

ENTRENCHING PEACE IN LAW: DO PEACE AGREEMENTS POSSESS INTERNATIONAL LEGAL STATUS?

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Some 650 peace agreements have been concluded between governments and armed opposition groups since 1990. These agreements often do not fulfil the criteria of sources in domestic or international law: they are negotiated outside the established lawmaking channels of domestic law and are signed by armed opposition groups, which are traditionally not accorded treaty-making capacity in international law. Yet many scholars contend that the international legal status of peace agreements should be recognised either as international(ised) or hybrid agreements. In some peace processes, negotiating parties also intend to attach international legal status to their agreement. Consequently, a rich repertoire has emerged on the question of the international legal status of peace agreements across the practice of peacemaking, United Nations Security Council ('UNSC') practice, domestic and international judicial and arbitral decisions, and scholarship. Providing a comprehensive examination of this repertoire, this article demonstrates that peace agreements are not yet attributed legal status in international law. However, it is also explained that the lack of international legal status of peace agreements does not yield their conclusion and implementation as precarious, as is often feared. Attaching international legal status to peace agreements would neither shield them from all domestic and international judicial challenges nor necessarily function as an incentive to conclude and comply with a peace agreement. The article concludes on the note that the lack of international legal status does not relegate peace agreements to 'scraps of paper', as the implementation of peace agreements can be enhanced by incorporation into domestic law and through international oversight mechanisms, including the tools at the disposal of the UNSC.

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I INTRODUCTION

Some 650 peace agreements aiming to bring an end to intrastate armed conflicts have been concluded between governments and armed opposition groups (‘AOGs’) since 1990.¹ The (international) legal status of these agreements typically emerges as a significant issue during peace processes. Signed by AOGs and negotiated outside the legally established channels of domestic law, peace agreements often do not possess standalone domestic legal status and need to be incorporated into domestic law. However, it may prove difficult to achieve domestic legal entrenchment and the required public, parliamentary and/or judicial approval in the divisive and precarious moments of peacemaking, particularly in regard to peace agreements that require significant departures from the existing laws and constitution. Furthermore, a promise to legally incorporate a peace agreement into domestic law may not constitute a sufficient incentive for AOGs to conclude an agreement, due to the risk of amendments to the agreement during the incorporation process and of revocation by future legislators.² To avoid the difficulties of domestic legal entrenchment of peace agreements, some peacemaking parties, such as the Colombian parties to the 2016 *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (‘2016 Final Peace Agreement (Colombia)’), have turned to international law to render peace agreements legally binding.³ Some scholars

¹ See *Language of Peace* (Website) <<https://www.languageofpeace.org/>>, archived at <<https://perma.cc/AM2Y-FFVV>>.

² See, eg, Arist von Hehn, *The Internal Implementation of Peace Agreements after Violent Intrastate Conflict: Guidance for Internal Actors Responsible for Implementation* (Martinus Nijhoff Publishers, 2011) 56, listing challenges of domestic implementation of peace agreements; namely, that ‘actors and constituencies that have not been part of the negotiation process of the agreement may try to influence the conversion of the agreement into domestic law’ and that ‘peace agreements typically provide for further negotiations on contentious issues and for further detailing of the principles’.

³ *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colombia–Revolutionary Armed Forces of Colombia — People’s Army*, signed 24 November 2016 (Peace Agreement) Preamble <<http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>>, archived at <<https://perma.cc/2VDN-Z7X5>> (‘2016 Final Peace Agreement (Colombia)’):

This *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* is signed by the National Government and the Revolutionary Armed Forces of Colombia — People’s Army (FARC-EP) as a Special Agreement pursuant to Article 3, common to the 1949 *Geneva Conventions*, as per its international standing.

also contend that the international legal status of peace agreements should be recognised either as international(ised) or hybrid agreements.⁴ This article carries out an examination of whether this position is grounded in international law as it currently stands. It also discusses the desirability of attaching international legal status to peace agreements from a policy perspective.

Despite the attempts of peacemaking parties and the assertions of some scholars that peace agreements possess international legal status, domestic and international courts have not followed suit to date. The Constitutional Court of Colombia, the Supreme Court of the Philippines and the Special Court for Sierra Leone ('SCSL') have all expressly rejected that peace agreements between governments and AOGs possess international legal status, while the Permanent Court of Arbitration ('PCA') has at best left the question open in relation to the 2005 *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army* ('CPA').⁵ The United Nations Security Council's ('UNSC') practice, which aims to secure compliance with peace agreements, does not point to an unequivocal acceptance of them as sources of international legal obligations either.⁶ To date, the rich international practice relevant to the international legal status of peace agreements aiming to end intrastate armed conflicts has not been examined comprehensively.⁷ Said international practice encapsulates state practice, including domestic judicial decisions; international judicial and arbitral decisions; and the UNSC resolutions pertaining to peace agreements. The principal aim of this article is to fill this doctrinal gap. To this end, Parts II and III focus on the two cumulative requirements for a peace agreement to be considered an international agreement: Part II focuses on the *treaty-making capacity* of AOGs under international law, while Part III examines whether peace agreements manifest an *intention to be binding as international*

⁴ See, eg, PH Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in Karel Wellens (ed), *International Law: Theory and Practice* (Martinus Nijhoff Publishers, 1998) 333, 338; Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) *American Journal of International Law* 373, 402–7 ('Peace Agreements'); Scott P Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011) 60(2) *International and Comparative Law Quarterly* 423; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) *Yale Journal of International Law* 107, 143–6; 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).

⁵ *Comprehensive Peace Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army*, signed 9 January 2005, chapeau para 4 <<https://peacemaker.un.org/node/1369>>, archived at <<https://perma.cc/B96A-FASK>> ('CPA'). For more on the arbitral award, see below Part II(C).

⁶ See below Part II(C)(2).

⁷ In addition to offering a different perspective on the international legal status of peace agreements, this article is more up-to-date and aims to be more comprehensive than the existing studies cited in above n 4.

law, or even as law, regardless of whether AOGs have treaty-making capacity.⁸ The analysis in Parts II and III reveals that peace agreements, with the below noted rare exceptions, are not yet accorded international legal status.

My second aim in this article is to probe the legal, political and practical consequences of the conclusion that peace agreements lack standalone legal status. More specifically, I challenge the arguments put forward in the scholarship: that attributing international legal status may, first, shield a peace agreement from domestic and international judicial challenges and, secondly, function as an incentive to conclude and comply with a peace agreement. I do so by demonstrating both the legal shortcomings of these arguments and the underestimated potential drawbacks of construing peace agreements as legally binding (international) instruments. What is revealed consequently is that, in addition to lacking a basis in positive international law, the project of attaching international legal status to peace agreements does not have a straightforward policy case either. It requires a much more nuanced analysis of the consequences of international ‘legalisation’ of peace agreements. I conclude on the note that the lack of international legal status of peace agreements does not mean that they are only ‘scraps of paper’: peace agreements between governments and AOGs can be taken seriously as political agreements, the implementation of which can be enhanced by international supervision and the entrenchment of peace agreement commitments in domestic law.

Before proceeding with the discussion of the international legal status of peace agreements, a terminological note is in order. This article focuses on formal peace agreements concluded between at least a state and an AOG with a view to ending an intrastate armed conflict.⁹ For the purposes of this article, ‘intrastate armed conflict’ is understood as a violent conflict between a state and one or more AOGs. From the perspective of the laws of armed conflict, the intrastate armed conflicts that are addressed by the peace agreements cited in this article are mostly non-international armed conflicts but may also be international(ised) armed conflicts.¹⁰ Moreover, some violent conflicts that have culminated in formal peace agreements may not even have reached the threshold of an armed conflict as per the law of armed conflict. The 2007 post-election violence in Kenya, for example, did not amount to an armed conflict but was

⁸ Although recourse to the criterion of ‘intention’ in the identification of treaties is problematised in scholarship, it is not necessary for the purposes of this article to engage with this discussion. The acceptance of this non-formal criterion in the mainstream theory of sources of international law suffices to justify its examination in this article. On the role of ‘intent’ in law-identification, see generally Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011) 178–82 (*Formalism and the Sources of International Law*); Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers, 2006) ch III.

⁹ For a discussion of peace agreement definition and classification, see generally Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008) 47–66 (*On the Law of Peace*).

¹⁰ On the concepts of ‘non-international armed conflict’ and ‘international(ised) armed conflict’, see Marko Milanovic and Vidan Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’ in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello, and Jus post Bellum* (Edward Elgar, 2013) 256. See also International Committee of the Red Cross, ‘How Is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (Opinion Paper, International Committee of the Red Cross, March 2008).

resolved with a peace agreement in 2008.¹¹ The implications of the legal qualification of a conflict for the legal status of a peace agreement, if any, are mentioned in the article where relevant.

II TREATY-MAKING CAPACITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW

Due to the presence of non-state parties and their disputed treaty-making capacity in international law, peace agreements between governments and AOGs are not accorded recognition as international treaties under the *Vienna Convention on the Law of Treaties* ('*VCLT*').¹² The *VCLT* provides that 'international agreements concluded between States and other subjects of international law or between such other subjects of international law' retain their legal force and are governed by the applicable international law.¹³ However, it does not provide any clarity as to who the non-state subjects of international law are or which subjects of international law are accorded treaty-making capacity in international law.¹⁴ Therefore, as the question of the treaty-making

¹¹ *Acting Together for Kenya: Agreement on the Principles of Partnership of the Coalition Government, Government/Party of National Unity–Orange Democratic Movement*, signed 28 February 2008 (Peace Agreement) <<https://peacemaker.un.org/kenya-coalitiongovernmentpartnership2008>>, archived at <<https://perma.cc/9LD3-ENDQ>>.

¹² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a).

¹³ *Ibid* art 3.

¹⁴ The earlier work of the International Law Commission enumerates 'insurgent groups' among the subjects of international law; however, whether the referred 'insurgents' can be as broadly understood as to include the contemporary AOGs is unclear. It is notable that the 1962 draft of the *VCLT* refers to insurgents as 'international entities', which seems to allude to the historical concepts of insurgency and belligerency, where recognition as such by parent or third states played a constitutive role: see 'Report of the International Law Commission Covering the Work of Its Fourteenth Session, 24 April – 29 June 1962' [1962] II *Yearbook of the International Law Commission* 157, 162; 'Report of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session: Geneva, 4 May – 19 July 1966' [1966] II *Yearbook of the International Law Commission* 169, 188–9 ('1966 Report of the ILC'); Emily Crawford, 'Insurgency' in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at June 2015) [1]–[2]. However, the statuses of insurgency and belligerency have fallen into desuetude: see generally Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017) 97–101. But see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 20, arguing that a state may in future lawfully recognise a situation as belligerency. At any rate, historically, belligerents had the capacity to enter into agreements with the recognising state(s) only in relation to armed conflict-related matters such as consular or trade relations: Fortin (n 14) 97. Therefore, even if contemporary AOGs were to be recognised as belligerents, it would be doubtful whether the accorded treaty-making capacity extended to the conclusion of a peace agreement, the scope of whose provisions often reach beyond matters strictly related to an armed conflict.

capacity of AOGs cannot be settled merely by reference to art 3 of the *VCLT*, the inquiry needs to extend to general international law.¹⁵

In this respect, three main views on the treaty-making capacity of AOGs, particularly in relation to the legal status of peace agreements, can be identified in international practice and scholarship. 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, either due to the recognition of the combated state or due to the ‘internationalised’ nature of an agreement. The involvement of international actors in the negotiation and implementation of peace agreements, references to (issues addressed by) international law in peace agreements and exhortations of the UNSC for compliance with peace agreements are taken as indicators of ‘internationalisation’ in this respect.¹⁶ 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.¹⁷ The third view, which is dominant in international practice, is that peace agreements do not possess international legal status, due to the lack of treaty-making capacity of AOGs. The next three sections explore these views respectively, concluding that the last approach remains the dominant position in international law.

A *Recognition of the Treaty-Making Capacity of AOGs through a Peace Agreement*

1 *Recognition by the Combated State*

By entering into peace agreements with AOGs, do combated states implicitly confer a limited treaty-making capacity on them? The international legal system has evolved to recognise the capacity of states to delegate treaty-making capacity

¹⁵ It must be noted from the outset that the discussion in this article concerns the treaty-making capacity of AOGs. It is increasingly accepted today that, having been addressees of obligations under international (humanitarian) law, AOGs have some form of international legal personality: see, eg, Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002) 57; Fortin (n 14) 118; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart Publishing, 2016) 59. This, however, does not necessarily denote that they enjoy lawmaking, including treaty-making, capacity: Fortin (n 14) 98–9. The view that different subjects of international law possess different capacities is in line with the International Court of Justice’s opinion 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’: *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 178.

¹⁶ See, eg, Cindy Daase, ‘The Redistribution of Resources in Internationalized Intra-State Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions’ (2011) 3(1) *Goettingen Journal of International Law* 23, 27–8; Sheeran (n 4) 436, 442; Kooijmans (n 4) 338; 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’ (2018) 67(3) *American University Law Review* 649, 678.

