PEACE AGREEMENTS: THEIR NATURE AND LEGAL STATUS

By Christine Bell*

The last fifteen years have seen a proliferation of peace agreements. Some 50 percent of civil wars have terminated in peace agreements since 1990, more than in the previous two centuries combined, when only one in five resulted in negotiated settlement.1 Numerically, these settlements amount to over three hundred peace agreements in some forty jurisdictions.2 International standards have even begun to regulate peace agreements. United Nations guidelines, guidelines and recommendations of the secretary-general, and Security Council resolutions have all normatively addressed peace agreements: both the processes by which they are negotiated and their substance, particularly with relation to accountability for past human rights abuses.3

The rise of the peace agreement has four common threads. The end of the Cold War saw an increase both in violent conflict occurring mainly within state borders (although often with transnational dimensions), and in the international attention devoted to such conflict.4 Second, a common approach to conflict resolution emerged that involved direct negotiations between governments and their armed opponents, who were treated for these purposes as equals.5 This approach contrasted with earlier methods of noninterference or engaging primarily

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5 Christopher Clapham, Rwanda: The Perils of Peacemaking, 35 J. PEACE RES. 193, 194 (1998) (arguing that a new notion of “standing” emerged after the Cold War, which required that all parties to the conflict be recognized as valid participants in any peacemaking process).
with states, often through regional frameworks. Third, this method resulted in a common approach to settlement design that linked cease-fires to agreement on new political and legal arrangements for holding and exercising power. Fourth, hard-gained settlement terms were formally documented in written, signed, and publicly available agreements, involving both domestic and international participation.

While the events of September 11, 2001, appear to have accelerated a renewed focus on interstate conflict, surprisingly perhaps, the widespread use of peace agreements has quietly continued and even found new contexts. Peace agreements have become relevant to attempts to reconstruct societies in the wake of interstate conflict, as evidenced by the situations in Kosovo, Afghanistan, and Iraq. Here, the interstate use of force has led to international involvement in internal statebuilding. This project has required the forging of accords between conflicted groups through a process of constitution making as negotiated agreement.

Despite the prevalence of documents that could be described as peace agreements, and the emergence of legal standards addressing them as a category, the term “peace agreement” remains largely undefined and unexplored. The label is often attached to documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures. A decade and a half of post–Cold War practice has given rise to a growing scholarship on peace agreements, particularly in the social science and conflict resolution fields. However, this literature has paid little attention to the role of the peace agreement as a binding document. Social scientists and conflict resolution analysts have examined what makes peace agreements succeed or fail. They have tried to isolate the different elements of settlements, so as to test empirically and through case studies the extent to which they reduce conflict.

This research, in its design and results, treats peace agreements as a group but tends to accord a limited role to the related questions of how an agreement is worded and whether or not it is a legal document. It focuses on the prime factors affecting compliance as the dynamics of third-party interventions; the structural characteristics of conflict processes, such as the role of “ripeness” and economics; changing regional and/or systemic power relationships and balances; and the range of issues covered by the agreement (with some attention to settlement design). Legal literature, in contrast, has produced detailed

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7 See peace agreement Web sites cited supra note 2.

8 BELL, supra note 2, at 6.


12 See, e.g., James D. Fearon & David D. Laitin, Ethnicity, Insurgency, and Civil War, 97 AM. POL. SCI. REV. 75 (2003).

appraisals of the terms, structure, and legal nature of specific agreements\textsuperscript{14} but little sustained analysis of peace agreements per se.\textsuperscript{15}

Each position is worth challenging. As regards legal literature, the scale of the phenomenon of peace agreements; the emerging body of standards dealing with them as a group; and a range of common practices relating to their negotiation, design, content, and implementation—all point to a set of documents with common legal features. As regards social science literature, the sideling of the legal attributes of peace agreements with respect to compliance or implementation flies in the face of even the most nuanced accounts of why law might matter. Further insight into compliance is useful, given that research suggests that nearly half of all peace agreements break down within five years, and more within a ten-year period, while many of the remainder enter a “no war, no peace” limbo whose evaluation is difficult.\textsuperscript{16}

This article explores the role of peace agreements in peace processes from a legal perspective. In particular, it examines when and how peace agreements emerge in peace processes (part I), and the extent to which they take recognizable legal forms or are “legalized” (part II). This discussion is used to explore the relationship between legalization of peace agreements and compliance with them.\textsuperscript{17} The article argues (parts III–V) that peace agreements are clearly legalized documents; that they have some characteristic features that persist across examples; and that these amount to a common legal practice—\textit{lex pacificatoria}, or law of the peacemakers (part VI).\textsuperscript{18} Recognizing peace agreement legalization as \textit{lex pacificatoria} is argued to be useful in further understanding the relationship of law to compliance in this context. It facilitates informed exchange between different peace processes as regards how best to promote compliance; engagement with social science debates on the factors affecting an agreement’s success or failure; and understanding and challenging of the force of the \textit{lex}.

I. Patterns of Peace Agreements

As peace processes evolve, a wide variety of documents that can be termed “peace agreement” are produced. These can usefully be classified into three main types, which tend to emerge at

\begin{itemize}
\item This analysis, slightly adapted, is taken from Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, \textit{The Concept of Legalization}, 54 INT’L ORG. 401 (2000); see also infra text at notes 73–77.
\item The term \textit{lex pacificatoria}, however, is the author’s own. Cicero used the term “pacificatoria legatione,” or “delegation of peacekeepers” (translation by author), in \textit{CICERO PHILIPPICS}, bk. XII, §1, ¶3 (n.d.), \textit{reprinted in CICERO PHILIPPICS} 508 (Walter C. A. Kerr trans., William Heinemann Ltd. 1926).
\end{itemize}
different stages of a conflict: prenegotiation agreements, framework/substantive agreements, and implementation/renegotiation agreements.\textsuperscript{19}

\textit{Prenegotiation Agreements}

The prenegotiation stage of a peace process, often termed “talks about talks,” typically revolves around how to get everyone to the negotiating table with an agreed-upon agenda. For parties to a long-term conflict, any move to the negotiating table is a trial-and-error process linked to whether they perceive themselves as getting more at the table than on the battlefield. For face-to-face or proximity negotiations to take place at all, parties need assurances that the talks will not be used by the other side to gain military and/or political advantages.\textsuperscript{20} The prenegotiation stage tends to focus on who is going to negotiate and with what status, raising issues such as the return of negotiators from exile or their release from prison; safeguards as to future physical integrity and freedom from imprisonment; and limits on how the war may be waged while negotiations take place.\textsuperscript{21} Often agreements emerging at this stage are incremental with the aim of building to a formal cease-fire that will enable multiparty talks. Typically, they do not include all the parties to the conflict but take the form of bilateral agreements between some of the parties and remain secret until a later date. Regional initiatives may also form a “pre” prenegotiation attempt to set or bolster a context for efforts at negotiations. The Harare Declaration,\textsuperscript{22} promulgated by the Organization of African Unity in 1989, set out conditions for multiparty talks in South Africa, which began to influence the parameters for negotiations, and formed the basis of Nelson Mandela’s secret talks with President F. W. de Klerk.\textsuperscript{23} In Afghanistan in 1999, the “six plus two” group (four bordering states, the Russian Federation, and the United States) aimed at building a context for talks through their Tashkent Declaration.\textsuperscript{24} The prenegotiation stage, if successful, will culminate in some form of cease-fire and direct talks designed to resolve the substantive issues in the conflict.

The agreements made at this stage, if published at all, have much more the feel of context-setting declarations or political pacts than binding legal agreements. They tend to be recorded as “declarations” or “records” of agreement or mutual understandings, rather than as agreements using the language of obligation.\textsuperscript{25} These titles reflect the role of joint documents at this

\textsuperscript{19} BELL, supra note 2, at 20–29; cf. Wallensteen & Sollenberg, supra note 1 (using different classification with some similarities).

\textsuperscript{20} C. R. MITCHELL, THE STRUCTURE OF INTERNATIONAL CONFLICT 206–16 (1981); ZARTMAN, supra note 11.

\textsuperscript{21} MITCHELL, supra note 20.


\textsuperscript{23} NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 663 (Abacus ed. 1995).


\textsuperscript{25} See, for example, the early agreements in South Africa between the African National Congress (ANC) and the South African National Party (SAG), and/or Inkatha (IFP), dealing incrementally with common commitments to end violence (Groote Schuur Minute, May 4, 1990, ANC-SAG); ending of armed actions and review of states of emergency (Pretoria Minute, Aug. 6, 1990, ANC-SAG); and implementing ofantiviolence measures and stabilizing peace (Royal Hotel Minute, Jan. 29, 1991, ANC-IFP; DF Malan Accord, Feb. 12, 1991, ANC-SAG). These documents are available online at <http://www.anc.org.za/ancdocs/history/minutes.html>, apart from the Royal Hotel Minute, which is reprinted in SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY 1991/92, app. E, at 519 (1992).
stage of the process: what is important to the parties is the fact of having met and having established a joint commitment to future negotiations. Pre negotiation documents are often presented as if each party were subscribing to its own understandings unilaterally, without reference to the other side’s understandings and actions. The emerging documents are targeted as much at parties outside the negotiations, as at those within: they are intended to create a context in which those outside might choose to participate. A lack of legal formality enables parties to avoid the appearance of commitment to compromise, which could undermine the move toward talks and give ammunition to dissenters or outbidders (those who challenge the power base of political rivals by taking more radical stances against suggested compromises). Issues such as the scope of the talks, the range of participants, the status of the participants—all crucial issues at the pre negotiation stage—are left open by the characterization of the documents as declarations or memorandums. The documents are self-executing in the sense that they either move discussions forward toward cease-fires and negotiations, or do not. The Downing Street Declaration, for example, was issued at an early stage of the Northern Ireland peace process by the British and Irish governments in response to secret negotiations. Clearly avoiding the appearance of law, the governments “recognise[d]” positions, and “confirm[ed],” “reaf firm[ed]” and “reiterate[d]” what were asserted to be past commitments. Yet the declaration evidenced a new intergovernmental understanding. It sketched an embryonic framework for agreement and signaled that a cease-fire would lead to all-party talks including the previously excluded Sinn Féin. The declaratory language made this achievement possible without the appearance of direct negotiations with, or concessions to, the Provisional Irish Republican Army (IRA) or its elected political counterparts in Sinn Féin, even though both had taken place.

Substantive/Framework Agreements

Substantive or framework agreements are aimed at sustaining cease-fires; they provide a framework for governance designed to address the root causes of the conflict and thus to halt the violence more permanently. The agreements reached at this stage most clearly deserve the label “peace agreement.” They tend to be more inclusive of the main groups involved in waging the war by military means. They are usually public and formally recorded in written, signed form and include international participants. Those who stay outside the process are often those who choose to do so, so as to bid the local signatories. The Burundi Peace Agreement, the Belfast Agreement, Sierra Leone’s Lomé Agreement, and the South African Interim Constitution are all examples.

Substantive/framework agreements establish or confirm mechanisms for demilitarization and demobilization intended to end military violence, by linking them to new constitutional structures addressing governance, elections, and legal and human rights institutions. These


27 Joint Declaration on Peace, supra note 26.


agreements vary in the degree of detail they contain—either full detail or principles with accompanying processes of reform may be provided. They also vary as to whether conflicts over sovereignty, statehood, and identity are completely resolved (as they largely were in South Africa); partially resolved and partially postponed (Northern Ireland); or almost completely postponed (Kosovo and Israel/Palestine). Some processes work toward one framework agreement with lengthy and detailed provisions aimed at dealing holistically with the issues, such as the Belfast Agreement and the South African Interim Constitution.\(^{30}\) Other processes, such as those of Guatemala, El Salvador, and Burundi, build up consensus issue by issue in a set of agreements that are ultimately brought together or ratified by a comprehensive final agreement.\(^{31}\)

Once framework agreements are reached in formal talks, their implementation requires parties to make fundamental compromises with respect to their preferred outcome and their use of force. They will do so only if they feel that the commitments they obtained from the other side are going to be implemented. This need for reciprocity is reflected in the attention the parties pay to the detail of the wording of agreements and the frequent use of lawyers during negotiations. Peace agreements 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 suggest that the parties mutually view them as legal documents. However, they do not easily fit within traditional legal categories such as treaty, international agreement, or constitution. The main reason is that the conflicts themselves are neither clearly interstate nor clearly internal.\(^{32}\) Peace agreements deal both with the external legitimacy of the state and the transnational dimensions of the conflict, and with the state’s internal constitutional order. The presence of nonstate signatories tends to take them outside international legal definitions of “treaty” or “international agreement,” while the presence of multiple state parties tends to make them difficult to analyze as domestic legal documents. This feature is discussed further in part II below.

