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**“Modus operandi,” “Lex pacificatoria” and the ICJ’s  
appraisal of the Lusaka Ceasefire Agreement in the  
*Armed Activities on the Territory of the Congo* Case  
More than just Latin lessons: The Role of Peace  
Agreements in International Conflict Resolution**

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**More than just Latin lessons: The Role of Peace Agreements in International Conflict Resolution**

Andrej Lang\*

***Abstract***

*This paper examines the legal appraisal of the Lusaka Ceasefire Agreement by the International Court of Justice in the case of Armed Activities on the Territory of the Congo (DRC v. Uganda). The paper begins with an examination of the role attributed to the Lusaka Agreement by the Court in the context of Uganda’s allegations that the agreement constituted consent to the presence of Ugandan troops on the territory of the DRC and that the DRC had breached several provisions of the agreement. It argues that the Court downgraded the legal status of peace agreements by qualifying the Lusaka Agreement as a “modus operandi” in order to prevent states from using peace agreements as a means of excluding their legal responsibility and to accommodate the various particular features of peace agreements that make it difficult to fit them into existing categories of international law. The paper argues that the Court undermined the crucial role of the legal force of peace agreements in the resolution of modern armed conflicts. It suggests that peace agreements ought to be conceptualized as legally binding agreements and should be integrated into the set of rules, practices, and institutions provided by international law to increase compliance and to channel state conduct in the aftermath of a conflict. The paper concludes by setting forth the framework of a proper legal regime for peace agreements that is centered around the application of the rules on countermeasures to peace agreements.*

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## **I. Introduction**

The International Court of Justice’s (“ICJ”) treatment of the Lusaka Ceasefire Agreement in the *Armed Activities on the Territory of the Congo (DRC v. Uganda)* case downgrades the legal status of peace agreements by treating them as mere “modus operandi,” rather than legally binding agreements. While the legal question directly raised by the *Armed Activities* case was limited and asked the Court only to rule on whether the Lusaka Agreement implicitly legalized the presence of Ugandan troops on Congolese territory,<sup>1</sup> it raises an underlying issue of utmost importance: The role of peace agreements in the resolution of modern armed conflicts.

The Court’s main concern was not Uganda’s vague allegation that the Lusaka Agreement could be interpreted as constituting consent to the presence of Ugandan forces on the territory of the DRC.<sup>2</sup> Rather, its grand concern was that states might, in the future, sign peace agreements only under the condition that their liability for violations of international law be explicitly excluded.<sup>3</sup> In order to circumvent this undesired scenario, the Court adopted a “very peculiar interpretation of the Lusaka Ceasefire Agreement.”<sup>4</sup> It held that “[t]he provisions of the Lusaka Agreement . . . represented an agreed *modus operandi* for the parties.”<sup>5</sup> Consequently, the Court concluded that “[i]n accepting this *modus operandi* the DRC did not ‘consent’ to the presence of Ugandan troops.”<sup>6</sup>

I argue in this article that the Court deliberately used the term “modus operandi” to generally downgrade the legal status of peace agreements. This downgrading allowed the Court to resolve its concerns about the use of peace agreements as a means for states to avoid international responsibility and it also enabled the Court to accommodate the special character of peace agreements outside the traditional categories of international law, while avoiding controversial issues of international law such as the status of non-state actors. However, the Court also disregarded the repercussions that depriving peace agreements of their legal force is likely to have on “whether peace lasts or war resumes.”<sup>7</sup> Virginia Fortna has recently published an empirical political-science analysis arguing that ceasefire agreements play a critical role in

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<sup>1</sup> Olivier Corten, one of the lawyers of the DRC in the *Armed Activities* case, rightly pointed out in the oral proceedings that this issue is very limited in scope because it is only invoked to justify “the peaceful stationing of Ugandan troops in the Congo which . . . [would be] covered by the Congolese Government’s consent.” In contrast, it “covers neither the human rights violations, nor the illegal exploitation of natural resources, nor even the armed actions allegedly conducted on Congolese territory [by Ugandan troops].” See Judgment, *Oral Proceedings on Merits and Counter-claims* (April 13 2005), Docket No. CR 2005/04, available at <http://www.icj-cij.org/docket/files/116/4293.pdf> [hereinafter “Oral Proceedings”], at para. 6.

<sup>2</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, I.C.J. Rep. 2005 (Dec. 19) [hereinafter “judgment”], at para. 92.

<sup>3</sup> Stephen Mathias, *The 2005 Judicial Activity of the International Court of Justice*, 100 AM. J. INT’L L. 638-39 (2006).

<sup>4</sup> Judgment, Sep. Op. of Parra-Aranguren J., para. 9.

<sup>5</sup> Judgment, para. 99.

<sup>6</sup> *Id.*

<sup>7</sup> Virginia Fortna, *Scraps of Paper? Agreements and the Durability of Peace*, 57 INT’L ORG 365 (2003).

determining whether the provisional end of hostilities becomes permanent or whether the parties resume fighting.<sup>8</sup> I argue that the legal force of peace and ceasefire agreements is crucial to this role.<sup>9</sup>

In complex conflict situations, in which both sides are confronted with prisoner's dilemma and security dynamics, the binding character of a peace agreement increases the costs of non-compliance and thus might actually turn the scale towards peace and against war. The ICJ's authority in the interpretation of international law is likely to influence the perception of the parties to armed conflicts with regard to the legal nature and effects of peace and agreements. It will impact the legal classification of an emerging type of peace agreement that includes state and non-state actors, establishes ceasefires, and prescribes the first steps of a new constitutional order for the domestic sphere. By qualifying the Lusaka Ceasefire Agreement as a mere *modus operandi*, however, the ICJ denied peace agreements legal effects in the set of rules, practices, and institutions provided by the international legal order. As a result, the possible chilling effect of the *Armed Activities* case threatens to undermine the crucial role of peace agreements in the resolution of armed conflicts.

In this paper, I argue that the legal status of peace agreements is crucial to their success. Legal status not only reduces breaches of peace agreements by significantly increasing audience costs; legal status also triggers the application of the rules on countermeasures that provide a very effective mechanism to prevent breaches of peace agreements from leading back into war. The rules on countermeasures have the capacity to channel and structure state conduct in situations of deep mistrust in the aftermath of a conflict where there is a great risk that minor accidents and provocations spark a spiralling back into war.

I will start to defend my claim by closely examining the passages of the judgment in which the ICJ deals with the Lusaka Agreement: the issue of consent and the dismissal of Uganda's third counter-claim alleging various violations of the Lusaka Agreement by the DRC. I conclude that the Court downgraded the legal status of the Lusaka Agreement (II). Against this background, I will analyse which reasons may have motivated the Court to downgrade the legal status of peace agreements (III). Subsequently, I will make the case for the crucial role of the legal status of peace agreements in the resolution of modern conflicts (IV). In order to determine which legal regime the Court should have established for peace agreements, I discuss the legal literature on the legal nature and effects of ceasefire, armistice, and peace agreements. I first analyze the literature on armistices - the predecessors of modern peace agreements - that essentially does not apply any legal rules to armistice agreements. Subsequently, I deal with the only author to so far have engaged in a comprehensive analysis of the legal nature and effects of modern peace agreements: Christine Bell, who places peace agreements within a new category of *lex pacificatoria*.<sup>10</sup> Because I disagree with Bell's approach as it fails to integrate peace agreements within the existing set of rules, practices, and institutions of the international legal system, I argue that peace agreements ought to be understood as legally binding international agreements to which the rules on countermeasures apply (V).

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<sup>8</sup> VIRGINIA FORTNA, *PEACE TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE* (2004).

<sup>9</sup> This point is also raised by Fortna who argues that the breach of formal ceasefire agreements causes audience costs which makes compliance with them more likely. See her hypothesis, *id.* at 28-29, and the verification, *id.* at 199-205.

<sup>10</sup> See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006).

## II. What the Court Said: Downgrading the Legal Status of the Lusaka Agreement by Qualifying it as a “Modus Operandi”

In its judgment in the *Armed Activities* case, the Court only attributed very limited significance to the Lusaka Agreement, notwithstanding the fact that Uganda relied heavily on its provisions<sup>11</sup> and that the agreement marked an important step in the Congolese war.<sup>12</sup> The Lusaka Agreement was signed by all major parties to the conflict, namely the Heads of State of the DRC, Uganda, Angola, Namibia, Rwanda, and Zimbabwe on 10 July 1999, and later joined by the rebel groups Movement for the Liberation of Congo (MLC) and Congolese Rally for Democracy (RCD).<sup>13</sup> It provided for a variety of measures to end the Congo war including arms control,<sup>14</sup> the re-deployment of forces,<sup>15</sup> the instalment of a United Nations/Organization of African Unity monitoring group,<sup>16</sup> and a national dialogue.<sup>17</sup>

Uganda argued in its pleadings before the Court that the Lusaka Agreement was “more than a mere ceasefire agreement, in that it lays down various ‘principles’ (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours.”<sup>18</sup> In particular, Uganda claimed, on the one hand, that the agreement constituted the DRC’s consent to the presence of Ugandan troops on Congolese territory,<sup>19</sup> hence justifying an alleged Ugandan violation of the principle of non-intervention, and, on the other hand, that the DRC had violated several provisions of the agreement.<sup>20</sup> The Court denied the alleged consenting effect of the agreement in a few sentences and rejected Uganda’s third counter-claim as inadmissible without dealing with the alleged Congolese violations of the agreement on the merits.<sup>21</sup> The dismissal of

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<sup>11</sup> See *Counter-Memorial of Uganda*, (April 21, 2001), paras. 65-101 and 409-12, available at <http://www.icj-cij.org/docket/files/116/8320.pdf> [hereinafter “Counter-Memorial”]; *Rejoinder of Uganda*, (April 21, 2001), paras. 299-320, available at <http://www.icj-cij.org/docket/files/116/8314.pdf> [hereinafter “Rejoinder”]; Counter-Memorial submitted by the Republic of Uganda, paras. 65-101 and 409-412; Rejoinder pp. 129-135.

<sup>12</sup> At the time of its conclusion, the Lusaka Agreement was regarded as the best chance for bringing peace to the Congo. The Secretary-General stressed that “it cannot be too often repeated that the Lusaka Ceasefire Agreement remains the best hope for the resolution of the conflict in the Democratic Republic of Congo and, for the time being, the only prospect of achieving it.” U.N. SECRETARY-GENERAL, REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS ORGANIZATION MISSION IN THE DEMOCRATIC REPUBLIC OF CONGO, S/2000/30 (Jan. 17 2000), at para. 86. The Security Council described it as “the most viable basis for the resolution of the conflict in the Democratic Republic of Congo . . . .” U.N. SECURITY COUNCIL, RESOLUTION 1279, UN doc. S/RES/1279 (Nov. 30 1999), at preamble, recital 4.

<sup>13</sup> The Lusaka Agreement was one of four distinct agreements that were signed in the course of the Congo conflict and that were at issue in the DRC v. Uganda case before the International Court of Justice. The others were the Kampala Disengagement Plan of 8 April 2000, the Harare Disengagement Plan of 6 December 2000, and the Luanda Agreement of 6 September 2002. While the Kampala and the Harare agreements essentially adjusted the time-frame prescribed by the Lusaka Agreement for the withdrawal of troops from the DRC as the original time-frame had not been observed, the Luanda Agreement had little relevance to the case before the ICJ because the claims brought by the DRC only referred to the time before the conclusion of the agreement on 6 September 2002.

<sup>14</sup> See Annex A, Chapter 9 of the Lusaka Ceasefire Agreement.

<sup>15</sup> Annex A, Chapter 1 of the Lusaka Ceasefire Agreement.

<sup>16</sup> Annex A, Chapter 8 of the Lusaka Ceasefire Agreement.

<sup>17</sup> Annex A, Chapter 5 of the Lusaka Ceasefire Agreement.

<sup>18</sup> Judgment, para. 97.

<sup>19</sup> Rejoinder, paras. 299-320.

<sup>20</sup> Counter-Memorial, paras. 409-12.

<sup>21</sup> Judgment, para. 99 and para. 93.

Uganda's third counter-claim marks the first time that the ICJ dismissed a counter-claim because of a lack of a direct connection.<sup>22</sup>

### 1. The Appraisal of the Lusaka Agreement in the Context of the Question of Consent

In order to escape its international responsibility for the violation of the principle of non-intervention, Uganda argued that the Lusaka Ceasefire Agreement “constituted consent by the DRC to the presence of Ugandan forces for at least 180 days *from 10 July 1999*.”<sup>23</sup> In Uganda's view, the Agreement's timetables for the withdrawal of foreign troops implicitly legalized the Ugandan presence on Congolese territory until that withdrawal had taken place. As a consequence, it claimed that the Lusaka Agreement “involved a waiver of any question of legality of the presence of Ugandan forces.”<sup>24</sup>

The Court rejected Uganda's contention primarily by describing the Lusaka Agreement as a “modus operandi.” It held that “[t]he provisions of the Lusaka Agreement . . . represented an agreed *modus operandi* for the parties.”<sup>25</sup> It concluded that “[i]n accepting this *modus operandi* the DRC did not ‘consent’ to the presence of Ugandan troops.”<sup>26</sup> I argue in this section that the Court used the term “modus operandi” to downgrade the legal status of the Lusaka Agreement so that it did not have the capacity to constitute consent.

“Modus operandi” appears to be a new term of art that has not previously been used in the field of international law.<sup>27</sup> Traditionally, three different legal terms have been associated with agreements that were concluded in the context of an armed conflict: the “ceasefire agreement,” the “armistice agreement,” and the “peace treaty.”<sup>28</sup> While these categories

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<sup>22</sup> In *Temple of Preah Vihear (Cambodia v. Thailand)* I.C.J. Reports 1959 [hereinafter *Temple of Preah Vihear*, Order] and in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* I.C.J. Reports 1989 [hereinafter *Arbitral Award*, Order], the claim was dismissed because it was not a counter-claim as it did not involve any extension or widening of the case. See Shabtai Rosenne, *Counter-Claims in the International Court of Justice Revisited*, in LIBER AMICORUM IN MEMORIAM OF JUDGE JOSE MARIA RUDA 473 (Calixto Armas Bareo ed., 2000).

<sup>23</sup> Judgment, para. 98 (emphasis added). Uganda also argued before the Court that the Lusaka Agreement constituted retroactively “an acceptance by all parties of Uganda's justification for sending additional troops into the DRC *between mid-September 1998 and mid-July 1999*” (emphasis added). The Court, however, rejected the alleged retroactive consenting effect of the Lusaka Agreement for the time from mid-September 1998 to mid-July 1999 by simply observing that no provision of the agreement could be interpreted in this sense. Judgment, paras. 96-97.

<sup>24</sup> Rejoinder p. 132.

<sup>25</sup> Judgment, para. 99.

<sup>26</sup> *Id.*

<sup>27</sup> The Court italicizes this term in its judgment, thus emphasizing it. See Judgment, para. 99.

