, international law places limited

normative constraints on the content of peace agreements and do not yet prescribe precise substantive outcomes to be included in an agreement.

Taken together, these findings do not lend support to the scholarly claims that there is an emerging 'law', or at least new legal norms, of peace-making if these are to be understood as law proper. The legal analyses that underlie such claims often adopt far-reaching interpretations of existing international law, treat the norms developed in peace-making policy as *lex feranda* or even *lex lata*, and consider the collective practice of peace agreements as a source of new norms of peace-making without an examination of the consistency of the practice and the existence of accompanying *opinio juris*. However, it must be noted that rather than a legal error this often results from the adoption of non-positivist approaches to the making of international law by the scholars who suggest that there are emerging legal norms of peace-making. In light of the "ambiguities, gaps and incoherencies" of "the new law", for example, Bell writes:

> "This might leave one to argue that the symbolism and the "idea of law" is as important as *what the law actually says at any one point in time*. If this is the case, then the question becomes: how do we best create *a common consensus as to the "idea of law"*. The answer might be – we establish a notion of best practice, and encourage people to comply through processes that include democratic dialogue on how international standards are best implemented in any one context. Is this not the best that international law can offer in any case?"[904]

This dissertation, on the other hand, studies the role of international law in the negotiation of peace agreements to understand "what the law actually says" and argues for the preservation of the boundary between "what the law actually says" and the "idea of law", which seemingly extends beyond positive law to include political and moral aspirations. This is not to dispute the importance of studying "the idea of law" in peace-making, but, rather, to emphasise the distinction between the two and the provide clarity as to which behaviour is required by law and what consequences are attached to non-compliance. As assertions made in the name of international law may not always reflect "what the law actually says", peace-making actors need such clarity.

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[904] Christine Bell, 'The "New Law" of Transitional Justice' in Kai Ambos (ed), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 124. See also Turner (n 180) 259: "[W]e need to re-think what we understand by 'law' in these contexts. Law has both normative and symbolic aspects. A strict legalist approach to law would treat law and legal standards as non-negotiable, and as setting the parameters of a legiti- mate negotiation process. Therefore what is to be resisted is the equation of the symbolic and normative functions."

Lastly, the conclusion that peace agreements are not international agreements and international law places limited normative constraints on their negotiation process and content does not equate to an argument that international law and international institutions do not have a significant role in the negotiation and implementation of peace agreements. Firstly, international actors, i.e. the UN, regional organisations, non-governmental organisations, independent international institutions, or peace facilitator third states, play crucial roles in facilitating peace negotiations. They also undertake implementation roles delegated in a peace agreement. For example, 28 peace agreements delegate an oversight role to the ICRC in the implementation of provisions on demilitarisation and release of detainees.[905] UN Agencies, for example the UNICEF in the implementation of the child component of peace agreements [906] and UNHCR in the implementation of the return, settlement and reintegration of refugees and IDPs,[907] also undertake similar roles. Secondly, in the absence of any form of accountability for international crimes and serious violations of human rights in a peace agreement, or its aftermath, the International Criminal Court and human rights courts and monitoring bodies may play a role in protecting the rights of victims. Lastly, the Security Council plays an *ad hoc* role in the negotiation and implementation of peace agreements by establishing parameters for the negotiation process of a settlement, calling for compliance with peace agreement commitments, characterising non-compliance with peace agreements as threats to peace, or imposing sanctions where required. To conclude, although peace-making had been significantly internationalised and normativised over the past three decades, these developments have not been translated into new international legal norms.

6.2. Empirical, normative and political questions on the role of international law in peace-making

This dissertation is a primarily doctrinal undertaking to assess the evolving role of international law in peace-making. It does not provide a comprehensive treatment of the empirical, normative and political questions at play, although such issues are flagged where relevant. These remain important questions for future research. Firstly, further empirical enquiry as to whether the proposed norms of peace-making may yield the outcomes desired

[905] See e.g. Agreement on the Resolution of the Conflict in South Sudan (n 195) Chapter II(1)(10). For other examples, see United Nations and University of Cambridge (n 1).

[906] See e.g. Comprehensive Peace Agreement (Sudan) (n 26), Annex 1, Part III, 24.11.

[907] See e.g. Arusha Peace and Reconciliation Agreement for Burundi (n 65), Annex IV, Chapter 1 (1.4).

is needed. For example, although most studies and policy documents establish a causal link between the norm of inclusion in peace negotiations and the durability of resultant peace agreements,[908] others question the strength of the evidence underlying the causality arguments. Reviewing the evidence base of a DFID Practice Paper,[909] Evans finds that "empirical evidence on both 1) whether peace processes/agreements can make a political settlement more inclusive and 2) whether negotiated/inclusive settlements are more sustainable remains mixed if not 'contradictory'".[910] As to the inclusion of women in peace negotiations, Carayannis et al mention that "[t]he benefit of women's participation in peace processes (beyond a normative conviction that female participation ought to be supported) tends to be based on female 'soft skills', such as trust- and community-building. Values, rather than empirical data, underscore affirmations of what the role of women ought to be, rather than what it is."[911] They also highlight that the studies that generate concrete evidence in relation to the participation of civil society actors in peace negotiations "raise serious cause for concern, as they highlight the political context within which civil society organisations operate and the potential that their inclusion will actually damage the peace process".[912] This is not to suggest that the development and promotion of the norm of inclusion of women and civil society in peace negotiations should be set aside, but, rather, a call for the establishment of a stronger evidence base to support the empirical arguments put forward in support of the normative arguments. The empirical enquiry should also extend to the more general claim that "[c]onsistency with international law and other norms contributes to bolstering the legitimacy of a peace process"[913] or that "[c]onsistency with international law and norms contributes to reinforcing the legitimacy of a process and the durability of a peace agreement".[914] As Arnault, the Special Representative of the Secretary-General and Head of the UN Mission in Colombia, contends, "current international demands ["in the field of normative peacemaking today"] need evidence-based validation before they need further advocacy".[915]

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[908] See e.g. *Pathways for Peace* (n 16) 195.