**Implementation/Renegotiation Agreements**

Implementation agreements begin to advance and develop aspects of the framework, fleshing out their detail. The Israeli-Palestinian Interim Agreement (Oslo II) filled out and partially implemented the framework in Oslo I; the South African final Constitution developed and implemented the Interim Constitution.\(^{33}\) By their nature, implementation agreements involve new negotiations and in practice often undergo a measure of renegotiation as parties test whether they can claw back concessions made at an earlier stage. Implementation agreements typically include all the parties to the framework agreement. Sometimes implementation agreements are not documented, and sometimes they take on recognizable legal forms. Indeed, to some extent, the notion of ongoing agreements being “peace agreements” may begin to disappear at this point as the conflict resolution attempts of the peace process merge imperceptibly into the ongoing processes of public law, signifying a measure of success. Thus, treaties appear


as a device to address and normalize regional relationships affected by the conflict. At the domestic level, peace agreements are often taken forward in the form of constitution making or legislation, a step removed from the main peace agreement, as is dealt with further in part III below. Conversely, implementation may be uneven or nonexistent; in such cases, implementation agreements can in effect involve renegotiation and new agreements whose relationship to the former peace agreement is often unclear. The quite different examples of Sierra Leone, Liberia, and the later Israeli-Palestinian agreements all illustrate the potential ambiguity in characterizing an agreement as an implementing, renegotiated, or entirely new instrument.

In summary, peace processes produce documents at the prenegotiation and implementation stage whose characterization as peace agreements could be contested. However, they indicate that many substantive/framework agreements constitute peace agreements par excellence. These agreements form the main focus of the remainder of the discussion.

II. PEACE AGREEMENT LEGALIZATION

The Difficulties of Legal Categorization

Despite appearing to be legal agreements, substantive peace agreements are difficult to place within existing international legal categories as positively understood. Such classification is hampered by the limitations of the categories, especially their unsuitability with regard to accommodating the hybrid subject matter of peace agreements and their mix of state and nonstate signatories. According to Article 2 of the Vienna Convention on the Law of Treaties of 1969, much of which is accepted as restating customary international law, a treaty is “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” The definition suffers from ambiguities. In particular, although commentators and judicial bodies alike regard intent as crucial to treaty formation, the notion is at best implicit in the Convention. Intent to be bound can be ascertained from the text of the agreement and surrounding evidence about the intentions of the parties, such as the subject matter of the obligations and the choice of language. This evidence can raise difficulties for peace agreements, which deal with a state’s internal institutions and structures, albeit so as to affect the nature and legitimacy (and sometimes territorial integrity) of the state on the international plane.


37 Arguably, it places emphasis on a positivist notion of the treaty as a “formal instrument” defined by formalist criteria, rather than as a substantive “source of obligation,” although these two concepts are both present to some degree. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945–1986, at 14–15 (1988).

38 See, e.g., SHAW, supra note 6, at 812.

39 See Vienna Convention, supra note 36, Art. 31; cf. MARTITI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 300 (1989) (on the difficulty of constructing intention).
Nevertheless, if the Vienna Convention’s definition is used as a starting point, some peace agreements appear to be treaties. Peace agreements in “pure” interstate conflicts clearly constitute treaties, although in the last fifteen years, these have been a minority.40 Treaties can also be used to address conflict with a mainly internal dimension. Parties to a conflict that were not states at its onset can have attained that status by the time a peace agreement is reached, as the General Framework Agreement for Peace in Bosnia and Herzegovina, or Dayton Peace Agreement (DPA), illustrates.41 However, other agreements signed directly with nonstate parties would seem to fall outside the strict definition of a treaty under the Vienna Convention, posing the question as to what legal status, if any, such agreements have. The definition was accepted as narrow at the time the Convention was concluded, in particular because it excluded oral agreements and, critically for this discussion, agreements signed by “other subjects of international law.”42 However, these omissions were remedied by Article 3 of the Vienna Convention (and a second convention in 1986 providing for treaties between states and international organizations), which together provided for the legal status of agreements that prior to 1969 were regarded as treaties.43 Article 3 states:

The fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;
(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) the application of the Convention to the relations of states as between themselves under international agreements to which other subjects of international law are also parties.

This provision is significant for the current discussion because it indicates that agreements between state and nonstate parties that are subjects of international law, or indeed between such nonstate parties alone, can be legally binding international agreements. Thus, customary law rules as regards formation and breach, similar to those codified in the 1969 Vienna Convention, apply.44 However, the Vienna Convention’s notion of “subjects of international law” leaves a gray area concerning who can claim such status that has assumed far greater importance than when the Convention was drafted in 1969, and is particularly relevant to practice relating to peace agreements.45 Three main groups who sign peace agreements have some basis for

40 For a review of interstate wars since 1990, see MONTY G. MARSHALL & TAD ROBERT GURR, PEACE AND CONFLICT 2005: A GLOBAL SURVEY OF ARMED Conflicts, Self-Determination Movements, and Democracy 11–12 (2005), available at <http://www.cidcm.umd.edu/inscr/PC05print.pdf> (references concerning five interstate conflicts, the majority of which have some relationship to intrastate conflict and follow similar peace agreement patterns, to some extent).
42 See, e.g., ROSENNE, supra note 37, at 11.
43 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1968, 25 ILM 543 (1986) (has a similarly worded Article 3); see also ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES (1961) (for law of treaties prior to 1969); ROSENNE, supra note 37, at 17–18 (noting International Law Commission drafts that included “any international agreement in written form . . . concluded between two or more States or other subjects of international law” as treaties).
45 ROSENNE, supra note 37, at 10–33 (noting the growth of the gray area in 1989; id. at 32).
claiming the status of subjects of international law. While an extended discussion of their international legal status is beyond the scope of this article, a brief summary can illustrate their claims.

Most obviously, armed opposition groups sign peace agreements as main protagonists of internal conflicts. In many peace agreements signed by armed opposition groups, grounds can be found to assert that the parties intended the agreement to be binding on the international legal plane, and that the nonstate signatories were “subjects of international law”—based on the recognition of such groups under international law, in particular through humanitarian law. Many agreements potentially fulfill these criteria and could serve as examples; all use formal legal language and have international signatories. These include agreements in Angola (between the government and UNITA), Burundi (between the government, armed opposition groups, and political parties), the Democratic Republic of the Congo (between the government and armed opposition groups), Guatemala (between the government and Unidad Revolucionaria Nacional Guatemalteca (URNG)), El Salvador (between the government and the Frente Farabundo Martí para la Liberación Nacional (FMLN)), Israel/Palestine (between the Israeli government and the Palestine Liberation Organization (PLO)), Mozambique (between the government and RENAMO), Rwanda (between the government and the Rwandese Patriotic Front), and Sierra Leone (between the government and the Revolutionary United Front of Sierra Leone (RUF)).

Second, indigenous peoples also sign peace agreements and can arguably claim to be “subjects of international law.” They have obtained a legal status that was not envisaged in 1969 but has historical precedence in the notion of indigenous peoples as “nations” in a premoder international legal system. This status is most obviously supported by the increasing recognition in international law that indigenous peoples are “peoples” entitled to forms of self-determination short of independent statehood. Throughout the last decade, various agreements have been signed with or on behalf of indigenous groups in situations involving armed violence, in what was commonly accepted as a peace process. For example, agreements were signed between the Chiapas people (through the Zapatista National Liberation Army (EZLN)) and

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48 S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 189 (2004).

the Mexican government; between Bangladesh and the indigenous peoples of the Chittagong Hills Tract; between the Indian government and tribal groups from northeast India; between France and the Kanaks of New Caledonia; and between the Guatemalan government and Unidad revolucionaria nacional guatemalteca concerning indigenous groups (here as part of a series of agreements within a broader peace process). 50 These agreements provided for cease-fires and broad frameworks for governance designed to address key issues in the conflict. Similar agreements have been signed in situations that—while less clearly involving violent conflict—did involve ongoing land disputes connected with self-determination, and what could be called the "structural violence" of marginalization. 51 Such agreements were concluded between South Africa and the ḦKhomani San, and, in a rapidly growing number, between indigenous peoples and the Canadian government. 52 Both types of indigenous peoples’ agreements evidence a legal nature, in terms of the language used, the type of commitments made by the parties, and the provision for detailed reciprocal bargains. The agreements also deal with matters integral to the notion of statehood, such as sovereignty, territory, government, and the language of “self-determination.” In some cases, they provide for legislation to give commitments domestic legal status.

Finally, political and military leaders of minority groups with secessionist claims in autonomous areas often sign peace agreements with the states in which they form a minority. These agreements include those between Georgia and Abkhazia, Moldova and Transdniestria, parties on the island of Bougainville and Papua New Guinea, and Russia and Chechnya. 53 The agreements use the language of obligation and evidence intention to be bound. Treaties can, of 


51 J ohan GALTUNG, PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION 197 (1996) (frames the term "structural violence" to refer to any constraint on human potential due to economic and political structures).


course, be signed by substate entities such as the constituent parts of a federation, depending on the powers conferred on them domestically.\textsuperscript{54} However, in these cases the status of the substate entity and its relationship to the state are disputed and the entity is typically operating extraconstitutionally. Nonstate groups could again attempt to argue that they are “subjects of international law” because they represent minority groups. While legal documents dealing with minorities have proliferated and arguably confer on them a right as groups, their claim to international subjectivity is generally considered to be weaker than that of indigenous peoples.\textsuperscript{55} Furthermore, there is little guiding authority on the mechanisms by which political or military leaders (mostly men) can claim to be the legitimate representatives of minority groups, although elections would provide some basis for the claim. Other claims to legal subjectivity might lie in the concept of the “state-in-the-making” whose treaty-making capacity must be recognized for statehood to be negotiated, or recognition that the minority’s representatives have status as a national liberation movement or erstwhile armed group.\textsuperscript{56} To some extent, the problem of legal status reflects international law’s difficulties in dealing with transitional situations. The categorization of nonstate actors as minorities rather than armed opposition groups, national liberation movements, or even states is itself a product of transition. In the course of the peace process, both the legal regime and the humanitarian law status of nonstate groups change, as the group moves from armed opposition to inclusion in government and the level of conflict subsides.\textsuperscript{57} A lack of governmental status (regional or otherwise) often ensues because the peace process has subsequently stalled, leaving the status of both the substate region and those who govern it in legal limbo.\textsuperscript{58}

The difficulty is that deciding whether some or all of the above agreements constitute binding international agreements is a tautological exercise.\textsuperscript{59} Many commentators equate the notion of international legal subjectivity with international legal personality,\textsuperscript{60} and from this view many of the above groups appear to fall short, having some of the attributes of legal personality, but not all.\textsuperscript{61} Other writers, most notably Anna Meijiknecht, suggest that international legal subjectivity is a subcomponent of international legal personality, meaning that something less than full personality

\textsuperscript{55} See Meijiknecht, supra note 49, at 225 (noting that any rational basis for this difference is difficult to find, and locating it in the acknowledgment of historical wrongs done to indigenous peoples); see also Antonio Casse, International Law 63 (2d ed. 2005); Hector Gros Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions ¶56, UN Doc. E/CN.4/Sub.2/405/Rev.1, UN Sales No. E.79.XIV.5 (1980).
\textsuperscript{56} Cf. Peter Malanczuk, Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law, 7 EUR. J. INT’L L. 485 (1996) (effectively arguing that these concepts give the Israeli-PLO agreements international legal status).
\textsuperscript{58} Cf. Wallenstein & Sollenberg, supra note 1, at 343 (classifying some of the peace agreements in these situations as “partial agreements”).
\textsuperscript{59} Meijiknecht, supra note 49, at 24–25.
might indicate treaty-making capacity.\textsuperscript{62} The tautology arises because a claim to international subjectivity, on either view, involves examining what rights, powers, duties, and immunities the actors in question are accorded on the international plane, including whether they are permitted to sign treaties or international agreements.\textsuperscript{63} Moreover, the main evidence of such permission may be the existence of an internationalized peace agreement itself.\textsuperscript{64} Recognizing peace agreements as international agreements therefore seems to require the nonstate group and the agreement to “bootstrap” each other into the international legal realm. Rosalyn Higgins has suggested that the notion of international participants in an international legal system conceived of as a “particular decision-making process” may be more conducive to understanding the current status of nonstate actors than traditional subject-object dichotomies.\textsuperscript{65} This approach can aid in determining whether current peace agreement practice is increasingly posing a fundamental challenge to the existing international legal order. It does not, however, assist in deciding definitively whether or not a peace agreement is a binding international agreement.

\textit{Legalization and Compliance}

Does it matter whether or not peace agreements are binding legal documents? For domestic lawyers, the connection between the legal categorization of a document and its enforcement seems to be self-evident.\textsuperscript{66} However, because the consequences of formal international legal status are less clear, international lawyers more readily question whether and how the binding legal form of an obligation affects compliance with it. Unlike political pacts or merely declaratory documents, treaties and international agreements are legally binding instruments with established enforcement mechanisms. However, their enforcement is notoriously less concrete than in domestic legal systems owing to the relative “anarchy” of the international legal order, in particular the absence of a central enforcement mechanism.\textsuperscript{67} The Vienna Convention on the Law of Treaties provides rules for dealing with termination and suspension of the operation of treaties, which in effect encapsulate self-help in the form of either partially or completely walking away as a state’s main remedy for another state party’s breach of the treaty.\textsuperscript{68} Therefore, enforcement in the domestic legal sense as backed up by courts does not exist. Implementation depends on the voluntary, ongoing assent of the parties.\textsuperscript{69} Commentators acknowledge that formal legal status still affects compliance, as discussed in part III below.\textsuperscript{70} However, they also

\textsuperscript{62} MEIJKNECHT, supra note 49, at 34.

