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MIGHTIER THAN THE SWORD

PEACE AGREEMENT DESIGN AND THE LAW

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Thesis submitted in fulfilment of the requirements for the award of PhD
Maynooth University
Department of Law
October 2017

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SUMMARY

In the last 30 years, peace agreements have proliferated as conflict resolution instruments. Yet quantity has not reflected quality: peace agreements continue to collapse at an alarming rate, and civil wars terminated by negotiated settlement remain twice as likely to reignite. By examining the myriad ways in which peace agreements give effect to legal processes and institutions, peace agreements can be optimised to the point that the signatories' pen can be mightier than the sword.

This thesis employs a legalization framework advanced by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal to identify the legal mechanisms that are central to sustainable peace processes. The research focuses on the protracted peace processes in the Philippines, Sierra Leone and Sudan, resulting in a sample of 9 agreements that reflect success and failure, and span 90 years of conflict resolution efforts collectively. These case studies provide insight into various geographic regions and cultural contexts, but remain linked by commonalities concerning the nature of their conflicts, their origins in the inequitable distribution of power and wealth, and the nature of their peace agreements as legalized documents tied to Constitutional processes. These commonalities reveal a strong correlation between the design of certain legal mechanisms (autonomous arrangements, inclusive measures, and forums for dispute resolution), and the sustainability of peace in various political contexts.

The thesis concludes with a comparative analysis of the provisions common to each of the case studies, and offers valuable, but generally applicable lessons on the specific role that law plays in shaping short-term bodies for conflict management, and the long-term processes that influence the transition to sustainable peace. The thesis' contribution thus lies in the advancement of theoretical frameworks for agreement design that can inform conflict resolution efforts in difficult contemporary and future contexts.

ACKNOWLEDGMENTS

Firstly, I would like to thank the Graduate Studies Office at Maynooth University and the National University of Ireland for lending me the financial support necessary to complete my Doctorate. It has been a pleasure and a privilege to pursue research as a career, and it is my personal honour to lend the names of John Hume, Pat Hume, and Edward J Phelan to my work.

I owe an enormous debt of gratitude to Professor Sandeep Gopalan, who made it possible for me to pursue a PhD in my home-from-home: Maynooth. I am also very grateful to Professor Michael Doherty, who became the Head of the Law Department at Maynooth in 2013. Michael steadied the ship at a difficult time in my studies when I was without a supervisor. In the time since, he has transformed the Department into an amicable and supportive environment where PhD students want for very little, and he has been instrumental in my development as an academic.

The person who bore the brunt of my difficulties and worried emails, however, is my supervisor, Dr. John Reynolds. At a point when funding opportunities seemed exhausted, employment opportunities were slim, and I began to doubt the quality of my work, John reassured me that true enlightenment can be an increasing sense of uncertainty. John made sure that there were few uncertain moments during my Doctorate, and he has played an invaluable role in guiding me towards the successes I have enjoyed in my early academic career. I am proud to have had him as a Supervisor, and I hope my thesis is worthy of his name.

I would like to express my thanks to all in the Law Department at Maynooth University for their friendship and support over the last few years. Some members of staff have been particularly influential in guiding me down the academic path, and in this regard I would like to thank Dr. Neil Maddox (who kept my postgraduate pursuits rooted firmly in the field of Law), Dr. Sibo Banda (a significant influence in my first year as an Undergraduate), and Seth Tillman (who has been a kindly mentor and a teacher to aspire to). Thank you to the good souls that comprise the growing PhD community within the Law Department – our meetings have been very happy ones, and I look forward to hearing of your continued successes!

Outside of the Law Department, I am indebted to the influence of Professor John O'Brennan of the Centre for European and Eurasian Studies, and Dr Mary

Murphy of the Sociology Department, both at Maynooth University. Mary and John encouraged my interest in research when I was only a first year student of Politics in Maynooth, and they honed the skills that would later lead me down an academic path. Kieran Doyle and Peter Cassells at the Edward M Kennedy Institute for Conflict Intervention were instrumental in grounding my theoretical ideas in practice and policy, and they helped me to get the best out of my PhD at Maynooth University. I hope that I can honour the faith they put in me at some point in the future. Dr. Deirdre McGowan, a Maynooth Law alumna and Head of the Law School at the Dublin Institute of Technology, afforded me an invaluable opportunity to get some lecturing experience as I tried to gain entry to the world of academia, and thankfully, this has since come to pass. A special word of thanks to my colleague at DIT, Dr. Stephen Carruthers, for his friendship and support during my first foray into full-time teaching.