¹⁷ See, eg, Antonio Cassese, ‘The Special Court and International Law: The Decision concerning the Lomé Agreement Amnesty’ (2004) 2(4) *Journal of International Criminal Justice* 1130, 1134.

to international organisations through their constituent documents¹⁸ or to sub-state entities through the domestic legal system.¹⁹ Therefore, some scholars suggest that states can be assumed to confer limited treaty-making capacity on AOGs by entering into agreements with them.²⁰ However, even if an intention to create an internationally binding agreement can be identified among the parties, it remains disputed whether a single state can confer treaty-making capacity on an AOG and therefore elevate an agreement to the status of an international agreement.

The ‘recognition by the combated state’ view resembles the view that a private person who is a party to an ‘internationalised’ state contract, that is, a contract between at least one state and one foreign private law person, gains limited international legal personality. This view was put forward by the sole arbitrator René-Jean Dupuy in the *Texaco Overseas Petroleum Co v Libya* (*Texaco v Libya*) arbitral ruling, where he held that ‘the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract’.²¹ In this view, the limited international legal personality of the private person concerned derives from its recognition by the state.²² However, this decision has been criticised in literature and has not been followed in judicial practice.²³ The SCSL’s statement in *Prosecutor v Kallon* (*Kallon*) 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’ seems to reflect the current state of

¹⁸ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, 25 ILM 543 (not yet in force) art 6. See also James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 168–9.

¹⁹ See Duncan B Hollis, ‘Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law’ (2005) 23(1) *Berkeley Journal of International Law* 137, 148. It must be noted that the conferred capacity in this case concerns the treaty relations of sub-state entities with third states but not with parent states.

²⁰ See, eg, Roberts and Sizakumaran (n 4) 120. Even if it is assumed that a state may confer treaty-making capacity on AOGs via a peace agreement, the binding status would ultimately depend on the intention of parties to create an internationally binding agreement: see below Part III. See also Luisa Vierucci, ‘“Special Agreements” between Conflicting Parties in the Case-Law of the ICTY’ in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 401, 411–12 (‘Special Agreements’), who argues that AOGs and agreements with AOGs derive their international legal status from the content of the agreement and intention of the parties.

²¹ *Texaco Overseas Petroleum Co v Libya (Award on the Merits)* (1978) 17 ILM 1, 17 [47] (*Texaco v Libya*).

²² *Ibid* 17–18 [48], quoting FA Mann et al, ‘Contrats entre Etats et personnes privées étrangères’ [Contracts between States and Foreign Private Persons] (1975) 11(2) *Revue belge de droit international* 562, 570; FV García Amador, Special Rapporteur, ‘International Responsibility. Fourth Report’ [1959] II *Yearbook of the International Law Commission* 1, 32.

²³ Eva Kassoti, ‘The Normative Status of Unilateral Ad Hoc Commitments by Non-State Armed Actors in Internal Armed Conflicts: International Legal Personality and Lawmaking Capacity Distinguished’ (2017) 22(1) *Journal of Conflict and Security Law* 67, 80; Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 124–5.

international law in this regard.²⁴ Until the treaty-making capacity of AOGs is accepted in international law, the conclusion remains that a single state cannot attribute this capacity to AOGs and thus international legal status to peace agreements.

Beyond the contested legal basis of the view that states recognise the treaty-making capacity of AOGs and the international legal status of peace agreements by signing an agreement with AOGs, the difficulties of applying this view in practice should also be considered. When the determination of the treaty-making capacity of AOGs is connected to the recognition of the state party, states would have to clarify their position, for example, 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 peacemaking settings, where constructive ambiguity and silence play a crucial role in reaching agreements,²⁵ this may place an additional burden on negotiators. Moreover, 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.²⁶ Therefore, it may not provide sufficient guarantees of compliance and equality between parties to convince AOGs to conclude peace agreements.

2 Recognition by Virtue of an 'Internationalised' Peace Agreement

A second view is that in the case of an 'internationalised' peace agreement signed by the representative of a third state or international organisation, the agreement gains international character by virtue of the AOG's intercourse on the international plane.²⁷ The 1994 *Lusaka Protocol* between the Angolan government and the National Union for the Total Independence of Angola ('UNITA'), co-signed by the Special Representative of the United Nations Secretary-General in Angola in the presence of the representatives of the United States, Portugal and Russia, is one of the many examples of 'internationalised' peace agreements.²⁸ Reviewing the Protocol, PH Kooijmans contended that an AOG acquires 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

²⁴ *Prosecutor v Kallon (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 13 March 2004) [44] ('*Kallon*'). See also Kirsten Schmalenbach, 'Article 3: International Agreements Not within the Scope of the Present Convention' in Olivier Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2nd ed, 2018) 55, 60.

²⁵ Stephen John Stedman, 'Introduction' in Stephen John Stedman, Donald Rothchild and Elizabeth M Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner Publishers, 2002) 1, 9–10; Fen Osler Hampson, *Nurturing Peace: Why Peace Settlements Succeed or Fail* (United States Institution of Peace, 1996) 220–1.

²⁶ See Murray (n 15) 49–50.

²⁷ On the role of AOG intercourse on the international plane in various conceptions of international legal personality, see Fortin (n 14) 88.

²⁸ *Letter Dated 9 December 1994 from the Permanent Representative of Angola to the United Nations Addressed to the President of the Security Council*, UN SCOR, UN Doc S/1994/1441 (22 December 1994) annex ('*Lusaka Protocol*').

target of the UNSC measures, but due to its part in the ‘internationalised’ peace agreement.²⁹ This is so in the case of the 1994 *Lusaka Protocol*, according to Kooijmans, as the UNITA must have committed itself to the United Nations as well as to the Angolan government by signing a settlement that is ‘co-signed’ by the Secretary-General’s representative.³⁰

Kooijmans’ argument was addressed explicitly by the SCSL in *Kallon* and implicitly by the Supreme Court of the Philippines concerning the constitutionality of the 2008 *Memorandum of Agreement on the Ancestral Domain Aspect of the GRP–MILF Tripoli Agreement on Peace of 2001* (‘MOA-AD’) between the government and the Moro Islamic Liberation Front (‘MILF’).³¹ Both courts rejected the argument, opining that the roles assumed by international actors in peace agreements did not in and of themselves make these actors parties to the said agreements.³² The Supreme Court of the Philippines further emphasised that the obligations assumed by the Philippines in the *MOA-AD* were addressed not to third states or international organisations but only to the MILF.³³ The Court rightly 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.³⁴

When a third state or international organisation signs a peace agreement as a witness, guarantor or mediator, this signature does not automatically result in

²⁹ Kooijmans (n 4) 338–40. However, 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: see *Lusaka Protocol*, UN Doc S/1994/1441 (n 28) 2.

³⁰ Kooijmans (n 4) 338. See also Nico Krisch, ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’ in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) vol 2, 1237, 1270–1, who states that non-state actors gain partial international legal personality by being recognised by an internationalised peace agreement or through UNSC measures; Daase (n 16) 65–6, who refers to the *Lomé Peace Agreement* and *Accra Peace Agreement* as internationalised peace agreements, whereby 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’; Wittke (n 4) 192–3.

³¹ *Kallon* (n 24) [38]; *Province of North Cotobato v Philippines Peace Panel on Ancestral Domain* (2008) 589 Philippine Reports 387 (Carpio Morales J) (Supreme Court of the Philippines) <<http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/47263>>, archived at <<https://perma.cc/C4H9-LNZB>>. (‘*Province of North Cotobato*’); *Memorandum of Agreement on the Ancestral Domain Aspect of the GRP–MILF Tripoli Agreement on Peace of 2001*, Philippines–Moro Islamic Liberation Front, signed 5 August 2008 (Peace Agreement) <<https://peacemaker.un.org/philippines-memorandum-ancestral-domains2008>>, archived at <<https://perma.cc/5WTS-NYSS>>.

³² *Kallon* (n 24) [39]; *Province of North Cotobato* (n 31).

³³ *Province of North Cotobato* (n 31).

³⁴ *Ibid.*

these actors assuming legal obligations under the peace agreement.³⁵ Nor does it transform the peace agreement into an international agreement. 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.

3 *Peace Agreements with a Double Character: Third States as Signatories*

Some intrastate armed conflicts have been brought to an end with the conclusion of agreements that have been signed by 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*.³⁶ The main agreement was concluded in the form of an international treaty signed by three states: the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. However, the 12 annexes attached to this main agreement were signed by varying combinations of these three states and the two sub-state entities, the Republika Srpska and the Federation of Bosnia and Herzegovina. Such peace agreements may be considered agreements with a double character: they may

³⁵ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013) 93–4. See also Michael Wood, ‘The Law of Treaties and the UN Security Council: Some Reflections’ in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011) 244, 245; Eric De Brabandere, ‘The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus post Bellum* as a Legal Concept’ (2010) 43(1) *Vanderbilt Journal of Transnational Law* 119, 143–4, discussing *Letter Dated 5 December 2001 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2001/1154 (5 December 2001) annex (‘*Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*’).

³⁶ *Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, UN GAOR, 50th sess, Agenda Item 28; UN SCOR, 50th sess, UN Docs A/50/790 and S/1995/999 (30 November 1995) annex (‘*General Framework Agreement for Peace in Bosnia and Herzegovina*’) (‘*Dayton Peace Agreement*’). Other examples include: *Letter Dated 24 February 2015 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council*, UN Doc S/2015/135 (25 February 2015) annex I (‘*Protocol on the Outcome of Consultations of the Trilateral Contact Group on Joint Steps Aimed at the Implementation of the Peace Plan of the President of Ukraine, P Proshenko, and the Initiatives of the President of the Russian Federation, V Putin*’) (‘*Minsk I*’); *Letter Dated 12 February 2015 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, UN GAOR, 69th sess, Agenda Item 32; UN SCOR, 50th sess, UN Docs A/69/778 and S/2015/110 (13 February 2015) annex II (‘*Package of Measures for the Implementation of the Minsk Accords*’); *Agreement on Further Development of Georgian–Ossetian Peaceful Settlement Process and on Joint Control Commission*, signed 31 October 1994 (Peace Agreement) <<https://peacemaker.un.org/georgian-agreement-jcc1994>>, archived at <<https://perma.cc/3KUT-UTLR>>; *Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council*, UN Doc S/1999/815 (23 July 1999) annex (‘*Ceasefire Agreement*’) (‘*Lusaka Ceasefire Agreement*’).

constitute international treaties between the states party and intrastate political agreements between the state and non-state parties (AOGs) to the conflict.³⁷

Two such agreements have appeared before the International Court of Justice ('ICJ') to date. In *Armed Activities on the Territory of the Congo*, the ICJ considered whether the *Lusaka Ceasefire Agreement* 'constituted consent to the presence of Ugandan troops on the territory' of the Democratic Republic of the Congo ('DRC') in the context of the DRC's allegations of the acts of aggression perpetrated by Uganda in its territory.³⁸ The *Lusaka Ceasefire Agreement* was signed on 10 July 1999 by the representatives of Angola, the DRC, Namibia, Rwanda, Uganda and Zimbabwe and was witnessed by representatives from Namibia, the Organisation of African Unity, the Southern African Development Community and the UN.³⁹ Two Congolese rebel groups, the Movement for the Liberation of Congo and Congolese Rally for Democracy, also signed the Agreement.⁴⁰ The *Lusaka Ceasefire Agreement* includes a calendar for the orderly withdrawal of all foreign forces from the territory of the DRC,⁴¹ 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.⁴² The Court, however, held that

[t]he 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.⁴³

³⁷ Two peace agreements, the 1991 *Comprehensive Peace Agreement of Cambodia* and the 1998 *Belfast Agreement* regarding the conflict in Northern Ireland, resemble peace agreements with a double character yet remain distinct from them. The parties to the 1991 *Comprehensive Peace Agreement of Cambodia* are the 19 states that participated at the Paris Conference on Cambodia, where the Supreme National Council ('SNC'), which embodied the four conflicting factions in the country, represented Cambodia. Therefore, despite including non-state actors under the umbrella of the SNC, the Agreement remained an international treaty between the 19 signatory states. See *Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the Secretary-General*, UN GAOR, 46th sess, Agenda Item 24; UN SCOR, 46th sess, UN Docs A/46/608 and S/23177 (30 October 1991) annex ('*Final Act of the Paris Conference on Cambodia*') ('*Comprehensive Peace Agreement of Cambodia*'). For the list of the 19 states and composition of the SNC, see Steven R Ratner 'The Cambodia Settlement Agreements' (1993) 87(1) *American Journal of International Law* 1, 1 n 1, 9–12. On the other hand, the 1998 *Belfast Agreement* 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. See *The Belfast Agreement*, signed 10 April 1998 (Peace Agreement) <<https://www.gov.uk/government/publications/the-belfast-agreement>>, archived at <<https://perma.cc/7NKA-QFHE>> ('*Belfast Agreement*').

³⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 209 [92] ('*Armed Activities*').

³⁹ *Lusaka Ceasefire Agreement*, UN Doc S/1999/815 (n 36).

⁴⁰ *Ibid* ch 10 arts 10(1), III(20); *Armed Activities* (n 38) 319 [51] (Judge Koojijmans).

⁴¹ *Lusaka Ceasefire Agreement*, UN Doc S/1999/815 (n 36) annex B ('*Calendar for the Implementation of Cease-Fire Agreement*').

⁴² *Armed Activities* (n 38) 209 [92].

⁴³ *Ibid* 211 [99].