\textsuperscript{63} See JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 43–48 (2002); cf. Malanczuk, \textit{Multinational Enterprises}, supra note 61, at 55 (arguing that some subjects of international law “have legal personality only with respect to certain international rights and obligations”).


\textsuperscript{65} ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (1994).


\textsuperscript{67} See, e.g., CASSESE, supra note 55, at 5.

\textsuperscript{68} Vienna Convention, supra note 36, pt. V.

\textsuperscript{69} Charles Lipson, \textit{Why Are Some International Agreements Informal?} 45 INT’L ORG. 495 (1991) (describing the term “binding agreement” as “misleading hyperbole”).

acknowledge that soft law or informal agreements generate some of the same pressures for compliance as the hard law or formal ones, and can be equally effective.\textsuperscript{71} Moreover, even hard law commitments do not operate in a “monolithic or unidimensional” way.\textsuperscript{72}

These considerations led Abbott, Keohane, Moravcsik, Slaughter, and Snidal to propose a broader concept of “legalization” as more useful to understanding an agreement’s legal status than deciding whether it constitutes hard or soft law.\textsuperscript{73} They set out a three-way matrix that maps the legalization of an agreement or norm according to (1) how “legal” the nature of the obligation is, (2) the precision with which it is drafted, and (3) the delegation to a third party of the power to interpret and enforce the agreement. Thus, an obligation expressed as a binding rule in precise language, to be enforced by an international court or organization, might stand “near the ideal type of full legalization, as in highly developed domestic legal systems.”\textsuperscript{74} A loose obligation, such as an expressly nonlegal norm, stated as a vague principle, to be enforced only by means of diplomacy, would stand at the other end of the spectrum. However, in between it is more difficult to separate and order the three dimensions:

In some settings a strong legal obligation \ldots might be more legalized than a weaker obligation \ldots, even if the latter were more precise and entailed stronger delegation. Furthermore, the relative significance of delegation vis-à-vis other dimensions becomes less clear at lower levels, since truly “high” delegation, including judicial or quasi-judicial authority, almost never exists together with low levels of legal obligation.\textsuperscript{75}

Therefore, the degree of legalization is captured by all three factors rather than just one.\textsuperscript{76} States attempt to manage the future risks of signing an agreement by trying to manipulate all three factors so as to balance the need to lock in the other party’s commitment with the importance of ensuring exit strategies for themselves.

This analysis is useful in understanding how and why the legal status of a peace agreement might matter. As Abbott and his colleagues suggest, it opens up common ground between the explorations of political scientists and lawyers as regards implementation.\textsuperscript{77} Furthermore, although designed for the international sphere, their analysis also makes it possible to consider the relationship of a peace agreement’s status as a “constitution” to what appear to be “un-constitution-like” types of obligation and third-party enforcement. In the following sections, the notion of legalization proposed by Abbott and his colleagues is adapted and applied to peace agreement practice addressing legal form (part III), the nature of the obligation (part IV), and delegation of interpretation and enforcement to third parties (part V). This examination begins to reveal the distinctive nature of peace agreement legalization, building the case for a \textit{lex pacificatoria}.

\textsuperscript{71} See sources cited supra note 70.

\textsuperscript{72} W. Michael Reisman, \textit{The Concept and Functions of Soft Law in International Politics}, in \textit{ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS} 135, 136 (Emmanuel G. Bello & Bola A. Ajibola eds., 1992).


\textsuperscript{74} Abbott et al., supra note 18, at 405.

\textsuperscript{75} \textit{Id.} at 406.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.} at 402.
III. LEGAL FORM

An agreement's legal form remains relevant to compliance because formalized agreements raise the reputation costs of noncompliance.\(^\text{78}\) Deciding when to use formal or informal agreements is also linked to a range of strategic choices for states concerning reputation, speed, capacity for revision, and domestic legal requirements.\(^\text{79}\) In the context of peace agreements, however, the difficulties of legal classification mean that the choice between binding and non-binding agreement is not straightforward. Under international law as currently constituted, state and nonstate actors that wish to sign legally binding agreements can make the terms of their agreements sound legal, can refer to international law as a basis for their commitments, and can delegate enforcement tasks to a range of international actors, as discussed in parts IV and V below. There may be good arguments that these factors take the agreements into the realm of international law, and even make them international agreements,\(^\text{80}\) but those who wish to frame agreements clearly as treaties can best do so by framing them as between state parties only. The choice, therefore, is between a treaty whose formal parties differ from those agreeing to the obligations, and agreements whose status as binding international agreements remains in doubt. This calls for a different understanding of how legal form connects to compliance in the peace agreement context, in terms of both the reputation costs of breach and the strategic choices available with regard to how agreements are framed.

State and nonstate actors that sign agreements directly with each other can attempt to use other dimensions of legalization (such as precise language and third-party enforcement) to compensate for the lack of clear legal form, as discussed in parts IV and V below. Yet something remains lost. The 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.\(^\text{81}\) Looking first to the state’s commitments, to the extent that the legal status of such an agreement is unclear, this deficiency undermines the notion that the state has attached its reputation to the agreement and has a self-interest in the integrity of the international legal system. Furthermore, the constraints on self-serving “auto-interpretation” brought by accepted modes of legal discourse to discussions, for example, of breach, force majeure, and impossibility are negated. In their place are left political and moral debates as regards breach, fault, and consequence, which have little claim to independence from the underlying disputes at the heart of the conflict, weakening their impact on conflict resolution.\(^\text{82}\) There is also some reason to believe that parties to agreements take their obligations more seriously when they believe them to be legal.\(^\text{83}\)

A binding legal agreement may be particularly meaningful in ensuring the commitment of nonstate actors. As the Permanent Court of International Justice noted, “[T]he right of entering into international engagements is an attribute of State sovereignty.”\(^\text{84}\) In the context of

\(^{78}\) See generally sources cited supra note 70.

\(^{79}\) See generally sources cited supra note 70.

\(^{80}\) See Cassese, supra note 64; cf Malanczuk, Multinational Enterprises, supra note 61, at 58—62 (discussing legal status of multinational companies and internationalized contracts). But see supra notes 59—65 and corresponding text.


\(^{82}\) See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 84—98 (2d ed. 1992) (for importance of “objective criteria,” as standards external to the parties in the conflict).

\(^{83}\) See Watson, supra note 14, at vii; see also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 35—37 (1990).

peace agreements, the imprimatur of legal form might influence nonstate actors to comply less because they have a reputation to lose if they fail to do so than because they have a new status and legitimacy to gain, which are tied up with the status of the peace agreement itself. State actors might be expected to resist conceding formal legal status to peace agreements precisely for this reason, especially given the current climate of “war against terrorism.” However, there are also reasons why it might be in states’ interests to concede treaty status. First, clarity over the binding nature of the agreement may add little to the claims of the nonstate group that has not already been conceded by the very fact of an agreement. Formal treaty status cements a cost, rather than creating it. Conversely, preserving the ambiguity over whether the agreement is binding also weakens its currency for states. The compromises of peace agreements are carefully crafted to stop terrible wars. Nonstate armed groups are less likely to abide by agreements that they know from the outset are merely “pieces of paper.” Worse still for states, rejecting the legal status of both the nonstate group and the peace agreement may result in the argument that the state is bound while the nonstate actors are not.

The positive legal status of peace agreements also remains important to compliance because it carries weight in legal forums: courts and tribunals use it as a starting point in determining their own jurisdiction. Here, positivist law categories hold sway, no matter how unfashionable, because they provide a rational basis for clear decision making. This can be illustrated by the Kallon case of the appeals chamber of the Special Court for Sierra Leone, established 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. In this case the defendants challenged the Special Court’s jurisdiction on the basis that it contravened the amnesty provision of the Lomé Peace Agreement, and that it would constitute an abuse of process to allow the prosecution of pre-Lomé crimes. The appeals chamber found itself considering the legal status of the agreement signed by the government and the RUF, so as to determine the validity of the amnesty. With respect to the status of the RUF and the Lomé Agreement, the chamber distinguished between being bound under common Article 3 of the Geneva Conventions (which it accepted as applicable), and the RUF’s treaty-making ability, stating that “[i]nternational law does not seem to have vested [the RUF] with such capacity.”

The tautologies of the decision, which relies on blank statements of law that are far from self-evident, point to the difficulties of the positivist law project in this area, but not its irrelevance. Even on the decision’s own terms, the question arises of whether it would have made any difference if legal provisions according a greater degree of international subjectivity to the

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85 Cf. Ruth Wedgewood, Legal Personality and the Role of Non-governmental Organizations and Non-State Political Entities in the United Nations System, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW 21, 35 (Rainer Hofmann & Nils Geissler eds., 1999) (arguing that it may prolong conflict because international status may strengthen the resistance of nonstate groups to settlement, citing the example of Georgia and Abkhazia); cf. AUST, supra note 54, at 48–54 (discussing the exercise of treaty-making capacity by parts of a state); Oliver Lissitzyn, Territorial Entities Other Than States in the Law of Treaties, 125 RECUEIL DES COURS 5 (1983 III) (semble).

86 Cf. Wedgewood, supra note 85, at 34 (Wedgewood’s (converse) argument relating to the difficulties of lack of legal status for nonstate actors).

87 See Vienna Convention, supra note 36, Art. 3(c); cf. Cassese, supra note 64, at 1139–40 (noting the argument that translating Sierra Leone’s Lomé Agreement into national legislation could mean that its provisions continue to bind the government, even when the underlying agreement was void, thus preventing the government from prosecuting amnestied crimes in domestic courts). There can also be arguments that notions of estoppel, precommitment, and unilateral declaration would obligate the state. See WATSON, supra note 14, at 201–64; Hillgenberg, supra note 73, at 505.

88 Kallon, supra note 81.

89 For the Lomé Agreement, see supra note 29.

90 Kallon, supra note 81, ¶48.

91 Cf. Cassese, supra note 64 (noting the tautologies of the decision and criticizing the reasoning).
nonstate actor had been acknowledged to apply, such as Protocol II (indicating territorial control) or even Protocol I (acknowledging the group in question to be a “national liberation movement” akin to a state). While Protocol I can be argued to be anachronistic, it still has some relevance, most notably in the Israeli-Palestinian conflict since the PLO signed the initial Israeli-Palestinian agreements.

The need to overrule the amnesty of the Lomé Agreement might appear to demonstrate why states should not concede that peace agreements signed with nonstate actors are binding on the international level. However, rejection of Lomé as a binding agreement let the RUF off the hook as regards compliance, while leaving the state subject to arguments that it was still bound to comply by virtue of its interstate commitments and its national legislation. Moreover, rejection of the international legal status of Lomé was not necessary in order to invalidate its amnesty provision. The Kallon result could have been reached by applying notions of treaty breach (the RUF having continued fighting in violation of the cease-fire commitments), or by deeming the amnesty provision invalid to the extent that it covered certain crimes against humanity, serious war crimes, torture, and other gross violations of human rights, or even by finding that the amnesty section applied only to future domestic law proceedings (for which a tenuous basis can be discerned in the wording).

Kallon does not stand alone: a range of international tribunals may be called upon to adjudicate on the compatibility of peace agreements with international law for a variety of reasons. Domestic courts, too, often end up examining the political and legal questions at the heart of the agreement, through constitutional or legislative adjudication that must determine the extent to which the peace agreement is a foundational interpretive document, or indeed a treaty, and where it is a political document to be deferred to as dealing with political questions only. To be sure, in many situations the role of courts and tribunals will be marginal to an agreement’s success or failure: courts and tribunals are likely to be ineffective in sustaining an

92 Protocol I, supra note 46, Art. 2; Protocol II, supra note 46, Art. 1.
94 Cf. Wedgwood, supra note 86, at 36 (arguing that decisions over treaty-making capacity should be made with a view to the implications of so doing).
95 Cf. Kallon, supra note 81, ¶ 62 (where the Special Court drew a distinction between the issue of the state’s obligations under the Agreement, and the validity of the treaty establishing the jurisdiction of the court).
96 But see 2 WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION ¶ 559 (2004) (finding that the amnesty was necessary to making peace).
97 See Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council, UN Doc. S/2000/786, annex, cited in Kallon, supra note 81, ¶ 8–9; see also Cassese, supra note 64, at 1138–39 (arguing that this would have been a better legal approach).
98 See Kallon, supra note 81, ¶ 66–74 (discussion of the limits of amnesty).
100 See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 131, para. 2.4(c) (July 9) (Elaraby, J., sep. op.) (describing the 1993 Oslo Accord as “contractual and . . . legally binding on Israel” when finding the construction of the wall contrary to international law).
agreement in the face of fundamental and violent dissent.\textsuperscript{102} However, marginal relevance is not the same as irrelevance. Courts and tribunals have the capacity to extend and develop the agreement’s meaning where they find it to be part of the legal framework.\textsuperscript{103} More negatively, they have the capacity to terminate the operation of an agreement even in the face of political chances to sustain it.\textsuperscript{104} The positive law status of peace agreements therefore remains important to their implementation. This importance, in turn, begins to explain innovations in legal form, which enable parties to frame obligations so that they fall within recognizable traditional legal categories.