Having already been in Maynooth for four years when I began my Doctorate, I was very conscious that the longer I stayed there and the more of my friends that left, the more the magic of the place might begin to fade away. With nearly nine years in Maynooth behind me, I am extremely grateful to all my friends (old and new) who make the place as special to me now as it was in September 2008: to the Leavey Lads and Ladies, everyone in TIA, the girls on Parsons Street and in Leinster Cottages, everyone who graced St. Catherine's, Seamus Carr, and the best friends I shared Hargadon and Geraldine House with. There are far too many of you to name individually, so I hope I` have done justice to the memories we share that I remember so fondly.

Finally, my sincere thanks to the people close to home who have experienced the ups and downs of my PhD just as much as I have. Thanks to Ian Hand, my ever-present best friend, and the first person I rang when I was offered my PhD. We celebrated the news at Pat Byrne's birthday: my other best friend, who has made more than sure that my social life did not suffer over the past 5 years! To Mikaela, who has amplified the best of my PhD successes and has been put out when things did not go to plan: thanks for making some of the worst parts of the PhD some of the happiest parts of my life (only another PhD student could have put up with it). And last but by no means least, thanks to my family. To my brothers, and brothers-in-arms, Stephen and James, who witnessed the proximate effects of a non-cooperating PhD, and helped to alleviate them through music and laughter. To my Mam and Dad,

who worked tirelessly and ceaselessly so that we've wanted for nothing, and who imparted us with a sense of social justice by their example. Thank you for enduring the numerous lectures and expositions that shaped this thesis, and for providing countless outlets for a tightly wound mind.

LIST OF ABBREVIATIONS

ABC – Abyei Boundary Commission

AFP – Armed Forces of the Philippines

AFRC – Armed Forces Ruling Council (Sierra Leone)

AGCH – Agreement for the General Cessation of Hostilities (Philippines, 1997)

ANC – African National Congress

APC – All Party Congress (Sierra Leone)

ARMM – Autonomous Region in Muslim Mindanao

ASEAN – The Association of South East Asian Nations

CAB – Comprehensive Agreement on the Bangsamoro

CCP – Commission for the Consolidation of Peace (Sierra Leone)

CMC – Ceasefire Monitoring Committee (Sierra Leone)

CMRRD – Commission for the Management of Strategic Resources, National Reconstruction and Development (Sierra Leone)

CPA – Comprehensive Peace Agreement (Sudan, 2005)

DDR – Demobilization, Disarmament, and Re-Integration

DoP – Declaration of Principles (Sudan)

DRC – Democratic Republic of Congo

ECOMOG – Economic Community of West African States Monitoring Group

ECOWAS – Economic Community of West African States

EO – Executive Outcomes

FAB – Framework Agreement on the Bangsamoro

FARC – Revolutionary Armed Forces of Colombia

GoSS – Government of South Sudan

ICJ – International Court of Justice

IGAD – Intergovernmental Authority on Development

IRA – Irish Republican Army

IS – Islamic State

MILF – Moro Islamic Liberation Front

MNLF – Moro National Liberation Front

MOA-AD – Memorandum on Ancestral Domain

NCDDR – National Commission on Disarmament, Demobilization and Reintegration

(Sierra Leone)

NCRC – National Constitutional Review Commission (Sudan)

NPRC – National Provisional Ruling Council (Sierra Leone)

OAU – Organisation of African Unity

OIC – Organization of Islamic Cooperation

PNP – Philippine National Police

RUF – Revolutionary United Front

SAF – Sudanese Armed Forces

SCSL – Special Court for Sierra Leone

SLA – Sierra Leonean Army

SLPP – Sierra Leone People's Party

SNC – Supreme National Council (Cambodia)

SPCPD – Southern Philippines Council for Peace and Development

SPLM/A – Sudan People's Liberation Movement/Army

SRSF – Special Regional Security Force

SSDF – South Sudan Defence Force

SSIM – South Sudanese Independence Movement

SZOPAD – Special Zone of Peace and Development in the Southern Philippines

UDSF – United Democratic Salvation Front (Sudan)

UN – United Nations

UNAMSIL – United Nations Mission in Sierra Leone

UNHCR – United Nations High Commissioner for Refugees

UNOMSIL – United Nations Observer Mission in Sierra Leone

VCLT – Vienna Convention on the Law of Treaties

To Mam and Dad who, as parents to three boys, are blessed as peacekeepers, and in memory of Jim Mooney, who showed us the road less travelled.