<sup>28</sup> Traditionally, the peace treaty is considered to put a final end to the conflict, while the ceasefire or the armistice agreement only provide for an end to the hostilities but do not end the conflict permanently. The terms armistice and ceasefire were historically interchangeable in substance. While the term “armistice” was widely used at the turn of the century and consequently applied in the Hague Convention on the Law and Customs of War on Land, “ceasefire” was introduced after the end of World War II and has become the common notion since. See David Morris, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 811 (1996). The term “ceasefire” has not completely replaced the concept of “armistice,” however, because the latter has developed a distinct meaning in the past decades. An armistice in today's meaning aims to terminate hostilities permanently. See Christopher Greenwood, *The Scope of Application of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL LAW WHEN STATES FAIL: CAUSES AND CONSEQUENCES 58 (Dieter Fleck ed., 1995); Yoram Dinstein, *Armistice*, in ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, Vol. I, 256-57 (Rudolf Bernhardt ed., 1992). In fact, it has increasingly displaced peace treaties after World War II since the conclusion of the latter has often been omitted even though peace has in fact been achieved. In contrast to a



increasingly lose relevance in contemporary state practice,<sup>29</sup> they seem to merge to some extent into the modern type of “peace agreement.” The modern peace agreement includes a ceasefire to halt the fighting and has largely replaced the categories of “armistice” and “peace treaty” by providing the means for resolving the underlying dispute between the parties and putting a final end to the conflict.<sup>30</sup>

I argue that the Lusaka Agreement is best qualified as a peace agreement, notwithstanding the fact that the parties named it a ceasefire.<sup>31</sup> Ceasefire agreements are signed to provide for a “breathing space for the negotiation of more lasting agreements.”<sup>32</sup> Peace agreements, in contrast, “touch upon broader political issues within the framework of the ceasefire resolutions.”<sup>33</sup> They aim at “resolving the underlying disputes between the parties and may extend to the political, cultural, economic, and ethnic differences at the heart of the conflict in a way that is intended to produce a lasting peace.”<sup>34</sup>

The Lusaka Agreement goes far beyond merely ordering the parties to cease hostilities.<sup>35</sup> The Court agreed with Uganda that the Lusaka Agreement is “more than a mere ceasefire

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ceasefire, “[t]he armistice, though primarily a military agreement, may touch upon broader political issues within the framework of the cease-fire resolutions.” See Morriss, *id.* at 814.

<sup>29</sup> Greenwood points out that “the dividing line between ceasefires, armistices and other forms of suspensions of hostilities has become increasingly blurred”. Greenwood, *supra* note 28, p. 59. Bailey assents: “There is no question that there has been confusion about the precise meaning of the terms cease-fire, truce, and armistice”. See Sydney Bailey, *Cease-Fires, Truces, And Armistices in the Practice of the UN Security Council*, 71 AM. J. INT’L L., 461 (1977).

<sup>30</sup> Since the end of the cold war, there has been a proliferation of peace agreements in the international arena that link ceasefires with political and legal arrangements for the durable hold and exercise of power. See Bell, *supra* note 10, p. 373. In contrast, the terms “armistice” or “peace treaty” are rarely used anymore. In the case that a peace agreement succeeds and hostilities end, the parties generally do not sign an additional peace treaty to officially declare that they are in a state of peace. The content of armistice agreements is very similar to that of peace agreements. However, there seems to be a terminological preference towards “peace agreements.”

<sup>31</sup> Bell also qualifies the Lusaka Agreement as a peace agreement. See *supra* note 10, at 381. In contrast, the parties to the Lusaka Agreement officially called the agreement a ceasefire (“Lusaka Ceasefire Agreement”). The Security Council also referred to the Lusaka Agreement as the “Lusaka Ceasefire Agreement.” U.N. SECURITY COUNCIL, RESOLUTION 1304, UN doc. S/RES/1304 (June 16 2000), at preamble, recital 9. DRC counsel Corten argued in the oral proceedings that this “terminology is particularly appropriate.” See Oral Proceedings, at para. 30. It could be argued that the parties consciously used the term “ceasefire” in order to avoid the legal obligations arising from the conclusion of a peace agreement. In contrast, I argue that the legal character has to be assessed primarily on the basis of the substance of the provisions of the agreement, so long as the parties did not explicitly lay down such an understanding of the legal obligations arising from the agreement. Article 31 (1) of the Vienna Convention on the Law of Treaties provides that the provisions of a treaty shall be interpreted “in accordance with the ordinary meaning ... in their context and in the light of its object and purpose.” It follows in my view that the official name of “ceasefire” is not sufficient to legally qualify the agreement as a ceasefire if the provisions of the agreement represent those of a peace agreement. The Court also seems to focus more on the substance than on the official name of the agreement when it states that the Lusaka Agreement is “more than a mere ceasefire agreement.” See Judgment, para. 97.

<sup>32</sup> See Sydney Bailey, *supra* note 28, at 469. Greenwood characterizes a ceasefire agreement as “temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders.” Greenwood, *supra* note 157, p. 58.

<sup>33</sup> This is Morriss’ description of an armistice that may also be applied to peace agreements. See Morriss, *supra* note 28, at 814. Bell characterizes “peace agreements” as agreements that are concluded in the context of “a violent internal conflict to establish a cease-fire together with new political and legal structure.” She also acknowledges, however, that “the term ‘peace agreement’ remains largely undefined and unexplored.” Bell, *supra* note 10, at 374.

<sup>34</sup> This is Morriss’ definition of a peace treaty. See Morriss, *supra* note 28, at 814.

<sup>35</sup> See Judgment, para. 97. Kooijmans points out that “[t]he Lusaka Agreement laid the foundation for the re-establishment of an integrated Congolese State structure.” See Judgment, Sep. Op. of Kooijmans J., para. 51.

agreement.”<sup>36</sup> It provides a framework to facilitate the orderly withdrawal of all foreign forces to build a stable and secure environment and it even tackles problems that are at the heart of the Congo conflict by providing for a political solution to the conflict.<sup>37</sup> Nevertheless, the Court did not qualify the Lusaka Agreement as a peace agreement but instead introduced the new category of *modus operandi*.

It could be argued that the Court did not reject established legal categories by introducing this new term of art but that it simply explained why the agreement did not constitute consent to the presence of Ugandan troops on Congolese territory. According to such an interpretation, the term “*modus operandi*” does not affect the legal status of the Lusaka Agreement, but rather merely represents a description of the agreement that illustrates that the provisions of the agreement did not purport to constitute consent.<sup>38</sup> Under this reading, a “*modus operandi*” is merely a “way in which a thing . . . operates”<sup>39</sup> or “in which a person performs a task or action.”<sup>40</sup> There is no obscurity in the language of the Court at all if we assume that the Lusaka Agreement simply lays out a procedure by which the parties shall take a significant step to solve the Congolese conflict.

I suggest, however, that this is not how the Court uses the term “*modus operandi*.” The Court does not say that the Lusaka Agreement *sets out* a *modus operandi*, it states that it “*represent[s]* a . . . *modus operandi*.”<sup>41</sup> In addition, it refers to the agreement *as a whole* as “*modus operandi* provisions.”<sup>42</sup> It seems therefore that the Court equates the Lusaka Agreement with a *modus operandi*. The Lusaka Agreement does not prescribe a *modus operandi*. It is a *modus operandi* itself.

This distinction is crucial because the qualification of the Lusaka Agreement as a *modus operandi* affects its legal nature, while a simple description of the legal regime set out by the agreement would only relate to its content. This distinction affects how we understand the Court’s rejection of Uganda’s consent argument. According to my reading, the qualification of the agreement as a *modus operandi* makes the legal nature of the agreement unsuitable to constitute consent. In contrast, if *modus operandi* only describes the content of the Lusaka Agreement, the Court would have had to analyse whether the individual provisions of the agreement could be interpreted to constitute consent to the presence of Ugandan troops on Congolese territory – something the Court did not do.<sup>43</sup>

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<sup>36</sup> Judgment, para. 97; Sep. Op. of Kooijman J., para. 50.

<sup>37</sup> Moreover, a peace agreement is like an armistice “usually concluded in a formal inter-governmental agreement (namely a treaty) following lengthy and elaborate negotiations.” See Dinstein, *supra* note 157, at 258 and Howard Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT’L L. 883 (1956) on armistice agreements. The Lusaka Agreement was signed after three weeks of intensive negotiations by the Heads of State of each signatory State.

<sup>38</sup> In one phrase, the ICJ remarks, in fact, that the Lusaka Agreement “did not purport to qualify the Ugandan military presence in legal terms.” See Judgment, para. 99. However, it appears that the ICJ only used this phrase to back up its qualification of the Lusaka Agreement as a *modus operandi*. Otherwise, it is not clear why the Court employed the term “*modus operandi*” in the first place. It would have been sufficient to state that the agreement did not purport to constitute consent.

<sup>39</sup> OXFORD ENGLISH DICTIONARY, Vol. IX 957 (2. ed. 1991).

<sup>40</sup> See OXFORD AMERICAN DICTIONARY AND THESAURUS 962 (2003).

<sup>41</sup> Judgment, para. 99 (emphasis added).

<sup>42</sup> Judgment, para. 100.

<sup>43</sup> In contrast, DRC counsel Cortes engaged in the oral proceedings in a detailed analysis of the provisions of the Lusaka Agreement to rebut Uganda’s argument that the provisions of the Lusaka Agreement purported to consent to the presence of Ugandan troops on Congolese territory. See Oral Proceedings, paras. 24-29.

An initial objection against my reading may be that it is an overly literal interpretation; perhaps the Court did not actually draft this passage in such a precise and conscientious manner. If we read the Court as treating the Lusaka Agreement as merely laying out a *modus operandi*, however, it is not clear why the Court employed the term “*modus operandi*” in the first place. It would have been sufficient to state that the provisions of the agreement did not purport to constitute consent. In addition, given the fact that various international agreements set out a *modus operandi* between the parties, it is difficult to see how this particular feature renders the Lusaka Agreement incapable of constituting consent to the Ugandan intervention.<sup>44</sup> It would also remain unclear why the Court emphasized this term in its judgment.<sup>45</sup> It is therefore far more likely that by alluding to the Lusaka Agreement as “*modus operandi* provisions” the Court ascribes a certain status to the agreement which prevents it from consenting to the presence of Ugandan troops on Congolese territory.

My interpretation is substantiated when it is read in light of Judge Parra-Aranguren’s dissenting opinion. The analysis of dissenting opinions often gives an idea of the argumentative context against which the decision of the Court was made.<sup>46</sup> Judge Parra-Aranguren, who is of the opinion that the Lusaka Agreement did constitute consent, accuses the Court of creating a legally impossible situation for Uganda:

On the one hand, if Uganda complied with its treaty obligations and remained in the territory of the DRC until the expiration of the timetables agreed upon, Uganda would be in violation of international law because the legal status of its presence had not been changed, the status of its military forces in the DRC being a violation of international law. On the other hand, if Uganda chose not to violate international law as a consequence of its military presence in the DRC, and therefore withdrew its troops from the territory of the DRC otherwise than in accordance with the timetables agreed upon, Uganda would have violated its treaty obligations, thereby also being in violation of international law.<sup>47</sup>

It is likely that the Court’s characterization of the Lusaka Agreement as a *modus operandi* was not only intended to reject Uganda’s consent argument but also to circumvent Judge Parra-Aranguren’s criticism by ascribing the Lusaka Agreement a status that precludes it from creating a legally impossible situation. The existence of a legally impossible situation requires that two conflicting legal obligations of the *same legal order* are imposed but cannot both be fulfilled. If

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<sup>44</sup> The Editorial Comment of the American Journal of International Law describes the Treaty of November 27 1912 between France and Spain concerning Morocco defining the spheres of influence of these two countries with regard to Morocco as a “*modus operandi*.” They state that the treaty was concluded because “a *modus operandi* had to be reached.” See Editorial Comment, 7 AM. J. INT’L L. 358 (1913). Furthermore, Cottier describes the legal structure and operation of the GATT and the WTO concerning the negotiations in the trade rounds as a *modus operandi*. See Thomas Cottier, *Preparing for Structure Reform in the WTO*, 10 J. INT’L ECON. L. 499 (2007). These uses of the term indicate that the provisions of the treaty lay down a ‘*modus operandi*’ - in contrast to an agreement constituting a *modus operandi* itself. In addition, Cottier’s use of the term ‘*modus operandi*’ suggests that ‘*modus operandi*’ describes process-oriented legal frameworks. The passage of the Court in *Armed Activities* introducing the term ‘*modus operandi*’ also stresses the process-oriented character of the Lusaka Agreement. See Judgment, para. 99.

<sup>45</sup> The Court italicizes the term ‘*modus operandi*’ in its judgment. Judgment, para. 99.

<sup>46</sup> See Justice Scalia who describes dissenting opinions as a vehicle for informing “the public . . . about the state of the Court’s collective mind.” Antonio Scalia, *The dissenting opinion*, 19 J. SUPR. CT. HIST. 38 (1994).

<sup>47</sup> See *supra* note 5, para. 8.

the agreement is a mere *modus operandi*, it lacks the necessary legal status to create the conflict that Parra-Arangueren assumes.<sup>48</sup>

Moreover, if the ICJ merely wanted to express the transitory character of the Lusaka Ceasefire Agreement, it could have used the existing term of art *modus vivendi*. A *modus vivendi* is “an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations on the parties.”<sup>49</sup> It is plausible to assume *a contrario* that the Court invented a new category of agreement rather than resorting to this established term of art because it did not want the Lusaka Agreement to create legally binding obligations. Instead, the Court effectively treated the agreement as “a political settlement, with no discernible legal consequences,” as Okoawa argues.<sup>50</sup>

## **2. The Appraisal of the Lusaka Agreement in the Context of the Dismissal of Uganda’s Third Counter-claim**

The argument that the ICJ qualified the Lusaka Agreement as a *modus operandi* to downgrade its legal status is further supported by the way in which the Court dismissed Uganda’s third counter-claim. The Court held that Uganda’s third counter-claim lacked a direct connection to the DRC’s original claim in fact and in law because of the inherently different nature of the Lusaka Agreement, as compared to the violations of principles of public international law that the DRC’s complaint alleged. In particular, the Court assumed that legal responsibility could not be established on the basis of violations of the Lusaka Agreement. This suggests that peace agreements have a different, somewhat lower, legal status than other norms of international law.

In its third counter-claim, Uganda accused the DRC of violating its obligations under the Lusaka Agreement. It claimed that the DRC did not disarm and demobilise the armed groups on its territory, including the anti-Uganda insurgents; that it impeded the deployment of the UN

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<sup>48</sup> In my view, it would have been more appropriate for the Court to counter Judge Parra-Aranguren’s assumption of the existence of a legally impossible situation for Uganda with a different consideration. I have pointed out that the existence of a legally impossible situation requires two competing legal obligations that cannot both be fulfilled. Parra-Aranguren presupposes that the Lusaka Agreement imposes a legal obligation on Uganda not to withdraw its troops from Congolese territory before the dates set by the Agreement’s timetables. I argue, in contrast, that timetables in peace agreements generally do not prescribe such an obligation. Rather, they are based on the consideration that the process of troop withdrawal might take a considerable amount of time and that nations occupying foreign territory might have interests in staying for a while that need to be taken into account in order to achieve peace. In the context of the Congo war, the timetables were not perceived as legal obligations by either the parties or the international community. Between June and August 2000, Uganda withdrew “five battalions from the Democratic Republic of the Congo, which it characterized as a unilateral gesture in support of the Kampala Disengagement plan.” U.N. SECRETARY-GENERAL, SIXTH REPORT OF THE SECRETARY-GENERAL ON THE UNITED NATIONS ORGANIZATION MISSION IN THE DEMOCRATIC REPUBLIC OF CONGO, S/2001/128 (Feb. 12 2001) [hereinafter “6th Report on MONUC”], at para. 30. This suggests that Uganda did not feel obliged by the timetable set out in the Lusaka Agreement. Rather, the timetables granted Uganda a privilege to remain on Congolese territory for the time specified, recognizing the security interests of Uganda due to repeated raids by Anti-Ugandan insurgents along the Congolese/Ugandan-border. The 6th Report on MONUC acknowledges this link by stating that “[t]he Lusaka Ceasefire agreement acknowledged the concerns of Rwanda, Uganda and Burundi over the presence of the armed groups which threaten the security of their borders, and recognized that the withdrawal of Rwandan and Ugandan troops would be linked directly to progress made in the disarmament and demobilization of the militias.” See para. 88. It follows that no impossible legal situation was created for Uganda because the timetables of the Lusaka Agreement do not require that its troops remain on Congolese territory.