\textit{Contrived Treaty Form}

Drafters of peace agreements sometimes attempt to contrive treaty status for them. They do this by framing an agreement between state and nonstate actors as if it were simply between states (although they typically do so when the states have also been involved to some extent as participants in the conflict). Bosnia’s DPA, the British/Irish treaty at the end of the Belfast Agreement, and Cambodia’s Paris Accords are all framed as agreements between state parties, and yet are also attempts to bind the ethnic/national groups who were waging war within state borders.\textsuperscript{105} This practice has precursors in the patterns of earlier peace processes, as regards Cambodia in the Indochina Conference of 1954;\textsuperscript{106} ethnic conflict in Cyprus in the 1960s;\textsuperscript{107} and the Camp David process in the Middle East in 1978, on which Bosnia’s Dayton process was in part modeled.\textsuperscript{108}

These treaties use state-party commitments to lock in nonstate actors in a two-way dynamic. The state parties in effect guarantee to kindred nonstate actors that the commitments to them in the agreement will be delivered; and to other parties that the commitments of nonstate actors will be honored. To achieve and reinforce this relationship between treaty and nonstate actor, some “\textit{unique} legal features” were written into these agreements with a view to enabling the nonstate actors to file a petition challenging the legality of the Likud government’s settlement policy because the matter was a political question and the subject of intensive peace negotiations).

\textsuperscript{102} See infra text at notes 131–38.
\textsuperscript{103} \textit{See Robinson, supra} note 101 (in effect revising, to prevent the collapse of the devolved legislature, the very clear electoral procedures set out in the Northern Ireland Act, 1998).
\textsuperscript{104} Cf. Ex parte Chairperson of Constitutional Assembly: \textit{In re} Certification of Constitution of S. Afr., 1996 (4) SA 774 (CC), 1996 (10) BCLR 1253 (CC) [hereinafter \textit{In re} Certification of Constitution] (delayed rather than prevented the certification of the final Constitution); \textit{see also Robinson, supra} note 101, ¶¶42–75 (dissenting judgments of Lord Hutton and Lord Hobhouse, respectively, which would have terminated the operation of the devolved legislative Assembly that stood at the center of the Belfast Agreement).
\textsuperscript{105} \textit{See supra} text at note 41.
group to sign them.\textsuperscript{109} The DPA, for example, consists of a central agreement signed by the three republics and witnessed by other states together with the European Union, and a dozen attached agreements (framed as annexes) signed by different permutations of parties and signatories, including the substate entities created by the Agreement.\textsuperscript{110} Both state and entity treaty commitments are difficult to place within a technical legal analysis. The basis for the entity signatures is unclear: as substate regions they came into existence by virtue of the DPA, and therefore could not have had treaty-making capacity as constituent parts of the federation.\textsuperscript{111} Neither was there any overt agreement of agency between the state and the entity.\textsuperscript{112} As for the Belfast Agreement, it is composed of a multiparty agreement and a British-Irish treaty, which parcels out the intergovernmental commitments in treaty form. Under the terms of this treaty, however, both governments make legislative and constitutional commitments requiring the cooperation of actors beyond their control—including “the people of the island of Ireland.”\textsuperscript{113} The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict of 1991 was signed “on behalf of Cambodia” by all the members of Cambodia’s National Supreme Council, and Article 28 provides that “[t]he signature on behalf of Cambodia by the members of the SNC shall commit all Cambodian parties and armed forces to the provisions of this Agreement.”\textsuperscript{114} In each case, treaty status was achieved by having states alone sign the main body of the agreement directly and incorporating commitments of nonstate actors in innovative ways.

Does this strategy then remedy the deficits in legal form of peace agreements signed directly with nonstate parties? The very attempt to contrive treaty status indicates the seriousness of state commitments, raising the costs of noncompliance for the state parties. As noted, it may also be relevant to legal adjudication. Nevertheless, the lack of correlation between the parties to the conflict and the parties to the treaty negates some of the benefits of choosing a clear legal form for the obligations. Treaty status can be achieved only by forgoing the inclusion of the nonstate actor as a direct party to the treaty, even though the nonstate actor’s compliance lies at the heart of the agreement’s implementation. The reputation costs of formal treaty status will only attach directly to state parties, even though they may lead indirectly to political costs for nonstate actors.\textsuperscript{115} If state guarantees on behalf of kindred nonstate groups are undelivered, it will be very difficult to tell whether the reason was insufficient effort or lack of capacity to influence these nonstate actors. As regards state underwriting of commitments to kindred nonstate groups, the state’s self-interest may soon induce it to reconsider.\textsuperscript{116} Moreover, peace-agreement treaties also suffer from two other problems, similar to those

\textsuperscript{109} Paola Gaeta, \textit{The Dayton Agreements and International Law}, 7 EUR. J. INT’L L. 147 (1996); see also AUST, supra note 54, at 52.

\textsuperscript{110} The central annexes were signed by the Republic of Bosnia and Herzegovina and the entities. However, Annex 1–B (Agreement on Regional Stabilization) and Annex 10 (Agreement on Civilian Implementation) were signed by the three republics and the entities. DPA, supra note 41.

\textsuperscript{111} Wedgwood, supra note 85, at 34.

\textsuperscript{112} Gaeta, supra note 109, at 150–52.


\textsuperscript{114} Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, 31 ILM 180 (1992) [hereinafter Cambodia Political Settlement]; see also Ratner, supra note 14, at 9 (interestingly showing that this device was aimed primarily at enabling authority to be granted from a national sovereign to the UN Transitional Authority for Cambodia, without using Chapter VII of the UN Charter).

\textsuperscript{115} See, e.g., FORTNA, supra note 13, at 21. The Cambodian mechanism probably comes closest to including nonstate actors as parties to the treaty but is not available in contexts where the nonstate actors do not cumulatively equate to “the state.”

Richard Baxter highlighted with respect to treaty enforcement generally. They often amount to incomplete agreements, because they provide for further agreements in an attempt to stage and sequence issues and develop a peace process. This quality makes them susceptible to a "stop-start" dynamic in which it is difficult to assess whether failure to negotiate constitutes a treaty breach. In the context of a peace agreement, this difficulty is accentuated because parties typically test whether they can reclaim concessions, or because continuing conflict changes their self-interest and/or their capacity for compromise. Peace agreements further suffer from the problems of political treaties such as "treaties of alliance": namely, that "[a] change in a government’s orientation must . . . be regarded as ‘a fundamental change in circumstances,’" which changes the foundation for the treaty as well. Again, such considerations have heightened relevance when it comes to peace agreements, which involve existential compromises by the state with regard to how it conceives of its own sovereignty, power, monopoly over the use of force, and capacity to resist nonstate violence. Such agreements may be uniquely vulnerable to subsequent violence and internal elections.

The limits of treaty status for peace agreements partly explain why these treaties share features with nontreaty peace agreements, such as references to the commitments of nonstate actors and the presence of a range of third-party signatories, as discussed in parts IV and V below.

Contrived Constitutional Form

An alternative way of securing a clear legal form for a peace agreement is to locate it in the domestic legal realm as a constitution. As has been pointed out, peace agreements are hybrid in a way that goes beyond the nature of their participants: they address both the external position of the state on the international plane and the internal constitutional structure of the state. Indeed, constitutional revision is often proffered by states as a means of defusing conflict, resulting in the styling of some peace agreements as constitutions. The main framework peace agreement in South Africa, for example, was the Interim Constitution, which set up a transitional arrangement designed to lead to elections and a constitutional assembly that would produce a final constitution. The Interim Constitution documented the "deal" as to how the African National Congress (ANC) and the National Party/South African government would hold power, the transitional mechanisms for government, and agreed principles that were to set the parameters for the drafting of a final constitution by the newly elected representatives. As other parties reached agreement with the ANC at the eleventh hour, new provisions were added to cut the Inkatha Freedom Party and right-wing Afrikaner groups into both the deal and the constitutional framework. Similarly, attempts to broker cease-fires in Bosnia-Herzegovina focused on peace agreements that in effect were constitutional blueprints whose principal purpose was to accommodate the new minorities inevitably created by the disintegration


118 Id. at 550.


120 INTERIM CONST., supra note 29, ch. 5.

of the former Yugoslavia.\textsuperscript{122} The final deal in Bosnia reflected a correlation between peace agreement negotiations and constitution making. The Washington Agreement, designed to bring peace between Bosniacs (Bosnian Muslims) and Croats in Bosnia had two parts: a preliminary agreement of only ten lines, plus a constitution for the federation that set out a “power map” as between Croats and Bosniacs.\textsuperscript{123} Peace agreements may include constitutions as merely one of their components: Annex 4 of the DPA is a “constitution” for the Republic of Bosnia and Herzegovina, although the peace agreement in its entirety can also be viewed as a constitution in the broadest sense.\textsuperscript{124} The failed Rambouillet Accords in Kosovo also included both a constitution and a broad framework for governance.\textsuperscript{125} The Bougainville Peace Agreement provided for a constitution and transitional arrangements.\textsuperscript{126}

Here again, however, the demands of the peace process mean that the peace-agreement constitution differs from traditional constitutions in both form and substance. In stable democratic societies, constitutions are viewed as superior to domestic law and less open to revision: they are foundational documents, setting out the distribution of power and encapsulating the values, aspirations, and ethos of the state.\textsuperscript{127} Peace-agreement constitutions, however, are also literal “social contracts” negotiated between political elites who have been at the heart of the conflict, often under pressure from the international community to conform to the notion of a constitution as establishing democratic institutions, government by law, and individual rights.\textsuperscript{128} As a result, particularly in situations of ethnic conflict, these constitutions do not just serve as a social contract between individuals and the state (or between individuals as to the nature and limits of the state); they also constitute a horizontal contract between different groups of individuals. As a glance at these constitutions reveals, this feature often results in a degree of contractual detail that smacks of the reciprocal obligation of private law rather than the broad “founding principles” of public law. The Interim Constitution of South Africa illustrates the phenomenon: it is 227 pages long (in two languages), with copious detail.\textsuperscript{129}

Instead of aiming at establishing permanence, peace-agreement constitutions are often explicitly transitional, providing for their imminent revision, extension, or even demise.\textsuperscript{130} They tend to be distinctive in their heightened reference to international law, and also in their use of third-party enforcement, relying both on constitutional courts with mandates explicitly shaped by the context of conflict resolution, and on a pluralist range of enforcement mechanisms that cut across political and legal spheres, as well as domestic and international spheres (see part V, below). The lack of “fit” between peace agreements and domestic law categories represents a mirror image of the lack of fit with international law categories. It again evidences a common nature of peace agreements regardless of their legal categorization, which is located in their mix of state and nonstate signatories, the

\textsuperscript{122} For more detail, see BELL, supra note 2, at 107.


\textsuperscript{124} DPA, supra note 41; see also BELL, supra note 2, at 144–47.


\textsuperscript{126} Bougainville Peace Agreement, supra note 53.

\textsuperscript{127} See ERIC BARENBT, AN INTRODUCTION TO CONSTITUTIONAL LAW 3–4 (1998).

\textsuperscript{128} Cf. Paul R. Williams & William Spencer, Iraq's Political Compact, BOSTON GLOBE, Aug. 13, 2005, at A15 (arguing that Iraq’s draft constitution is “first and foremost a political compact”).

\textsuperscript{129} INTERIM CONST., supra note 29.

\textsuperscript{130} See id., ch. 5 (The Adoption of a New Constitution); see also RUTI TIETEL, TRANSITIONAL JUSTICE 197–201 (2000) (documenting the use of temporary “transitional” constitutions in a range of jurisdictions).
need to address simultaneously both “internal” and “external” dimensions of intrastate conflict, and the need to address both short-term and long-term peace process goals.