Across wide lawns and cultured flowers drifted
The conversation of the highly trained...
Far off, no matter what good they intended,
The armies waited for a verbal error
With all the instruments for causing pain:
And on the issue of their charm depended
A land laid waste, with all its young men slain,
Its women weeping, and its towns in terror.

– *Embassy*, W H Auden

On some table, a document is signed by some people that none of us knows, and for years our main aim in life is the one thing that usually draws the condemnation of the whole world and incurs its severest punishment in law…. An order has turned these silent figures into our enemies; an order could turn them into friends again.

– Erich Maria Remarque, *All Quiet on the Western Front*

1.

INTRODUCTION

In the decades following the end of the Cold War, the international community grew "accustomed to peace as the normal state of affairs."[1] Significant improvements in the "technology of peace"[2] during the 1990s led to a proliferation of internationally-driven peace agreements in the post-Cold War period, and affected a long-term decline in the number of conflicts suffered globally.[3] But this era has since passed. After a time during which the number of conflicts decreased, the five-year period from 2011-2016 has seen the growth of increasingly internationalized conflict, and clashes have become more deadly.[4] Indeed, in 2014, battle deaths hit a 25-year high.[5]

Yet peace agreements have continued to grow as a means of terminating conflict, and negotiated settlements remain a marked feature of modern conflict.[6] Between 1989 and 2014, as many as 212 documents that could be classified as peace agreements were signed—a figure which averages 8 agreements per year.[7] While the *quantity* of agreements being promulgated before the international community suggests a positive development, the data suggests that agreement *quality* (and, therefore, sustainability) is in fact severely lacking. In 2011, only one peace agreement was concluded, and fighting resumed after just three days.[8] In 2013, peace

[1] Margaret MacMillan, 'The Rhyme of History: Lessons of the Great War' (2013) The Brookings Essay <http://www.brookings.edu/research/essays/2013/rhyme-of-history> accessed 6 January 2014.
[2] Virginia Page Fortna, 'Where Have All the Victories Gone? Peacekeeping and War Outcomes' (2009) Paper presented to the Annual Meeting of the American Political Science Association Toronto, 6 September 2009 <http://www.columbia.edu/~vpf4/victories%20Sept%202009.pdf> accessed 14 July 2016, 40.
[3] Lotta Themnér & Peter Wallensteen, 'Armed Conflicts, 1946-2011' (2012) 49(4) Journal of Peace Research 565, 571 [original citations omitted].
[4] Jean-Marie Guéhenno, 'Conflict is Key to Understanding Migration,' Carnegie Europe (13 May 2016) <http://carnegieeurope.eu/strategiceurope/?fa=63578> accessed 17 May 2016.
[5] Institute for Economics and Peace, 'Global Peace Index 2016' (June 2016) <http://static.visionofhumanity.org/sites/default/files/GPI%202016%20Report_2.pdf> accessed 14 July 2016, 34.
[6] Lotta Harbom & Peter Wallensteen, 'Armed Conflicts, 1946-2009' (2010) 47(4) Journal of Peace Research 501, 503.
[7] See Therese Pettersson & Peter Wallensteen, 'Armed Conflicts, 1946-2014' (2015) 52(4) Journal of Peace Research 536. The datasets for 2011-2014 are set out in the fourth issue of that publication for each of those years.
[8] Themnér and Wallensteen (n 3) 571. The agreement in question was the Addis Ababa Agreement

agreements in the Central African Republic and the Democratic Republic of Congo collapsed within months of their conclusion.[9] Despite an upward in trend in the number of peace agreements signed since 2011, empirical evidence continues to suggest that negotiated settlements collapse at an alarming rate. Barbara Walter has found that almost half of all negotiated settlements will collapse,[10] while civil wars terminated through negotiated settlement are twice as likely to reignite.[11] Alarmingly, those conflicts are 50% more deadly than conflicts terminated by a decisive victory, meaning the evidence no longer supports the normative argument that peace agreements save lives.[12] So what should researchers focus in on when we consider "why some settlements work and others do not"?[13] This thesis set outs to address that question with particular reference to the role of law and 'legalization' in peace agreement stability.

1. I. THE ROLE THAT LAW MIGHT PLAY IN AGREEMENT STABILITY

Agreement stability is intricately linked to agreement design: the extent to which the agreement maps out political structures and empowers those structures to react to unanticipated developments.[14] Peace agreements are thus highly legal documents, often linking ceasefire commitments "to new constitutional arrangements for how power will be held and exercised" in territories divided by conflict.[15] In the tenuous peace that follows the conclusion of open hostilities, the law can serve as a neutral vehicle for post-conflict reconciliation. Many peace agreements entail demobilization and disarmament provisions that require the parties to form a single army under a single government,[16] creating what the literature refers to as 'a security

signed by the Government of Sudan and the SPLM/A North.