By reference to this paragraph, some scholars argue that the ICJ downplayed the legal force of the *Lusaka Ceasefire Agreement* by treating it as a ‘*modus operandi*’ or merely as a political instrument.⁴⁴ The characterisation of the Agreement as a *modus operandi*, however, seems to relate to its *function* of clarifying the withdrawal process rather than its legal status. The Court’s decision that the withdrawal calendar does not constitute consent, but only provides for the solution of a reality on the ground, does not necessarily detract from the legal force of the Agreement. The Court merely interpreted the Agreement in a way that led to the dismissal of Uganda’s claim that the Agreement constituted consent to Uganda’s presence in the DRC without denouncing the legal force of the Agreement. Neither the Court nor the parties contested the legal force of the Agreement; in fact, they relied on its provisions.⁴⁵ What is notable in this case in relation to peace agreements with a double character is that the Court did not consider the existence of armed group signatories as detracting from the international legal force of the *Lusaka Ceasefire Agreement* as it applied to the states party. Although the Court did not pronounce on the legal status of the Agreement, it expressly referred to it as a binding international agreement in its order of provisional measures of 1 July 2000.⁴⁶

Secondly, in its order of provisional measures in *Ukraine v Russian Federation*, the ICJ reminded the parties that the UNSC endorsed the *Protocol on the Results of Consultations of the Trilateral Contact Group* (‘*Minsk II Agreement*’) and stated that it ‘expect[ed] 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’.⁴⁷ The Court indicated its expectation of implementation of the *Minsk II Agreement* as ‘an additional measure aimed at ensuring the non-aggravation of the dispute between the Parties’ after the operative paragraphs of the order.⁴⁸ Although non-implementation of the Agreement may be deemed by the Court as an aggravation of the dispute, it is difficult to infer from the relevant paragraph whether the Court considers the Agreement as a source of international

⁴⁴ See, eg, Andrej Lang, “Modus Operandi” and the ICJ’s Appraisal of the Lusaka Ceasefire Agreement in the *Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution* (2008) 40(Special Issue) *New York University Journal of International Law and Politics* 107, 113–25; Alexia Solomou, ‘Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies’ (2014) 27(2) *Leiden Journal of International Law* 495, 512.

⁴⁵ See also Serena 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) 320, 325–6.

⁴⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Provisional Measures)* [2000] ICJ Rep 111, 127 [37]. The Court also refers to the various agreements concluded between the DRC and Uganda, including the *Lusaka Ceasefire Agreement*, as ‘treaties’: *Armed Activities* (n 38) 212 [105].

⁴⁷ *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 Russian Federation) (Provisional Measures)* [2017] ICJ Rep 104, 140 [104] (‘*Ukraine v Russian Federation*’).

⁴⁸ *Ibid* 139 [103].

obligations.⁴⁹ However, any conclusion that the *Minsk II Agreement* is not a binding international agreement between states party would possibly be due to the lack of requisite intention on the part of the states concerned rather than the existence of non-state actor signatories.⁵⁰

Although peace agreements with a double character can be sources of international legal rights and obligations as between their states party, the same cannot be said for the obligations assumed by the states party 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 states party and by ‘locking’ AOGs into a formal document.⁵¹ However, beyond this symbolic effect, the treaty form of the peace agreements with a double character does not affect the legal status of an agreement as between the states party and the AOG(s).

B *Treaty-making Capacity and Effective Control over a Territory*

Another approach suggested for the determination of the international legal status of peace agreements is to recognise the inherent treaty-making capacity of AOGs by virtue of the state of armed conflict and their effective territorial control. For example, 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 that the two AOGs that operate in Darfur, the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (‘SPLM/SPLA’) and the Justice and Equality Movement, ‘possess under customary international law the power to enter into binding international agreements’.⁵² The view that AOGs acquire treaty-making capacity upon becoming a party to an armed conflict and establishing de facto control over a territory also finds support in scholarship. For example, arguing that the 1999 *Peace Agreement between the Government of*

⁴⁹ The ICJ’s ‘function is to decide in accordance with international law such disputes as are submitted to it’: *Statute of the International Court of Justice* art 38(1). Therefore, it may be argued that the Court considered the *Minsk II Agreement* to be 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 referred to it as the basis of a provisional measure to prevent the non-aggravation of the dispute.

⁵⁰ 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: Oleksandr Merezhko, ‘Russo–Ukrainian War: Kremlin Denials Prevent Progress towards Peace’, *Atlantic Council* (Blog Post, 14 July 2020) <<https://www.atlanticcouncil.org/blogs/ukrainealert/russo-ukrainian-war-kremlin-denials-prevent-progress-towards-peace/>>, archived at <<https://perma.cc/3KNC-Z86P>>.

⁵¹ Bell, ‘Peace Agreements’ (n 4) 389–91.

⁵² *Letter Dated 31 January 2005 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2005/60 (1 February 2005) annex (‘*Report of the International Commission of Inquiry on Darfur to the Secretary-General*’) 55 [172], 55 [174]. The SCSL has been critiqued by some scholars, who consider its dismissal of the treaty status of the *Lomé Peace Agreement in Kallon* to be cursory: Roberts and Sivakumaran (n 4) 145, citing Bell, ‘Peace Agreements’ (n 4) 387; Cassese (n 17) 1134–5. See also *Kallon* (n 24) 45–50. Nevertheless, the Commission’s conclusion, which is hastier than the *Kallon* decision, has been cited as practice in support of the treaty-making capacity of AOGs: Roberts and Sivakumaran (n 4) 145–6.

*Sierra Leone and the Revolutionary United Front of Sierra Leone*⁵³ ('Lomé Peace Agreement') is an international treaty, Antonio Cassese holds that '[i]nsurgents 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'.⁵⁴

Among the proponents of this view, the scope of the treaty-making capacity of AOGs remains contested, particularly in relation to whether it is limited to matters that are strictly related to armed conflict, such as the exchange of prisoners or establishing an armistice,⁵⁵ and to the conclusion of agreements only with third states.⁵⁶ At any rate, this view is not supported sufficiently by state practice⁵⁷ and remains contested also on policy grounds, as it may incentivise AOGs to exert more violence to establish territorial control.⁵⁸ Finally, even if it is assumed that AOGs that exercise territorial control acquire the capacity to conclude binding peace agreements under international law, this does not provide a general basis for the legal status of peace agreements concluded with AOGs that do not exercise such control.

C Lack of Treaty-Making Capacity of AOGs

Despite the vast scholarship arguing that AOGs acquire treaty-making capacity under certain conditions or that international law should evolve towards the recognition of the role of AOGs in lawmaking in general, the current state of international law does not seem to attribute treaty-making capacity to AOGs or international legal status to peace agreements concluded between governments and AOGs. As mentioned in the previous sections, the following review of the state practice regarding peace agreements does not point to the recognition of treaty-making capacity of AOGs in customary international law.

First of all, only a small number of peace agreements explicitly claim legal status, with only one of them — the *2016 Final Peace Agreement (Colombia)* — claiming international legal status.⁵⁹ Furthermore, domestic courts have so far refused to attach international status to peace agreements. The Supreme Court of the Philippines, citing the *Kallon* decision discussed below, held that the *MOA-AD* 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

⁵³ *Letter Dated 12 July 1999 from the Chargé d'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council*, UN Doc S/1999/777 (12 July 1999) annex ('*Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*') ('*Lomé Peace Agreement*').

⁵⁴ Cassese (n 17) 1134.

⁵⁵ Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing, 2016) 18.

⁵⁶ Schmalenbach (n 24) 77, arguing that the treaty-making capacity of AOGs is limited to the conclusion of agreements with third states in relation to matters arising from the control over a territory and conduct of armed conflict, and that it cannot be assumed to extend to the conclusion of agreements between AOGs and the combated government, including special agreements, which remain of non-international character.

⁵⁷ Hollis (n 19) 151, who states that the legal status of unauthorised sub-state arrangements with third states remains ambiguous, citing Canada's rejection of the binding character of a number of agreements between Quebec and France.

⁵⁸ Roberts and Sivakumaran (n 4) 120–1.

⁵⁹ *2016 Final Peace Agreement (Colombia)* (n 3) Preamble, s 6.1.8.

lack of treaty-making capacity of the MILF.⁶⁰ Ruling on a special agreement concluded between the government and an AOG, the Constitutional Court of Colombia 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’.⁶¹

In a case brought before the Constitutional Court of Burundi, the Court had to consider whether the 2000 *Arusha Peace and Reconciliation Agreement for Burundi*⁶² (*APR Agreement*) had supra-constitutional force in order to decide whether the terms of the *APR Agreement* prevailed over the *Constitution of the Republic of Burundi* in the context of a norm conflict about presidential term limits.⁶³ As to the normative nature of the *APR Agreement*, the Constitutional Court limited its analysis to whether the *APR Agreement* had supra-constitutional force over the Constitution and did not pronounce on the legal force of the *APR Agreement* per se. However, it is notable that the Permanent Representative of Burundi to the UN asserted that the *APR Agreement* was a ‘political agreement’ and could not take precedence over the Constitution.⁶⁴ Furthermore, the US Special Envoy to the Great Lakes region of Africa emphasised the relevance of the *APR Agreement* to the settlement of the crisis by urging the Burundi government ‘to ensure that the upcoming elections are consistent with the Arusha Accords’ yet added that the US was ‘not making a legal argument here’.⁶⁵

The few relevant decisions of international courts and tribunals addressing the legal status of peace agreement to date have not affirmed the recognition of the treaty-making capacity of AOGs in international law either. The PCA pronounced, albeit very briefly, on the legal status of a peace agreement and held that the *CPA* between the Government of Sudan and the SPLM/SPLA is not a treaty as defined by the *VCIT* but an agreement between the government of a sovereign state and a political movement that ‘may — or may not — govern over

⁶⁰ *Province of North Cotobato* (n 31).

⁶¹ Constitutional Court of Colombia, C-225/95, 18 May 1995, [17] [tr Marco Sassòli, Antoine A Bouvier and Anne Quintin (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, 3rd ed, 2011) vol 3, 2245 [17]].

⁶² *Arusha Peace and Reconciliation Agreement for Burundi*, signed 28 August 2000 <<https://peacemaker.un.org/node/1207>>, archived at <<https://perma.cc/7NK9-KQXT>> (*APR Agreement*).

⁶³ Constitutional Court of the Republic of Burundi, RCCB 303, 4 May 2015 <<https://www.ihrda.org/wp-content/uploads/2015/05/Arret-de-la-Cour-Constitutionnelle-du-Burundi-sur-le-nombre-de-mandat-presidentiell.pdf>>, archived at <<https://perma.cc/YL9C-JZLD>> [‘RCCB 303’, *Pan African Lawyers Union* (Web Document) <<https://www.ihrda.org/wp-content/uploads/2015/05/Judgment-of-Burundi-Constitutional-Court-ENGLISH-Translation.pdf>>, archived at <<https://perma.cc/7TEV-79N2>>].

⁶⁴ Ambassador Albert Shingiro, ‘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 Peace Building Commission’ (Speech, United Nations Peace Building Commission, 18 March 2015) <<http://www.burundimission.org/speech-of-his-excellency-ambassador-albert-shingiro-at-the-meeting-of-burundi-configuration-of-the-u-n-peace-building-commission/>>, archived at <<https://perma.cc/56H8-78U7>>.

⁶⁵ Russ Feingold, ‘Sustained American Attention to the Great Lakes Region of Africa’ (Speech, United States Institute of Peace, 24 February 2015) 10 <<https://www.usip.org/publications/2015/02/feingold-presses-three-african-states-elections>>, archived at <<https://perma.cc/3MGH-CKK8>>.

a sovereign state in the near future'.⁶⁶ The Tribunal further refers to international law as being applicable to the dispute in addition to and separate from the *CPA*, which is part of the *lex specialis* prescribed by the parties.⁶⁷ This further clarifies that the *CPA* was not regarded as an international agreement by the Tribunal.

The SCSL in the *Kallon* decision, where the Court had to decide on whether the amnesty granted by virtue of the 1999 *Lomé Peace Agreement* constituted a bar to its jurisdiction,⁶⁸ reached a similar conclusion following a more elaborate reasoning. Article 9(3) 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 time of the signing of the present Agreement.⁶⁹

Opposing the jurisdiction of the SCSL, the defence counsel submitted that the *Lomé Peace Agreement* was a binding international agreement and that allowing the prosecution of the alleged crimes covered by the *Lomé Peace Agreement* amnesty would constitute an abuse of process.⁷⁰ 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'.⁷¹ In reaching this conclusion, the Court also evaluated whether insurgent groups like the Revolutionary United Front ('RUF') were 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 Common Article 3 of the *Geneva Conventions* without acquiring international personality, adding that the 'convincing' theory is that AOGs are obliged 'as a matter of international customary law'.⁷² 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.⁷³

⁶⁶ *Delimiting Abyei Area (Sudan v Sudan People's Liberation Movement/Army) (Final Award)* (Permanent Court of Arbitration, Case No 2008-07, 22 July 2009) [427] ('*Delimiting Abyei Area*').

⁶⁷ *Ibid* [396], [427], [434]. Although the Tribunal considered international law, particularly the *VCLT*, in the interpretation of the 2005 *CPA* and the annexed *Abyei Protocol* 'as part of the general principles [of law] referred to in Article 3 of the Arbitration Agreement', reference to international law in the interpretation of an agreement does not suffice to conclude that the Tribunal considered the agreement to be a binding international agreement: at [572].