<sup>49</sup> Walter Rudolf, *Modus Vivendi*, in *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW*, Vol. III, 442-443 (Rudolf Bernhardt ed., 1992).

<sup>50</sup> See Okawa, *supra* note 6.

Observer Mission to the Congo (MONUC) in government-controlled territory; and, in particular, that it prevented the Congolese national dialogue.<sup>51</sup>

The Court dismissed Uganda's third counter-claim under Article 80, paragraph 1, of the Rules of Court as "not directly connected with the subject-matter of the Congo's claims,"<sup>52</sup> finding a lack of a sufficient factual and legal connection between Uganda's counter-claim and the DRC's original claim that Uganda had perpetrated acts of armed aggression on Congolese territory.<sup>53</sup> The Court found that there was no factual connection between the two claims because Uganda's counter-claim "relate(s) to *methods for solving the conflict* in the region agreed at multilateral level in a ceasefire accord . . . [while] Congo's claims . . . relate to acts for which Uganda was allegedly responsible *during that conflict*."<sup>54</sup> There was also no legal connection because "whereas the Congo seeks to establish Uganda's responsibility based on the violation of the [principles of the non-use of force and of non-intervention] . . . Uganda seeks to establish the Congo's responsibility based on the violation of specific provisions of the Lusaka Agreement."<sup>55</sup>

The lack of a direct connection in fact and in law illustrates that Uganda's third counter-claim was dismissed because of the inherently different legal nature of the Lusaka Agreement. The factual distinction between "methods for solving the conflict" and acts committed "during the conflict" suggests that the breaches of the Lusaka Agreement alleged by Uganda were of a different nature than the violations of the principles of non-use of force and of non-intervention claimed by the DRC. The absence of a direct legal connection seems to be based on the assumption that it is not possible to establish legal responsibility on the basis of violations of the Lusaka Agreement.<sup>56</sup> The Court's rejection of Uganda's third counter-claim thus appears to be premised on the particular legal status of the Lusaka Agreement, lending support to my argument that the qualification of the Lusaka Agreement as a *modus operandi* downgraded the legal status of the agreement.<sup>57</sup>

It is important to note that the Court's rejection of this counter-claim deviated from its previous case-law regarding the admissibility of counter-claims. In fact, it marks the first time

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<sup>51</sup> See Counter-Memorial, paras. 409-12.

<sup>52</sup> See Judgment, para. 93.

<sup>53</sup> See Judgment (order, Nov. 29 2001), paras. 42-43. According to the Court, a counter-claim has a "dual character": on the one hand, it is an "autonomous legal act" in the sense that it "it constitutes a separate 'claim,'" on the other hand, "it is linked to the principal claim" in the sense that it "widen(s) the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings." *Id.* at para. 29.

<sup>54</sup> *Id.* at para. 42.

<sup>55</sup> *Id.*

<sup>56</sup> It cannot be based simply on the fact that the provisions of the agreement are a different norm than the principle of non-intervention, because the provisions referred to by Uganda's admissible first counter-claim, alleging that assaults on diplomats constituted a violation of the Vienna Convention on Diplomatic Relations, also differ from the principle of non-intervention. However, it is possible that the principle of non-intervention and the provisions of the Vienna Convention fall into a common category of international norms to which the Lusaka Agreement does not belong.

<sup>57</sup> The link between the legal status assigned to the Lusaka Agreement by the Court and the refusal of the Court to admit Uganda's third counter-claim alleging breaches of the Lusaka Agreement by the DRC was also noted by the DRC in the oral proceedings. The DRC argued that the Court meant, by stating that the "[a]greement concerns matters relating to '*methods of solving the conflict*' and not . . . issues concerning acts for which the parties were allegedly responsible '*during that conflict*'" that "the Lusaka ceasefire Agreement in no way prejudices the rights, claims or position of the parties." Oral Proceedings, para. 31.

ever that the ICJ dismissed a counter-claim because of a lack of a direct connection.<sup>58</sup> Prior to this case, the Court had employed a rather flexible and generous approach towards counter-claims.<sup>59</sup> The primary purpose of the direct connection requirement was to prevent “the risk of infringing the Applicant’s rights and of compromising the proper administration of justice,”<sup>60</sup> in other words: an abuse of process. The Court had deemed it sufficient that counter-claims “form part of the same factual complex” and that the parties are “pursuing the same legal aims.”<sup>61</sup> The Court interpreted the same legal aims as the “attempt to establish State responsibility and to seek reparations on that account, over and above the dismissal of the original claims.”<sup>62</sup> The Court applied this standard in the cases *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>63</sup> *Oil Platforms*<sup>64</sup> and *Land and Maritime Boundary between Cameroon and Nigeria*.<sup>65</sup> In the latter case, for example, the ICJ held that there was a direct factual connection because the alleged facts all “occurred along the frontier between the two States” and a direct legal connection because “the parties pursue the same legal aim, namely the establishment of legal responsibility and the determination of the reparation due on this account.”<sup>66</sup>

In the *Armed Activities* case, the Court implicitly established new conditions for the existence of a direct connection in fact and in law. Had the Court applied the standard from its previous case-law to *Armed Activities*, Uganda’s third counter-claim could not have been dismissed. In the previous cases, it was sufficient to establish the existence of a factual connection by demonstrating that the alleged conduct formed part of the same factual complex.<sup>67</sup> In *Armed Activities*, however, the Court held that violations of “methods for solving the conflict” are insufficient notwithstanding the fact that they took place within the same territorial confines and within the same conflict. Only the perpetration of acts committed “during the conflict” would form part of the same factual complex in the *Armed Activities* case. Similarly, in previous cases, a direct connection in law existed when both parties sought to establish legal responsibility for the violations of any norm of international law and claimed reparations. In *Armed Activities*, however, Uganda’s attempt to establish Congo’s responsibility on the basis of breaches of the Lusaka Agreement was insufficient to establish a direct legal connection.

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<sup>58</sup> See *supra* note 22. This occurs at a time when the Court has changed its practice on counter-claims from making a decision about them in the judgment on the merits to dealing with their admissibility at a preliminary stage in the form of presidential orders and when the Court is increasingly confronted with peremptory challenges to the admissibility of counter-claims. The cases of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (*Bosnia-Herzegovina v. Yugoslavia*), I.C.J. Rep. 1997 (order, Dec. 17) [hereinafter “Genocide case”] and *Oil Platforms* (*Iran v. USA*), I.C.J. Rep. 1998 (order, Mar. 10) [hereinafter “Oil Platforms”] at the end of 1997 and early in 1998 marked the first time the ICJ was faced with peremptory challenges to the admissibility of counter-claims. Before, questions relating to counter-claims were decided in the judgment on the merits. See Rosenne, *supra* note 22, at 459.

<sup>59</sup> S. Yee, *Article 40*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 912, 917 (Zimmermann, Andreas et al. ed., 2006).

<sup>60</sup> See Genocide case, para. 31 and Judgment (order, Nov. 29 2001), para. 35.

<sup>61</sup> Genocide case, paras. 33-35, repeated in Judgment (order, Nov. 29 2001), para. 38.

<sup>62</sup> Yee, *supra* note 59, at 911.

<sup>63</sup> See Genocide case, at paras. 34-35.

<sup>64</sup> See Oil Platforms, at para. 38.

<sup>65</sup> See Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria: Equatorial Guinea Intervening*) 985 I.C.J. Rep. 1999 (order, June 30).

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*; Genocide case, at paras. 34-35; Oil Platforms, at para. 38.

It appears that the provisions of the Lusaka Agreement do not constitute binding norms of international law in the view of the Court. Traditional categories of international law such as the rules on state responsibility do not apply to peace agreements. As a consequence, the Court assigned peace agreements a legal status that renders them largely irrelevant in the realm of international law. In addition, the application of stricter conditions for the admissibility of Uganda's third counter-claim compared to the previous case-law suggests that the Court intended to avoid deciding the substantial issues brought forward by Uganda concerning the Lusaka Agreement.

In order to understand why the Court refrained from deciding the issues presented by the Lusaka Agreement on the merits by downgrading the legal status of the agreement, and to understand the underlying issues concerning the legal nature of peace agreements, it is crucial to inquire into the Court's reasons for the qualification of the Lusaka Agreement as a *modus operandi*.

### **III. Why the Court Downgraded the Legal Status of the Lusaka Agreement**

It appears from the judgment in *Armed Activities* that the Court primarily qualified the Lusaka Agreement as a *modus operandi* in order to prevent it from constituting consent to the presence of Ugandan troops on Congolese territory. If this were the Court's only concern, however, it could simply have interpreted the content of the Agreement as not constituting consent. I argue, therefore, that this reason is not sufficient to explain why the Court downgraded the legal status of the Lusaka Agreement. As a result, I will look more deeply at the Court's reasons for downgrading the legal status of peace agreements.

First, it seems that the Court wanted to prevent a scenario where states could eliminate their international responsibility through the inclusion of *legally binding* liability-excluding provisions in peace agreements. Second, I believe that the Court was aware of the peculiar features of peace agreements, namely: the inclusion of non-state actors as signatories, their process-oriented character, and the armed conflict context. I argue that the Court qualified the Lusaka Agreement as a *modus operandi*, on the one hand, to accommodate these features, and, on the other hand, to signify that the agreement does not form part of the realm of public international law. This allowed the Court to avoid addressing the alleged breaches of the agreement by the DRC and related issues such as the legal status of non-state actors in international law.

#### **1. The Court Downgraded the Legal Status of the Lusaka Agreement to Prevent States from Explicitly Excluding their Legal Responsibility in Peace Agreements**

I argue that the Court feared that any recognition of the consenting and thus liability-excluding effect of peace agreements would give states an incentive to exclude their international responsibility through the conclusion of peace agreements that include explicit liability-excluding provisions. In the *Armed Activities* case, for example, a consenting effect of the Lusaka Agreement would have excluded Uganda's responsibility for violating the principle of non-intervention. The Court may have been concerned that if it interpreted the Lusaka Agreement in this sense that

[a] state in a position analogous to that of Uganda in this case might well seek to include a provision to the effect that the presence of its troops during the agreed withdrawal period had been consented to by all parties or a provision that the presence of its troops during the agreed withdrawal period shall not engage its international legal responsibility . . . [and thereby] void international responsibility for the presence of its soldiers during the relevant period.<sup>68</sup>

Indeed, as Stephen Mathias argues, “the issues of consent and possibly even the waiver of one state’s legal rights against another . . . may, in the future, become matters of express treatment in such agreements.”<sup>69</sup> In this event, a peace agreement could even exclude international responsibility for wrongful acts committed before the agreement was actually concluded, as Uganda claimed in *Armed Activities*.<sup>70</sup>

The Court may have been particularly concerned with such provisions in light of the fact that peace agreements are different from other agreements between states. In general, belligerents do not reach a ceasefire on equal footing: “There are usually winners and losers in a war and at least one side’s acceptance of a cease-fire may have been ‘coerced.’”<sup>71</sup> In the *Armed Activities* case, for example, the DRC was ‘coerced’ into signing the Lusaka Agreement and, in particular, to agreeing to provisions such as the integration of rebel groups into the political process<sup>72</sup> and the troop withdrawal timetables.<sup>73</sup> In fact, at the time of the negotiations of the Lusaka Agreement, President Kabila faced the threat of imminent military defeat that he could only prevent by signing the agreement.<sup>74</sup>

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<sup>68</sup> Mathias, *supra* note 3, at 638.

<sup>69</sup> *Id.* at 639.

<sup>70</sup> Uganda had argued before the Court that the Lusaka Agreement constituted “an acceptance by all parties of Uganda’s justification for sending additional troops into the DRC *between mid-September 1998 and mid-July 1999*” (emphasis added). See Judgment, paras. 96-97.

<sup>71</sup> See Fortna, *supra* note 7, at 340.

<sup>72</sup> The rebel groups Movement for the Liberation of Congo (MLC) and Congolese Rally for Democracy (RCD) were closely affiliated with Uganda. Including them into the peace process insured the preservation of Ugandan influence in the DRC. See René Lemarchand, *The Democratic Republic of Congo: From Collapse to Potential Reconstruction*, Occasional Paper for the Centre of African Studies, University of Copenhagen 49 (2001). This would have placed “Museveni in a position of unrivalled power in East and Central Africa.” *Id.* at 4. Moreover, a national dialogue on an equal footing would have “significantly weakened [Kabila] militarily, politically and in terms of regional alliances.” *Id.* at 10. The International Crisis Group [hereinafter “ICG”] assumed that the “format for the talks outlined in the Lusaka ceasefire was expressly designed to unseat the regime of then President Laurent Kabila by forcing him to negotiate on an equal status with his many opponents.” See International Crisis Group, *From Kabila to Kabila: Prospects for Peace in the Congo*, Rep. No. 27 (Mar. 16 2001) [hereinafter “Report on Regime Change”], at 18. In the Lusaka Agreement, the rebel groups were considered as partners with equal status to Kabila in the national dialogue negotiations. See ICG, *The Agreement on a Cease-Fire in the Democratic Republic of Congo: An Analysis of the Agreement and Prospects for Peace*, Rep. No. 5 (Aug. 20 1999) [hereinafter “Report on Lusaka Agreement”], at 2.

<sup>73</sup> See ICG, Report on Regime Change, at 1, 3.

<sup>74</sup> “In the midst of the Lusaka talks, the situation turned critical for Kabila and his government. On 15 June 1999, RPA forces crossed the Sankuru River and captured the Kasai Oriental town of Lusambo. The river formed the last natural obstacle in front of province’s diamond-rich capital of Mbuji Mayi. [ . . . ] The strategic importance of Mbuji Mayi cannot be overstated. [ . . . ] If Mbuji Mayi were to fall, the government would be deprived of these funds and lose its land links to Katanga, also rich in minerals. In the words of RPA Deputy Chief of Staff James Kabarebe: ‘If Kananga, Mbuji Mayi and Kabinda are taken, then Kinshasa will fall’. Under immense international pressure the Rwandans eventually agreed to stop their military advance and sign a ceasefire.” See ICG, *Scramble for the Congo: Anatomy of a an ugly war*, Rep. No. 26 (Dec. 20, 2000) [hereinafter “Report on Congo War”], at 3. “Since then this



With this background in mind, the Court's decision to downgrade the legal status of Lusaka Agreement may have been taken to rebut any allegations that a peace agreement can be used to exclude international responsibility. Had the Court only stated that the provisions of the Lusaka Agreement did not purport to exclude Uganda's liability for the violation of the principle of non-intervention, parties to future conflicts might have been tempted to more explicitly exclude their international responsibility in peace agreements.<sup>75</sup> As a result, it was necessary for the Court to downgrade the legal status of peace agreements so that they could never have a liability-excluding effect - no matter what the parties agreed.<sup>76</sup>

## **2. The Court Qualified the Lusaka Agreement as a Modus Operandi to Accommodate the Distinct Features of Peace Agreements and to Avoid Dealing with Controversial Issues of Contemporary International Law**

The other core consideration of the Court in the qualification of the Lusaka Agreement as a modus operandi was two-fold. On the one hand, the Court was aware of the distinct features of peace agreements that make it difficult to fit them into traditional categories of international law. I argue that, as a consequence, the Court decided not to integrate peace agreements into the realm of international law but to assign them to the new category of modus operandi. On the other hand, the Court felt that downgrading the legal status of peace agreements was very convenient because it enabled the Court to avoid deciding controversial issues of international law such as the legal status of non-state actors. A legally binding agreement could potentially have had the capacity to upgrade the legal status of the rebel groups that signed the Lusaka Agreement.