As with treaty form, these distinctive attributes negate some of the “hard law” advantages of constitutional form. Even in traditional settings, constitutional interpretation is accepted as implicating politics in a deeper and more overt way than the interpretation of legislation, in opening up value debates and in requiring an ongoing working out of the relationship between the judiciary and the legislature that cuts to the heart of the relationship between law and politics itself.131 Such controversies are dramatically accentuated in societies that are constructing both core democratic and legal institutions, using a constitution negotiated out of violent conflict and tentative beginnings in ceasefires. Indeed, it has been suggested that transitional concepts of constitutionalism require new theories of adjudication.132 Constitutional interpretation in traditional settings draws on established notions of the rule of law and operates to buttress traditional concepts of order, community, and stability. However, in the transitional setting these concepts, and indeed the neutrality of the judiciary itself, are typically deeply contested. These circumstances point to the need for an activist, transformative approach to constitutional interpretation, and a judiciary that is willing and able to engage with the legal and political nature of transition, and the implications for its own role. Peace agreements sometimes signal this need by calling for flexible, “purposive” approaches to constitutional interpretation.133 Yet the more judges attempt to engage in this type of interpretation, the more they risk politicizing their role, by articulating what appear to be political goals.134 As the constitutional judicial function will be new by virtue of the context, the legitimacy of both the judiciary and the judicial function itself will be tied up with any goals that judges articulate. The stop-start nature of peace agreements also means that the judicial role is likely to be fundamentally tested by the capacity of key actors to act outside the constitution. Political violence and ongoing dissent to the legitimacy of the state “challenge[ ] the very presuppositions upon which our commitment to constitutional politics must be predicated.”135 How effective constitutional adjudication is in countering such dissent, or indeed in policing excessive responses to it, remains an open question. Such examples as exist seem to indicate that the judicial role can occasionally be effective in a bold sense,136 but more often merely plays at the fringes of the dispute137 or fails completely.138

Framing peace agreements as constitutions can also be counterproductive in terms of compliance. Constitutional status gives rise to questions about the relationship of the peace-agreement constitution to the past constitutional order. Peace-agreement constitutions tend to supplant existing constitutions outside their established processes for revision or replacement. The

132 TEITEL, supra note 130, at 5.
133 Bougainville Peace Agreement, supra note 53, §A.3; INTERIM CONST., supra note 29, Art. 35.
137 KRETZMER, supra note 101, at 187 (arguing that while the Israeli Supreme Court has been conservative, it has had some influence in shaping decisions in the “shadow of the law”).
constitution of the DPA, for example, did not refer to or acknowledge the previous Bosnian Constitution, or attempt to work within its legal framework.139 A peace agreement’s claim to constitutional validity lies in the lack of legitimacy of the previous constitution (and by implication the state), and the need to negotiate an end to the violence that reflects the question mark over the state’s legitimacy. In some cases (for example, South Africa) the lack of state legitimacy is accepted by all sides; however, in many other cases it is not. Lack of constitutional continuity, coupled with the international involvement that tends to be required to broker agreement in these circumstances, leaves the peace agreement and new regime open to charges of illegitimacy as a constitutional rupture, and an externally imposed one at that.140 These arguments are often manipulated by opponents of the agreement on the side of the former state.141

Contrived “Agreement” and UN Security Council Resolutions

Another way of achieving binding legal obligations is to lock the parties to a conflict into a framework underwritten by Security Council resolutions.142 Security Council resolutions can be used to bring the force of law to peace agreement commitments, establishing mechanisms for monitoring compliance that stand independently of the status of the agreement itself, which nevertheless forms their raison d’être.143 Security Council resolutions can also be used to impose a framework for governance and ongoing negotiations, even in the absence of agreement.

Here the “peace process” is rooted in binding UN Security Council resolution, with international constitution brokering as a conflict resolution device. This approach has characterized processes of postconflict reconstruction consequent to the international use of force by NATO in Kosovo, the U.S.-led interventions in Afghanistan and Iraq, and the turmoil in postreferendum East Timor. The internal processes that the international community (in its different forms) has fashioned in these cases have essentially consisted of an initial framework for internationalized governance provided by a Security Council resolution, followed by constitutional processes that are used to broker agreement between the competing domestic groups. The processes in Kosovo, Afghanistan, and East Timor can be briefly sketched as having four stages: (1) adoption of a Security Council resolution providing a mandate for the international establishment of an interim administration;144 (2) establishment of an appointed local transitional government—multiethnic where relevant—which is gradually given increasing powers (from consultation toward limited direct exercise of power),145 in an attempt to foster cooperation

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140 See sources cited supra note 139.

141 This difficulty bolsters the argument that peace agreements face a particular set of implementation difficulties in formally democratic states. See Colm Campbell & Fionnuala Ni Aolain, The Paradox of Transition in Conflicted Democracies, 27 HUM. RTS. Q. 172 (2005). These states are the most likely to have a functioning prior constitutional order from which to attack the constitutional manifestations of the peace agreement.

142 See, e.g., SC Res. 1023 (Nov. 22, 1995) (on which Croatian Erdut Agreement of 1995, infra note 190, was suspensive); SC Res. 1244 (June 10, 1999).

143 See, e.g., SC Res 788 (Nov. 19, 1992) (calling for Liberian parties to Yamoussoukro IV Accord to respect the agreement and requesting the secretary-general to dispatch a special representative to Liberia to evaluate and report on the situation, and to submit a report on the implementation of the resolution).

144 Kosovo: SC Res. 1244, supra note 142; East Timor: SC Res. 1272 (Oct. 25, 1999); Afghanistan: SC Res. 1378 (Nov. 14, 2001).

145 Kosovo: UN Doc. UNMIK/REG/2000/1 (Jan. 14, 2000) (establishing Joint Interim Administrative Structure, thereby implementing the agreement signed on December 15, 1999, by the Kosovo Albanian political party leaders present at the talks leading to the Rambouillet Accords); East Timor: UN Docs. UNTAET/REG/1999/2 (Dec. 2, 1999), 2000/23 (July 14, 2000), 2000/24 (July 14, 2000); Afghanistan: SC Res. 1383 (Dec. 6, 2001)
between competing groups and to pave the way to (3) elections; and (4) drafting of a new constitution to replace the interim structures of governance with permanent structures (these last two sometimes happening in reverse order). Despite not being UN-led, U.S. reconstruction in Iraq appears to be following a broadly similar constitution-making pattern (albeit with further questions about its legitimacy). The use of peace agreement patterns in a context where there is no initial “agreement” can be argued to be an accentuation of existing peace agreement practice as much as an aberration from it. Its extremes reflect peace process patterns that use internationalized commitments at the beginning stage, ostensibly to enable resort to local constitutionalism and politics as the permanent vehicle for ongoing conflict resolution at the end stage.

In summary, peace agreements are drafted in an attempt to use a legal form and appear to evidence an intent to be legally bound. However, these aims are somewhat frustrated at present by the limits of traditional legal categories, and in particular the difficulty of fitting direct agreements between state and nonstate parties into those categories. The 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. These shortcomings point to the importance of legalized models as an alternative to formal legal status and help to explain why peace agreements are characterized by common innovations as regards form, obligations, and third-party delegation, regardless of whether or not they can be placed in a formal legal category.

IV. THE NATURE OF OBLIGATIONS

The limits and deficits of formal law may be compensated for by how an agreement’s obligations are crafted, to some extent. Precise and coherent commitments, it is argued, facilitate compliance by imparting clarity regarding implementation and breach, which enhances their normative “compliance pull.” Conversely, imprecise language can decrease the normative compliance pull even of obligations framed in legally binding forms. Peace agreement legalization, however, also points to constitutional discourse as an equally important way of framing


147 East Timor: UN Doc. UNTAET/REG/2001/2, supra note 146; Kosovo: UN Doc. UNMIK/REG/2001/9, supra note 146; Afghanistan: Bonn Agreement, supra note 145, §1(6).


151 Id.
obligations in legal terms. In this area, the distinctiveness of peace agreements is driven by the difficulties of constructing obligations that can rely on different rationales for legalization at different stages of the peace process.

Precision for Short-Term Goals

Peace agreement commitments aimed at ending the immediate violence are clearly based on precise drafting to legalize their obligations. Establishing cease-fires, demobilization, and later demilitarization requires clear and verifiable commitments documented as precise obligations. The language of peace agreements bears this out: they are written through with agreed numbers of armed forces, specification of weaponry, timetables, and even maps.\textsuperscript{152} Research on the success or failure of these commitments emphasizes the importance of precision to compliance.\textsuperscript{153} Indeed, this research suggests that precision may be critical to limiting the scope for drastic “mistakes” by armies when withdrawing.\textsuperscript{154} Precise commitments relating to demobilization and demilitarization are also especially amenable to third-party monitoring, interpretation, and enforcement. Peace agreements frequently provide full detail of mandate, role, and verification procedures, as illustrated by the extensive provisions of Angola’s Lusaka Protocol of 1994, Bosnia’s DPA of 1995, and Sierra Leone’s Lomé Agreement of 1999.\textsuperscript{155}

Precision and Political Institutions

Peace agreements also evidence precision and detail in the forms of internal government they aim at establishing—particularly as regards the transitional arrangements. In the same way that demobilization signifies a transfer of power, so do the new arrangements for government. The mechanics of the transfer of political power are just as important to the parties, not least because they are linked to the vulnerability created by demobilization commitments. However, precision is also needed in dealing with the technical legal issues that the transition raises as to the applicable legal regime, such as what laws are in force, the specific timing of when and how the legal regime will change, and the detail of the effect of these changes on political and legal institutions like the presidency, the police, and the courts. The transitional provisions of Burundi’s Arusha Accord and South Africa’s Interim Constitution are examples.\textsuperscript{156}

In addition, a high degree of precision is often characteristic of the longer-term provisions on how power will be held and exercised. Here, the precision of peace agreement commitments is linked to the substantive content of the obligations through the notion of mutual “enlightened self-interest.” The drafters of peace agreements often focus on creating incentives for cooperation and self-execution by providing for tightly reciprocal obligations at the levels both of stopping the violence and of creating democratic institutions. For political and military elites making fundamental compromises, the devil is quite literally in the details, as parties try to anticipate the consequences of any new arrangements for their own power. Thus, for an ethnic group whose separatist claims are to be accommodated with something less than its own state, the detail of which powers are to be devolved to the substate entity, the relationship of the entity


\textsuperscript{153} FORTNIA, \textit{supra} note 13.

\textsuperscript{154} \textit{Id.} at 20.

\textsuperscript{155} Lusaka Protocol, \textit{supra} note 47, Annex 3; DPA, \textit{supra} note 41, Annex 1A; Lomé Agreement, \textit{supra} note 29, Annex 1.

\textsuperscript{156} Burundi Peace Agreement, \textit{supra} note 29, Protocol II, ch. II; \textit{INTERIM CONST.}, \textit{supra} note 29, ch. 15.
to the central state, the precise numbers of the different ethnic groups in the central and regional institutions, their weighting as regards veto powers or constitutional amendment, and the procedures for breaking deadlock will all be crucial to agreement. The peace agreements for Burundi, Northern Ireland, South Africa, Bosnia, and Bougainville illustrate the detail that results.157 Similarly for armed groups in left-right conflicts, the move to political participation typically involves detail on the democratic principles to govern the state and its key institutions, and the precise mechanisms by which it will open up to multiparty democracy. The agreements of Mozambique, Guatemala, and El Salvador serve as examples.158 This conflict-oriented detail also permeates the equality and human rights provisions that typically form part of the power map and are closely tied to the arrangements for government. In cases of ethnic conflict, detail is often crucial to providing for equality within centralized state structures, in particular for minorities left in the wrong territory at the subdivisional level. In the case of ideological conflicts, human rights detail plays an important role in underwriting the process of democratization, for example by providing for specific rights to political organization, or by focusing on eliminating prevalent human rights abuses. This aspect is illustrated by the emphasis on nondiscrimination in the Bosnian DPA, and the detailed provisions aimed at stopping disappearances in the El Salvadoran and Guatemalan human rights agreements, together with the detailed provision for the reform of key legal institutions found in their later agreements.159 The level of detail and contractual “feel” of peace-agreement constitutions, as has been pointed out, is somewhat at odds with their characterization as constitutions but reflects common conflict resolution goals.

The Limits of Precision

There are limits, however, to the compliance pull of precision in the peace agreement context that point to the importance of alternative modes of legalization. Precision may be insufficient to providing incentives to cooperation where the agreement does not encapsulate any real agreement between the parties. Thus, the difficulties and failures of implementation in, for example, Rwanda, Sierra Leone, and to a lesser extent Bosnia have been put down to the absence of genuine agreement at the heart of the accords.160 Those peace agreements became to a greater or lesser extent vehicles for pursuing largely unchanged military agendas. The Arusha Accords of Rwanda even stand charged with facilitating genocide by changing the domestic military and political power balance while failing to grapple with the parties’ lack of commitment to making the accords work.161

Precision may also not be the key tool for managing the longer-term difficulties of implementation, which cannot be anticipated. The assumptions that underlie the fashioning of reciprocal commitments may become undone over time, particularly as the peace process

157 Burundi Peace Agreement, supra note 29; Belfast Agreement, supra note 29; INTERIM CONST., supra note 29; DPA, supra note 41; Bougainville Peace Agreement, supra note 53.
158 General Peace Agreement for Mozambique, supra note 47; Guatemala Peace Agreement, supra note 31; El Salvador Agreement, supra note 31.
161 Clapham, supra note 5.
enters the arena of domestic implementation. Paradoxically, tightly reciprocal peace agreement commitments can often shake loose the seeds of the agreement’s own demise. For example, in Northern Ireland, the operation of the devolved Assembly (a key Unionist goal) was conditioned on the operation of cross-border bodies (a key Nationalist demand), which Unionists had insisted would be subject to the Assembly. However, under pressure from their antiagreement factions, the concerns of Unionists over lack of IRA decommissioning trumped their desire to self-govern. At this point, their reciprocal self-interest disappeared and the mechanism based on it in fact worked against implementation of the agreement by requiring all of the political institutions to be dismantled once one collapsed. More subtly, in South Africa the transitional consociational mechanisms and safeguards of constitutionalism that were aimed at minority protection were effectively negated by the unanticipated scale of the electoral victories of the ANC, which soon gave it the percentages required to change the Constitution unilaterally. In short, while precision constitutes an important tool for short-term goals of peace agreements, it is less effective in promoting the long-term goal of constitutionalism as a mechanism of ongoing conflict transformation.