⁶⁸ *Kallon* (n 24) [66]–[74].

⁶⁹ *Lomé Peace Agreement*, UN Doc S/1999/777 (n 53) art 9(3).

⁷⁰ *Kallon* (n 24) [22]. See also at [30]–[31].

⁷¹ *Ibid* [42], [48]. See also Yoram Dinstein, *Non-international Armed Conflicts in International Law* (Cambridge University Press, 2014) 49, who argues that '[a] peace accord between an incumbent Government and non-State actors, however important, does not constitute a treaty' and that the non-state signatory does not become a subject of international law by virtue of being a party to such an agreement 'unless a peace accord leads to secession'.

⁷² *Kallon* (n 24) [45]–[47].

⁷³ *Ibid* [47]–[49]. The Agreement was already incorporated into the domestic law of Sierra Leone through the *Lomé Peace Agreement (Ratification) Act, 1999* (Sierra Leone): *Kallon* (n 24) [25].

Beyond the state practice in relation to peace agreements and the mentioned judicial decisions as subsidiary means for the determination of customary international law, the state practice regarding the conclusion of special agreements as per Common Article 3 of the 1949 *Geneva Conventions* and the UNSC practice on peace agreements may also shed light on the treaty-making capacity of AOGs and the legal status of the peace agreements they conclude. Therefore, the next two sections focus on these bodies of practice respectively.

1 *Peace Agreements: Special Agreements as per Common Article 3 of the 1949 Geneva Conventions?*

Especially following the conclusion of the *2016 Final Peace Agreement (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 Common Article 3 of the 1949 *Geneva Conventions* came to prominence.⁷⁴ First, the answer to 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.⁷⁵ Therefore, the aim and contents of a special agreement are confined to the sphere of international humanitarian law and, to a limited extent, to international human rights law. The International Committee of the Red Cross' *Commentary on the Second Geneva Convention ('ICRC Commentary')* 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 help to implement humanitarian law.⁷⁶

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-international humanitarian law related matters, ranging from land reform to the political participation of the former rebel group, the Revolutionary Armed Forces of Colombia ('FARC').⁷⁷ As the *ICRC Commentary* affirms, such an agreement

⁷⁴ See, eg, Luisa Vierucci, 'The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks' (2017) (Autunno Inverno) *Processi di pace e dignità umana* 1, 2–4 ('Colombian Peace Agreement'); Laura Betancur Restrepo, 'The Legal Status of the Colombian Peace Agreement' (2016) 110 *AJIL Unbound* 188.

⁷⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('*Geneva Convention I*').

⁷⁶ Lindsey Cameron et al, 'Article 3: Conflicts Not of an International Character' in Knut Dörmann et al (eds), *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) 134, 296–7.

⁷⁷ See, eg, *2016 Final Peace Agreement (Colombia)* (n 3) chs 1–2.

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.⁷⁸

This raises the second question of whether a peace agreement gains international legal status to the extent that it constitutes a special agreement; that is, 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’,⁷⁹ could it be argued that the article attaches legal status to special agreements? Some scholars argue that special agreements can be treaties proper⁸⁰ or sources of international obligations regardless of their formal classification.⁸¹ 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 to be international agreements.⁸² A 1994 agreement between the Guatemalan government and the Guatemalan National Revolutionary Unity demonstrates the hesitation that governments may have in concluding special agreements formally classified as such, despite the dominant view that 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’,⁸³ although, in objective terms, the agreement includes guarantees stemming from international humanitarian law.⁸⁴

Proponents of the view that special agreements are binding qua international law further refer to the case law of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’),⁸⁵ particularly the *Prosecutor v Tadić*⁸⁶ appeal

⁷⁸ Cameron et al (n 76) 297. See below Part IV(A)(1) on the reasons behind the strategy of the Colombian parties to attach purported special agreement status to the entire peace agreement.

⁷⁹ *Geneva Convention I* (n 75) art 3.

⁸⁰ Vierucci, ‘Special Agreements’ (n 20) 412; Roberts and Sivakumaran (n 4) 143–6; Zegveld (n 15) 28–30.

⁸¹ Ezequiel Heffes and Marcos D Kotlik, ‘Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime’ (2014) 96(895/896) *International Review of the Red Cross* 1195, 1216–22; Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law’ (2010) 1(1) *Journal of International Humanitarian Legal Studies* 5, 30.

⁸² See ‘Other Instruments’, *Customary International Humanitarian Law Database* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/src_iiotin>, archived at <<https://perma.cc/L9YL-JGX8>>, which lists special agreements among ‘other instruments’ instead of among ‘treaties’. See also Kassoti (n 23) 69, who maintains that theories attempting to justify the binding force of these special agreements under international law have not prevailed so far; Dinstein (n 71) 71, arguing that special agreements do not generate international obligations but may be sources of domestic legal obligations.

⁸³ *Letter Dated 8 April 1994 from the Secretary-General to the President of the General Assembly and to the President of the Security Council*, UN GAOR, 48th sess, Agenda Item 40; UN SCOR, 49th sess, UN Docs A/48/928 and S/1994/448 (19 April 1994) annex I (‘*Comprehensive Agreement Human Rights*’) art IX(2).

⁸⁴ *Ibid* art IX(1).

⁸⁵ See, eg, Roberts and Sivakumaran (n 4) 145.

judgment and the *Prosecutor v Blaškić*⁸⁷ and *Prosecutor v Galić*⁸⁸ ('*Galić*') trial judgments, in which the Tribunal referred to the special agreements concluded between the parties to the conflict in Bosnia and Herzegovina. In these judgments, the Chambers relied on special agreements principally to establish its subject-matter jurisdiction on the basis of certain provisions of the 1949 *Geneva Conventions* or their *Additional Protocols*.⁸⁹ Special agreements were thus accorded legal force only in relation to bringing into application international humanitarian law. The Trial Chamber treated a special agreement as an autonomous source of international obligations in only the *Galić* trial judgment, although without elaborating on its reasoning, to establish its subject-matter jurisdiction over the crime of spreading terror among the civilian population.⁹⁰ 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.⁹¹ Therefore, it did not discuss whether the special agreement in question was binding qua international law. As such, the case law of the ICTY remains too scant and ambiguous to provide 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 even if they constitute special agreements.

2 Security Council Practice regarding Peace Agreements

The UNSC has been significantly involved in the resolution of intrastate 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,⁹² welcomed⁹³ or endorsed peace agreements,⁹⁴ called for/demanded/encouraged/invited compliance with peace agreement

⁸⁶ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-I-T, 2 October 1995).

⁸⁷ *Prosecutor v Blaškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) ('*Blaškić*').

⁸⁸ *Prosecutor v Galić (Judgement and Opinion)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) [25] ('*Galić*').

⁸⁹ See *Blaškić* (n 87) [172]; *Galić* (n 88) [22]–[25], [95]–[96]; *Tadić* (n 86) [143]–[145].

⁹⁰ *Galić* (n 88) [95]–[96], [138]. For a detailed discussion of the judgments and other uses of special agreements in the case law of the ICTY, see Vierucci, 'Special Agreements' (n 20).

⁹¹ *Prosecutor v Galić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006) [83]–[85].

⁹² See, eg, SC Res 2118, UN SCOR, 7038th mtg, UN Doc S/RES/2118 (27 September 2013) annex II ('*Action Group for Syria Final Communiqué*') para 11.

⁹³ See, eg, SC Res 2366, 2366th mtg, UN Doc S/RES/2366 (10 July 2017) Preamble para 2.

⁹⁴ See, eg, SC Res 1383, UN SCOR, 4434th mtg, UN Doc S/RES/1383 (6 December 2001) para 1; SC Res 1464, UN SCOR, 4700th mtg, UN Doc S/RES/1464 (4 February 2003) para 1; SC Res 2202, UN SCOR, 7384th mtg, UN Doc S/RES/2202 (17 February 2015) para 1.

commitments,⁹⁵ characterised noncompliance with peace agreements as threats to peace,⁹⁶ deplored or condemned noncompliance⁹⁷ and imposed sanctions in case of noncompliance with a peace agreement.⁹⁸ Surveying the practice of the UNSC in relation to 46 non-international armed conflicts active during the 1990–2013 period, Gregory H Fox, Kristen E Boon and Isaac Jenkins find that the UNSC ‘ordered’ AOGs to abide by peace agreements in 83% of such conflicts and established sanctions to induce compliance in situations including those of Côte d’Ivoire, the DRC, Liberia, Rwanda and Sierra Leone.⁹⁹ The UNSC has also supported the UN’s good offices and mediation services in intrastate conflicts,¹⁰⁰ authorised peacekeeping missions to support the implementation of peace agreements¹⁰¹ and established transitional administration and peace building operations in exceptional cases, such as those of East Timor¹⁰² and Kosovo.¹⁰³

It is hard to adduce any evidence from the UNSC’s welcomes or endorsements as to the international or binding character of a peace agreement. It is similarly difficult to establish a correlation between the imposition of sanctions in case of noncompliance with peace agreement obligations and their legal status, as the former does not necessarily require the determination of a violation of international law.¹⁰⁴ On the other hand, some scholars argue that the UNSC’s practice of exhorting peace agreement parties, including AOGs, to comply with their undertakings provides evidence for the increasing recognition that peace agreements between governments and AOGs to end intrastate armed conflicts may be binding as a matter of customary international law.¹⁰⁵

⁹⁵ See, eg, SC Res 851, UN SCOR, 3254th mtg, UN Doc S/RES/851 (15 July 1993) (*‘Resolution 851’*); SC Res 942, UN SCOR, 3428th mtg, UN Doc S/RES/942 (23 September 1994) para 4; SC Res 999, 3544th mtg, UN Doc S/RES/999 (16 June 1995) para 10; SC Res 1270, UN SCOR, 4054th mtg, UN Doc S/RES/1270 (22 October 1999) para 2 (*‘Resolution 1270’*); SC Res 1334, UN SCOR, 4253rd mtg, UN Doc S/RES/1334 (22 December 2000) para 2; SC Res 1346, UN SCOR, 4306th mtg, UN Doc S/RES/1346 (30 March 2001) paras 7, 10; SC Res 1527, UN SCOR, 4909th mtg, UN Doc S/RES/1527 (4 February 2004) Preamble para 4; SC Res 1528, UN SCOR, 4918th mtg, UN Doc S/RES/1528 (27 February 2004) para 10; SC Res 1572, UN SCOR, 5708th mtg, UN Doc S/RES/1572 (15 November 2004) paras 3–4 (*‘Resolution 1572’*); SC Res 1765, UN SCOR, 5716th mtg, UN Doc S/RES/1765 (16 July 2007) para 2.

⁹⁶ See, eg, SC Res 864, UN SCOR, 3277th mtg, UN Doc S/RES/864 (15 September 1993) pt B (*‘Resolution 864’*).

⁹⁷ See, eg, *Resolution 851*, UN Doc S/RES/851 (n 95) paras 5–7; *Resolution 1572*, UN Doc S/RES/1572 (n 95) para 1.

⁹⁸ See, eg, SC Res 1127, UN SCOR, 3814th mtg, UN Doc S/RES/1127 (28 August 1997) Preamble para 7, para 4 (*‘Resolution 1127’*); SC Res 1521, UN SCOR, 4890th mtg, UN Doc S/RES/1521 (22 December 2003) Preamble paras 6, 8, para 4.

⁹⁹ Fox, Boon and Jenkins (n 16) 677.

¹⁰⁰ See, eg, SC Res 2042, UN SCOR, 6751st mtg, UN Doc S/RES/2042 (14 April 2012) para 1.

¹⁰¹ See, eg, *Resolution 1270*, UN Doc S/RES/1270 (n 95) para 8(a); SC Res 1509, UN SCOR, UN Doc S/RES/1509 (19 September 2003) paras 1, 3(a).

¹⁰² SC Res 1272, UN SCOR 4057th mtg, UN Doc S/RES/1272 (25 October 1999) paras 1–3.

¹⁰³ SC Res 1244, UN SCOR, 4011th mtg, UN Doc S/RES/1244 (10 June 1999) paras 5–11.

¹⁰⁴ See 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 Publishing, 2017) 19, 23, 36.

¹⁰⁵ Fox, Boon and Jenkins (n 16) 676–8. See also Wittke (n 4) 202–8.

First of all, this argument assumes that the UNSC resolutions can be evidence of customary international law in themselves — that is, as resolutions of an international organisation rather than as means by which the practice and/or *opinio juris* of member states can be identified, for example, by reference to their votes or statements during debates.¹⁰⁶ It is beyond the scope of this article to fully examine this argument. However, it suffices to mention that it does not find unambiguous support in the current state of international law. For instance, conclusion 12, para 2 in the draft conclusions on identification of customary international law adopted by the International Law Commission in 2018 provides that

[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.¹⁰⁷

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 ...¹⁰⁸

Therefore, the Commission does not consider the resolutions as the practice of the UNSC contributing to the identification of customary international law.¹⁰⁹

Secondly, and more importantly for the purposes of this article, regardless of whether the UNSC resolutions are considered to be practice of the international organisation evidencing custom or a means of identifying the views of member states, a closer review of the UNSC resolutions addressing compliance of the parties with peace agreements does not lead to an unequivocal conclusion that the UNSC, or its member states, regards peace agreements as sources of binding international obligations. The UNSC has invited, urged, emphasised the necessity of, called for and demanded compliance with peace agreements in several situations.¹¹⁰ For example, in relation to the situation in Angola, the UNSC condemned UNITA for its continuing use of military violence and demanded that they ‘abide fully by the “*Acordos de Paz*” concluded in 1991.¹¹¹

¹⁰⁶ See Gregory Fox, ‘Security Council Resolutions as Evidence of Customary International Law’, *EJIL: Talk!* (Blog Post, 1 March 2018) <<https://www.ejiltalk.org/security-council-resolutions-as-evidence-of-customary-international-law/>>, archived at <<https://perma.cc/K5NF-2WLK>>.