### **a. Accommodating the Distinct Features of Peace Agreements**

Peace agreements are concluded in a state of conflict during which respect for the law is usually strongly diminished because the foundations of the nation-state itself are often at stake.<sup>77</sup> Bell asserts that peace agreements are "existential compromises by states with regard to how it conceives of its own sovereignty, power, monopoly over the use of force, and capacity to resist

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advantage has slipped away from the Rwandans. [. . .] Since the ceasefire therefore the strategic balance has continued to change." *Id.* at 6.

<sup>75</sup> In the context of the *Armed Activities* case, there existed, in fact, an agreement that explicitly legalized the presence of Ugandan troops on Congolese territory. Article 1 (4) of the Luanda Agreement that was concluded on September 6 2002, and hence did not form part of the facts before the Court, provided that "[t]he parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the parties put in place security mechanisms guaranteeing Uganda's security, including training and coordinated patrol of the common border."

<sup>76</sup> It is striking that the Special Court for Sierra Leone that was established by the Government of Sierra Leone and the United Nations to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law during the conflict in that country also dealt with the problem of liability-exclusion in peace agreements by downgrading the legal status of the peace agreement at hand. In the *Kallon* case, the respondent had challenged the court's jurisdiction on the basis that it contravened the amnesty provisions of the Lomé Peace Agreement. The appeals chamber rejected this defence on the basis that the Lomé Agreement lacked a sufficient legal status because it was signed between the government and the rebel group RUF the latter of which "[i]nternational law does not seem to have vested with such [treaty-making] capacity." See *Prosecutor v. Kallon, Kamara*, Decision on Jurisdiction, Nos. SCSL-2004-15-AR72(E), SCLS-2004-16-AR72(E) (Mar. 13, 2004) [hereinafter *Prosecutor v. Kallon*], at para. 48.

<sup>77</sup> There is indeed the "argument . . . that legal rules do not really 'matter' in areas relating to the use of force." For a critique of this argument, see Anthony Arend, *Legal Rules and International Society*, 124 (1999).

nonstate violence.”<sup>78</sup> As a consequence, it is sometimes argued that the provisions of peace agreements are less respected and complied with by the parties than most general norms of international law.<sup>79</sup> The Court may therefore have downgraded the legal status of the Lusaka Agreement in an attempt to limit the effects of this disregard for the law.

In addition, the peculiar features of modern peace agreements make them much more difficult to adjudicate than ordinary treaties.<sup>80</sup> For example, these agreements frequently address “simultaneously both [the] ‘internal’ and ‘external’ dimensions of intrastate conflict.”<sup>81</sup> They are process-oriented because they frequently contain obligations for the parties to negotiate a political settlement of the conflict, but do not dictate the outcomes.<sup>82</sup> The Lusaka Agreement, for example, provides for a national dialogue and determines the participants of the dialogue,<sup>83</sup> their status in the negotiations,<sup>84</sup> and the binding character of the resolution adopted by them<sup>85</sup> but leaves out the outcome of the negotiations. These types of provisions are difficult to adjudicate because in the absence of a legal obligation to come to a specified result, it is difficult to determine when a party breached its duty to negotiate in good faith according to the framework provided by the peace agreement.<sup>86</sup> As a consequence, the ICJ refused to rule on the substance of Uganda’s allegations that the DRC breached the national dialogue provisions of the Lusaka Agreement and dismissed Uganda’s third counter-claim.

#### **b. Avoiding Controversial Issues of International Law**

Modern peace agreements pose an additional problem. The peace process often requires the inclusion of opposition and rebel groups. As a result, peace agreements are often signed by state and by non-state actors, even though non-state actors have not been fully accepted as subjects of international law.<sup>87</sup> The Lusaka Agreement, for example, was signed by the rebel groups MLC and RCD. It is very disputed whether and to what degree

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<sup>78</sup> See Bell, *supra* note 10, at 391. Laurent Kabila, for example, repeatedly claimed that he would not participate in the national dialogue under occupation and on an equal footing with the rebel groups.<sup>78</sup> See ICG, Report on Congo War, at 81.

<sup>79</sup> Support for this point of view can also be derived from the Lusaka Agreement. The International Crisis Group states that the parties did “not [adhere] to the provision to cease hostilities and disengage military units from battle.” They argue that “many have taken this opportunity to engage further in their military and other ambitions.” “For example, even though Uganda and Bemba have signed the agreement, Uganda continues to provide military assistance and training to the MLC, and Bemba has continued to pursue territorial gains in north western DRC.” See ICG, Report on Lusaka Agreement, at 18. For the various breaches of the Lusaka Agreement by the Kabila government, see Counter-Memorial, at 87-94.

<sup>80</sup> See Bell, *supra* note 10, at 395.

<sup>81</sup> *Id.* at 393.

<sup>82</sup> *Id.* The Lusaka Agreement provides for a national dialogue that shall result in a new political order for the DRC but does not specify how this order should be designed. See Annex A, Chapter 5 of the Lusaka Ceasefire Agreement.

<sup>83</sup> Chapter 5.2. i) of the Lusaka Ceasefire Agreement names the Congolese parties to the dialogue: the Government of the Democratic Republic of Congo, the Congolese Rally for Democracy and the Movement for the Liberation of Congo, the political opposition, as well as representatives of the forces vives.

<sup>84</sup> Chapter 5.2. ii) of the Lusaka Ceasefire Agreement states that all the participants in the inter-Congolese political negotiations shall enjoy equal status.

<sup>85</sup> See Chapter 5.2. iii) of the Lusaka Ceasefire Agreement.

<sup>86</sup> See Bell, *supra* note 10, at 411.

<sup>87</sup> *Id.* at 407.

armed opposition groups are subjects of international law.<sup>88</sup> This lack of certainty affects the legal nature of the agreement as a whole.<sup>89</sup>

By downgrading the legal status of peace agreements, the Court avoided dealing with the increasingly pressing issue of the legal status of non-state actors in international law. Judge Kooijmans pointed out in his dissenting opinion in *Armed Activities* that an ordinary ceasefire agreement would not have the capacity to change the legal situation, but that the Lusaka Agreement was more than a mere ceasefire agreement.<sup>90</sup> Kooijmans argued that the Lusaka Agreement possibly created a new legal state of affairs by upgrading the status of the two rebel movements MLC and the RCD.<sup>91</sup> Hence, had the Court not downgraded the legal status of the Lusaka Agreement, the Court would have been required to engage in more depth with the issue of the status of rebel groups in international law.

There were therefore good reasons for the Court not to blindly apply traditional categories of international law to peace agreement. The distinctive character of peace agreements, as well as the fact that they are increasingly signed by state and by non-state actors, make it difficult to fit them into current international law categories. Moreover, it would be undesirable if states explicitly excluded their international responsibility for wrongful acts in peace agreements. Nevertheless, downgrading the legal status of peace agreements and hence declining to make them justiciable is, in my view, the wrong response to these problems. It overlooks what is on the other side of the scale of the qualification of peace agreements as a *modus operandi*. The ICJ underrated the importance of the legal nature of peace agreements in the resolution of modern conflicts, in particular how the legally binding nature of such agreements can influence the behaviour of parties to a conflict.

#### **IV. What is at Stake: The Force of Legally Binding Peace Agreements in International Conflict Resolution**

By downgrading the legal status of peace agreements, the Court ignored the behaviour-regulating effect that international law has on states during the conflict prior to any adjudication.<sup>92</sup> In these circumstances, the role of peace agreements can be crucial. Legally binding peace agreements

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<sup>88</sup> For a thorough analysis of the legal status of non-state actors in international law, see LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (2002). This debate is important for the issue of whether agreements that are also signed by non-state actors are legally binding. Article 3 of the Vienna Convention on the Law of Treaties states that “[t]he fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law . . . shall not affect . . . the legal force of such agreements.” The tautological problem behind this conflict is that, on the one hand, the existence of treaty-making capacity requires international subjectivity, on the other hand, the existence of international subjectivity depends on the rights and duties of the actors in the international arena, including whether they have the capacity to sign legally binding agreements. See Bell, *supra* note 10, at 384; Zegveld, *id.* at 51. Bell infers that “[r]ecognizing peace agreements as international agreements therefore seems to require the nonstate group and the agreement to ‘bootstrap’ each other into the international legal realm.” *Id.* The issue is therefore less one of legal doctrine but rather of legal politics.

<sup>89</sup> *Id.* at 379-84.

<sup>90</sup> See Judgment, Sep. Op. of Kooijmans J., para. 50.

<sup>91</sup> *Id.* at paras. 50-53.

<sup>92</sup> H.L.A. Hart rightly points out that “the principal functions of the law as a means of social control are not to be seen in private litigations or prosecutions, which represent vital but still ancillary provisions for the failure of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.” See H.L.A. HART, *THE CONCEPT OF LAW* 40 (2. ed., 1994).

serve as a pledge by the parties for compliance because the breach of peace agreements causes high audience costs. The normative power of the law increases the credibility of the parties' commitments. The ICJ plays an important role in upholding the normative effect of international law. Downgrading the legal status of peace agreements threatens to undermine their capacity to increase audience costs, potentially resulting in parties feeling increasingly less bound by the obligations that they signed on to in peace agreements.

On the basis of Fortna's work on the effects of ceasefire agreements on the durability of peace in the aftermath of a conflict,<sup>93</sup> I argue in this section that peace agreements increase the chances for durable peace and that one crucial factor of this effect is the legal nature of peace agreements. While there has been considerable research in the fields of social science and conflict resolution on the question of why and under what conditions peace agreements succeed or fail,<sup>94</sup> the legal character of peace agreements and the role of the law in peace processes have received little attention.<sup>95</sup> To address this gap, I characterize the situation of parties to a conflict that have signed a peace agreement and show how the legal status of peace agreements affects the conduct of the parties. Finally, I outline the reasons why the legal status of peace agreements induces the parties to comply.

In situations where peace agreements are concluded, cooperation is required to maintain a "possible, but precarious peace."<sup>96</sup> The conclusion of a peace agreement shows the parties' willingness to end fighting. The fighting prior to the agreement, however, suggests substantial conflicting interests. The main contribution of peace agreements to maintaining peace is that they facilitate cooperation. Parties anticipate obstacles to cooperation and draft peace agreements accordingly to diminish the effect of these obstacles. Hence, peace agreements make it more costly to attack, they reduce uncertainty about the other side's actions and intentions, and they prevent misunderstandings and accidents from spiralling back into war.<sup>97</sup> The Lusaka Agreement, for example, installed a United Nations/Organization of African Unity monitoring group to detect non-compliance with the agreement.<sup>98</sup> It ordered the re-deployment of forces in declared and recorded locations to prevent confrontations between opposing troops.<sup>99</sup> It employed measures for arms control.<sup>100</sup> These provisions demonstrate that, notwithstanding the conclusion of a peace agreement, parties to a conflict still have many reasons to resume fighting.<sup>101</sup>

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<sup>93</sup> See Fortna, *supra* note 8.

<sup>94</sup> See *id.*; STEPHEN STEDMAN, DONALD ROTHCHILD & ELIZABETH COUSENS (EDS.), *ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS* (2002); FEN OSLER HAMPSON, *NURTURING PEACE: WHY PEACE SETTLEMENTS SUCCEED OR FAIL* (1996); Kristian Skrede Gleditsch & Kyle Beardsley, *Nosy Neighbours: Third-Party Actors in Central American Conflicts*, 48 J. CONFLICT RESOL. 379 (2004); Stephen John Stedman & Donald Rothchild, *Peace Operations: From Short-Term to Long-Term Commitment*, 3 INT'L PEACEKEEPING 17, 25 (1996) (giving some limited attention to the clarity of a peace agreement); Barbara Walter, *The Critical Barrier to Civil War Settlement*, 51 INT'L ORG. 335 (1997); Louis Kriesberg, *Constructive Conflicts: From Escalation to Resolution*, 283-84 (1998); Dorina A. Bekoe, *Toward a Theory of Peace Agreement Implementation: The Case of Liberia*, 38 J. ASIAN & AFR. STUD. 256 (2003); Ulrich Schneckener, *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, 39 J. PEACE RES. 203 (2002); Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SECURITY 5 (1997).

<sup>95</sup> See Bell, *supra* note 10, at 374.

<sup>96</sup> See Fortna, *supra* note 8, at 12.

<sup>97</sup> *Id.* at 10.

<sup>98</sup> Annex A, Chapter 8 of the Lusaka Ceasefire Agreement.

<sup>99</sup> Annex A, Chapter 11 of the Lusaka Ceasefire Agreement.

<sup>100</sup> Annex A, Chapter 9 of the Lusaka Ceasefire Agreement.

<sup>101</sup> Fortna, *supra* note 8, at 19-20.

Fortna identifies two dilemmas that states that have signed a peace agreement confront. First, they encounter the prisoner's game dilemma. On the one hand, they prefer peace to war, on the other hand, they do not prefer peace to settling the dispute on their own terms. It follows from this dilemma that "[c]onflicting interests give belligerents an incentive to break the cease-fire in a bid to make unilateral gains on the battlefield."<sup>102</sup> Second, states have to deal with security dilemma dynamics: while in certain situation states might actually prefer not to attack each other, "[i]n an atmosphere of deep mistrust in the aftermath of war, each side has good reason to fear attack from its opponent."<sup>103</sup> This dilemma might result in a resumption of hostilities even though each party would actually prefer peace.

While peace agreements adopt various measures to address these dilemmas, the very signing of a formal, legally binding peace agreement is crucial to ensuring the success of these measures.<sup>104</sup> The success of each of the measures adopted depends on the authoritative power of the agreement. The outlined prisoner's game dilemma and the security dilemma dynamics stress the need for reciprocity and for clarity. Parties to a conflict will only be willing to sacrifice their interests "if they feel that the commitments they obtained from the other side are going to be implemented."<sup>105</sup> They pay close attention to the exact wording of peace agreements. The drafting process is generally surveyed by lawyers.<sup>106</sup> The importance that the parties attribute to the conclusion of a formal peace agreement and the scrutiny with which they draft its provisions indicate that they sign such agreements in order to exchange pledges of compliance.

The case of Laurent Kabila provides a good example for the 'pledge dimension' of peace agreements. While Kabila seemingly only signed the Lusaka Agreement in order to stop the advance of Rwandan troops, without ever intending to keep his commitments to the deployment of UN and for a national dialogue on an equal footing, he had to take into account that his breach of the Lusaka Agreement came at a high price. Laurent Kabila was considered primarily responsible by the international community for the failure of the Lusaka Agreement, which significantly reduced his diplomatic leeway.<sup>107</sup> The pledge is not valuable because the parties trust each other's promise, but because the conclusion of a peace agreement increases the costs for breaking the agreement. Fortna has pointed out that

[t]he very act of agreeing formally and publicly to peace can alter incentives. By committing publicly to a formal cease-fire agreement, actors stake their international reputations on compliance. By signing a formal agreement, states bind themselves under international law.<sup>108</sup>

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<sup>102</sup> Fortna, *supra* note 7, at 341. Ceasefire agreements can change the domestic military and political power balance, as the history of the Lusaka Agreement documents. Shortly before the conclusion of the agreement, Rwanda was close to gaining control over the strategically immensely important city of Mbuji Mayi. The signing of the Lusaka Agreement, however, took the momentum away from Rwanda and enabled Kabila strengthen the position of Congolese troops in Mbuji Mayi. *See supra* note 74.