[9] Lotta Themnér and Peter Wallensteen, 'Armed Conflict, 1946-2013,' (2014) 51(4) Journal of Peace Research 541, 549.

[10] Barbara Walter, "Designing Transitions from Civil War: Demobilization, Democratization, and Commitments to Peace" (1999) 24(1) International Security 27 in Evan Hoffman and Jacob Bercovitch, 'Examining Structural Components of Peace Agreements and Their Durability' (2011) 28(4) Conflict Resolution Quarterly 399, 400.

[11] Monica Duffy Toft, 'Ending Civil Wars: A Case for Rebel Victory?' (2010) 34(4) International Security 7, 20 [original citations omitted].

[12] ibid.

[13] Stina Högbladh, 'Patterns of Peace Agreements - presenting new data on Peace Processes and Peace Agreements' (Annual meeting of the International Studies Association, San Diego, 22 March 2006), 4.

[14] Hoffman and Bercovitch (n 10) 404.

[15] Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008) 6.

[16] Luca Renda, 'Ending Civil War: the Case of Liberia,' (1999) 23(2) The Fletcher Forum of World

dilemma.'[17] Combatants can be reluctant to disarm, "because doing so renders them vulnerable to physical retaliation by enemies."[18] By founding the agreement on strong legal guarantees, combatants can signal their intentions clearly and overcome this dilemma.[19] The precise delineation of ceasefire lines and demilitarized zones can prevent a military build-up around contested territory. The provision of joint commissions comprised of representatives from both sides "can provide a communication channel and forum for discussion of problems".[20] Peceny and Stanley cite "timetables for implementation, and provisions for UN verification" as further examples of legal measures that can build trust and "lock in repeated nonbellicose interactions" between parties.[21] The presence of legal language can thus provide "a very effective mechanism to prevent breaches of peace agreements … by channeling and structuring state conduct in situations of deep mistrust in the aftermath of a conflict."[22]

Principles of law can also be utilized to rehabilitate domestic systems where the rule of law has been compromised, and where existing legal structures have been "partly constitutive of the conflict itself."[23] In circumstances where an agreement must "address the illegitimacy of the pre-agreement legal and political order,"[24] international law can provide "a host of international and comparative" external reference points,[25] and a "basic lexicon of generally agreed terms and concepts."[26] Normative considerations such as human rights, gender equality and political participation find expression in peace agreements, not because of the parties' bargaining power alone, but because negotiations take place in 'the shadow of the law'—the law's normative and equalizing influence. The law is thus particularly

Affairs 59, 59-60.
[17] ibid.
[18] Mark Peceny & William Stanley, 'Liberal Social Reconstruction and the Resolution of Civil Wars in Central America' (2001) 55(1) International Organization 149.
[19] Virginia Page Fortna 'Scraps of Paper? Agreements and the Durability of Peace' (2003) 57(2) International Organization 337, 344.
[20] Virigina Page Fortna, *Peace Time – Cease-Fire Agreements and the Durability of Peace* (Princeton University Press 2004) 28.
[21] Peceny and Stanley (n 18) 156-157.
[22] Andrej Lang, ''Modus Operandi' and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution' (2008) 40 New York University Journal of International Law & Politics 107, 110.
[23] Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66(3) The Modern Law Review 317, 334.
[24] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) The American Journal of International Law 373, 406.
[25] Campbell, Ní Aoláin and Harvey (n 23) 334.
[26] Rob McLaughlin and Hitoshi Nasuy, 'The Law's Potential to Break—Rather Than Entrench—the South China Sea Deadlock?' (2016) 21(2) Journal of Conflict and Security Law 305, 309.

useful in a conflict resolution context because it provides what appears to be "a legal order that is 'neutral' as between the parties,"[27] and the ability to project "mere opinions onto a status of what is (universally) right."[28]

However, international law is not always a neutral vehicle, and can be subject to various political, cultural and historical interpretations. Indeed, Shahshahani contends that international law merely provides a "non-political veneer" for "enhanced politicking" between the parties.[29] Contested perceptions of unprecedented legal arrangements can lead to "unilateral, interest-laden interpretations of a single concept",[30] such as autonomy, territory, citizenship, and so on. The law can correct interpretive bias by providing for courts and dispute resolution forums capable of clarifying any ambiguities and determining any competing interpretations.[31] Some argue that legally binding agreements are thus to be preferred over those of a predominantly political nature, "because they trigger a constitutional process with deliberative fora and interpretative tribunals that have to be involved at different stages."[32] However, these processes are not always immune to subjective influence. Interpretative bodies themselves can be incoherent in practice,[33] and can be subject to dominant or unilateral control in intrastate processes. As such, law and politics should not be seen as competitive spheres of influence in a peace process, but rather as mutually constitutive elements of that process. Indeed, the objective cover provided by law often makes ground-breaking compromise possible where reasons of domestic and international politics had frustrated previous attempts.[34]