¹⁰⁷ *Report of the International Law Commission: Seventieth Session (30 April – 1 June and 2 July – 10 August 2018)*, UN GAOR, 73rd sess, Supp No 10, UN Doc A/73/10 (2018) 121.

¹⁰⁸ *Report of the International Law Commission: Sixty-Eighth Session (2 May – 10 June and 4 July – 12 August 2016)*, UN GAOR, 71st sess, Supp No 10, UN Doc A/71/10 (2016) 107.

¹⁰⁹ See also Niels Blokker, ‘International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?’ (2017) 14(1) *International Organizations Law Review* 1, 9–10.

¹¹⁰ See above n 95 and accompanying text. If one adopts the position that only the verb ‘decide’ indicates binding character in UNSC resolutions, then the range of verbs used by the UNSC regarding compliance with peace agreements does 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 UNSC resolution and not the peace agreement.

¹¹¹ *Resolution 851*, UN Doc S/RES/851 (n 95) paras 4–5.

Upon UNITA's continued failure to cease military action, in 1993, the UNSC determined that the situation in Angola constituted a 'threat to international peace and security'.¹¹² In 1997, the UNSC demanded UNITA's compliance with the *Lusaka Protocol* of 1994,¹¹³ and, acting under ch VII of the *Charter of the United Nations*, it decided on a range of measures to be taken against UNITA by the member states of the UN.¹¹⁴ 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*'.¹¹⁵ Although the UNSC attached clear significance to a negotiated solution to the conflict in Angola through the implementation of the *Peace Accords for Angola*¹¹⁶ and the *Lusaka Protocol*, its pronouncements do not necessarily suggest that it considered the obligations under these agreements to be of international legal nature.¹¹⁷

Another noteworthy example is found in the UNSC engagement with the situation in Darfur. In *Resolutions 1769* and *1828*, the UNSC 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'.¹¹⁸ According to the preamble of *Resolution 1769*, the relevant agreements in this context include the 2006 *Tripoli Agreement to Settle the Dispute between the Republic of Chad and the Republic of Sudan*¹¹⁹ and proceeding bilateral agreements between Sudan and Chad addressing the conflict in Darfur,¹²⁰ in addition to the 2006 *Darfur Peace Agreement*.¹²¹ It is not clear whether the UNSC distinguished between 'international obligations' and 'commitments' as different types of undertakings, nor is it apparent whether the UNSC characterised the obligations under the *Darfur Peace Agreement* as 'international obligations' or as 'commitments'. It may be argued that the phrase 'international obligations' refers only to the obligations under the interstate

¹¹² *Resolution 864*, UN Doc S/RES/864 (n 96) pt B.

¹¹³ *Resolution 1127*, UN Doc S/RES/1127 (n 98) para 2.

¹¹⁴ *Ibid* pt B.

¹¹⁵ *Ibid* para 9.

¹¹⁶ *Letter Dated 17 May 1991 from the Charge d'Affaires AI of the Permanent Mission of Angola to the United Nations Addressed to the Secretary-General*, UN Doc S/22609 (17 May 1991) annex ('*Letter Dated 8 May 1991 from the Minister for External Relations of Angola to the Secretary-General*') enclosure ('*Peace Accords for Angola*').

¹¹⁷ In some resolutions where the UNSC makes a determination of a violation of international human rights or humanitarian law, it emphasises that those responsible must be brought to justice: see, eg, SC Res 1791, UN SCOR, 5809th mtg, UN Doc S/RES/1791 (19 December 2007) para 7; SC Res 1865, UN SCOR, 6076th mtg, UN Doc S/RES/1865 (27 January 2009) para 11. However, the UNSC has not made similar statements regarding violations of peace agreements.

¹¹⁸ SC Res 1769, UN SCOR, 5727th mtg, UN Doc S/RES/1769 (31 July 2007) para 22 (emphasis added) ('*Resolution 1769*'); SC Res 1828, UN SCOR, 5947th mtg, UN Doc S/RES/1828 (31 July 2008) para 16 (emphasis added).

¹¹⁹ *Letter Dated 14 February 2006 from the Chargé d'Affaires AI of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council*, UN Doc S/2006/103 (15 February 2006) annex II ('*Tripoli Agreement to Settle the Dispute between the Republic of Chad and the Republic of the Sudan*').

¹²⁰ *Resolution 1769*, UN Docs S/RES/1769 (n 118) Preamble paras 11, 15.

¹²¹ *Darfur Peace Agreement*, Sudan–Sudan Liberation Movement/Army–Justice and Equality Movement, signed 5 May 2006 <<https://peacemaker.un.org/node/535>>, archived at <<https://perma.cc/Z7FH-2U4H>>.

agreements and UNSC resolutions, which are cited as ‘relevant agreements’, but not to the commitments under the peace agreement.

Although the UNSC has similarly referred to the commitments, obligations or responsibilities of parties to peace agreements in several situations, it has not expressly characterised these as international, or even as legal, undertakings. Therefore, the practice of the UNSC remains inconclusive as to the recognition of the treaty-making capacity of AOGs that are parties to a peace agreement or the legal status of such agreements otherwise.¹²² The emphasis of the UNSC 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 for the maintenance or restoration of international peace and security, as the UNSC has gradually broadened its interpretation of a ‘threat to peace’ to also include intrastate armed conflicts.¹²³

To recapitulate, the analysis in Part II demonstrates that peace agreements concluded between a state and one or more AOGs to end an intrastate armed conflict do not yet constitute international agreements due to the lack of treaty-making capacity of the latter in international law. There seem to be two main exceptions to this conclusion. First, peace agreements with a double character, that is, agreements signed by more than one state and AOGs, may constitute international agreements, but only as between states party. Secondly, peace agreements with national liberation movements, representing a people entitled to the right to self-determination and pursuing national liberation, may carry international legal force if they are concluded in written form and the parties intended them to be binding.¹²⁴ For example, the agreements signed between Israel and the Palestine Liberation Organization, especially the *Declaration of Principles on Interim Self-Government Arrangements* (commonly

¹²² The International Law Association Committee on Non State Actors also reached the same conclusion in this matter: Committee on Non State Actors, International Law Association, ‘Non-State Actors: 3rd Report Prepared by the Co-Rapporteurs, Cedric Ryngaert and Jean d’Aspremont’ (2014) 76 *International Law Association Reports of Conferences* 686, 694–5.

¹²³ Olivier Corten and Pierre Klein, ‘Are Agreements between States and Non-State Entities Rooted in the International Legal Order?’ in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011) 3, 19–20. On the concept of ‘threat to peace’, see Nico Krisch, ‘Article 39’ in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) vol 2, 1272, 1278–93.

¹²⁴ On the treaty-making capacity of national liberation movements, see Crawford (n 18) 113; Yves le Bouthillier and Jean-François 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) vol 1, 73; Schmalenbach, (n 24) 74–5. But see Malcolm Shaw, ‘The International Status of National Liberation Movements’ (1983) 5(1) *Liverpool Law Review* 19, 32–4; Shabtai Rosenne, *The Perplexities of Modern International Law* (Martinus Nijhoff Publishers, 2004) 264–5. It must be noted that the treaty-making capacity of national liberation movements is functionally limited to the conclusion of agreements with a state against which it is fighting and concerning the right to self-determination: see Nguyen Quoc Dinh, *Droit international public*, ed Patrick Daillier and Alain Pellet (LGDJ, 7th ed, 2002) 192.

referred to as the *Oslo Accords*),¹²⁵ are widely recognised as international agreements.¹²⁶

The conclusion of Part II that the majority of peace agreements with AOGs do not possess international legal status raises the question of whether these agreements reflect an intention for them to be legally binding on the international level but fail to be so merely due to the formal obstacle of the treaty-making capacity of AOGs. Therefore, the next section turns to this question and examines whether peace agreements are drafted in a way that demonstrates an intention to create (international) legal obligations, or instead are political commitments.

III INTENTION TO CREATE INTERNATIONAL LEGAL OBLIGATIONS UNDER A PEACE AGREEMENT

The drafting process of the *VCLT* indicates that the element of ‘intention to create obligations under international law’ is embraced in the phrase ‘governed by international law’.¹²⁷ Many objective factors, such as the requirement of ratification of a treaty, provisions regarding entry into force, the inclusion of compulsory judicial settlement mechanisms, international registration, the actual terms of the agreement, the choice of language and the circumstances of its conclusion,¹²⁸ as well as the certainty of the subject matter of the treaty,¹²⁹ may be considered for the determination of the intention of the parties. The criterion of intention also features in the process-based accounts of the legal normativity of peace agreements that depart from the ‘source thesis’¹³⁰ and concepts such as subjectivity or lawmaking capacity. Inspired by the New Haven School, Ezequiel Heffes and Marcos D Kotlik, for example, propose to focus on the participation of AOGs in lawmaking processes instead of their lawmaking capacity.

¹²⁵ *Letter Dated 8 October 1993 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations Addressed to the Secretary-General*, UN GAOR, 48th sess, Agenda Item 10; UN SCOR, 48th sess, UN Docs A/48/486 and S/26560 (11 October 1993) annex (‘*Declaration of Principles on Interim Self-Government Arrangements*’).

¹²⁶ See, eg, Eyal Benvenisti, ‘The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement’ (1993) 4(4) *European Journal of International Law* 542, 544–5; Peter Malanczuk, ‘Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law’ (1996) 7(4) *European Journal of International Law* 485, 488–90; John Quigley, ‘The Israel–PLO Interim Agreements: Are They Treaties?’ (1997) 30(3) *Cornell International Law Journal* 717, 740. See generally Geoffrey R Watson, *The Oslo Accords: International Law and the Israeli–Palestinian Peace Agreements* (Oxford University Press, 2000). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 253 [2.4] (Judge Elaraby).

¹²⁷ ‘1966 Report of the ILC’ (n 14) 189.

¹²⁸ Crawford (n 18) 356–7; Klabbbers (n 8) 72–89; For a critical examination of the role of intent in law-ascertainment, see d’Aspremont, *Formalism and Sources of International Law* (n 8) 178–82.

¹²⁹ Malgosia Fitzmaurice, ‘The Identification and Character of Treaties and Treaty Obligations between States in International Law’ (2003) 73 *British Yearbook of International Law* 141, 145. But see Oscar Schachter, ‘The Twilight Existence of Nonbinding International Agreements’ (1977) 71(2) *American Journal of International Law* 296, 298.

¹³⁰ On the ‘source thesis’ and international law, see d’Aspremont, *Formalism and the Sources of International Law* (n 8) ch 7.

Thus, they argue that agreements with AOGs aiming to bring into force humanitarian provisions, including special agreements and peace agreements,

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.¹³¹

Overall, in relation to peace agreements, three main factors have been noted in scholarship as indicators of an intention to create international obligations: first, formal features, such as provisions regarding entry into force, international registration, use of legal language and precision of obligations; secondly, international aspects of the subject matter and references to international law; and thirdly, international involvement in agreement monitoring, implementation, enforcement and dispute settlement. These factors should be examined on a case-by-case basis, but the following discussion focuses on whether these features are commonly found in peace agreements and whether they necessarily denote an intention to create international obligations.

A *Formal Features of Peace Agreements*

Only in the case of a small number of peace agreements have the parties explicitly indicated the legal nature of the agreement. The parties to the 1994 *Lusaka Protocol*, for example, reiterated their acceptance of the *Peace Accords for Angola* among the ‘relevant legal instruments’ to the resolution of the Angolan conflict, along with the relevant UNSC resolutions.¹³² The later 2002 *Luena Agreement* of Angola rather ambiguously reaffirmed the continuing validity of the 1994 *Lusaka Protocol* as a ‘political-juridical instrument’.¹³³ Similarly ambiguous is the acceptance of the parties to the 2015 *Agreement for Peace and Reconciliation in Mali Resulting from the Algiers Process* that the ‘annexe as well as the Declaration of the Parties to the Algiers Process ... form an integral part of the Agreement and have the same legal status as the other provisions in the body of the text’,¹³⁴ 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’.¹³⁵ It is open to argument whether the implementing measures are intended to give legal force to the peace agreement or to elaborate on and complement it. Moreover,

¹³¹ Heffes and Kotlik (n 81) 1218.

¹³² *Lusaka Protocol*, UN Doc S/1994/1441 (n 28) annex 1, para 1. See also at annex 2.

¹³³ *Identical Letters Dated 25 April 2002 from the Permanent Representative of Angola to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN Doc S/2002/483 (26 April 2002) annex (‘Annex to the Identical Letters Dated 25 April 2002 from the Permanent Representative of Angola to the United Nations Addressed to the Secretary-General and the President of the Security Council’) Preamble para 1 (‘*Luena Agreement*’).