<sup>103</sup> Fortna, *id.* In the context of the Lusaka Agreement, "[e]ach [party] suspected the others of a double game, and used its suspicions to justify its own duplicity." *See* ICG, Report on the Congo War, at iii.

<sup>104</sup> Fortna, *id.*

<sup>105</sup> *See* Bell, *supra* note 10, at 378.

<sup>106</sup> *Id.*

<sup>107</sup> *See* ICG, Report on the Congo War, at 83. Yasuaki generalizes this mechanism, remarking that "[n]ations which violate a rule of international law are often denied or have restrictions imposed on the enjoyment of ... [their] interests." *See* Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 EUR. J. INT'L L. 105 (2003), at 118.

<sup>108</sup> Fortna, *supra* note 8, at 21.

While international law lacks a central enforcement authority like the national government in the domestic sphere, a breach of international law still comes at a price. It “brings international obbrobrium and legitimizes retaliation by the other side.”<sup>109</sup> Fortna remarks that “[d]iplomacy becomes more difficult for the defector.”<sup>110</sup> In addition, “transgression may cause aid to be withheld and increase international support for the other side.”<sup>111</sup> In the case of the Congolese war, it was only after Joseph Kabila succeeded his father and expressed his willingness to cooperate and to implement the provisions of the Lusaka Agreement that the international community suddenly changed its attitude towards the Congolese government and gave wide international support to the new president.<sup>112</sup>

Fortna observes that as a consequence of the cost of the international reaction to breaches of peace agreements, “[w]hen states do break formal cease-fires, they often go to great lengths to make it look as if they were provoked so as to minimize the international costs.”<sup>113</sup> She refers to the example of Israel’s ending the 1948 ceasefire in the first Arab-Israeli war only after waiting for an Arab provocation to launch its offensive, despite learning of the impending Arab attack hours beforehand; it took the first blow so that it would be clear that it was not the aggressor.<sup>114</sup> Similarly, in the Congo war, the parties to the conflict were careful to construct breaches of the Lusaka Agreement only as a reaction to earlier breaches by other parties.<sup>115</sup> These examples demonstrate that the breach of a peace agreement causes audience costs: “By declaring to an audience (the international community, especially aid donors and military sponsors) their commitment to peace, states invoke costs to breaking this commitment.”<sup>116</sup> The legal nature of the peace agreement thus increases the pressure on parties to comply with the different provisions of the peace agreement as “[l]egalization is (therefore) one of the principal methods by which states can increase the credibility of their commitments.”<sup>117</sup>

These examples point to a crucial factor that is empirically difficult to observe.<sup>118</sup> It is the answer to a deep-lying question that Fortna does not examine: Why do formal peace agreements cause an increase of audience costs?<sup>119</sup> In my view, it is the normative power of the law.<sup>120</sup> Even

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> For this change in detail, see ICG, Report on Regime Change, *supra* note 72.

<sup>113</sup> Fortna, *supra* note 8, at 22.

<sup>114</sup> *Id.*

<sup>115</sup> See, for example, the statement of Justice Minister Mwenze Kongolo that “the Lusaka protocol is dead” and the first obstructions of the national dialogue following shortly after hostilities between Uganda and Rwanda on Congolese territory had occurred after the Lusaka Agreement was signed. ICG, Report on Lusaka Agreement, at ii.

<sup>116</sup> Fortna, *supra* note 8, at 22.

<sup>117</sup> See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 426 (2000).

<sup>118</sup> For empirical approaches on whether international law impacts state conduct, see Ryan Goodman & Derek Jinks, *How To Influence States: Socialization And International Human Rights Law*, 54 DUKE L.J. 621 (2004); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997), at 337-66; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). For an excellent critique of Hathaway and an account of empirical international legal studies, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003).

<sup>119</sup> On the general discussion on why States comply with international law, see Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review); L. HENKIN, *HOW NATIONS BEHAVE* (2nd ed.

though the decision-making heads of states such as Laurent and later Joseph Kabila in the DRC or Museveni in Uganda generally engage in rational calculations to realize the basic goals of their respective states,<sup>121</sup> their actions will be constrained, and partly even defined, by the regime established by international legal rules in general, and by the Lusaka Agreement in particular.<sup>122</sup>

In my view, there are two central reasons why the conclusion of legally binding peace agreements increases the likelihood of durable peace and decreases the chance that violence will resume: one is psychological in nature, the other refers to the institutional dimension of the law.

Psychologically, the domestic socialization of the actors generally induces them to obey the commands of peace agreements (although not at any price). Compliance with the law is a norm that is deeply rooted in society, generating a psychological effect of the law known as “compliance-pull.”<sup>123</sup> The law has a legitimacy-generating character, and in reverse, it denies legitimacy to those that disregard the law. International law benefits from the psychological effect of the law in the domestic arena because actors in the international sphere are socialized domestically.<sup>124</sup> They are used to obeying the commands of the law and try to avoid being blamed for breaches of the law.

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1979), at 49 - 68; THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); A. CHAYES & A.H. CHAYES, *THE NEW SOVEREIGNTY* (1995); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, (1997), at 337-66.

<sup>120</sup> In my view, the impact of international legal rules on states is best captured by the constructivist theory. It is based on the premise that the international system is a “social structure” (See Alexander Wendt, *Constructing International Politics*, 20 International Security 73 (1995)) that is “defined, in part, by shared understandings, expectations or knowledge” (*Id.*) and that forms “a mutually constitutive relationship” with the actors of the system (See Arend, *supra* note 77, at 128.). International legal rules form part of this structure as state practice evinces (*Id.*, at 129). They partly constitute the structure of the international system (*Id.*, at 138). For an excellent overview over the different theories of international law with respect to the concept of compliance, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345 (1998).

<sup>121</sup> Uganda, for example, did not primarily insist on the initiation of the national dialogue to bring peace to the DRC. Rather, it aimed at strategically improving its position in the Congo conflict. Clarke presumes that “Museveni may have seen the Lusaka Agreement as a way of displacing Kabila by political means: if the letter of the Accords were followed, then a national conference of all political forces in the country would eventually be held. If Kabila failed to live up to the political side of the Agreement, on the other hand, then Museveni would have a legitimate excuse to prosecute the war in Congo with renewed vigour.” See John Clark, *Explaining Ugandan intervention in Congo: evidence and interpretations*, 39 The Journal of Modern African Studies 283 (2001).

<sup>122</sup> Fortna provides some examples of case-studies where the existence of formal ceasefire agreements seemingly constrained the behaviour of the parties to the conflict. In the Kargil conflict between India and Pakistan, India scrupulously avoided crossing the formal ceasefire line after it was “blamed for the 1965 war because it was provoked into crossing the formal cease-fire line.” Fortna, *supra* note 8, at 203. In the Middle East conflict, the “existence of a cease-fire agreement reached in June 1982 between Israel and Syria also constrained (though it did not stop) Israeli military moves in Lebanon,” as reports from contemporary witnesses indicate. *Id.* at 205. Yasuaki points out that “government officials of a state usually take actions even in the critical case of resorting to armed force by paying attention to the regulatory function and legitimating power of international law.” See Onuma Yasuaki, *supra* note, at 125. While the notion of decision-making elites is usually more complex and diverse and is not limited to the leader of the country, there is evidence that, in particular, Laurent Kabila and Museveni took most decisions with regard to the Congo war on their own. See for Museveni, Clark, *supra* note 121, at 262.

<sup>123</sup> For the term “compliance-pull,” see THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 65 (1990). For a description of the phenomenon, see *id.* at 37.

<sup>124</sup> Yasuaki points out that “[t]he fact that law has been internalized contributes to the tendency of government officers to conduct their state affairs in accordance with law in international society.” See Yasuaki, *supra* note 107, at 122.

While it is true that international law does not have the same means to secure compliance that are available in the domestic sphere, namely the “infrastructure of government, constitution, courts, and police,”<sup>125</sup> it generates compliance in a more subtle way. Thomas Franck argues that the “rules of the international system obligate primarily because they are like the rules of a club”:<sup>126</sup>

Membership in the club confers a desirable status, with socially recognized privileges and duties and it is the desire to be a member of the club, to benefit by the status of membership, that is the ultimate motivator of conformist behaviour.<sup>127</sup>

When states sign peace agreements, therefore, they attach their reputation to the agreement and their membership status in the “club” is affected by their compliance with that agreement.<sup>128</sup> Instrumentally, the stigma that is associated with a breach of the law causes audience costs and decreases the legitimacy of actions taken because the “[v]iolation of a legal commitment entails reputational costs – again generalizable to all legal commitments – that reflect distaste for breaking the law. International law reinforces this effect through its strong emphasis on compliance.”<sup>129</sup>

This normative dimension of the law is accompanied by an institutional dimension that socially constructs the way international law is perceived by the relevant actors. The psychological compliance-pull of the law is safeguarded and amplified by a set of rules, practices and institutions provided by the international legal system. Principles like *pacta sunt servanda*, decentralized enforcement mechanisms like countermeasures and institutions such as the ICJ significantly contribute to the compliance of States with international law. A condemnation by the ICJ for the breach of international law, for example, reinforces the image of the law-breaker and will, as a consequence, likely impact domestic decision-making processes.<sup>130</sup>

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<sup>125</sup> Franck, *supra* note 123, at 38.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Throughout the Congo war, it has always been a major consideration for Museveni not to lose “his reputation as a regional broker, and the donor support that this credibility has assured him.” See ICG, Report on Lusaka Agreement, at 14.

<sup>129</sup> See Abbott & Snidal, *supra* note 117, at 428.

<sup>130</sup> Yasuaki rightly remarks that “[e]ven when the US and a limited number of major powers ignore some rules of international law under certain circumstances, their negative reputation as violators of international law will remain and often jeopardize their leadership in their future relations with other nations. The negative reputation as a violator of international law also counts in domestic politics as well, particularly in liberal democratic societies.” See Yasuaki, *supra* note 107, at 119. A good example of how judgments of the ICJ and the image of the law-breaker impact the decision-making process of governments is the ICJ’s decision in the *Nicaragua* case. In fact, Nicaragua used this decision as a substantial part of its strategy to fight U.S. involvement in Nicaragua. Paul S. Reichler, a U.S. lawyer who played a leading role in representing Nicaragua in the ICJ, provides the following account of Nicaragua’s aims in suing the United States: “It was clear that to win the debate in Congress we had to change the question. That was the reason for proposing that Nicaragua sue the United States in the World Court: to change the focus of the debate in Congress in order to win forthcoming votes on Contra aid. The question would no longer be the simplistic one asked (and answered) by the Reagan administration: whether the Sandinistas were Communists whose very existence threatened U.S. interests. With the United States in the defendant’s dock in The Hague, members in Congress would have to ask themselves whether U.S. national interests were truly served when America wantonly disregarded and thereby undermined, the most fundamental principles of international law.” See Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT’L L.J. 15 (2001), at 22-23.



By downgrading the legal status of peace agreements, however, the ICJ effectively refused to adjudicate these agreements.<sup>131</sup> Not only will this prevent the Court in the future from condemning breaches of a peace agreement, but it gives rise to the even more pressing concern that the qualification of peace agreements as a *modus operandi* threatens to insulate them entirely from the existing set of rules, principles, and enforcement mechanisms of international law. This could initiate a process in which the respect for the legal character of peace agreements increasingly diminishes.

Such a development would significantly impact the capacity of peace agreements to induce compliance because the legal status of peace agreements is a crucial element to their success. I have argued in this section that the parties consciously employ legal instruments as a pledge for compliance vis-à-vis their reciprocal commitments. The normative and institutional dimension of the law makes states obey peace agreements. Downgrading the legal status of peace agreements weakens peace agreements with regard to both dimensions. Given the effect that this downgrading may have for future conflict resolution, the Court should have integrated peace agreements within the common set of rules, practices, and institutions of the international legal system.

## **V. What the Court Should Have Done: A Proper Legal Regime for Peace Agreements**

My main concern with the ICJ downgrading the legal status of peace agreements by qualifying the Lusaka Agreement as a *modus operandi* is that it results in the exclusion of peace agreements from the existing set of rules, practices, and institutions of international law. While the normative dimension of the law is crucial to the success of peace agreements, an even more important function of legal status is that it embeds peace agreements into an existing set of rules, practices, and institutions used by the international legal system to induce compliance. The benefits that come with legal status are not merely achieved with the label of “law.” Rather, the legal status of peace agreements will only have its full effect if it is backed by principles such as *pacta sunt servanda* and decentralized enforcement mechanisms such as the rules on countermeasures.

International law can play a central role in guiding and channeling state conduct in unstable, precarious situations where peace agreements have been signed. Notwithstanding the psychological compliance-pull of international law, an examination of modern conflicts teaches us that peace agreements are frequently violated. In fact, peace agreements employ instruments such as monitoring groups, observer missions, and arms control regimes because it is assumed that their provisions will be violated at some point. The core function of peace agreements is not primarily to prevent minor breaches of the agreement from occurring; rather, their *raison d’être* is to assure that these breaches do not lead back to war. Post-conflict situations rely on legal mechanisms to prevent minor incidents and accidents from spiralling back into war. In order to ensure the success of these legal solutions and to minimize incentives to return to war, I argue that peace agreements must be given their full legal effect by integrating them into the existing set of rules, practices, and institutions of international law. I will focus in this article principally on the rules on counter-measures because their application to peace agreements could make an important contribution to regulating effectively the conduct of states in the aftermath of a

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<sup>131</sup> See my arguments *supra* at II (2). The fact that the ICJ dealt with the Lusaka Agreement in the context of the issue of consent is, in my view, not an indication that the ICJ regards peace agreement as adjudicable because the Court downgraded the legal status of the Lusaka Agreement to rebut Uganda’s consent argument.

conflict.<sup>132</sup> In particular, I argue that the rules on countermeasures provide adequate means to channel and restrain state conduct in the aftermath of a conflict. While they incorporate the logic of retaliation to accommodate post-conflict situations, they give states clear guidance on how they may react if the other party breaches the peace agreement. They require states to take a set of successive steps before they may resort to countermeasures, thereby controlling their reactions, and reducing the risk of minor incidents spiralling back into war.

My approach differs from other current accounts of the legal effects of armistice agreements (the predecessors of modern peace agreements<sup>133</sup>) which evade the difficult task of fitting peace agreements into the established categories of international law. These accounts merely provide that a renewed armed attack constitutes a new violation of the principle of non-use of force. They do not address which rules of international law, below the threshold of armed force, could be used to address such breaches, even though guidance and structure is needed most in this regard if the ultimate goal is to avoid a resumption of hostilities.<sup>134</sup>

A more promising and nuanced account of how the legal character and effects of peace agreements might be preserved is offered by Bell, who introduces the new category of “lex pacificatoria.” I nevertheless disagree with Bell's approach because it relegates peace agreements to a distinct, somewhat self-contained category of transnational law. Assigning peace agreements to the field of lex pacificatoria excludes peace agreements from the existing set of rules, practices, and institutions provided by the international legal system that is crucial to compliance. In my view, peace agreements need to be integrated into the existing categories of international law.

In this section, I first analyze what legal effects the legal literature attributes to ceasefire and armistice agreements and subsequently address the shortcomings of these accounts. Second, I critically discuss Bell's lex pacificatoria approach, arguing that peace agreements need to be integrated into the existing set of rules, practices, and institutions of the international legal system. Finally, I present my own approach that outlines how the application of the rules on countermeasures may strengthen the capacity of peace agreements to prevent minor breaches from spiralling back into war.