Constitutional Values as Alternative Legalization

The longer-term goals of peace agreements must be achieved through the deeper constitutionalization of the commitments they embody. This requires the building of trust between the parties to the conflict, and securing their baseline commitment to the working of the new institutions, including the constitution itself. Attempts to set the foundation for a shared constitutional outlook are often contained in a peace agreement’s vaguer language relating to the nature of the agreement and the nature of the state. Typically, this language is imprecise: either aspirational in outlook or deliberately employing “constructive ambiguity” to enable agreement. The agreed history of the opening chapter of the Burundi Peace Agreement, the self-determination provisions addressed to the Afrikaner Brotherhood in South Africa, the self-determination and binationalist language of the Belfast Agreement, and Guatemala’s commitments on indigenous peoples, all address substantive causes of the conflict and attempt to signal the different nature of the postagreement state. The lack of precision does not indicate a lack of legalization or a failure of drafting; rather, the very vagueness of what are symbolic and aspirational provisions evidences the substantive long-term goal of finding shared notions of identity and statehood.

The language of constitutional values also serves other purposes, such as legitimacy and good process. Detailed precision with regard to longer-term constitutional development not merely

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164 Cf. ADRIAN GUELKE, SOUTH AFRICA IN TRANSITION: A MISUNDERSTOOD MIRACLE (1999) (arguing that South Africa’s Interim Constitution has been misunderstood as a constitutional compromise between majority and minority communities, with the strongest restraints on majority power expressly transitional). Note, however, that it can be argued that on occasion the ANC felt politically constrained to work within the existing constitution rather than to amend it unilaterally.
165 Cf. Schnecken, supra note 13 (arguing that the key to long-term success of peace agreements lies in institutional design aimed at enabling elite leadership and cooperation).
166 Burundi Peace Agreement, supra note 29, Protocol 1, ch. 1; South Africa Amendment Act, supra note 121, §13, Art. XXXIV; Belfast Agreement, supra note 29; Agreement on the Identity and Rights of Indigenous Peoples, pmbl., supra note 50.
167 Cf. Abbott & Snidal, supra note 150.
encounters a problem of anticipation, but also is arguably undesirable. A narrow range of actors tends to be involved in peace negotiations; typically, they do not have the expertise, legitimacy, or sometimes even the will necessary to design long-term constitutions and consequent institutional reform in all their value-driven complexity. Processes of ongoing institutional development and reform both serve as a risk management device with similarities to third-party delegation in other contexts and, importantly, lend legitimacy to the constitution-making project. By setting forth principles and processes rather than final provisions, peace negotiations can be concluded more quickly, while also enabling broader civic involvement in the processes of reform—involve that is important to the local ownership and effectiveness of the new institutions. This is an alternative way of legalizing obligations.

Process Dilemmas: Legalization in Transition

Tensions, however, color the relationship between the short-term and long-term conflict resolution goals of peace agreements. While treatylike internationalized commitments are useful and even important to implementing an agreement in the short term, they may operate in subtle and not-so-subtle ways to negate and frustrate the longer-term goals of domestic constitutionalization. Thus, mediators often face a set of dilemmas as to how to achieve both short- and long-term goals, while providing for functioning institutions during the transitional period. These dilemmas include whether to have elections before or after constitutional reform projects; when and how to introduce mechanisms to account for past abuses; when to use international “off-the-peg” legal tools as transitional devices; and whether these measures might undermine localized processes of constitutional development. The dilemmas, often framed as clashes of “principle” and “pragmatism,” in fact reflect the tension between different short-term and long-term conflict resolution imperatives, and the fact that different international and domestic actors have different degrees of legitimacy at different stages of the implementation process.

The tensions point to a central, distinctive compliance challenge for the legalization of peace agreements. The obligations must be framed so that they can depend on different rationales and mechanisms for enforcement at different stages of the peace process. In their ideal form, peace agreements attempt to incorporate internationalized treatylike commitments with a high degree of third-party enforcement, while enabling a transition to domestic constitutional commitments, implemented through normalized politics and normalized public law processes. The difficulty for drafters is to craft obligations that will pin down commitments that are clear enough to command compliance yet leave some room for the coherent holistic development also crucial to compliance.

In summary, precision is a valuable element of peace agreement legalization in the short term, particularly as regards the military commitments and transitional mechanisms of government. It suffers from limitations, however, in providing for the longer-term constitutionalization of commitments as worked out through the entrenched reform of political and legal institutions, where precise detail on wholesale constitutional reform can be counterproductive.

168 See SC Res. 1325, ¶ 15 (Oct. 31, 2000); Women, Peace and Security, supra note 3, ¶ 63; Principles to Combat Impunity, supra note 3, princ. 6 (recommending broad consultation on the composition of truth commissions), princ. 32 (reparations procedures), princ. 35 (institutional reforms aimed at preventing recurrence of violations); see also The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, supra note 3, ¶ 64(h).

169 See HAMPSHON, supra note 9; Christine Bell, Peace Agreements and Human Rights: Implications for the UN, in THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 241, 246–48 (Nigel D. White & Dirk Klaasen eds., 2005).

170 See sources cited supra note 169.
to compliance and is better served by the language of principle, values, and symbolism. The challenge is to find a way to use both forms of legalized obligation so as to bolster compliance, in a context where different forms of legalization bolster or undermine at different stages of the process.

V. Delegation to Third Parties

The distinctive characteristics of peace agreements are further illustrated by the ways they delegate authority to designated third parties to interpret and implement their provisions. This element constitutes the third dimension of legalization. Abbott and colleagues plot a spectrum of legalization as regards third-party delegation, which ranges from a high end to a low end:171 from binding decisions of international or domestic courts with general jurisdiction and direct private access; through courts with limited jurisdiction and access; to arbitration, mediation, or conciliation. At the top end of the spectrum, third-party delegation is legally binding; at the bottom end, it amounts to little more than a forum for purely political bargaining.

The range of third-party delegation in peace agreements is very broad and cannot be examined fully here. The general dynamics can be illustrated, however, by examining two persistent features, the use of third-party guarantors, and what I have termed “hybrid legal pluralism.” These again, it is argued, illustrate a distinctive lex pacificatoria, both in types of mechanism and in related notions of how third parties can best influence the implementation of peace agreements.

Third-Party Guarantors

The majority of peace agreements employ third-party states and international organizations as signatories to agreements, either through direct signature or signature in the capacity of “witnesses,” “guarantors,” or “observers.”172 What this practice means, or whether the terms in which the organization signs have any technical legal implication, is unclear. (Is a “witness” different from a “guarantor,” “observer,” “moral guarantor,” or an “outside” state as an apparently coequal signatory without specific commitments?) While these states and organizations often continue to be involved in the peace process, little discussion has been devoted to whether or how their involvement is shaped by their signature and the particular label by which they are described as a third party to the agreement.173

It is suggested here that their role as signatories works in various ways. Most significantly perhaps, the signature of third-party guarantors can reinforce their role as “norm promoters” by influencing the progress of the peace agreement. Mark Peceny and William Stanley have

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171 Abbott et al., supra note 17, at 404.
172 Examples are numerous. See, e.g., DPA, supra note 41 (United States, United Kingdom, France, Germany, Russia, and the European Union as witnesses); Lomé Agreement, supra note 29, Art. 34 (Togo, the United Nations, the Organization of African Unity (OAU), the Economic Community of West African States (ECOWAS), and the Commonwealth of Nations as moral guarantors); Tashkent Declaration, supra note 24 (the United Nations as observer).
173 See preliminary discussion of contemporary treaty guarantees in Wippman, supra note 15, passim; BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 193–94 (2000). Cf. Georg Ress, Guarantee, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 626 (Rudolf Bernhardt ed., 1995); Georg Ress, Guarantee Treaties, in id. at 634 (discussing guarantees and treaties of guarantee and their implications for state obligations). But see Kallos, supra note 81, ¶ 41 (where Special Court interpreted third-party signatures as evidence that those parties were “moral guarantors” that “assumed no legal obligation”).
argued that third-party effectiveness lies more in its norm promotion capacity than in delivering security guarantees. Using Central America as an example, they argue that the peace processes followed a three-stage trajectory illustrating this role: (1) local actors in the conflicts adopted liberal practices to legitimize themselves internationally; (2) internationally mediated negotiations demonstrated to the combatants that the adversaries had changed their preferences and could be trusted to move from violence to the political rules set out in the peace agreements; and (3) international actors and the United Nations engaged in concrete and direct efforts to support liberal social reconstruction and widen participation in it.

This link between third-party guarantees and norm promotion can be seen in the increasingly self-conscious approaches of the United Nations as a “normative negotiator.” Involvement of the United Nations as observer, mediator, and/or signatory now appears to bring with it normative constraints as to the content of peace agreements, which helps to explain the increasing attempts to provide guidelines and standards for such agreements. In 1999 the UN secretary-general established guidelines for his representatives that, although not public, apparently dealt with the normative human rights constraints on peace agreements, in particular with reference to amnesty. Shortly thereafter, in one clear example of third-party enforcement, the UN special envoy in Sierra Leone added a “disclaimer” to his signature of the Lomé Agreement with respect to the amnesty provision’s inconsistency with international law. This action was to play a part in the establishment of the Sierra Leone Special Court and the eventual demise of the amnesty. The UN secretary-general’s recent report on the rule of law affirms the constraints on UN involvement in peace agreements.

The value of norm promotion also helps to explain the compliance value of having even non-governmental actors sign peace agreements, such as the San Egidio community as mediator in Mozambique, and the Catholic Church as “moral and spiritual guide” in the Colombian peace accords. Arguably, their value as signatories derives not just from their ongoing mediation function, but from the norm-promoting role they have played.

Third-party signatories help to insert some of the advantages of treaty status into instruments whose status as international agreements is questionable. The presence of third-party signatories means that the treaty partners have created obligations to each other and to the third parties as well. This commitment raises the compliance stakes for both state and nonstate signatories, particularly when third parties view themselves as having an active norm promotion function. As regards the state, it may counterbalance the political nature


UN Press Release SG/SM/7257, supra note 3.


See Kallman, supra note 81, ¶ 89.


Kooijmans, supra note 14.
of the commitments made to nonstate actors. As regards nonstate actors, the third party’s opinions and pressures with regard to breach will not be as easy to dismiss as those of the “other side.” International legitimacy may be a substantive goal of nonstate actors, and articulating a need to keep third parties on board may also increase their ability to resist their own outbidders locally. As has been noted, the use of outside state signatures may also address the commitments of these states themselves to peace, less as third parties and more as regards their own involvement in the international or transnational dimensions of the “intrastate” conflict.

The inclusion of third-party guarantors as signatories of peace agreements may appear cosmetic and low on the spectrum of legalization, especially when they are not even states. However, this assessment may underestimate the ways that such guarantors can tie the status of the peace agreement to the normative direction of the commitments it contains. This norm promotion role, of course, raises important questions as to how third-party neutrality, consistency, and legal legitimacy affect third-party norm promotion capacities. It seems likely that this norm promotion function is reduced where third-party interventions are not clearly rooted in international norms, or even violate them.

Hybrid Legal Pluralism

The third-party tapestry of peace agreements typically involves a wide variety of international, domestic, and hybrid mechanisms, many of which straddle the law-politics boundary and have overlapping functions and sometimes even mandates. This form of third-party delegation can be characterized as “hybrid legal pluralism” and is rooted in the hybrid nature of peace agreements, already alluded to. It can be mapped loosely on the spectrum of third-party delegation running from high legalization to low legalization. While binding court decisions are often placed at the top end of the legalization spectrum, in the peace agreement context detailed peacekeeping mandates aimed at oversight and verification of security guarantees can provide equally strong mechanisms by involving third parties in the day-to-day fabric of implementation. Elaborate mandates for peacekeeping and monitoring, underwritten by Security Council resolutions, are often crucial to establishing cease-fires and consequent processes of demobilization, demilitarization, and reintegration. The relevant provisions of the DPA and the Cambodian Paris Accords all form good examples.

Binding arbitration is often presented as next in the legalization spectrum. In the peace agreement context a range of different mechanisms play a similar type of role to binding arbitration. Processes of review associated with Security Council resolutions that have underwritten peace agreements fit this mold. Interestingly, Security Council resolutions can also be used to supplement matters that were not dealt with in the agreement at all, for example reform of the judiciary.