¹³⁴ *Accord pour la paix et la réconciliation au Mali issu du processus d’Alger*, signed 15 May 2015 (Peace Agreement) art 66 <<https://peacemaker.un.org/node/2681>>, archived at <<https://perma.cc/8N7R-EXTD>> [tr University of Edinburgh, ‘Agreement for Peace and Reconciliation in Mali Emanating from the Algiers Process’, *PA-X Peace Agreement Database* (Web Document) <<https://www.peaceagreements.org/wview/1365/Accord%20Pour%20la%20Paix%20et%20la%20Reconciliation%20au%20Mali%20-%20Issu%20du%20Processus%20d'Alger>>, archived at <<https://perma.cc/5KF9-HY8E>>].

¹³⁵ *Ibid* art 3.

there is not any indication that the claimed legal status is of international character. As mentioned above,¹³⁶ 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*’.¹³⁷ However, arguably as an indication of the parties’ hesitation about the purported international standing of the Agreement, they also requested the incorporation of the Agreement into a UNSC resolution as well as into the Colombian constitution.¹³⁸

Although peace agreements rarely pronounce on their legal status, almost all agreements mimic legal form and language, for instance, by using words such as ‘shall’ or ‘agree’, in formulating obligations.¹³⁹ As typical of international treaties, peace agreements also contain provisions on their entry into force, amendment and implementation in good faith. Some are deposited before international organisations or actors. The 2005 *CPA* is, for example, lodged with the UN, the African Union (‘AU’), the Intergovernmental Authority on Development Secretariat in Djibouti, the League of Arab States and the Republic of Kenya.¹⁴⁰ Many peace agreements are also submitted to the UN Secretary-General to be ‘circulated as a document of the Security Council’.¹⁴¹ However, unless parties explicitly attach international legal status to the agreement, as in the case of the *2016 Final Peace Agreement (Colombia)*, legalisation techniques such as the mimicking of treaty language and form may not be conclusive in and of themselves of the parties’ intention to commit to international, let alone legal, obligations. These legalisation techniques may rather be used by peacemaking 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.

B *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 law¹⁴² to specific international rules or instruments.¹⁴³ Many issues

¹³⁶ See above n 74 and accompanying text.

¹³⁷ *2016 Final Peace Agreement (Colombia)* (n 3) Preamble. See also at s 6.1.8.

¹³⁸ *Ibid* 289–90 (‘*Agreement on 7 November 2016*’) paras I, IV.

¹³⁹ See, eg, *Lusaka Protocol*, UN Doc S/1994/1441 (n 28) annex 3 (‘*Military Issue (I)*’) paras I(1)–(2), (5), which makes use of ‘shall’; *General Framework Agreement for Peace in Bosnia and Herzegovina*, UN Docs A/50/79C and S/1995/999 (n 36) art I, which makes use of ‘shall’; *APR Agreement* (n 62) arts 2, 22(1)–(2), which makes use of ‘agree’. See also Foreign and Commonwealth Office (UK), ‘Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures’ (Policy Document, March 2014) 15–16.

¹⁴⁰ *CPA* (n 5) chapeau para 11(4).

¹⁴¹ See, eg, *Letter Dated 9 December 1994 from the Permanent Representative of Angola to the United Nations Addressed to the President of the Security Council*, UN SCOR, UN Doc S/1994/1441 (22 December 1994).

¹⁴² See, eg, *2016 Final Peace Agreement (Colombia)* (n 3) Preamble para 12.

¹⁴³ See, eg, *Ceasefire Agreement*, Sudan–Justice and Equality Movement Sudan, signed 10 February 2013, art 32(v) <<https://peacemaker.un.org/sudan-ceasefire-jems2013>>, archived at <<https://perma.cc/WF8L-DB7D>>, citing SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000), in relation to violence against women and children.

regulated by peace agreements — for example, elections, autonomy and self-governance in sub-state regions, and human rights — are also relevant to the rules and principles of international law, even in the absence of explicit references by the parties. As the subject matter of peace agreements has been taken into account in the debate on the legal status of peace agreements,¹⁴⁴ it may be worth asking whether references to international law and to matters regulated by international law in a peace agreement can be indicative. As Olivier Corten and Pierre Klein also note, such references often function as a restatement of the state party's commitment to its existing obligations under international law and are commonly found also in domestic legal instruments.¹⁴⁵ Therefore, they do not necessarily reflect an intention to undertake new international legal obligations under the peace agreement. 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. Although certainty of subject matter has been considered in the determination of the legal status of agreements or specific provisions,¹⁴⁶ the content of an agreement in general has no bearing on its legal status.¹⁴⁷

C *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, and assistance (for example, electoral, constitutional or technical assistance).¹⁴⁸ Some peace agreements also provide for international dispute settlement, such as in relation to the settlement of the territorial disputes over the Abyei region in Sudan¹⁴⁹ and the Brčko district in Bosnia.¹⁵⁰ In some rare cases, they even provide for international territorial administration, as,

¹⁴⁴ See, eg, Sheeran (n 4) 446–7, 457.

¹⁴⁵ Corten and Klein (n 123) 12–13.

¹⁴⁶ See, eg, *ibid* 12; Fitzmaurice (n 129) 145; *Oil Platforms (Iran v United States of America) (Preliminary Objection)* [1996] ICJ Rep 803, 820 [52]: ‘Article 1 [of the *Treaty of Amity, Economic Relations, and Consular Rights* of 15 August 1955] has, as already observed, been drafted in terms so general that by itself it is not capable of generating legal rights and obligations.’

¹⁴⁷ d’Aspremont, *Formalism and Sources of International Law* (n 8) 180.

¹⁴⁸ On international involvement in the negotiation and implementation of peace agreements, see generally Geir Sjøberg, ‘Third Party Involvement in the Negotiation and Implementation of Intrastate Peace Agreements’ in Miek Boltjes (ed), *Implementing Negotiated Agreements: The Real Challenge to Intrastate Peace* (TMC Asser Press, 2007) 177.

¹⁴⁹ *The Road Map for Return of IDPs and Implementation of Abyei Protocol*, Sudan–Sudan People’s Liberation Movement, signed 8 June 2008 (Peace Agreement) s 4 <<https://peacemaker.un.org/sudan-roadmap-IDPs2008>>, archived at <<https://perma.cc/QB5V-J6WM>>; *Arbitration Agreement between the Government of Sudan and the Sudan People’s Liberation Movement/Army on Delimiting Abyei Area*, signed 7 July 2008 <<https://docs.pca-cpa.org/2016/02/Arbitration-Agreement-between-The-Government-of-Sudan-and-The-Sudan-People%E2%80%99s-Liberation-Movement-Army-on-Delimiting-Abyei-Area-July-7-2008.pdf>>, archived at <<https://perma.cc/AB3U-4DYP>>. See also *Delimiting of Abyei Area* (n 66).

¹⁵⁰ *Dayton Agreement*, UN Docs A/50/790 and S/1995/999 (n 36) annex 5 (‘*Agreement on Arbitration*’). See also *Arbitration for the Brčko Area (Bosnia and Herzegovina v Republika Srpska) (Final Award)* (1999) 38 ILM 536.

for instance, in the case of the *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*, commonly referred to as the *Erdut Agreement*.¹⁵¹ Some scholars argue that the delegation of such roles to international actors, particularly the submission of disputes to international dispute settlement, demonstrates the intention of parties to create an internationally binding peace agreement.¹⁵² However, as opposed to an intention to create legally binding obligations on the international level, the ‘internationalised’ aspects of peace agreements seem to be associated rather with negotiating parties or involved international actors’ desire to enhance the credibility of an agreement and its implementation record.

It could nonetheless 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 intended to be binding as such.¹⁵³ However, such provisions often take the form of invitations, requests or authorisations by conflict parties rather than as legal obligations undertaken by external actors.¹⁵⁴ In lieu of relying on peace agreements as the legal framework for their involvement, external actors often enter into separate international agreements with host/recipient states or, in the 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 missions in support of agreement implementation, peace agreements provide the basis for consent, whereas a subsequent resolution by the UNSC or a regional organisation and status of forces agreements with host states establish the legal framework. External actors may also enter into agreements for the provision of technical or

¹⁵¹ *Letter Dated 15 November 1995 from the Permanent Representative of Croatia to the United Nations Addressed to the Secretary-General*, UN GAOR, 50th sess, Agenda Item 92; UN SCOR, 50th sess, UN Docs A/50/757 and S/1995/951 (15 November 1995) annex (‘*Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*’) paras 2–5 (‘*Erdut Agreement*’).

¹⁵² See, eg, Katherine W Meighan, ‘The Israel–PLO Declaration of Principles: Prelude to a Peace?’ (1994) 34(2) *Virginia Journal of International Law* 435; Koojimans (n 4) 338. See also *Texaco v Libya* (n 21) 17–18 [47]–[49]: The sole arbitrator Dupuy considered the submission of contractual disputes to international arbitration as a factor that may indicate an intention to create international obligations.

¹⁵³ Nonetheless, such provisions may prevent the parties to the conflict from invoking the principle of non-interference in internal affairs when international actors fulfil the requested or authorised roles as per a peace agreement: Vierucci, ‘Colombian Peace Agreement’ (n 74) 4–5.

¹⁵⁴ See, eg, *Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC)*, signed 5 December 2011, paras 28–30 <<https://www.peaceagreements.org/wgenerateAgreementPDF/758>>, archived at <<https://perma.cc/VB66-EWRA>>; *Erdut Agreement*, UN Docs A/50/757 and S/1995/951 (n 151) paras 2–3; *Letter Dated 22 October 2001 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2001/988 (23 October 2001) annex (‘*Letter Dated 14 September 2001 from the Permanent Representative of Papua New Guinea to the United Nations Addressed to the Secretary-General*’) enclosure I (‘*Presentation of the Bougainville Peace Agreement, and Formal Request for Assistance in Implementation by the United Nations Political Office/Observer Mission in Bougainville, Papua New Guinea (UNPOB/UNOMB)*’) para 5(2).

financial assistance to agreement implementation and post-conflict reforms.¹⁵⁵ As such, despite the lack of international legal status of peace agreements, the international aspects of peace agreements, that is, the components relating to the involvement of international actors, can be accommodated and ‘legalised’ through different legal avenues.

D *Are Peace Agreements of ‘International’ Character?*

As the preceding sections demonstrate, 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 in the context of peace agreements. The effect of such factors on the legal nature of agreements between states and non-state entities has also been evaluated in the context of ‘internationalised’ state contracts. For instance, in the *Texaco v Libya* arbitral ruling, mentioned above in relation to the treaty-making capacity of non-state entities, the sole arbitrator Dupuy considered the following as the three criteria of ‘internationalisation’ in relation to the law governing state contracts: reference to general principles of law as part of the applicable law, provision for international arbitration and the character of the agreement at issue as an economic development agreement.¹⁵⁶ This followed on from his assertion that state contracts derive their binding nature from international law, which empowered the parties to determine the law applicable to their contracts.¹⁵⁷ Many commentators, on the other hand, remain of the view that state contracts remain ordinary contracts, breaches of which do not entail responsibility under international law, despite displaying such characteristics.¹⁵⁸

Regardless of which of the two views is taken to reflect the state of international law on state contracts, the relevance of that conclusion to the debate on the legal nature of peace agreements may nonetheless be questioned due to a

¹⁵⁵ See, eg, ‘About GEMAP’, *Liberia Governance and Economic Management Assistance Programme* (Web Page) <https://web.archive.org/web/20191219031120/http://www.gemap-liberia.org/about_gemap/index.html>. The *Governance and Economic Management Assistance Program Agreement* (‘GEMAP Agreement’) was signed by the National Transitional Government of Liberia and the International Contact Group on Liberia (comprised of members from the UN, the Economic Commission of West African States, the AU, the World Bank, the US, Ghana, Nigeria, the United Kingdom, Germany and Sweden), and it established the Governance and Economic Management Assistance Programme in assistance of the implementation of the 2003 *Accra Comprehensive Peace Agreement* and the stipulated reform of economic and fiscal governance: *Letter Dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/850 (29 August 2003) annex (‘*Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the Political Parties*’) arts VI(1)b, VI(11), XII(4), XIII(4), XVI(5), XXIX(2), XXXIII (‘*Accra Comprehensive Peace Agreement*’). The *GEMAP Agreement* was welcomed by the UNSC in SC Res 1626, UN SCOR, 5263rd mtg, UN Doc S/RES/1626 (19 September 2005) Preamble para 6.

¹⁵⁶ *Texaco v Libya* (n 21) 15–17 [41]–[45].

¹⁵⁷ *Ibid* 12 [26].

¹⁵⁸ See generally Chittharanjan F Amerasinghe, ‘State Breaches of Contracts with Aliens and International Law’ (1964) 58(4) *American Journal of International Law* 881. On the legal nature of state contracts, see also *Anglo-Iranian Oil Co (UK v Iran) (Judgment)* [1952] ICJ Rep 93, 112–13; Fitzmaurice (n 129) 159–60; Kassoti (n 23) 80–1.

fundamental difference between state contracts and peace agreements. As the sole arbitrator Dupuy emphasised, state contracts are considered *international* contracts ‘both in the economic sense because they [involve] the interests of international trade and in the strict legal sense because they [include] factors connecting them to *different States*’.¹⁵⁹ The *international* character of peace agreements as such, on the other hand, is not as easily established as that of state contracts: first, peace agreements are concluded between a state and a sub-state entity that is not necessarily connected to a different state. Secondly, although conclusion of a peace agreement involves the interests of international peace and security, peace agreements concern matters that are predominantly of intrastate nature, that is, relating to the legal and political order within a state. Therefore, the rationale behind the recognition of state contracts as ‘internationalised’ contracts — as sources of international legal obligations despite not being characterised as international agreements proper — does not apply to peace agreements.