## **1. The Ambiguities in the Legal Literature Concerning the Legal Effects of Ceasefire and Armistice Agreements**

While the legal literature is mostly silent on the issue of the legal nature and effects of modern peace agreements,<sup>135</sup> some authors have written on the legal nature and effects of the traditional concepts of ceasefire and armistice agreements.<sup>136</sup> Their contributions are useful for appraising the legal status of modern peace agreements because armistices and peace agreements are today

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<sup>132</sup> It would go beyond the scope of this article to analyze systematically which other norms and categories of international law could also make a significant contribution.

<sup>133</sup> See *infra* at V(1).

<sup>134</sup> Cf. YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 51-54 (3. ed., 2005) [hereinafter: “War”]; Dinstein, *supra* note 28; Morriss, *supra* note 28; Greenwood, *supra* note 28; Bailey, *supra* note 29 and 32; Levie, *supra* note 37.

<sup>135</sup> Bell is the first author that has engaged in a comprehensible analysis of the legal nature and effects of modern peace agreements.

<sup>136</sup> See Yoram Dinstein, *War, aggression, and self-defence* 51-54 (3. ed., 2005) [hereinafter: “War”]; Dinstein, *supra* note 28; Morriss, *supra* note 28; Greenwood, *supra* note 28; Bailey, *supra* note 29 and 32; Levie, *supra* note 37.

nearly identical concepts.<sup>137</sup> I suggest, however, that these authors attach very little legal significance to these agreements. I argue that they disregard the critical importance of legal guidance in post-conflict situations, while they do not sufficiently explain why they do not apply existing rules of international law such as counter-measures.

These authors are ambiguous about the legal effects of these agreements because they are concluded in a state of war where the law of war (*jus in bello*) applies.<sup>138</sup> In this paradigm, the breach of a ceasefire agreement effectively does not have any relevant legal consequences because the ceasefire agreement only suspended hostilities without ending the state of war.<sup>139</sup> In contrast, the breach of an armistice agreement constitutes the unleashing of a new use of force violating Article 2 para. 4 of the UN Charter and giving rise to the right of self-defence<sup>140</sup> because the armistice agreement terminated the state of war.<sup>141</sup> It remains unclear what results from the breach of an armistice beyond a violation of the prohibition of the use of force under Article 2(4). In particular, it is unclear what legal significance a breach has if the parties violate the provisions of an armistice without resorting to force.

If the state of war is terminated, the logical consequence would be that the general provisions of international law apply once again.<sup>142</sup> Accordingly, it would be natural to assume

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<sup>137</sup> The only difference between the two concepts is that while the term “armistice” emphasizes that the agreement only represents a prelude to war, the term “peace agreement” stresses that the war is terminated. However, it appears that peace agreements have, in fact, mostly replaced armistice agreements in contemporary state practice. *See supra* note 30. While the distinction between a peace agreement and an armistice would provide for an additional category, modern international scholars seem to prefer the single category of peace agreements that encompasses armistices and peace treaties in the traditional sense.

<sup>138</sup> As a consequence, there is significant reluctance to apply the general norms of international law to agreements that are concluded during war but do not terminate the war.

<sup>139</sup> It is emphasized in the legal literature on ceasefire agreements that they only interrupt hostilities. Dinstein, *War*, at 52. As a consequence, “a cease-fire violation is irrelevant to the determination of armed attack and self-defence.” *Id.* The only rules on ceasefire agreements are the articles 36 to 41 of the Hague Convention on the Law and Customs of War on Land from 1907 that are widely perceived to form part of International Customary Law. Even though they employ the term “armistice” that was common at the time when the Convention was drafted, they effectively deal with ceasefire agreements. *See* Dinstein, at 257. The main provision, Article 40 of the Convention, provides that a ceasefire may be denounced in the event of a material breach of the ceasefire by the other party. However, if the breach of a ceasefire is irrelevant to the determination of armed attack and self-defence, the question is what legal relevance a breach of the ceasefire actually has, and why parties should only denounce a ceasefire in the event of material breaches.

<sup>140</sup> Dinstein, *supra* note 28, at 258.

<sup>141</sup> Dinstein points out that “[a]t the present time, armistices tend to terminate hostilities on all fronts . . . and to deny totally the right of any party to resume military operations under any circumstances whatsoever.” He adds that “where the text of the armistice agreement or the intention of the parties lends itself to such interpretation, an armistice can nowadays put an end to the state of war.” Dinstein, *supra* note 28, at 257. Greenwood also states that an armistice can “terminate the state of war, if the parties intend that it should have that effect.” Greenwood, *supra* note 28, at 58.

<sup>142</sup> However, it is not clear that armistice agreements have the capacity to terminate the war. Traditionally, only peace treaties or implied mutual consent terminated the state of war. As a consequence, most legal scholars do not even consider whether general norms of international law could apply to armistice agreements. However, these authors overlook that the role of armistice agreements has substantially changed in the past decade. The fact that they, and peace treaties, have to a large extent been replaced by peace agreements supports the recognition of the capacity of peace agreements to terminate war. Dinstein rightly points out that “[t]here is entrenched resistance in the legal literature to any reappraisal of the role assigned to armistice in the vocabulary of war.” He demands that “the terminology has to be adjusted to fit the modern practice of States” and that “[s]cholars must open their eyes to the metamorphosis that has occurred over the years in the legal status of armistice.” *See* Dinstein, *supra* note 136, at 44.

that the rules on countermeasures apply as well, however, the legal literature does not draw this conclusion. While there seems to be consensus that the parties are bound by the provisions of an armistice agreement,<sup>143</sup> the question of the legal consequences of a breach of an armistice is generally avoided.<sup>144</sup> It thus remains unresolved whether the obligations of an armistice agreement are legal or political in nature, what, if any, are the legal consequences of a breach of an armistice provision, and whether the ICJ should adjudicate such issues and provide for remedies or reparation at least in the form of satisfaction in recognizing the breach as a violation of international law.

This situation is unsatisfactory because the history of the Lusaka Agreement and other peace agreements has taught us that the parties to a conflict generally do not immediately decide to unleash a new war immediately after they have signed a peace agreement. Rather, minor provocations, misunderstandings, and accidents spiral steadily back into war. In my view, international law has a crucial role to play in channelling state conduct after a peace agreement has been signed to prevent this descent into warfare again. As this section has shown, the current state of the literature does not clarify the legal consequences of a breach of an armistice or cease-fire agreement. In the next section, I examine the most promising attempt to define the legal status of modern peace agreements.

## **2. The Promotion of a New Field of *Lex Pacificatoria* that Effectively Downgrades the Legal Status of Peace Agreements**

Bell engages in a comprehensive legal analysis of modern peace agreements as the emerging legal instrument for modern conflict resolution.<sup>145</sup> While she stresses the importance of the legal status of peace agreements,<sup>146</sup> however, she effectively assigns peace agreements to a distinct, self-contained category of transnational law that she calls “lex pacificatoria.” I argue in this section that “lex pacificatoria” does not ensure the full legal effect of peace agreements because it does not integrate them into the existing set of rules, practices, and institutions of international law. As a result, lex pacificatoria does not provide a sufficient legal instrument to channel state conduct in conflict situations.

Bell makes the case for the recognition of an emerging field of lex pacificatoria as an alternative mode of legalization to accommodate the particular features of peace agreements such as the inclusion of non-state actors as signatories, their process-oriented character, their war background, and the conflicting nature of their short-term and long-term goals.<sup>147</sup> Bell argues for “the usefulness of considering peace agreement practice on its own terms, as a distinctive use of law that cuts across international and domestic, public and private spheres.”<sup>148</sup> She draws a

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<sup>143</sup> “The terms of an armistice treaty shall be strictly observed by the parties to a conflict.” See Greenwood, *supra* note 157, p. 60.

<sup>144</sup> It is only stated in the negative that a breach does not give rise to the right to resume hostilities outside the right to self-defence. See Morriss, *supra* note 158, at 822-23, 931. “Although terms of the armistice agreements dealing with important but collateral issues such as verification regimes or implementation mechanisms may fail, the overriding obligation not to resort to force as a means of dispute settlement is deemed severable and continues to be binding.”

<sup>145</sup> Bell, *supra* note 10.

<sup>146</sup> *Id.* at 374-75.

<sup>147</sup> In Bell’s view, the defining features of lex pacificatoria are the “distinctive self-determination role” of peace agreements expressed by their external and internal dimension, the “distinctive mix of state and nonstate signatories,” distinctive types of “treatylike contractual and value-driven constitutional provisions,” and “distinctive types of third-party delegation” such as observers or facilitators. See Bell, *supra* note 10, at 408-12.

<sup>148</sup> *Id.* at 410.

parallel to *lex mercatoria* by stating that “just as the term *lex mercatoria* seeks to provide a label conducive to understanding the ways that commercial practices assert their own legalization across international and domestic spheres, so the term *lex pacificatoria* usefully captures similar dynamics with regard to the legalization of peace agreement commitments.”<sup>149</sup> In essence, Bell proposes to conceptualize peace-agreements as contracts that “incorporate internationalized treatylike commitments with a high degree of third-party enforcement, while enabling a transition to domestic constitutional commitments.”<sup>150</sup> The crux of Bell’s approach is that she does not attempt to integrate peace agreements into existing categories of international law, but instead relegates them to a distinct, somewhat self-contained category of international law. She explicitly states that “the contract itself may not constitute a binding international agreement.”<sup>151</sup> As a consequence, Bell effectively denies peace agreements full legal effect at the international level.

While Bell’s *lex pacificatoria* approach provides valuable contributions to the conceptualisation of an emerging type of peace agreement, and lays down the foundations for innovative legal categories and classifications that may accommodate the different rationales and mechanisms that are associated with the peculiar nature of modern peace agreements, I disagree with the legal effects that she attributes to peace agreements and with the way that she frames their relationship to other norms of international law.

I have argued above for the crucial role of the legal character of peace agreements in the resolution of international conflicts – a role that Bell also acknowledges. In fact, the need for a justification of the legal nature of peace agreements appears to be the driving normative force behind Bell’s model of *lex pacificatoria*.<sup>152</sup> However, the beneficial effects of peace agreements are not achieved by merely labelling them as law. The legal nature of peace agreements is rendered meaningless for the purpose of inducing compliance and generating legitimacy in the context of peace processes if it is not accompanied by credible legal effects. By assigning peace agreements to a distinct legal category of *lex pacificatoria*, Bell deprives peace agreements of their full legal significance in the international legal order. As a result, she effectively eliminates the beneficial legal effects of peace agreements that I identified in Part IV.

Law operates through a set of rules, practices, and institutions that socially construct the law as it is perceived by the relevant actors. A traditional international agreement forms part of this doctrine, is incorporated into the common set of rules, practices, and institutions of the international legal system, and can be interpreted by the ICJ and other international courts and tribunals.

A crucial element of being incorporated in this way into the doctrine of international law is that the principle *pacta sunt servanda* comes into effect. *Pacta sunt servanda* states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>153</sup> Yasuaki rightly points out that “[i]t is a powerful idea in all human societies including international society [that States do not] dare to violate easily because they know that they have to pay high political costs if they do so.”<sup>154</sup> He argues that “[o]nce the treaties are concluded, it is difficult to denounce them unilaterally because of the legal and political power of the principle

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<sup>149</sup> *Id.* at 409.

<sup>150</sup> *Id.* at 399.

<sup>151</sup> *Id.* at 405. She insists, however, that “[i]nternational law can . . . provide a basis for enforcement of the contract internationally and even in domestic courts.” *Id.*

<sup>152</sup> *Id.* at 374-75.

<sup>153</sup> See Article 26 of the Vienna Convention on the Law of Treaties.

<sup>154</sup> See Yasuaki, *supra* note 107, at 116.

*'pacta sunt servanda.'*”<sup>155</sup> However, *pacta sunt servanda* only applies to agreements that form part of the common set of rules, principles, and practices of the international legal system. By drawing a parallel to *lex mercatoria*, Bell effectively suggests that peace agreements are a category of law widely insulated from the international legal system and the compliance pull of the *pacta sunt servanda* principle.

The limited potential of Bell's theory can be seen by applying the *lex pacificatoria* model to the Lusaka Agreement. Had the Court adopted Bell's approach, it would have arrived at the same result as it did in *Armed Activities*.

First, if the Court treated the Agreement as *lex pacificatoria*, it would still lack the capacity to constitute consent to the presence of Ugandan troops on Congolese territory. The Lusaka Agreement is only capable of consenting to the presence of Ugandan troops on Congolese territory if it forms part of the same system of conflict of norms as the principle of non-intervention. Only under this condition may the conflict of norms be solved because the agreement has the capacity to justify a violation of the principle of non-intervention. The agreement does not have this effect, however, if it forms part of a distinct, self-contained category of transnational norms that are not part of the international legal system.

Second, the Court would still have found Uganda's counter-claim inadmissible for lack of a direct connection to the DRC's original claim. If the Lusaka Agreement forms part of a distinct category of transnational norms, it does not represent a suitable object for Uganda's third counter-claim. A counter-claim is admissible only if it attempts to establish legal responsibility. Legal responsibility in international law is established on the basis of the rules on state responsibility. If the Lusaka Agreement does not form part of international law but belongs to a distinct category of transnational law, it is not a suitable object for the principles of state responsibility.

There is, moreover, a significant discrepancy in the parallel that Bell draws between *lex mercatoria* and *lex pacificatoria*; unlike *lex mercatoria*, there are serious reasons to believe that the law regulating peace agreements should not be self-contained and self-enforcing. What arguably justifies the conceptualisation of *lex mercatoria* as a distinct, self-contained system of law is the mutual self-interest of merchants in a reliable code of rules of behaviour, where compliance is based on reputation rather than authoritative legal enforcement mechanism, combined with the lack of interest of actors outside the system in interfering with this system. Things are substantially different, however, in the context of armed conflicts. The actors of *lex pacificatoria* are not merchants doing business but parties to an armed conflict. The main problem for parties to an armed conflict is that prisoner's game dilemmas and security dilemma dynamics make it very difficult for them to solve the problem on their own. In fact, according to the International Crisis Group, this was one of the main reasons for the failure of the Lusaka Agreement:

The agreement depended entirely upon the cooperation of the parties to succeed. Tragically, none of the signatories fulfilled what they had pledged. Each suspected the others of a double game, and used its suspicions to justify its own duplicity. Since the belligerents themselves were the ones responsible for policing the agreement, and since there was no external guarantor to compel their compliance, the agreement quickly became empty.<sup>156</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> See ICG, Report on Congo War, at iii.

It follows that parties to a conflict rely on the involvement of the international community to solve their conflict. They sign peace agreements in order to employ the compliance-pull generated by international law. The normative order of international law incorporating principles such as the prohibition of the use of force thus has a fundamental interest in the success of the peace process. While Bell also incorporates certain principles of international law in peace agreements as normative guidelines for interpretation,<sup>157</sup> she refuses to integrate peace agreements into the system of rules, practices, and institutions provided by international law.

I argue, however, that this integration is crucial to the capacity of peace agreements to induce compliance. The parties to a conflict will only regard the provisions of peace agreements as binding and constraining if they are accompanied by credible legal effects. Warring parties need to be socialized by principles, institutions and the rules of enforcement of the international legal system to respect the provisions of peace agreements. Arend rightly points out that “[i]f the decision-making elites in states perceive legal rules to be fundamentally different from other rules, the effect legal rules produce in international relations may be different from the effect of other ‘norms’, ‘rules’ and ‘institutions.’”<sup>158</sup> Therefore, the capacity of peace agreements to increase audience costs and to constrain state conduct in the aftermath of a conflict relies on the possibility of adjudication by the ICJ, on the applicability of the principle *pacta sunt servanda*, and on the compliance-inducing effect of the rules on countermeasures. *Lex pacificatoria* lacks the normative and institutional quality of the international legal system. As a consequence, assigning peace agreements to the category of *lex pacificatoria* threatens to substantially reduce the compliance-pull of peace agreements.