Peace agreements that adopt consciously legal language and appear to impose substantive obligations can also exert considerable normative influence on the parties thereto. Actors tend to conduct their relations within the legal framework prescribed by the agreement in order to justify their actions—attacks and provocations are much harder to justify when explicitly prohibited by a clearly worded ceasefire, for example. As this social phenomenon encourages legal compliance, it is known as

[27] Bell (n 24) 406.
[28] Martti Koskenniemi, 'The mystery of legal obligation,' (2011) 3(2) International theory 319, 324.
[29] Sepehr Shahshahani, 'Politics Under the Cover of Law: Can International Law Help Resolve the Iran Nuclear Crisis?' (2007) 25(2) Boston University International Law Journal 369, 398.
[30] McLaughlin and Nasuy (n 26) 311.
[31] ibid at 312.
[32] Sandeep Gopalan, 'India-Pakistan Relations: Legalization and Agreement Design' (2007) 40 Vanderbilt Journal of Transnational Law 687, 717.
[33] McLaughlin and Nasuy (n 26) 311.
[34] Shahshahani (n 29).

'compliance-pull.' Parties may also promulgate their peace agreements internationally, in order to signify the sincerity of their commitments, and appeal to principles of international law. While these agreements can still be breached, doing so incurs significant 'audience costs,' i.e., loss of political, military and economic support from domestic constituencies and the international community.[35] Even where established norms cannot effect total compliance, Morriss argues that they constitute a useful barometer "for differentiating good faith efforts at compliance … from willful and knowing violations properly subject to international condemnation and collective resistance" from the international community.[36]

1. II. THE GAP IN THE LITERATURE

Despite the central role that law plays in influencing party behavior, rehabilitating post-conflict systems, and maintaining ceasefire mechanisms in the interim, scholarly focus on the pivotal role of law in shaping peace processes is severely lacking. An ample body of work in the social sciences has explored the factors that bring parties to the negotiating table, and the countless variables that contribute to agreement stability,[37] yet very little has been written about the specific role played by law in these core tenets of peacebuilding.[38] As Kittrie argues, "International law's potential contributions… are just that, potential. They must be consciously harnessed."[39] Scholars have flagged the lack of inquiry into the effects of different kinds of legal input on the durability of peace,[40] despite the fact that its

[35] Fortna (n 20) 28.
[36] David Morriss, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations' (1996) 36 Virginia Journal of International Law 801, 817.
[37] See generally, Caroline A Hartzell, 'Explaining the Stability of Negotiated Settlements to Intrastate Wars' (1999) 43(1) Journal of Conflict Resolution 3, Caroline A Hartzell, Matthew Hoodie and Donald Rothchild, 'Stabilizing the Peace after Civil War: An Investigation of Some Key Variables' (2001) 55(1) International Organization 183, Stephen Stedman, Donald Rothchild and Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder 2002), Barbara Walter, 'The Critical Barrier to Civil War Settlement' (1997) 51 International Organization 335, Barbara F Walter, *Committing to Peace: Successful Settlements of Civil Wars* (Princeton University Press 2002) 3.
[38] Orde F Kittrie, 'More Process than Peace: Legitimacy, Compliance, and the Oslo Accords' (2003) 101 Michigan Law Review 1661, 1662. Notable exceptions include Christine Bell's landmark monograph (n 15), and Carsten Stahn, 'Jus Post Bellum: Towards a law of transition from conflict to peace' (Cambridge University Press 2008).
[39] Kittrie (n 38) 1666.
[40] Inger Österdahl, 'Just War, Just Peace and the Jus post Bellum' (2012) 81(3) Nordic Journal of International Law 271, 276. See also, Fortna (n 19) 339.

crucial role in stemming the recurrence of conflict has been well documented.[41] Certain provisions of a peace agreement may maximize signatory-compliance and enhance stability, while structural flaws within a peace agreement's text that can lead to peace processes bringing about "more process than peace."[42] Kittrie, for example, refers to the Oslo Accords between Israel and Palestine and puts their failure down to key elements of their design, such as their open-ended and ambiguously drafted provisions, which "clearly had a corrosive effect in and of themselves."[43] Kittrie duly concludes that there are lessons to be learned from the failure of such agreements "that are generally applicable to designing peace negotiations and peace agreement texts to maximize compliance with their terms."[44]