IV THE LACK OF INTERNATIONAL LEGAL STATUS OF PEACE AGREEMENTS: (WHY) DOES IT MATTER?

At first blush, the conclusion that a peace agreement between a state and an AOG does not constitute an international agreement does read rather disconcertingly, as if it is to deny such agreements the positive consequences and functions of international legal status. The main legal consequence of the characterisation of a peace agreement as an international agreement would be for the peace agreement to be governed by international law, most importantly by the law of treaties and the law of state responsibility. The doctrinal inclination towards the recognition of the international legal status of peace agreements, however, seems not to be driven by such formalist legal consequences, but rather concentrates on the functions that legal status purportedly plays in upholding the agreement before domestic and international courts, facilitating the conclusion of an agreement by the parties and enhancing its compliance.¹⁶⁰ For instance, it has been suggested that an important consequence of the classification of a peace agreement as an international agreement would be that it could be invoked in domestic and international courts.¹⁶¹ Furthermore, Christine Bell suggests that the recognition of ‘peace agreement’ as a distinct legal category of hybrid, internationalised instrument — that is, as *lex pacificatoria* — is in itself a ‘conflict resolution project’, as

¹⁵⁹ *Texaco v Libya* (n 21) 11 [22] (emphasis added).

¹⁶⁰ This inclination may also be partly driven by doctrinal agendas 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 generally Jean d’Aspremont, ‘The Doctrinal Illusion of the Heterogeneity of International Law-Making Processes’ in Hélène Ruiz Fabri, Rüdiger Wolfrum and Jana Gogolin (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing, 2006–14) vol 2, 297.

¹⁶¹ See, eg, Fox, Boon and Jenkins (n 16) 678.

peace agreement use of legal form is driven by the need to design a set of 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.¹⁶²

The objectives of enhancing compliance with an agreement and invoking it before domestic and international courts appear to be also behind the invocation of international legal status by parties to or beneficiaries of peace agreements, as in the case of the *2016 Final Peace Agreement (Colombia)*. In referring to the peace agreement as a special agreement as per its international standing, the Colombian government and the 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’.¹⁶³ Against this backdrop, the next two sections examine whether international legal status may in fact function as, first, a shield from domestic and international judicial challenges and, secondly, an incentive to conclude and comply with a peace agreement. Upon closer analysis, the conclusion that peace agreements lack international legal status seems less disconcerting, as the role international legal status plays in shielding an agreement from judicial challenges and inducing compliance, if any, seems to be more limited and contingent than generally assumed.

A *International Legal Status as a Shield from Domestic and International Judicial Challenges*

1 *Domestic Judicial Challenges*

The major domestic judicial challenge that peace agreements often face is the challenge of unconstitutionality directed at the agreement or implementing constitutional amendments and laws.¹⁶⁴ This challenge arises when a peace agreement is aimed to be legally implemented within the framework of an existing constitution — that is, when a new constitution is not brought into effect by a peace agreement that either is concluded as a constitution or provides for the making of a new constitution.¹⁶⁵ The legal or constitutional change in implementation of a peace agreement may be procedurally or substantively in contravention of the existing constitution. Procedurally, the process of legal incorporation may not be in accordance with the constitutionally stipulated

¹⁶² Bell, *On the Law of Peace* (n 9) 161, 192. See also Sheeran (n 4) 435–6.

¹⁶³ Betancur Restrepo (n 74) 192.

¹⁶⁴ See Asli Ozcelik and Tarik Olcay, ‘(Un)constitutional Change Rooted in Peace Agreements’ (2020) 18(4) *International Journal of Constitutional Law* (forthcoming); Cheryl Saunders, ‘Constitutional Review in Peace Processes: Securing Local Ownership’ (2014) 25 *Accord* 56, 57. For case studies on the tensions between constitutions and peace agreements, see Carlos Bernal-Pulido, ‘Transitional Justice within the Framework of a Permanent Constitution: The Case Study of the Legal Framework for Peace in Colombia’ (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1136; Sedfrey M Candelaria and Regina Ann L Nonato, ‘An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes’ (2008) 53(2) *Ateneo Law Journal* 263, 275–7.

¹⁶⁵ On ‘constitutional peace agreements’ or ‘peace agreement constitutions’, see Bell, ‘Peace Agreements’ (n 4) 391–4. See generally Jennifer S Easterday, ‘Peace Agreements as a Framework for *Jus post Bellum*’ in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014) 379.

constitutional amendment or lawmaking procedure. Substantively, provisions of a peace agreement may not be in conformity with the substantive principles of a constitution; for instance, such tension may arise between amnesty provisions and the rule of law guarantees, or between provisions on autonomy and self-governance and the principle of territorial integrity. The claim that a peace agreement possesses international legal status is, in this context, connected to the aim to avert such unconstitutionality challenges by shielding the agreement or its implementing constitutional amendment and laws from judicial challenge, without addressing the substantive unconstitutionality per se. However, whether international legal status can in fact play this role in the entrenchment of peace agreements in domestic law depends on the role the respective 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 (Colombia)* was partly driven by the need to shield the constitutional amendments and laws adopted in implementation of the Agreement from unconstitutionality challenges before the Constitutional Court of Colombia.¹⁶⁶ According to the doctrine of the constitutional block adopted in Colombia, certain rules or instruments of international law are accorded constitutional status; they become part of the framework against which the Constitutional Court assesses the constitutionality of constitutional amendments or laws.¹⁶⁷ However, the strategy of the parties to incorporate the Peace Agreement into the constitutional block by attaching international legal status to it was forestalled by the Constitutional Court, which ruled that the Peace Agreement would not be automatically included in the Colombian constitution and that the result of the plebiscite on the Peace Agreement would only be binding on the President and not on all state authorities.¹⁶⁸ Rejected in the plebiscite, the Agreement was then renegotiated by the parties as to stipulate, inter alia, that the Agreement would not be part of the Constitution or the constitutional block but only a parameter for the

¹⁶⁶ Christine Bell, 'Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective' (2016) 110 *AJIL Unbound* 165, 169, citing Humberto de la Calle, 'Intervención del jefe de la delegación del gobierno, Humberto de la Calle, en la Corte Constitucional' [Intervention of the Head of the Government Delegation, Humberto de la Calle, in the Constitutional Court] (Intervener Submission, Constitutional Court of Colombia, 26 May 2016) <<http://es.presidencia.gov.co/noticia/160526-Intervencion-del-Jefe-de-la-Delegacion-del-Gobierno-Humberto-de-la-Calle-en-la-Corte-Constitucional>>, archived at <<https://perma.cc/BWG3-BKAD>>.

¹⁶⁷ Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press, 2017) 42–3.

¹⁶⁸ Corte Constitucional de Colombia [Constitutional Court of Colombia], Sentencia C-379/16, 18 July 2016, [13.2], [13.5] <<https://www.corteconstitucional.gov.co/Relatoria/2016/c-379-16.htm>>, archived at <<https://perma.cc/RCB4-JWMN>>. See also Corte Constitucional de Colombia [Constitutional Court of Colombia], Sentencia C-225/95, 18 May 1995, [17] <<https://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm>>, archived at <<https://perma.cc/E3MN-SYPP>>. The Constitutional Court of Colombia held that special agreements concluded in the context of an internal armed conflict do not constitute international treaties between subjects of public international law.

interpretation of the implementing laws for three presidential terms.¹⁶⁹ The parties retained the reference to special agreement status in the re-negotiated agreement, but arguably merely for symbolic purposes to emphasise the partly humanitarian nature of the Agreement.¹⁷⁰ Nevertheless, in Colombia, it is theoretically possible for a peace agreement to gain constitutional status and be shielded from unconstitutionality challenges *if* the agreement has the status of an international agreement, due to the recognition of the doctrine of the constitutional block.

In most jurisdictions, on the other hand, constitutions are accorded primacy over ratified international treaties. Therefore, even if peace agreements were to be accepted or signed as international treaties, they would not survive an unconstitutionality challenge merely by virtue of their international status.¹⁷¹ This was affirmed indirectly by the Supreme Court of the Philippines in its decision on the constitutionality of the *MOA-AD* between the Philippine government and the MILF.¹⁷² One of the grounds of unconstitutionality put forward by the petitioners was that the government's peace panel committed a grave abuse of discretion by undertaking in the *MOA-AD* to amend the Philippine constitution and existing laws to ensure their conformity with the Agreement, as the promise of constitutional amendment meant that the amendment procedure established by the Constitution would not be observed.¹⁷³ Upholding the petition in this respect, the Court held that the government, by promising to amend the Constitution, usurped the constituent powers vested by the Philippine Constitution only in Congress (Constituent Assembly), the delegates to a Constitutional Convention and the people themselves (People's Initiative).¹⁷⁴ 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*.¹⁷⁵ 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'.¹⁷⁶ Therefore, regardless of

¹⁶⁹ Oficina del Alta Comisionado para la Paz [Office of the High Commission for Peace], 'Notas sobre los cambios, ajustes y precisiones del nuevo acuerdo final para la terminación del conflicto y la construcción de la paz estable y duradera' [Notes on the Changes, Adjustments and Precisions of the New Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace] (Notes, 13 November 2016) 21, 22 <<http://es.presidencia.gov.co/noticia/161114-Cambios-ajustes-y-precisiones-del-Nuevo-Acuerdo-Final-de-Paz>>, archived at <<https://perma.cc/L85G-LU3T>>.

¹⁷⁰ Vierucci, 'Colombian Peace Agreement' (n 74) 3–4.

¹⁷¹ But see Conseil constitutionnel [French Constitutional Court], decision n° 98-408 DC, 22 January 1999 reported in JO, 24 January 1999, holding that the *Rome Statute of the International Criminal Court* ('*Rome Statute*') was incompatible with the French Constitution and that the Constitution had to be amended to conform to the *Rome Statute*. See also Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice' (2017) 15(1) *International Journal of Constitutional Law* 84.

¹⁷² *Province of North Cotabato* (n 31).

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.* (emphasis added).

whether the peace agreement possessed international legal status or not, the promise of constitutional amendment without following the procedure to do so was found to be unconstitutional.

The role of international legal status in shielding a peace agreement from domestic judicial challenges, particularly that of unconstitutionality, first and foremost depends on the acceptance of peace agreements as international agreements by domestic courts, which have not to date departed from the dominant position in international law established above.¹⁷⁷ However, even if it were recognised that peace agreements possess international legal status, whether an international agreement is ipso facto immune from unconstitutionality challenges as a matter of domestic law also depends on whether international law is accorded supremacy over the constitution in a jurisdiction, which would rarely be the case.¹⁷⁸

2 International Judicial Challenges

At the international level, laws and practices stemming from peace agreements are likely to be, and have been, challenged particularly before international criminal tribunals or international human rights courts. As to international criminal tribunals or the International Criminal Court, 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. It is established that 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.¹⁷⁹ 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 Peace Agreement* was not an international agreement and could not be a bar to its jurisdiction, it is notable that the SCSL did not preclude the challenge that an amnesty grounded in an international agreement could bar the jurisdiction of an international criminal tribunal.¹⁸⁰ However, even if the *Lomé Peace Agreement* were an international agreement, it would still not necessarily prevail over the *Statute of the Special Court for Sierra Leone*, ‘since the Special Court itself was not a party to the Accord [(*Lomé Peace Agreement*)] and, even if it were, the Accord would still not necessarily trump the Special Court’s Statute’.¹⁸¹ A similar issue also arose before the ICTY. One of the challenges put forward by Radovan Karadžić against the jurisdiction of the ICTY was an alleged agreement between him and mediator Richard Holbrooke,

¹⁷⁷ See above Parts II–III.

¹⁷⁸ See *Kushtetuta Republikës së Kosovës* [Constitution of the Republic of Kosovo] (Kosovo) art 143, which is a rare example of an international peace proposal being granted supremacy within the constitutional order: *Letter Dated 26 March 2007 from the Secretary-General Addressed to the President of the Security Council: Addendum: Comprehensive Proposal for the Kosovo Status Settlement*, UN Doc S/2007/168/Add.1 (26 March 2007). It must be noted that this was a proposal, not a signed agreement, and the supreme status was not linked to any consideration of international legal status of the proposal.

¹⁷⁹ *Kallon* (n 24) [67]. See also Roger O’Keefe, *International Criminal Law* (Oxford University Press, 2015) 548–9.

¹⁸⁰ *Kallon* (n 24) [72], [86].