### **3. The Capacity of Countermeasures to Channel and Restrain State Conduct in the Aftermath of a Conflict**

In this section, I outline my view that the legal status of peace agreements should trigger the application of the rules on countermeasures. In the absence of a “world policeman to command or coerce obedience to international law rules,” the international legal system relies on decentralized enforcement mechanisms “such as countermeasures to win respect and compliance with these duties.”<sup>159</sup> Countermeasures form part of the Articles on State Responsibility. They are well-established rules that have the capacity to channel and restrain state conduct in the aftermath of a conflict. The various steps required by the rules on countermeasures that a party would have to take to lawfully retaliate for breaches of a peace agreement will often prevent minor provocations and incidents from spiralling back into war.

While I do not see any compelling reasons not to apply countermeasures to peace agreements, I acknowledge that other norms of international law exist that cannot reasonably be applied because of the special features of peace agreements. I argue, however, that this is not a sufficient reason to entirely exempt peace agreements from the realm of traditional categories of international law. Only to the extent that “hard” international law does not fit, should categories of soft law such as Bell’s *lex pacificatoria* be applied to peace agreements.

I will begin this section by outlining my approach in more detail and then move on to apply it to the facts and arguments presented to the Court in *Armed Activities*. I conclude that had the Court applied this approach in the *Armed Activities* case, it could still have rejected Uganda’s

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<sup>157</sup> Bell, *supra* note 10, at 405-08.

<sup>158</sup> See Arend, *supra* note 77, at 118.

<sup>159</sup> David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 818 (2002).

consent argument, but it would have had to hold Uganda's third counter-claim admissible and uphold it on the merits.

**a. The Beneficial Effects of the Application of the Rules on Countermeasures to Peace Agreements**

Countermeasures are secondary norms of international law that apply only in the event of the breach of a primary norm of international law, such as the provisions of an international agreement.<sup>160</sup> They are a central feature of a decentralized system of enforcement that authorizes the state affected by the wrong to lawfully breach a norm of international law vis-à-vis the wrongdoer. They determine which acts an injured state may lawfully take and which acts the responsible state must bear.<sup>161</sup> I argue that the legal regime of countermeasures should be used to guide and channel the conduct of states in post-conflict situations because it determines which acts a party to a peace agreement can lawfully take as a reaction to a breach of the peace agreement by the other party, and which acts would constitute wrongful acts themselves. As a result, the rules on countermeasures provide the very clarity and reciprocity that I suggested above were crucial to preventing a return to war.

Currently, no rules except the prohibition of the use of force are applicable to violations of peace agreements. There exists no legal regime that structures and restricts state responses to the breach of a peace agreement. States rely primarily on self-help. As a result, there is a high risk that breaches trigger a whole range of unguided retaliatory responses that spark a spiralling back into war. By dismissing Uganda's third counter-claim alleging several violations of the Lusaka Agreement by the DRC, the ICJ refused to attribute any legal significance to breaches of peace agreements. Instead of providing states with guidance and structure on how to address breaches of peace agreements within the framework of international law, the Court fosters their reliance on self-help.

The Court disregards the possibility of using the rules on countermeasures to provide a legal regime that is particularly well-suited to channel and structure state conduct in post-conflict situations that are characterized by deep uncertainty and mutual distrust, in which security dynamics emphasize the importance of reciprocity and clarity. While countermeasures provide states with the unique opportunity to lawfully retaliate against the wrongful acts of other states, they make this right contingent upon the fulfillment of certain conditions that substantially limit the "danger of abuse inherent in the acknowledgment of a unilateral power of enforcement for individual states."<sup>162</sup>

Applying the legal regime of countermeasures would require a state to take clearly defined steps before it could retaliate for the breach of a peace agreement. First, a countermeasure may "only" be taken for the purpose "to induce [a] State to comply with its obligations."<sup>163</sup> Second, countermeasures must be preceded by steps designed as procedural safeguards against impulsive reactions. They must be preceded by a request that the responsible

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<sup>160</sup> For substantial discussion of countermeasures, see ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984); OMER Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTERMEASURES IN INTERNATIONAL LAW (1988).

<sup>161</sup> ANTONIO CASSESE, INTERNATIONAL LAW 241 (2. ed. 2005).

<sup>162</sup> Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT'L L. 890 (2001).

<sup>163</sup> See Art. 49 (1) of the Articles on State Responsibility. As a consequence of this purpose, a countermeasure may not be taken against a state that is not responsible for the wrongful act. See Article 49 (2) of the Articles on State Responsibility.



state cease the wrongful act<sup>164</sup> and they must be accompanied by an offer to negotiate.<sup>165</sup> In addition, the responsible state must be notified of any decision to take countermeasures.<sup>166</sup> Third, countermeasures are intended as instrumental measures. They must be terminated if the wrongful act has ceased (“for the time being”)<sup>167</sup> and must be “as far as possible” reversible.<sup>168</sup> Fourth, a countermeasure must be proportional.<sup>169</sup> Proportionality “secures a certain predictability of the responses and predetermines, albeit roughly, the social sanction against the wrongdoer.”<sup>170</sup> Finally, a state may only resort to non-forcible countermeasures. Forcible measures are excluded from the ambit of permissible countermeasures because the rules on countermeasures are subordinated to the prohibition of the use of force under Article 2 (4) of the UN Charter.<sup>171</sup> As a consequence, the provisions of the peace agreement that establish a ceasefire may never be suspended as a reaction to the breach of the peace agreement by the other party unless the right to self-defence under Article 51 of the UN Charter applies.<sup>172</sup>

States can be expected to follow the rules on countermeasures because they give states the opportunity to retaliate in a lawful way.<sup>173</sup> While the logic of the conflict induces states to retaliate for breaches by the other party, states also strive for recognition from the international community. As discussed earlier in this article, they are careful not to be identified as the party that violated the peace agreement. Countermeasures accommodate the two-folded desire of states to retaliate and to remain part of the club by retaliating within the bounds of the law. While they entitle states to lawfully commit a wrongful act to react to a wrong inflicted upon them, they confer this entitlement only under the condition that the state observes a set of rules that is designed to minimize unauthorized coercions and to restrain the discretion of states in conflict situations.

The downside of applying the rules on countermeasures to peace agreements is that it could be argued that it legitimizes breaches of a peace agreement, so long as they are in reaction to the violation of the agreement by the other party. It could be argued that it would be preferable not to legitimise any breaches of peace agreements. The application of countermeasures to peace agreements might itself threaten to trigger a spiral of countermeasures leading straight back into war.

Nevertheless, I argue that it is not very likely that the denial of the opportunity to revert to countermeasures will prevent parties from violating peace agreements. A consistent application of the rules on countermeasures would have the effect that parties to a conflict increasingly justify themselves within the constraining categories of the countermeasures regime because they do not want to be condemned by the international community. A socializing effect would unfold.

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<sup>164</sup> Article 52 (1) (a) of the Articles on State Responsibility.

<sup>165</sup> Article 52 (3) of the Articles on State Responsibility.

<sup>166</sup> Article 52 (1) (b) of the Articles on State Responsibility.

<sup>167</sup> Article 49 (2) of the Articles on State Responsibility.

<sup>168</sup> Article 49 (3) of the Articles on State Responsibility.

<sup>169</sup> Article 51 of the Articles on State Responsibility.

<sup>170</sup> Cannizzaro, *supra* note 162, at 890.

<sup>171</sup> Article 50 (1) (a) makes reference to Article 2 (4) of the UN Charter and provides that countermeasures shall not affect the obligation to refrain from the threat or use of force.

<sup>172</sup> This view is disputed as it depends on whether hostilities are terminated or only suspended. *See supra* note 142.

<sup>173</sup> The Commentaries of the International Law Commission to the Articles on State Responsibility avoid using the term “retaliation.” Instead, they stress that countermeasures may only be taken to induce compliance. Nevertheless, as the dividing line between retaliation and an inducement to compliance in the form of a (legalized) wrongful act is thin, and the internal purpose of an act is difficult to determine, I argue that states will, in practice, often resort legally to countermeasures as a channeled means of retaliation.

As soon as a strong awareness of the regime of countermeasures in the context of peace agreements has developed, the choice of the parties to a peace agreement as to which measures they might take in reaction to breaches of the agreement would become constrained by what is considered an admissible countermeasure in international law.

A consistent application of the rules on countermeasures would limit state discretion and eliminate the current ability of states to manipulate the lack of rules to liberate themselves from the provisions of the peace agreements to the greatest extent possible. For example, after Ugandan and Rwandan troops clashed in Kisangani, Justice Minister Mwenze Kongolo claimed at the SADC meeting in Maputo that “as far as we are concerned the Lusaka protocol is dead.”<sup>174</sup> The clash of troops is clearly a wrongful act, however, if the rules on countermeasures are applied, there would be no doubt that the DRC could not respond to such a breach by completely nullifying the entire Lusaka Agreement. The government of the DRC would first have to request Uganda and Rwanda to cease the breach of the peace agreement. Then, it would have to try to settle the conflict by peaceful means. Even if these attempts failed, the DRC would have been restricted to taking a countermeasure that is proportional and aimed at inducing compliance with the peace agreement. Denouncing a peace agreement is never an adequate countermeasure to induce compliance with the agreement.

The legal regime of countermeasures is also flexible enough to accommodate some of the peculiar features of peace agreements, such as their process-oriented character. It requires, in my view, that any countermeasures adopted would have to respect the time-frame set out in the peace agreement. In the case of the Lusaka Agreement, for example, the national dialogue “was supposed to start immediately after the cessation of hostilities, the establishment of the JMC and the disengagement of forces, and be completed before the deployment of the UN Peace-Keeping mission, the disarmament of armed groups and the withdrawal of foreign forces.”<sup>175</sup> As a result of this time-frame, Uganda’s decision to suspend the withdrawal of its troops until progress was made within the framework of the national dialogue was a justifiable countermeasure. In contrast, Laurent Kabila’s unwillingness to initiate the national dialogue unless all foreign troops were withdrawn was not a proportional countermeasure because, under the terms of the Agreement, Uganda and Rwanda were not obliged to withdraw their troops until the national dialogue was initiated.

Another example of a lawful counter-measure was Uganda’s and Rwanda’s refusal to withdraw their troops unless the DRC cooperated with UN-appointed facilitator Masire. Their use of this counter-measure was proportionate because Kagame and Museveni began pulling back their troops as soon as the newly appointed President Joseph Kabila called back Masire, lifted the ban on political parties, and prepared a renewed national dialogue.<sup>176</sup>

In order for the legal regime of countermeasures to apply at all, however, peace agreements must be considered to be binding international agreements. Both the Court’s opinion in *Armed Activities* and Bell’s *lex pacificatoria* theory do not understand peace agreements as legally binding international agreements, even though state practice seems to suggest the opposite.<sup>177</sup>

As discussed above, peace agreements are drafted so as to trigger the normative pull of the law. Parties to a conflict sign a peace agreement because they want their opponents to be

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<sup>174</sup> See ICG, Report on Lusaka Agreement, at ii.

<sup>175</sup> See ICG, Report on Congo War, at 79.

<sup>176</sup> See Lemarchand, *supra* note 72, at 40.

<sup>177</sup> See Fortna, with regard to ceasefire agreements, *supra* note 8, at 199-205.

legally bound by its provisions. Peace agreements are, as a result, generally drafted in a legalized manner:

[They] share a legal-looking structure, with preambles, sections, articles and annexes. They also share legal-type language, speaking of parties, signatories and, binding obligations. The structure and language of peace agreements suggests that the parties mutually view them as legal documents.<sup>178</sup>

Bell therefore concludes that “peace agreements are drafted in an attempt to use a legal form and appear to evidence an intent to be legally bound.”<sup>179</sup>

International law attributes legal significance to the joint will of the parties when it recognizes international conventions as a source of international law.<sup>180</sup> It indicates that the joint will of the parties to sign an agreement is a source of binding law.<sup>181</sup> I argue that we ought to respect the joint will of the parties to a peace agreement and conceive of it as a legally binding agreement. As Levie points out, a peace agreement “is an agreement; it is a contract; it is consensual.”<sup>182</sup>

The problem is that “these aims are somewhat frustrated at present by [the] limits of traditional legal categories.”<sup>183</sup> I have pointed out that the process-oriented character of peace agreements, the political background of war, and the inclusion of non-state actors as parties to the agreements make it difficult to fit peace agreements into traditional categories of international law. In the case of the the Lusaka Agreement more particularly, the fact that it was also signed by non-state actors limits the applicability of the Articles on State Responsibility and puts into question whether the Agreement complies with the Vienna Convention’s definition of a treaty as an agreement between states.<sup>184</sup>

International law is generally not a very flexible and modifiable category of law, as it relies to a high degree on legal certainty and formalism to be successful as a legal system.<sup>185</sup> In contrast, peace agreements rely on flexibility to enable the parties to quickly adjust to new factual circumstances.<sup>186</sup> This is why Bell prefers to place peace agreements within the new

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<sup>178</sup> See Bell, *supra* note 10, at 378.

<sup>179</sup> *Id.* at 395.

<sup>180</sup> Article 38 (1) (b) of the Statute of the International Court.

<sup>181</sup> See Article 38 para. (1) (a) of the Statute of the International Court.

<sup>182</sup> Levie, *supra* note 37, at 881. He refers to the traditional notion of the armistice.

<sup>183</sup> Bell, *supra* note 10, at 395. She argues that “[t]he compliance pull gained by achieving obligations with a clear claim to be binding as treaties or constitutions is undermined by the lack of correlation between the parties to the obligation and the formal parties to the agreement, and the peculiar nature of the peace agreement as a process document.” *Id.* Watson describes this dilemma with regard to the Oslo Accords where, according to him, Israel and the Palestinians wanted both to be legally bound by the agreement but traditional international law only provided the legal categories for Israel to be bound. See Geoffrey Watson, *The Oslo Accords: international law and the Israeli-Palestinian peace agreements*, 92 (2000).

<sup>184</sup> The Vienna Convention on the Law of Treaties only applies if the agreement is signed by states (Article 2 of the Convention) and provides that the legal force of agreements not only signed by states depends on whether the signatories are subjects of international law (Article 3 of the Convention. See *supra* note 788.

<sup>185</sup> Bederman, *supra* note 88, at 826.

<sup>186</sup> As an example of the need for flexibility and the potential problems associated with the legally binding character of peace agreement can be found in the regime change in the DRC during the Congo war. While the significance of the national dialogue provisions had been emphasized by the great majority of actors during the reign of Laurent Kabila, it was increasingly questioned after Joseph Kabila took over. See ICG, *The Inter-Congolese Dialogue: Political Negotiation or Game of Bluff?*, Report No. 37 ( Nov. 16, 2001), at 22. Some have argued that “[s]ince the

category of *lex pacificatoria* rather than attempting to integrate peace agreements into existing categories of international law. In contrast, my examination of the benefits of integrating peace agreements into established categories of international law suggests that we ought to do so whenever possible.

The problem with most current conceptions of international law is that the different forms of legalization in international law are mostly framed as a binary option between “hard” international law and pure politics.<sup>187</sup> Everything that does not fit into the current categories of hard international law is viewed as a purely political instrument. For example, the legal literature on armistice agreements essentially treats armistices as purely political instruments because it has difficulty qualifying their legal effects. I argue, in contrast, that there is an urgent need to apply hard law categories like *pacta sunt servanda* and countermeasures to peace agreements. Only to the extent that this is doctrinally not possible, should a softening of legal arrangements occur.