183 See Gleditsch & Beardsley, supra note 10 (showing how the different parties were affected by transnational input to the peace processes in Central America).
185 Cf. Campbell, Harvey, & Ni Aoláin, supra note 14, passim (arguing that the Belfast Agreement should be seen as a hybrid domestic and international law instrument); Laura A. Dickinson, The Promise of Hybrid Courts, 97 AJIL 295 (2003) (discussion of hybrid courts and tribunals).
186 DPA, supra note 41, Annex 1A (Military Aspects of the Peace Settlement); Cambodia Political Settlement, supra note 114, Annex 2 (Withdrawal, Ceasefire, and Related Measures).
International involvement in discrete peace agreement tasks or in the reform of domestic legal processes can play a similar role. International participation is often used to develop and implement specific provisions of peace agreements, with a rule-making power delegated to the international actor in question. As regards provisions on refugees and displaced persons, for example, the UN High Commissioner for Refugees is often charged with assisting in implementation, and on occasion has been vested with the power to produce its own rules or even further agreements.\textsuperscript{188} Similarly, several agreements have given the International Committee of the Red Cross a role and rule-making power in the release of prisoners.\textsuperscript{189} A range of international and hybrid bodies have been put in charge of supervising or monitoring elections.\textsuperscript{190} The use of international or hybrid criminal tribunals or truth commissions with respect to dealing with the past might also fall in the category of entrusting international actors with discrete tasks. These forums involve a form of nonconsensual jurisdiction relating to one dimension of the agreement; they enjoy rule-making authority and many apply a form of international law.\textsuperscript{191} In this context international human rights bodies can play similar specific enforcement roles through treaty-monitoring functions, although these roles are ongoing. As governments ratify treaties in consequence of peace agreements, and become subject to their reporting mechanisms, they often adduce the agreement as evidence of progress on human rights issues. Human rights bodies have shown innovative responses, which operate to enforce large sections of the agreement, and sometimes the agreement in its entirety.\textsuperscript{192} In all these areas international involvement not only reinforces compliance, but enables both detail and controversy to be


\textsuperscript{191} See, e.g., Burundi Peace Agreement, supra note 29, Protocol I, Art. 6 (delegating decision on establishing international criminal tribunal to the UN Security Council). But cf. SC Res. 1315 (Aug. 14, 2000) (establishing the Special Court for Sierra Leone, despite provision for it not being included in the terms of the Lomé Agreement); SC Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia, even though it was not explicitly provided for in the DPA).

resolved outside the main negotiations.\textsuperscript{193} International third-party involvement thus assists both substance and process.

Beyond this there is a broad spectrum of international participation in a variety of essentially domestic tasks, such as the organization of transitional government, constitutional and legal reform, participation in courts and tribunals, development of civil society, and general reconciliation.\textsuperscript{194} Here, the involvement of international third parties reflects difficulties with domestic processes. Domestic legislation, for example, would seem to lie at the “high” end of the spectrum of delegation, as an internalization of international commitments that enables legal adjudication. However, in the peace agreement context, as with constitutional adjudication, it raises a particular set of compliance difficulties and can also undermine compliance.

Translating commitments into simple legislative form involves opposition groups with opposition agendas, who were not primary parties to the deal. In contrast to accepted processes of treaty ratification, the lack of formal legal status of peace agreements leaves the parameters of the incorporation debate more open. Opposition groups may force the government to backtrack on commitments so as to respond to its primary domestic constituency. Particularly in identity conflicts, a minority or indigenous group may find itself in a second, more diffuse set of negotiations where its own role is reduced to lobbying against the watering down of a finely crafted deal of which it was a coauthor. Indeed, the state’s own democratic processes can be used by political outbidders on the state side to prevent implementation altogether, either in opposition, or indeed because they win the next elections on the strength of their antiagreement platform.\textsuperscript{195} In the Middle East, the elections following the assassination of Prime Minister Yitzhak Rabin saw victory for the anti-Oslo Benjamin Netanyahu by a slim majority; as a result, the Israeli government reversed its approach to the peace process even though there had arguably been no sea change in the Israeli public’s support for it.\textsuperscript{196} In Sri Lanka in November 2003, favorable government soundings to a proposal by the Liberation Tigers of Tamil Eelam for an interim (autonomy) agreement led the antipeace-process president (from the opposition party) to fire three government ministers who had been involved in the negotiations, prorogue parliament, and declare a state of emergency.\textsuperscript{197} Problems with passing new legislation to complete commitments in peace agreements have occurred in Macedonia and Bangladesh,\textsuperscript{198} among other countries, where opposition political parties were able to use their positions in legislative and executive branches to undermine implementation of the agreement and the peace process itself.

\begin{itemize}
\item \texttt{www.ilo.org/ilolex/english/newcountryframeE.htm} (where ILO examined the complaint as regards the Convention through the framework of the San Andrés Larrainzar Agreements between the ELZN and the Mexican government, \textit{supra} note 50, which were based on this Convention).
\item \textsuperscript{193} See Burundi Peace Agreement, \textit{supra} note 29, Protocol I, Art. 6.
\item \textsuperscript{194} See generally Korhonen, \textit{supra} note 184.
\item \textsuperscript{195} See Mor, \textit{supra} note 165; Stedman, \textit{supra} note 13.
\end{itemize}
To address these difficulties, peace agreements tend to include substantive reform of legislative and constitutional processes and institutions that make international law a key reference point and give international actors a role in what are normally domestic institutions. An example is the DPA’s involvement of international actors in all of Bosnia’s key domestic legal institutions and the role of the Office of the High Representative as “final authority in theater regarding interpretation” (a role that came to include the power to legislate in the event of political deadlock). Other examples include the internationalized reform of policing and criminal justice in Northern Ireland, and the similar processes established in Central American peace agreements.

Lower still on the spectrum of legalization, a range of arbitration, mediation, review, and “peace promotion” processes can be established, to operate almost completely at the political level. Examples include the British/Irish governmental review process of the Belfast Agreement, the Joint Israeli-Palestinian Liaison Committee, and in many agreements an assortment of peace promotion bodies and provision for new agreements to be negotiated.

The hybrid legal pluralism of peace agreements bears some similarity to other uses of international law alluded to by the term *lex pacificatoria*. Legal pluralism occurs in settings such as environmental law and contract compliance, where a range of quasi-legal mechanisms cut across international and domestic legal spheres in an attempt to give soft law commitments some impact on compliance. As regards “hybridization,” internationalized contracts have used general principles of international law either as the law governing the contract, or as a tool for *amiabiles compositores*, to prevent state parties from manipulating national law to their advantage. International law can thus provide a basis for enforcement of the contract internationally and even in domestic courts, regardless of the fact that the contract itself may not constitute a binding international agreement.

Nevertheless, the hybrid legal pluralism of peace agreements is arguably distinctive in several respects. While a mapping from more legalized to more political commitments (high to low) is loosely possible, it is difficult to distinguish between the implementation of the peace agreement and continuation of the peace process: postagreement does not equate to postconflict.

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199 Cf. Campbell, Harvey, & Ní Aoláin, *supra* note 14, at 326–28 (arguing that the Belfast Agreement must be read as a “hybrid” international/domestic agreement).

200 DPA, *supra* note 41, Annex 10, Art. V.

201 Belfast Agreement, *supra* note 29, Annexes A, B, respectively; El Salvador: Peace Agreement, *supra* note 152, ch. 2, Art. 3(B) (providing for international legal advisory services for police monitoring); Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society, Sept. 19, 1996, Guat.-URNG–UN, pt. IV, ¶31, 36 ILM 304 (urging international community to provide technical and financial assistance with police reform).


205 See, e.g., Declaration of Principles, *supra* note 203, Art. VII.


208 Fatouros, *supra* note 207.
This problem, in turn, makes it difficult to distinguish between the delegation of implementation of the agreement and ongoing mediation of the agreement’s development. The boundary between political and legal mechanisms also tends to be particularly blurred in the transitional context. Legal institutions as both subjects and objects of reform tend to be more overtly politicized during transitions. Thus, the mixed international/domestic legal institutions of Bosnia with their multiethnic composition, and the new South African Constitutional Court’s constitutional certification function (replicated in Burundi), could be viewed as examples of strong legalized delegation, or as new political negotiating forums for development and validation of constitutional law and values. Conversely, political institutions established through the contractlike language of the peace agreement tend to have a legalized feel, as evidenced by some of the procedures for breaking deadlock in consociational mechanisms, which on occasion have recourse to courts. Peace agreements are also difficult to plot in terms of different international and domestic forms of delegation because of the design of “hybrid” mechanisms involving both international and domestic actors in hybrid institutions. International and domestic actors work together across many aspects of the agreement to enforce and develop it: on joint military commissions, joint peace-monitoring councils, and consultative processes during international administrations. As a result, this hybrid legal pluralism is distinctive in the depth and reach of both the “hybridization” and the pluralism of the mechanisms that simultaneously enforce and develop the agreement.

The hybrid legal pluralism of peace agreements is also distinctive with regard to its underlying rationale. Peace agreements resemble internationalized contracts in the use of international law as a basis for a legal order that is “neutral” as between the parties. However, in the peace agreement context, the use of international law is driven less by the need for an autonomous denationalized legal order, and more by the need to take processes of domestic legal reform outside their normal channels so as to address the illegitimacy of the preagreement legal and political order. The use of international law reflects the fact that in internal conflicts the legitimacy and role of law itself is typically implicated, as the very notion of the rule of law has been degraded and devalued and requires rehabilitation. Domestic law processes thus are both a potential enforcement tool (the subject of change) and the object of change, complicating any notion of their role in producing compliance. In rare cases, such as that of South Africa, transformation of the domestic order can be achieved through a domestically implemented fundamental reconstruction. In most cases, it cannot. At the other extreme, internationalization can bring domestic functions to the paradoxic situation where they are undertaken in their entirety by international actors. The most comprehensive internationalization

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209 Cf. RATNER, supra note 15, at 43–50 (noting that the most recent phase of UN peacekeeping related to negotiated agreements involves both “preserving” and “promoting” the settlement, id. at 44).
210 DPA, supra note 41, Annex 4, Art. 6 (Constitutional Court); Annex 6, Art. 7 (Human Rights Chamber); INTERIM CONST., supra note 29, ch. 5, Art. 71; see also In re Certification of Constitution, supra note 104, 1996 (4) J.African L.R. 774 (CC), 1996 (10) BCLR 1253 (CC); Burundi Peace Agreement, supra note 29, Protocol II, ch. 2, Art. 15(5) (similar provision).
211 See, e.g., DPA, supra note 41, Annex 4, Art. IV(3)(f).
212 See, e.g., id., Annex 1A, Art. 8; Cambodia Political Settlement, supra note 114, Annex 2, Art. 2 (providing for Mixed Military Working Group to be established to resolve problems arising in the observance of the cease-fire).
213 See, e.g., Burundi Peace Agreement, supra note 29, Protocol III, ch. 3, Art. 27; Bougainville Peace Agreement, supra note 55, pt. E.
214 See notes 144–49 supra and corresponding text.
215 But note that the distinction can also be viewed as one of degree, as peace agreements have in part developed common practices through transnational contacts, while in the commercial law setting common legal practices respond to a notion of the “illegitimacy” of national laws, albeit in a very different context.
of these processes is found in the “contrived agreement” situation, and the use of an international territorial administration (ITA).\textsuperscript{217} ITAs indicate the capacity for international “third parties” to subsume and carry out the functions of government in their totality. They are instituted in the name of conflict resolution and evidence the close connection between “implementation” and “development” of a framework for peace. As Ralph Wilde notes, international territorial administration is justified legally, morally, and politically in terms of the deficits in sovereignty and governance of the state in question, although it again gives rise to questions about the limited legitimacy of international actors in undertaking domestic governance.\textsuperscript{218}

In summary, the examination of third-party delegation has begun to illustrate both the way that use of third-party guarantors can bring about norm promotion and the use of what has been termed “hybrid legal pluralism.” The distinctiveness of hybrid legal pluralism in this context is driven by the need to respond to the politicization and degradation of domestic law in conflicts. Thus, international “third party” enforcement often necessarily includes the domestic actors whose agreement is intended to be forged in hybrid institutions. Conversely, domestic legal forms tend to be internationalized through a heightened role for international law, and by involving international actors in implementing the agreement.

\section*{VI. The Nature of Peace Agreements: A New \textit{Lex Pacificatoria}?}

\textit{Toward a Lex Pacificatoria}

Peace agreements have produced practices of legalization marked by some consistency across widely varying peace processes. This legalization can be argued to constitute an emerging \textit{lex pacificatoria} (law of the peacemakers) that draws on the idea of \textit{lex mercatoria} (international law deriving from the practices of merchants) as a source of international commercial law.\textsuperscript{219} This embryonic \textit{lex pacificatoria} can now be identified as including

\begin{itemize}
  \item a distinctive self-determination role: peace agreements address both external and internal challenges to a state’s legitimacy through new permutations of government and human rights protections;
  \item a distinctive mix of state and nonstate signatories: peace agreements are “hybrid” agreements straddling international and domestic legal categories;
  \item distinctive types of obligation: peace agreements consist of both treatylike/contractual and value-driven/constitutional provisions; and
  \item distinctive types of third-party delegation: peace agreements rely on hybrid legal pluralism, involving multiple intertwined and overlapping legal and political mechanisms, for their implementation.
\end{itemize}

These distinctive elements reflect the conflict resolution role of peace agreements as simultaneously foundational and process-oriented documents. If we set aside legal categories and consider peace agreements on their own terms, they may be best thought of as transitional internationalized constitutions. They provide a power map and framework for governance, but

\textsuperscript{217} See generally Wilde, \textit{Danzig to East Timor}, supra note 184; Wilde, \textit{Representing ITA}, supra note 184.