¹⁸¹ O’Keefe (n 179) 525.

reached during the negotiations preceding the conclusion of the *Dayton Peace Agreement*, that he would not be prosecuted by the ICTY in return for withdrawal from public life.¹⁸² 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’,¹⁸³ as ‘the Statute of the Tribunal can only be amended or derogated by means of UNSC resolution’.¹⁸⁴ These examples point out that, even if it were assumed that the concerned agreement constitutes an international agreement, an amnesty rooted in a peace agreement cannot be raised to challenge the jurisdiction of an international criminal court, as it cannot in and of itself amend or derogate from the founding instrument or the statute of the court. The international legal status of an agreement may also be irrelevant to its invocation before a foreign or international court, as amnesties typically only promise non-prosecution before domestic courts of the state party and do not extend to foreign or international courts.¹⁸⁵

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 power-sharing arrangements that implicate equality and non-discrimination guarantees. For instance, the power-sharing arrangement at the heart of the *Dayton Peace Agreement*, which bars non-members of constituent peoples (Bosniaks, Serbs, and Croats) from candidature to certain political positions,¹⁸⁶ clashes with the non-discrimination guarantee of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁸⁷ (‘ECHR’) and the right to free elections under art 3 of the *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁸⁸ In *Sejdić v Bosnia and Herzegovina*, the European Court of Human Rights did not review this clash, as the power-sharing arrangement was incorporated into the constitutional system of Bosnia and Herzegovina and the Court did not have jurisdiction *ratione temporis* at the time of the adoption of the *Dayton Peace Agreement* and the

¹⁸² *Prosecutor v Karadžić (Decision on Karadžić’s Appeal of Trial Chamber’s Decision on Alleged Holbrooke Agreement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-5/18-AR73.4, 12 October 2009) [4]–[5] (‘*Karadžić*’). See also Antonio Cassese et al, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011) 97.

¹⁸³ *Karadžić* (n 182) [36].

¹⁸⁴ *Ibid* [35].

¹⁸⁵ For this reason, during the peace talks with the Ugandan government in 2006, the Lord’s Resistance Army in Uganda sought the inclusion of an explicit provision that the government would seek a deferral of the International Criminal Court arrest warrants for its leaders: Barney Afako, ‘Negotiating in the Shadow of Justice’ (2010) 11(Supplement) *Accord* 21, 22–3.

¹⁸⁶ *Dayton Peace Agreement*, UN Docs A/50/790 and S/1995/999 (n 36) annex 4 (‘*Constitution of Bosnia and Herzegovina*’) Preamble, arts IV(1)(2), V.

¹⁸⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 14.

¹⁸⁸ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 20 March 1952, ETS No 9 (entered into force 18 May 1954) art 3. See also *Sejdić v Bosnia and Herzegovina* [2009] VI Eur Court HR 273, 309–13 [38]–[50] (‘*Sejdić*’).

relevant constitutional provisions.¹⁸⁹ Had the Court examined the norm conflict, could Bosnia and Herzegovina have argued that it could not assume responsibility for violating the *ECHR* — an international treaty — because it had undertaken a conflictual obligation under the *Dayton Peace Agreement* — another international treaty? Were the *Dayton Peace Agreement* not of a legal nature, there would not be a legal norm conflict in the first place. In this respect, the fact that the *Dayton Peace Agreement* is an international treaty makes a difference. However, the international legal status of the *Dayton Peace Agreement* places its provisions on power sharing merely on hierarchically equal standing with the *ECHR*. It does not in and of itself resolve the norm conflict and absolve Bosnia and Herzegovina of responsibility for violating the *ECHR*.¹⁹⁰

It is beyond the scope of this article to provide a comprehensive exploration of all potential domestic and international judicial challenges that a peace agreement may be subjected to. However, the examples suffice to demonstrate that international legal status alone would fail to shield peace agreements from domestic and international judicial challenges in many potential scenarios.

B *International Legal Status as an Incentive to Conclude and Comply with a Peace Agreement*

In the context of peacemaking, many purposes and functions are attached to the desire to grant peace agreements international legal status. In addition to the role that international legal status is hoped to play before domestic and international courts, these include the potential function of international legal status as a guarantee that noncompliance with a peace agreement would trigger international legal consequences, irrespective of its domestic legal fate. As such, the classification of a peace agreement as a source of international obligations may have implications on the prospects of parties entering into peace negotiations and concluding a peace agreement.

As for AOGs, the prospect of recognition of the international legal status of a peace agreement may function as an incentive to enter into an agreement. First, the willingness of a state to undertake obligations under an international agreement may be considered a sign of strong commitment. Secondly, attributing international legal status to a peace agreement has symbolic significance for AOGs, who aim to gain international recognition and a degree of equality with the state party.¹⁹¹ 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. As such, international legal status is likely to prove a disincentive for states.

¹⁸⁹ *Sejdić* (n 188) 312 [46].

¹⁹⁰ For instance, the European Court of Human Rights held the United Kingdom responsible for violating the *ECHR* irrespective of its conflicting international obligations arising from bilateral treaties: *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A) 27 [86]; *Matthews v United Kingdom* [1999] I Eur Court HR 251, 266 [33]–[35], 273 [65]. On ‘unresolvable’ norm conflicts in international law, see Marko Milanović, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20(1) *Duke Journal of Comparative and International Law* 69, 75, 115–17.

¹⁹¹ Sujit Choudhry, ‘Civil War, Ceasefire, Constitution: Some Preliminary Notes’ (2012) 33(5) *Cardozo Law Review* 1907, 1918–19.

On the other hand, it is conceivable that for both state and AOG parties, binding force, particularly at the international level, may function as a confidence-building measure and incentivise them to conclude an agreement, violations of which would be sanctioned by law.¹⁹² The increased reputational cost of noncompliance with legal obligations may also be a factor in the durability of a peace agreement.¹⁹³ Geoffrey R Watson refers to the challenges that 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’.¹⁹⁴ Therefore, he argues that international law should recognise peace agreements between states and sub-state entities as a ‘new species of binding international agreement’.¹⁹⁵

Although international legal status may increase the costs of noncompliance, it is important to note that the connection between legal status and compliance also depends on the context. Alex de Waal emphasises that

[t]he 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.¹⁹⁶

Another proviso regarding the role international status can play in enhancing compliance with agreements concerns the limited avenues available to AOGs in international dispute settlement, as arbitration appears to be the only possibility.¹⁹⁷ Moreover, what appears to be the most relevant international guarantee, the oversight of the UNSC over a peace agreement, does not rely on its legal status, as explained above.¹⁹⁸ Therefore, possibly due to the awareness of the parties that the agreement would lack standalone international or domestic legal status unless it is negotiated as a constitution from the outset, they often stipulate that the agreement shall be incorporated into domestic law, delegate implementation roles to external actors and request the oversight of the UN, particularly the UNSC.

To recapitulate, 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

¹⁹² 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 calculus at the compliance stage, if only because it generates expectations of compliance in others that must enter into the equation.’

¹⁹³ Lang (n 44) 138–9. See also African Centre for the Constructive Resolution of Disputes and African Union, *African Union Mediation Support Handbook* (ACCORD, rev ed, 2014) 155–6 <<https://www.accord.org.za/publication/african-union-mediation-support-handbook/>>, archived at <<https://perma.cc/T8U6-D7EB>>.

¹⁹⁴ Watson (n 126) 92.

¹⁹⁵ *Ibid.*

¹⁹⁶ Alex de Waal, ‘Violence and Peacemaking in the Political Marketplace’ (2014) 25 *Accord* 17, 19.

¹⁹⁷ See Freya Baetens and Rumiana Yotova, ‘The Abyei Arbitration: A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?’ (2011) 3(1) *Goettingen Journal of International Law* 417, 439–40.

¹⁹⁸ See above 21–4.

willingness to conclude an agreement with an AOG and hinder public approval if it is construed as an attempt to bypass constitutionally established procedures of legal change.¹⁹⁹ Therefore, any proposal for the legalisation of peace agreements at the international level should be tempered, given the possible unintended consequences that legalisation and internationalisation may trigger.

C *Internal and External Consequences of Negotiated Commitments to Peace*

Against the backdrop of the preceding analysis, it seems that peace agreements between governments and AOGs that aim to end an intrastate armed conflict may be more convincingly characterised as political agreements — unless a material peace agreement is adopted in the *form* of a domestic law, constitution or UNSC resolution — that function as internal roadmaps for post-agreement legal and political reforms, as opposed to international legal agreements. This conclusion does not pose an obstacle to conceptualising peace agreements as ‘internationalised’ instruments in a non-legal sense, concluded and implemented with the extensive involvement of international actors. Nor does it relegate peace agreements to ‘scraps of paper’. As political agreements, peace agreements contain commitments that are binding in a *political* sense.²⁰⁰ As Oscar Schachter notes, albeit in the context of non-binding international agreements between states, ‘[t]here is no *a priori* reason to assume that the undertakings are illusory because they are not legal’.²⁰¹

Schachter further argues that non-binding 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 being a bilateral matter and they entitle the parties to monitor each other’s conduct.²⁰²

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. For the state party, such consequences include the announcement of a ceasefire, incorporation of the peace agreement into domestic law or the initiation of the process of the adoption of a new constitution.²⁰³ For the AOG party, conclusion of a peace agreement often requires disarmament and transformation into a political party.²⁰⁴

¹⁹⁹ See, eg, Betancur Restrepo (n 74) 188. Laura Betancur Restrepo argues that one of the reasons behind the plebiscite defeat of the *2016 Final Peace Agreement (Colombia)* was the parties’ attempt to fashion it as an international legal agreement and bypass constitutional rules of legal change.

²⁰⁰ Michael Bothe, ‘Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?’ (1980) 11 *Netherlands Yearbook of International Law* 65, 68; Frieder Roessler, ‘Law, De Facto Agreements and Declarations of Principle in International Economic Relations’ (1978) 21 *German Yearbook of International Law* 27, 41.

²⁰¹ Schachter (n 129) 304.

²⁰² *Ibid* 303–4.

²⁰³ See, eg, *2016 Final Peace Agreement (Colombia)* (n 3) s 3.1; *APR Agreement* (n 62) protocol I art 5, protocol III, annex II.

²⁰⁴ On the post-conflict political transformation of AOGs, see Veronique Dudouet, Katrin Planta and Hans J Giessmann, *The Political Transformation of Armed and Banned Groups: Lessons Learned and Implications for International Support* (Framework Paper, 2016).

Externally, peace agreements transform the matter of ending a conflict from a unilateral effort to a bilateral process, which also entails the public scrutiny of the agreement's conclusion and implementation, as the parties to the agreement are accountable to (certain groups in) the society.²⁰⁵ In particular, the monitoring and dispute resolution mechanisms in peace agreements entitle parties to react to and request changes in each other's conduct.²⁰⁶ Lastly, another external consequence of committing to a peace agreement is that external actors that are delegated roles in an agreement's implementation and verification can also exhort the parties to comply with the agreement.²⁰⁷

V CONCLUSION

Peace agreements aiming to end intrastate 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 those of 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 treaty-making capacity of AOG parties and an intention to create international legal obligations. Therefore, unless and until they are incorporated into domestic law or their provisions are otherwise given legal effect in domestic or international law, peace agreements between governments and AOGs seem to remain political agreements.

In the absence of standalone domestic or international legal status of peace agreements, giving legal effect to agreements in domestic law and enhancing the credibility of their implementation through international oversight mechanisms seem to be promising alternatives. 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 of a peace agreement and respect for the rule of law in a peace process. Moreover, it also enhances the involvement of the public and political actors beyond the negotiating parties in the legalisation of the agreement. To this end, and where feasible, respect for domestic legal change procedures and approval of an agreement through a referendum or parliamentary procedures may be sought in

²⁰⁵ Robert D Putnam's conceptualisation of international negotiations as two-level games, whereby Level 1 negotiations between representatives of states are subject to the scrutiny of Level 2 negotiations between the respective governments and their domestic constituencies, can be extrapolated to understand the dynamics of the official peace negotiations and the relevant debates among (certain groups in) society; see generally Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) *International Organization* 427. Even AOGs are in most cases accountable to the societal groups in whose name they claim to be fighting.

²⁰⁶ See Madhav Joshi, SungYong Lee and Roger Mac Ginty, 'Built-in Safeguards and the Implementation of Civil War Peace Accords' (2017) 43(6) *International Interactions* 994, 1000–1.

²⁰⁷ See generally Aaron Griffiths and Catherine Barnes, 'Incentives and Sanctions in Peace Processes' (2008) (19) *Accord* 9. See also von Hehn (n 2) 69.

the design of a peace agreement.²⁰⁸ It cannot be denied that legal and constitutional departures, which cannot be accommodated within a pre-existing domestic framework, may be required for achieving a negotiated compromise between warring parties. There may even be ‘legitimate’ grounds, however they are defined, for such illegal or unconstitutional departures. It is not the aim of this article to tackle the tensions between ‘permanent’ constitutions and peace agreements, but to point out that attaching international legal status to peace agreements cannot in and of itself avert this problem.

Domestic implementation of a peace agreement can be enhanced by international monitoring and verification of the process. In addition to built-in guarantees of international facilitation in a peace agreement, the oversight of the UNSC over the implementation of a peace agreement may contribute to the credibility of the agreement and its implementation record, as it does not depend on an agreement’s legal status or require the consent of the parties. To conclude, enhancing the credibility of a peace agreement is crucial for both its conclusion in the first place and its subsequent implementation. The mechanisms and institutions to do so may be found beyond the supposed guarantees of international legal status, which peace agreements between governments and AOGs are not yet accorded.

²⁰⁸ See generally Christopher Thornton and Felix Tusa, *To Seal the Deal: Mechanisms for the Validation of Political Settlements* (Background Paper, 2017); Neophytos Loizides, ‘Negotiated Settlements and Peace Referendums’ (2014) 53(2) *European Journal of Political Research* 234.