Instead of conceiving of the relationship between hard law and soft law as a binary option, we should understand it rather as a continuum along which lies a variety of different forms and degrees of soft law.<sup>188</sup> While hard law “refers to legally binding obligations that are precise . . . and that delegate authority for interpreting and implementing the law,”<sup>189</sup> “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions.”<sup>190</sup> Adopting the continuum approach allows us to apply existing hard law norms to peace agreements whenever possible, while preserving the ability of turning to soft law categories when the particular features of modern peace agreements conflict with the traditional categories of international law.

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death of Laurent Désiré Kabila, the Inter-Congolese Dialogue, as it was developed in Lusaka, has lost one of its *raison d’être*.” *Id.* at 22. Accordingly, numerous bilateral consultations that took place between the warring parties after Laurent Kabila’s death suggested the implicit confession “that the Lusaka agreement has not worked, and that calling for its implementation means in essence calling for the status quo.” *See* ICG, Report on Congo War, at 82. However, I argue that these valid objections do not require the entire exemption of the national dialogue provisions from the application of the rules on state responsibility. The problem of the increasing inadequacy of the Lusaka Agreement against the background of changed factual circumstances can be solved without a full exemption. First, the Lusaka Agreement could be re-negotiated. The Kampala, Harare, and Luanda Agreements all adjusted the timetables of the Lusaka Agreement with regard to the withdrawal of foreign troops. Second, if one party that is not interested in the peace process obstructs these efforts, it appears appropriate to pick up Richard Baxter’s proposal with regard to political treaties in general that “[a] change in a government’s orientation must . . . be regarded as ‘a fundamental change in circumstances.’” *See* Richard Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L & COMP. L. Q. 550 (1980). Peace agreements are highly politicised agreements. The replacement of Laurent Kabila by his son Joseph constituted a change in the orientation of the Congolese government. More importantly, if we explicitly exclude long-term provisions of peace agreements entirely from the regime of state responsibility, we might in the long term compromise their constraining effect on the behaviour of the parties. The national dialogue provisions of the Lusaka Agreement, for example, crystallized the awareness of the international community and concentrated its efforts to induce compliance. It provided a road-map to peace that Laurent Kabila could not depart from. The international community’s denial of support to Laurent Kabila because of his obstruction of the national dialogue process, and the support for his son because he took steps to re-vitalize the national dialogue, indicate the constraining effects of such a provision. They determine the necessary steps for the peace process and constrain the behaviour of the parties accordingly.

<sup>187</sup> *See* Abbott & Snidal, *supra* note 117, at 422 who acknowledge that “[s]oft law has been widely criticized and even dismissed as a factor in international affairs.”

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

Bell's conception of *lex pacificatoria* falls into the binary approach by completely relegating peace agreements to the soft law category. I argue, in contrast, that peace agreements should be integrated into existing categories of hard international law to the extent possible. Only where the goals of peace agreements would be frustrated, or where the existing categories of international law simply do not fit, should a softening such as Bell proposes occur. For example, it should not automatically follow from the lack of recognition of non-state actors as subjects of international law, that state signatories of a peace agreement like the Lusaka Agreement are relieved from their obligations under categories of hard international law. Binding international norms should still be applied to state parties, while non-state actors could be regulated in domestic courts as Bell proposes, with international legal norms serving as soft normative guidelines.<sup>191</sup>

#### **b. How the Court Should Have Appraised the Lusaka Agreement**

How would the Court have decided the *Armed Activities* case if it had adopted my approach of integrating peace agreements into current categories of international law? First, the ICJ should not have resolved the issue of consent by qualifying the Lusaka Agreement as a *modus operandi*. Under my approach, peace agreements are norms of international law that form part of the system of conflicts of international law. Thus, they are in principal capable of legalizing behaviour that would otherwise be considered a violation of the principle of non-intervention. In my view, the Court should have based its rejection of Uganda's consent argument exclusively on the fact that the timetables of the Lusaka Agreement did not purport to legally consent to the presence of Ugandan troops on Congolese territory. Rather, the timetable was a privilege granted to Uganda in order to master the time-consuming task of troop withdrawal and to protect its long-term interests in the DRC.<sup>192</sup> The timetable did not affect the existence of the wrongful act of the violation of the principle of non-intervention. It only prolonged the requirement to cease the wrongful act immediately.

A disadvantage of my approach is admittedly that it does not prevent the scenario about which the ICJ was particularly concerned. It would in principal be possible under my theory for the aggressor in a conflict to evade its international responsibility by agreeing to a peace agreement only under the condition that its provisions explicitly exclude liability.

However, it might be possible to at least partly counter this negative effect through the application of article 53 of the Vienna Convention on the Law of Treaties that declares a treaty void when it conflicts with principles of *jus cogens*.<sup>193</sup> Interestingly, the Special Court for Sierra

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<sup>191</sup> Bell, *supra* note 10, at 411-12.

<sup>192</sup> See *supra* note 48.

<sup>193</sup> Dinstein also points out with regard to armistice agreements that, while "[t]he contracting parties to an armistice agreement are free to insert any provisions which they deem appropriate," "[t]he freedom of contractual engagements applies, as with all other treaties, subject only to the requirement that the stipulations of the armistice do not conflict with a peremptory norm of general international law." Dinstein, *supra* note 28, at 258. Article 53 defines *jus cogens* as a peremptory norm of general international law that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. However, the meaning and scope of *jus cogens* is very disputed. See for substantial literature on *jus cogens*, CHRISTIAN TOMUSCHAT & JEAN-MARC THOUVENIN (ED.), *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER. JUS COGENS AND OBLIGATIONS ERGA OMNES* (2006); ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* (2006); LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW. HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* (1998); ROBERT KOLB, *THÉORIE DU IUS COGENS INTERNATIONAL. ESSAI DE RELECTURE DU CONCEPT* (2001); CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF*

Leone in the *Kallon* case rejected the claim that the amnesty clause in the Lomé Agreement eliminated its jurisdiction partly by relying on jus cogens.<sup>194</sup> It held that “a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.”<sup>195</sup> In a similar fashion, the ICJ could have held that the concept of jus cogens prevents states from excluding ex-post<sup>196</sup> their international responsibility for violations of the principles of non-intervention and non-use of force.<sup>197</sup>

Second, it follows under my approach that the ICJ should have held Uganda’s third counter-claim admissible. The Court held Uganda’s third counter-claim inadmissible because it did not regard the Lusaka Agreement as a legally binding agreement upon which international responsibility could be established. It follows from my approach, in contrast, that peace agreements form an integral part of international law to which the rules on state responsibility apply – satisfying the direct connection requirement for the admissibility of counter-claims. As a consequence, Uganda could have established the Congo’s legal responsibility for breaches of the Lusaka Agreement.

Third, I argue that the Court should have sustained Uganda’s third counter-claim on the merits. In the present case, Uganda had claimed in particular that the DRC prevented the Congolese national dialogue.<sup>198</sup> I argue that the Court should have found this to be a wrongful act of the DRC. The problem with this proposition is that the provisions on the national dialogue in the Lusaka Agreement exemplify the process-oriented character of modern peace agreements that require an elevated degree of flexibility. They are therefore particularly difficult to adjudicate.

Nevertheless, legal responsibility may be established on the basis of the rules on state responsibility for *evident* breaches of such type of provisions. Such an evident breach of the national dialogue provisions could have been inferred to the DRC in the *Armed Activities* case. While all parties to the conflict failed to comply with the provisions of the Lusaka Agreement, it is fair to say that Kabila played a particularly obstructive role and evidently breached the

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TREATIES (1976); Lee M. Kaplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003).

<sup>194</sup> The claim that the amnesty clause excluded the jurisdiction of the Court is similar to the qualification of the Lusaka Agreement as a *modus operandi* to rebut Uganda’s contention that the agreement constituted consent in the *Armed Activities* case.

<sup>195</sup> See *Prosecutor v. Kallon*, at para. 71.

<sup>196</sup> The situation would be different if the DRC had invited Uganda to enter its territory. In this case, there would not be a violation of the principles of non-intervention and non-use of force in the first place. In fact, Uganda had made such an argument in the *Armed Activities* case. However, the Court rejected this argument.

<sup>197</sup> There are two specific problems with the application of Article 53 of the Vienna Convention to peace agreements. The first is that provisions of a peace agreement that exclude liability for violations of jus cogens do not conflict directly with jus cogens. They do not request the parties to commit acts violating jus cogens norms, but rather provide that in the case that such acts were committed, international responsibility for them is excluded. The other problem arising with the application of Article 53 to peace agreements is that according to the wording of Article 53 and the principle of non-separability of the provisions of an illegal treaty expressed in Article 44, the application of Article 53 to peace agreements as a means to uphold the legal nature and relevance of these agreements – in contrast to the approach of the ICJ – depends on whether certain provisions could be held void while others remain valid, for the invalidity of the entire ceasefire agreement would have practically the same outcome as the approach of the ICJ.

<sup>198</sup> Other alleged violations of the Lusaka Agreement were that the DRC did not disarm and demobilise the armed groups on its territory, including the anti-Uganda insurgents, and that it impeded the deployment of the UN Observer Mission to the Congo (MONUC) in government-controlled territory. See Counter-Memorial, at 87-94 and 409-12.

national dialogue provisions of the Lusaka Agreement.<sup>199</sup> Lemarchand accused Kabila of “stubborn refusal to implement the Lusaka accords”<sup>200</sup> and stated that Kabila “made a mockery of the Lusaka accords, consistently resisted calls to negotiate with the rebels and their allies, and heaped scorn on the UN-appointed facilitator.”<sup>201</sup> The International Crisis Group stated that “[m]ost international players, including France, US, Britain and Belgium, among others, agree that Kabila is the main obstacle to the implementation of the Lusaka Agreement.”<sup>202</sup> As a consequence, it took his death and the appointment of his son Joseph as President of the DRC to bring fresh hope to the stalled Lusaka Peace process.<sup>203</sup>

To sum up, the ICJ should not have rejected Uganda’s consent argument by qualifying the Lusaka Agreement as a *modus operandi*. Rather, it should have argued that the timetable provisions of the Lusaka Agreement do not purport to legally consent to Uganda’s presence on Congolese territory. Furthermore, the Court should have admitted Uganda’s third counter-claim and sustained it on the merits. It should have stated that the rules on countermeasures apply to peace agreements, and consequently, that legal responsibility can be established for the breach of the Lusaka Agreement because countermeasures have the capacity to guide and channel state conduct in precarious situations of deep mistrust in the aftermath of a conflict where little incidents can easily spark spiralling back into war. The current state of the law fails to give any relevant legal guidance to the parties in the event of a violation of the peace agreement. In contrast, Bell’s *lex pacificatoria* approach provides a promising legal framework for peace agreements but deprives this legal regime of most of its beneficial effects by assigning peace agreements to a distinct, self-contained category of transnational law. In effect, *lex pacificatoria* resembles in many ways the diminished legal status of the ICJ’s qualification of peace agreements as *modus operandi*. I argued, in contrast, that peace agreements need to be integrated into the existing set of rules, practices and institutions of the international legal system to the extent possible. Only in the case that hard international law categories do not reasonably accommodate the particular features of peace agreements is it feasible to resort to soft law categories like Bell’s *lex pacificatoria*.

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<sup>199</sup> The efforts of the official facilitator Masire were systematically obstructed by the Kabila government. *See* ICG, Report on Congo War, at 80. The demand of a Francophone co-facilitator, “made by Laurent Kabila after he had already agreed to the former Botswana president’s appointment,” served as a means “to bedevil the English-speaking Masire’s office” and “to delay or undermine the equal status format envisaged in the Lusaka Agreement.” *See* ICG, Report on Regime Change, at 23. In addition, the Government arbitrarily claimed a change of design of the Inter-Congolese Dialogue: It was now supposed to “be conducted through a 300-member Constituent Assembly unilaterally appointed by Kabila.” Moreover, “in contradiction with the Lusaka agreement, Kabila has on numerous occasions declared that the national dialogue would never be held under occupation. His representatives have argued for a separation of the military and political aspects of Lusaka – requiring the withdrawal of foreign troops before a national dialogue can take place” – a claim that was unacceptable to Uganda. *See* ICG, Report on Congo War, at 80-81. In addition to the breach of the provisions of the Lusaka Agreement on the national dialogue, Kabila was arguably responsible as well for creating obstacles to the establishment of the MONUC mission in the DRC. “UN officials say that, in 95 per cent of the cases, the obstructions to MONUC activities have come from Kabila’s Government. The UN Secretary General’s fourth report on the UN mission in the DRC accuses Kabila of persistent harassment and intransigence in its attitude to MONUC including: refusal to authorize MONUC’s flights, media hate campaigns, state-organised street protests, an extortionate currency exchange rate, plus taxes and fuel charges that add millions to operational costs.” *Id.* at 76.

<sup>200</sup> *See* Lemarchand, *supra* note 72, at 5.

<sup>201</sup> *Id.* at 40.

<sup>202</sup> *See* ICG, Report on Congo War, at 83.

<sup>203</sup> *See* ICG, Report on Regime Change, at ii; Lemarchand, *supra* note 72, at 53.

## VI. Conclusion

I have argued that the qualification of the Lusaka Agreement as a *modus operandi* in the *Armed Activities* case downgrades the legal status of peace agreements. I have outlined what I believe may have been the Court's reasons for this downgrading. On the one hand, the ICJ eliminated the capacity of peace agreements to exclude the international responsibility of states for wrongful acts. On the other hand, the Court tried to accommodate the distinct features of peace agreements and avoid addressing complex issues of international law raised by modern peace agreements. The problem with this approach is that it undermines the legal status of peace agreements. In situations of prisoner's game dilemmas and security dynamics, in which the balance between the temptation to make unilateral gains on the battlefield and the cost of non-compliance is unstable, and where peace is precarious and war likely to resume, a degeneration of the legal nature and effects of peace agreements in the perception of the relevant actors might turn the scale towards war and against peace.

Bell has presented an approach that places peace agreements within a new category of *lex pacificatoria* that explicitly aims at preserving the legal character of peace agreements. I reject this approach because it too amounts to a downgrading of the legal effect of peace agreement. In effect, Bell would come to the same conclusions that the Court reached in *Armed Activities*. Peace agreements would continue to lack relevant legal effect in the realm of international law.

The compliance-pull of the law, however, is not merely realized through the label of the law, but rather depends on the availability of effective adjudication and the integration with other norms of international law. In this regard, the holding of the ICJ in *Armed Activities* is of particular importance. After all, the Court has been vested with the task to strengthen the authority of the law in the international legal system. Its decisions affect the perception of the relevant actors of the international legal system of what the law is, especially since *Armed Activities* marks the first time that the Court has dealt with peace or ceasefire agreements.

The judgment of the Court in *Armed Activities* sends the wrong message to the signatories of future peace agreements who consciously employ legally binding agreements as a pledge for compliance. My concern is that the limited legal role that the ICJ attributes to the Lusaka Agreement might in the long-term have a chilling effect on the parties to a peace agreement because "[t]he lingering ambiguity over the binding status of an agreement can undo the parties' intention to be bound, by offering those who would later renege an opportunity to dismiss the agreement as not binding."<sup>204</sup> In contrast, the legal regime that I outlined that is based on the conceptualization of peace agreements as legally binding international agreements, and the application of the rules on countermeasures to peace agreements, is likely to strengthen the guiding role of the law in the aftermath of a conflict. It increases the capacity of peace agreements to make peace last.

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<sup>204</sup> Bell, *supra* note 10, at 386.