The lack of attention given to this issue is not just a matter of academic oversight, but a question of diplomatic culpability and scholarly ethics. Just as the law plays a central role in achieving and maintaining peace, so too does it shape "new trajectories of political violence" if the peace agreements collapses.[45] This causative link demands that greater attention be paid to the policy decisions that affect how domestic actors deploy violence.[46] The law plays a significant role in phrasing and giving effect to these policy decisions, particularly in the context of power-sharing provisions and autonomous arrangements, which uproot existing Constitutional structures in order to achieve a more equitable distribution of power. To date, political scientists have tended to dominate the debate on the legitimacy of these arrangements, much to the detriment of any legal contributions.[47] While the lack of legal focus can be somewhat attributed to the difficulty of finding answers to the complex question of peace within a single discipline,[48] the unique role that law plays in these processes demands further attention. Law is not just a means of legitimating post-conflict structures of law, politics, and inequality, but is often a unique end in itself. Some combatants fight solely for the cultural and political

[41] Mark L Schneider, 'Strategies for Implementing and Enforcing Peace Agreements: Lessons Learned' (2006) 7 Cardozo Journal of Conflict Resolution 317, 319.
[42] Kittrie (n 38) 1664.
[43] ibid at 1686.
[44] ibid.
[45] Sharath Srinivasan, 'Negotiating Violence: Sudan's Peacemakers and the War in Darfur' (2013) 113 (450) African Affairs 24.
[46] ibid at 25.
[47] Jeremy I Levitt, 'Illegal Peace?: An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa' (2006) 27(2) Michigan Journal of International Law 495, 497.
[48] Omar M Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks' (2007) 32 The Yale Journal of International Law 61, 62.

recognition that legal language grants and peace agreements provide. As Bell has noted, "we never imagine that people kill and die for textual recognition. But in fact often they do, and so it is important to take law's performative potential seriously."[49]

The obvious advantage of research in this area is that we may yet learn from previous failings in this field, and apply that knowledge elsewhere to prevent negative outcomes or even achieve unprecedented compromises. This idea of knowledge transfer is not particularly novel in the field of political diplomacy. Delegations from conflict-affected regions frequently visit locations where landmark agreements were reached, in the hope of learning something that might apply to their own circumstances. Indeed, the success of the Good Friday Agreement on Northern Ireland has brought delegations from from Afghanistan, Armenia, Azerbaijan, Liberia, Pakistan, Iraq, Sri Lanka, Kashmir, Timor Leste, Colombia, Israel, and Palestine to Ireland over the last 20 years.[50] The European Union has more recently cited its experience in Northern Ireland as an example to the peace process in Mindanao,[51] and the influence of the Good Friday Agreement is readily observable in the 2014 Comprehensive Agreement on the Bangsamoro's provisions on policing and decommissioning. The innovative approach to peace-making employed in South Africa had a significant influence on the 2000 Arusha Peace and Reconciliation Agreement in Burundi, which prescribed similar provisions on human rights, gender equality, and a vehicle for future negotiations that was tied to the Constitution.[52] More recently, the 2016 peace agreement in Colombia featured transitional justice mechanisms that were influenced by the international tribunal for the former Yugoslavia and the Truth and Reconciliation Commission in South Africa.[53] From a practical point of view, the commonality of peace agreement content across various peace process is thus a matter of common sense.[54]

From the analytic point of view, however, the story is of course not a straightforward one of transferable templates and knowledge. Any sustainable solution to conflict must be tailored "to the historical realities of the conflict in

[49] Bell (n 15) 297.
[50] John Doyle, 'Conflict Resolution in South Asia—Parallels and Lessons from the Northern Ireland Peace Process' (2015) 26 Irish Studies in International Affairs 5.
[51] Andrew Sherriff, Volker Hauck and Camilla Rocca, 'Glass half full: Study on EU lessons learnt in mediation and dialogue,' AETS Consortium (2013), 21-22.
[52] Bell (n 15) 43.
[53] Ed Vulliamy, 'Colombia peace deal with FARC is hailed as new model for ending conflicts' The Guardian (26 September 2015).
[54] Bell (n 15) 201.

question",[55] to "its drivers, its protagonists, their motives and interests."[56] But this does not mean that the search for general guidelines, universal standards, or proven peacebuilding practices is a futile or naïve mission.[57] Just as conflicts play out to distinct patterns that can often seem invisible to their contemporaries,[58] so too do peace agreements replicate successful and unsuccessful mechanisms, with similar results. Indeed, Bell has noted that academic analysis of the structural aspects of agreements can inform the 'borrowing' of provisions that consistently support peace,[59] as evidenced by the Good Friday Agreement's enduring influence elsewhere. Of course, no single agreement can provide a one-size-fits-all approach to peacebuilding. A prototypical agreement would fail to address the peculiarities of any given conflict, and a theoretical study will have limited application on the ground.[60] However, a critical review of commonly adopted peacebuilding practices can provide a template that fills a recognized gap in the literature, and presents a more informed approach to legal peace-making.