[909] *Building Peaceful States and Societies: A DFID Practice Paper* (n 40).

[910] Summarised in Menocal (n 579) 9. See also Carayannis and others (n 521) 21.

[911] Carayannis and others (n 521) 22.

[912] ibid 20.

[913] UN Department of Political Affairs (n 38) 11.

[914] *United Nations Guidance for Effective Mediation* (n 60) 16.

[915] Arnault (n 73) 25.

Secondly, the extent to which peace negotiations are susceptible to norm-driven bargaining should be probed. It is argued that a legal framework of procedural justice in peace negotiations would help transform peace negotiations into rational design processes, in which norms would facilitate the achievement of an agreement.[916] Others are sceptical as to the extent of the role of norms in peace-making, post-conflict constitution-making, or statebuilding processes, as at the end of the day it may rather be the political and social context that determines the practices adopted.[917] Furthermore, the 2017 United Nations-World Bank joint report on the Pathways for Peace notes that armed groups in some conflicts today are resistant to international humanitarian law, international institutions, and negotiated settlements to conflicts.[918] This requires a re-thinking of the peace-making 'toolbox' of international actors, which include normativised approaches and negotiated settlements, sometimes employed regardless of whether there is a transition on the ground and whether the conflict actors are susceptible to negotiated settlements.

In addition to these empirical questions, further legalisation of peace-making or the role of existing international law in peace-making should be assessed through the lens of normative and political questions. The project may lead to contestation where legal norms stipulate substantive outcomes. This is already evident in the peace versus justice debate: legal accounts that prioritise criminal accountability over negotiated settlements that aim to establish negative peace have faced resistance in the practice of peace-making with the continuing use of blanket amnesties or conditional amnesties that provide for non-criminal forms of justice. Similar, if not starker, contestation may follow if a law of peace-making prescribes the inclusion of substantive outcomes, for example, in relation to human rights, democracy, rule of law, or constitutional reform in peace agreements. In this respect, process-related norms of peace-making, such as the norm of inclusion, may have better chances of being accepted as international legal norms.[919]

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[916] Saliternik (n 82) 622.

[917] See Bhuta (n 198); Mark Tushnet, 'Some Skepticism about Normative Constitutional Advice' (2008) 19 William and Mary Law Review 1473; Pål Wrange, 'The Limitations of International Law Expertise – War amongst Peacemakers: The Juba Peace Process as Battleground for International Lawyer's Biases', vol 2 (Nico Krisch, Mario Prost and Anne van Aaken eds, Oxford: Hart Publishing Ltd 2013).

[918] *Pathways for Peace* (n 16) 6.

[919] See Turner (n 558) 290.

6.3. Further legalisation of peace-making: Opportunities and challenges

Legalisation of peace-making presents opportunities to peace-making actors. Firstly, if international law evolves to accord legal status to peace agreements signed between governments and armed opposition groups, this may incentivise armed opposition groups to enter into a negotiated settlement and enhance the compliance pull of the agreement. Secondly, international law provides clarity as to what must not be negotiated.[920] Peace-making compromises that impinge on *jus cogens* prohibitions are unlawful. For example, a peace agreement must not provide the basis for the discriminatory, racial or segregational treatment of any group in a society. Moreover, as explained in Chapter 5, some amnesties may lead to violations of a state's obligations under conventional international criminal law or human rights law. Thirdly, international law provides a "common vocabulary to frame and negotiate issues".[921]

However, the opportunities of legalisation must be weighed against the challenges it presents to peace-making. Firstly, if peace agreements are accepted as international agreements, this may disincentivise states to conclude such agreements with armed opposition groups. Furthermore, in this scenario, where a state desires to conclude a political agreement, it would have to clarify its intention either explicitly or through the terms of the agreement. Demanding such clarity may hamper peace negotiations, which often rely on constructive ambiguity and strategic silence. Secondly, although having recourse to legal parameters has a facilitative role in negotiations, excessive legalisation may diminish the peace-making space. The development of new norms of peace-making or other rules of international law that are also relevant to peace-making, for example the duty to prosecute international crimes, should take into account the peace-making practices necessary to accommodate the demands of peace and of local norms. For example, if the International Law Commission takes up the proposal of codifying the normative directions in peace-making,[922] or during the development of the Draft Articles on Crimes Against Humanity,[923] due regard should be given to how the demands of peace, accountability or human rights can be reconciled. Lastly, although international law provides a common vocabulary to

[920] Chandra Lekha Sriram, 'Beyond Transitional Justice: Peace, Governance, and Rule of Law' (2017) 19 International Studies Review 53, 56 (Arguing that "international legal rules and norms" are utilised by international policy-makers to bring some degree of determinacy and stability to what transitions require).

[921] Bhuta (n 198) 851; Turner (n 180) 257.

[922] See Wählisch (n 86) 265.

[923] 'Report of the International Law Commission, Sixty-Ninth Session' (n 703) 9.

negotiating parties and the public, it cannot in and of itself resolve fundamental disagreements that may exist among domestic actors regarding the nature and purpose of transition. To conclude, instead of assuming that the legalisation of peace-making at the international level is a good *per se*, arguments in favour of further legalisation need to be tempered with caution.

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