\textsuperscript{218} See sources cited supra note 184.

it is often only partial and transitional, requiring further development. Contractual, treatylike commitments, backed up by delegation to mechanisms that are typically internationalized, are aimed at ensuring short-term implementation. However, domestic legal and political processes are contemplated to form the long-term vehicle for conflict transformation, and a transition to these must take place.

Figure 1, above, illustrates an idealized trajectory of peace agreement goals over time. This trajectory illustrates why peace agreements contain their distinctive mix of hybrid ingredients. It also points to peace agreement legalization as an attempt to bridge the uneasy gap between the short-term and long-term peace process goals and mechanisms. The hybrid nature of peace agreements goes beyond form, signatories, and even substance, in reaching to a need to rely on different rationales for why pacta sunt servanda at different stages in the process. In their initial stages peace agreements are meant to command implementation as contractual-like treaties; but it is their ability (or not) to serve as constitutions that enables them to continue as conflict resolution frameworks. Thus, Rwanda’s Arusha Accords, which failed so dramatically as an internationalized agreement, were still used after the genocide to provide and legitimate the basic framework of governance: as a treaty they would have been void, but as a constitution they could live on—albeit problematically.220

The attempt to produce legal-type documents, and indeed the very existence of the peace agreement phenomenon, testifies to the importance of legalized commitments to peace agreement parties: they constitute a key way of doing business. Any theory of how peace agreement legalization promotes compliance would seem best located in accounts of transnational legal processes as “normative, dynamic, and constitutive.”221 Such accounts argue that the compliance pull of legalized agreements lies in their capacity to promote transactions between parties that over time interpret and internalize norms so as to “reconstitute the interests and even the identities of the participants in the process.”222 This description rings true in the peace agreement context and appears to go far in explaining how the interrelated dynamics of form, obligation, and third parties, described above, aim at inducing compliance.223

Yet the distinctive attributes of their legalization all reflect the fact that if peace agreements are to construct states as peaceful, democratic, and legitimate, they must reconstruct a division between political and legal order and to some extent between international, domestic, and even

220 U.S. Dep’t of State, Background Note: Rwanda (Mar. 2006), at <http://www.state.gov/r/pa/ei/bgn/2861.htm#gov>.
221 Koh, supra note 206, at 2646.
222 Id. (Koh identifies this process as having three main dynamics: interaction (between transnational actors and parties); interpretation (of the application of legal norms); and internalization (of legal norms). He argues that this theory synthesizes, rather than replaces, other theories of compliance.)
223 Cf. id. at 2651–54 (using Oslo Accords as an example, Koh argues that transnational legal processes tied the antipeace-process Netanyahu into the Oslo framework to the point where he even signed and complied with a further agreement).
public and private spheres. This requirement gives rise to two difficulties for any theory of compliance. First, peace agreements focus on processes as much as outcomes, so that what constitutes compliance with them is under negotiation even as they are being implemented. This suggests a need to have some basis for distinguishing between the compliance pull of transnational legal processes on the parties and simple renegotiation. Second, the notion of internalizing norms is complicated by the position of domestic law in the peace agreement setting, where it is both object and subject of negotiation. Paradoxically, these difficulties characteristically result in the internationalization of domestic legal processes. International involvement itself, however, faces increasing normative and legitimacy challenges as time passes, creating a transitional dilemma for its norm promotion capacity.

While full elaboration of how any theory of compliance can account for these complications is beyond the scope of this article, it is suggested that understanding the common dynamics of peace agreement legalization—the lex pacifica—isa key starting point. Only through identifying the essential elements of peace agreement practice and understanding the extent to which it is both a unified and a legal practice can further lines of inquiry be established.

The Case for the Lex Pacificatoria

To be characterized as lex pacifica, peace agreement legalization must make the case that it is law (lex); and that it is distinct to peacemakers (pacificatoria). As regards lex, this article has argued that peace agreement practice evidences a strong degree of coherence stemming from the importance of legalization to achieving agreement between parties in the first place. It is further suggested 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 pacifica usefully captures similar dynamics with regard to the legalization of peace agreement commitments. Ultimately, whether the case for the lex has been made depends on one’s factual assessment of peace agreement practice and one’s view of what constitutes law (whether—and which—essentialist functionalist definitions or nonessentialist conventionalist definitions are preferred).

Whether the embryonic lex pacifica is differentiated enough to constitute a “new” form of law deserves further consideration. International law could move to accommodate peace agreements signed with nonstate actors as international agreements, just as it has accommodated agreements with international organizations. Indeed, this article has demonstrated how peace agreement practice may be forcing this accommodation. However, it must also be acknowledged that to move to a clear understanding of all such peace agreements as binding international agreements would change the face of international law, even as arguments persist that it is indeed moving away from the notion of states as the primary actors. Such acknowledgment would also raise the problem of what lines are to be drawn with reference to international law. While many of the agreements reviewed here have an arguable claim to be considered as international agreements because the nonstate actors enjoy some type of legal

224 Koh’s account of the role of transnational legal process in the Oslo Accords itself illustrates this difficulty, id. at 2653, as it can be argued that the agreements signed by Netanyahu in fact operated to dismantle key Oslo understandings rather than to implement them.
225 CUTLER, supra note 219; Lowenfeld, supra note 219.
227 KLABBERS, supra note 63; Catherine Bröllmann, A Flat Earth? International Organisations in the System of International Law, 70 NORDIC J. INT’L L. 319 (2001); cf. Malančzuk, Multinational Enterprises, supra note 61 (discussing whether internationalized contracts evidence a revision of international law).
subjectivity, other similar agreements are signed by actors such as domestic politicians, members of civil society, and armed groups with little claim at all to such status. Moreover, domestic legal forms cannot easily accommodate peace agreements without major revision, as the discussion of peace-agreement constitutions illustrated. These categorization difficulties point to 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. While the lex operates in an interstitial place similar to that of other legal documents such as internationalized contracts, it does so for quite different reasons and to quite different ends—it is the law of the peacemaker rather than the merchant.

The Lex Pacificatoria and Compliance Inquiries

This evaluation of the case for the lex pacificatoria indicates the ways that it constitutes a tool for further developing an understanding of the relationship of law to compliance in the peace agreement context. In fact, the main value of the term may be instrumental. Labeling peace agreement legalization as constituting a distinct legal practice highlights its coherence and can inform borrowings across peace processes in the search for implementation. It enables dialogue with empirical researchers, in particular with reference to their own often contradictory and unsatisfactory attempts to measure the success or failure of peace agreements. While focused on “civil war” or “internal conflict,” the studies use different definitions and thus compare different sets of data. Indeed, debate continues on the extent to which “civil war” can usefully be considered an undifferentiated category. The authors also disagree on how to measure peace. Should it be measured by the number of deaths caused by the conflict (raising the difficulty of how to define such a death)? What period of time demonstrates the existence of peace? When does the absence of deaths and lack of ostensible conflict indicate an accord’s success, or repression and failure? Should indicators of democracy also be included in any quantification of success? Furthermore, the choices made by social scientists as to how to correlate peace agreement provisions with conflict outcomes often seem problematically selective, and at odds with approaches that could factor in the dynamics of processes that are much less easily tested empirically. As a result, the studies find different factors to be crucial to success, with consequentially differing policy implications.

Understanding the lex pacificatoria embodied in peace agreement legalization makes an important contribution to these empirical debates because it reveals why some of the empirical quandaries are so intractable. If peace agreements are identified as transitional constitutions, then the difficulty of measuring success or failure lies in the difficulty of evaluating whether a constitution is successful or not. Clearly, there are empirical ways to measure success or failure, based on level of violent conflict or whether the constitution’s institutions are up and running.

229 See, e.g., Burundi Peace Agreement, supra note 29 (signed by a range of political parties as well as armed opposition groups); see also Dili Peace Accord, Apr. 21, 1999 (signed by the National Council of Timorese Resistance and Falantil, and the Pro-integration Party); cf. South Africa National Peace Accord, Sept. 14, 1991, available at <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/sa4.pdf> (signed by ANC and National Party government, and a range of forty parties, including civic actors).

230 See, e.g., Peceny & Stanley, supra note 1; Nicholas Sambanis, Using Case Studies to Expand Economic Models of Civil War, 2 PERSP. ON POL. 259 (2004); see also Licklider, supra note 16, at 685 (discussing difficulties with definitions and research design).

231 See, e.g., Peceny & Stanley, supra note 174; Sambanis, supra note 230; cf. Licklider, supra note 16.

232 See, e.g., FORTNA, supra note 13; Licklider, supra note 16; Walter, supra note 10.

233 The case study approaches do provide some process analysis. See Sambanis, supra note 230 (critiquing WORLD BANK, supra note 11); cf. Bekoe, supra note 13.
However, whether a constitution is actually working involves a much broader discussion of what it is that the constitution was meant to do. This includes questions such as, in what ways has the constitution provided alternatives to violent conflict? To what extent does it deliver benefits such as equality between groups and legitimacy to government? Does constitutional discourse divide or unite ethnically divided polities, and does it prevent or enable other political conversations? To have a sensible discussion about how law relates to compliance, we must have some discussion about what compliance should look like. These questions point to the benefit of examining peace agreements by means of a broad definition, and indeed of linking the discussion to ongoing debates about processes of social change and democratic renewal even outside the context of violent conflict. It suggests a need for social scientists and lawyers to talk to each other about the stuff of jurisprudence.

Recognition of a lex pacificatoria also indicates the need for further examination of the implications of legal pluralistic practice for compliance, particularly at the domestic level. The term lex pacificatoria signals the range of new inquiries. What is the relevance of the agreement’s text to political discourse? How has international participation shaped this relationship? How have the various bodies charged with implementing the agreement—national monitoring commissions, peace councils, or even truth and reconciliation commissions—evolved quasi-legal regulation? Or conversely, where legal forums adjudicate on implementation, what is the role of peace agreements as regards judicial functions? At what point can legal adjudication cut free from the agreement’s apparent goals, and how do we decide whether this cutting free represents a negation of the agreement or the achievement of a successful transition to “normal” political and legal structures? The compliance implications of the hybrid pluralist legal tapestry of peace agreement implementation at the domestic level have received little attention.

Finally, and perhaps most important, recognition of a lex pacificatoria enables engagement with the force of the lex and so offers the chance to question and shape its assumptions and manifestations. The phenomenal aspects of peace agreement practice point to a “univocal political meaning” on the global front, which operates to legitimate internationalized processes and blueprints.234 This legitimating narrative presents peace agreements as always a good thing and peace processes as always moving straightforwardly from conflict to peace, and from internationalized process to domestic constitutionalization, in conformity with human rights standards. International actors appear as neutral and legitimate, and national actors as violent and equally at fault. In fact, peace processes evidence different degrees of legitimacy and neutrality of both international and domestic actors. They can move both away from and toward violence. They produce agreements that often have an ambiguous relationship to international law’s normative standards, particularly those of human rights law. The fiction of a voluntary agreement crafted by equal parties, so crucial to achieving agreement, often disappears at the implementation stage, which involves supervising and enforcing what, in essence, are fundamental reallocations of power. At this point, international implementers must often abandon either their “neutrality” or their effectiveness—in practice, not all the parties can win.235 The choice has implications for the normative basis on which international actors assert their legitimacy.236

234 Boaventura de Sousa Santos, Law and Democracy: (Mis)trusting the Global Reform of Courts, in GLOBALISING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 253 (Jane Jenson & Boaventura de Sousa Santos eds., 2000).
236 See sources cited supra note 184.
The above discussion has indicated that the legitimacy and the effectiveness of peace agreement legalization are related. Unless we understand the coherence of peace agreement legalization as having the force of law, we risk losing sight of a necessary discussion as to the identity of the moral and normative underpinnings of the emerging _lex_. Such a loss leaves technical devices and patterns—from constitutional blueprints to transitional justice mechanisms—to be rolled out without any coherent comparative discussion of whether they build on or undermine their possible normative justifications. Without this discussion it can be somewhat puzzling why virtually identical measures seem legitimate and successful in some cases and illegitimate and unsuccessful in others.

Unveiling a _lex pacificatoria_ reveals not just the normative capacity of international law, but the capacity of peace agreement practice to recast its norms. This capacity reaches its height where peace agreement practice touches on normative gaps with regard to how international law deals with both mainly internal conflict and transitional situations. The peace agreement phenomenon and the emerging _lex pacificatoria_ therefore stand firmly at the heart of current debates over the future direction and power of international law itself and deserve further consideration.

237 For evidence of the potential of “organizational” tools to promote common practice without articulating norms, see U.S. Dep’t of State, Post-conflict Reconstruction Essential Tasks Matrix (Apr. 1, 2005), at <http://www.state.gov/s/crs/rls/52959.htm> (note, however, caveats in the preface as regards the need to be appropriate for context). See Post Conflict Reconstruction Unit, Post Conflict Stabilisation: Improving the United Kingdom’s Contribution (Autumn 2004), at <http://www.postconflict.gov.uk/consultation/>.


239 See sources cited _supra_ note 238.