1. III. THE AIMS OF THE THESIS

> "Could we simply not formalise these sorts of arrangements, instead of always starting from scratch, recognising that of course each case will have its own intricacies."[61]

This thesis aims to identify legal mechanisms and provisions that are central to sustainable peace processes, in order to advance a broad theoretical framework for sustainable peace agreements that can be employed and adapted in addressing the particularities of a given conflict. The research critically evaluates protracted peace processes that had a prolific peace agreement output in order to highlight the features that were central to the stability of successful agreements, and those features that

[55] Brian Orend, 'Justice after War' (2002) 16(1) Ethics & International Affairs 43, 43-44.
[56] Jean-Marie Guéhenno, '10 wars to watch in 2015' Foreign Policy (2 January 2015) <https://foreignpolicy.com/2015/01/02/10-wars-to-watch-in-2015> accessed 5 January 2015.
[57] Orend (n 55) 43-44.
[58] Christopher R Hill, 'A Contract Group Plan for Syria,' Project Syndicate (30 May 2015) <http://www.project-syndicate.org/commentary/syria-civil-war-international-peace-plan-by-christopher-r-hill-2015-05> accessed 3 June 2015.
[59] Bell (n 24) 410.
[60] Mark J Allman and Tobias L Winright, *After the Smoke Clears - The Just War Tradition and Post War Justice* (Orbis 2010) 174-175
[61] Roméo Dallaire, *They Fight Like Soldiers, They Die Like Children* (Arrow Books 2011) 172.

were detrimental to their predecessors. A subsequent comparative analysis of the provisions common to each of the case studies will identify provisions that are consistently attributable to agreement stability. This will allow for the development of theoretical frameworks for agreement design that can inform conflict resolution efforts in difficult contemporary and future contexts.

Accordingly, the research centers on a detailed desk study of peace processes in the Philippines, Sierra Leone and Sudan. The conflicts therein have collectively entailed over 90 years of negotiations, resulting in a sample of 9 agreements that reflect success and failure. These case studies provide insight into various geographic regions and cultural contexts, but remain linked by commonalities with regards to the nature of their conflicts (the central state versus constituents from its neglected peripheries), issues regarding the distribution of power (addressed through autonomy and power-sharing arrangements) and wealth (land, diamonds, and oil), and the nature of their peace agreements as legalized documents tied to Constitutional processes. Sierra Leone also serves as an interesting counterpoint to the main aims of this thesis, highlighting the difficulties of relying on a solely legal analysis to illustrate the intricacies of building peace; and bearing important lessons for contemporary issues such as the internationalization of internal conflict and the growth of non-state actors with little regard for the rule of law. There is thus much to learn from a detailed analysis of these conflicts, their successes and shortcomings, and the contexts that informed them.

Analyzing the peace processes as a series of peace agreements is central to this thesis and the broader goal of understanding why some agreements succeed while others fail. Structural flaws in an agreement's text may fell a negotiated settlement at an early stage in the peace process, but subsequent agreements can build upon the failures of their predecessors,[62] as the analysis herein illustrates. The peace process can thus be seen as a vehicle for progress and learning, and examining the links between agreements in a process is central to understanding variation in agreement stability. Studying unsuccessful agreements is also central to advancing a nuanced understanding of peacebuilding processes. Existing studies have focused on the variables that make peace easier to maintain, much to the detriment of our

[62] Kwesi Aning and Samuel Atuobi, 'The Neglected Economic Dimensions of ECOWAS's Negotiated Peace Accords in West Africa' (2011) 46(3) Africa Spectrum 27, 39.

knowledge of the variables that damage the prospects for peace.[63] This oversight is particularly damaging in a legal context, where the law can inadvertently legitimize structures that undermine peace. Focusing on the process as a whole, and the factors that both increase and decrease the sustainability of peace, is thus central to our wider goal of furthering "sustainable processes and mechanisms capable of helping transform conflict into peace and reconciliation."[64]

When considering whether an agreement or peace process has been successful or not, the thesis is not informed by an advanced discussion of what constitutes a successful peace. There is debate amongst the literature as to whether success should be gauged by the absence of hostilities and lack of civilian casualties; or more positive indicators of peace, such as quality of democracy, quality of life, reductions in inequality, and so on.[65] This thesis adopts a concept of 'success' that is closer to the former: the conclusion of a negotiated settlement giving rise to new political structures/relationships, and the resolution of the overarching conflict-dyad marked by the cessation of hostilities between the signatories. The thesis does not regard positive or negative peace as a determinant of success, but the research does provide insight as to how legal provisions affect such outcomes and influence agreement sustainability.

Defining a peace agreement for the purposes of the thesis is important, given the amount of documents that claim the label the 'peace agreement.'[66] The term is largely descriptive and is usually attached to formalized agreements, "either between two States or a State and an armed belligerent group (sub-state or non-state)—that formally ends a war or armed conflict and sets forth terms that all parties are obliged to obey in the future."[67] However, there is significant variation among agreements with regard to their formal legal status and their substantive obligations.[68] Some 'agreements' represent pre-negotiation documents, where the parties agree on a set of principles that will inform or guide subsequent talks. Such agreements are merely political, and are not justiciable before national or international courts. Bell labels

[63] Caroline A Hartzell, 'Explaining the Stability of Negotiated Settlements to Intrastate Wars' (1999) 43(1) Journal of Conflict Resolution 3, 4.
[64] Kittrie (n 38) 1664.
[65] Bell (n 15) 293 [original citations omitted].
[66] The University of Ulster Transitional Justice Peace Agreements Database lists some 640 documents that can be termed 'peace agreements.' See <http://www.peaceagreements.ulster.ac.uk>.
[67] Leslie Vinjamuri and Aaron P Boesenecker, 'Accountability and Peace Agreements – Mapping trends from 1980 to 2006' (Centre for Humanitarian Dialogue, September 2007) 6.
[68] Kal Raustiala, 'Form and Substance in International Agreements,' (2005) 99 *American Journal of International Law* 581.

these pre-negotiation agreements as merely "agreements to agree."[69] Other agreements, such as ceasefire arrangements, are concluded to provide "a breathing space for the negotiation of more lasting agreements."[70] Neither of these types of agreement are appropriate for the purposes of this thesis. Instead, the research focus on agreements conceived of in a more 'lasting' sense – those that "extend to the political, cultural, economic, and ethnic differences at the heart of the conflict in a way that is intended to produce a lasting peace."[71] Bell labels these types of agreement as substantive or framework agreements, and describes how they typically envision procedures for ceasefire, demobilization and disarmament, as linked to new Constitutional structures addressing governance and legal institutions.[72] This is the definition that informs this thesis. Significant variation remains among the peace agreements that fall within this definition. Framework agreements may provide a basic roadmap for new political structures, but they are often lacking the legal procedures and level of detail necessary to make them so. Substantive agreements, on the other hand, provide detailed instructions as to how these institutions will be established, comprised, and mandated; with timetables for implementation, and dispute resolution procedures if the agreement does not proceed to plan. The case studies examined herein provide interesting examples of the variation among the 9 peace agreements that attempted to resolve the respective conflicts to which they were addressed.

A few inevitable limitations in this thesis' design diminish the extent to which the research can be applied across certain contexts. For example, though dividing the agreements into their constituent legal parts allows us to identify the features that do and do not support peace,[73] the causative link between certain provisions and agreement (in)stability is not always clear. As Virginia Page Fortna notes, even if strong legal mechanisms are incorporated into a peace agreement, it remains much easier to blame those mechanisms when peace collapses than it is to attribute success to them if the peace holds.[74] As such, the extent to which the law contributes to agreement stability is not always calculable, and is often dependent on a host of other factors. We must also be mindful that when studying peace processes,

[69] Bell (n 15) 56-60.
[70] Lang (n 22) 115-116.
[71] Morriss (n 36) 814.
[72] Bell (n 15) 60.
[73] Fortna (n 20) 214
[74] ibid at 39.

we do not equate 'process' with progress.[75] Peace processes do not always proceed along a path to peace, with each failed agreement marking a stepping stone to peace. Negotiations often proceed along 'a knife edge,' and can necessitate two steps back before the parties take a single step forward along the fine line between success and failure.[76] The benefit of hindsight further inhibits our ability to understand the difficult and demanding conditions that produce peace agreements. As retrospective observers, we are freed from the burdens and pressures of compromise.[77] This makes it easier for me to criticize unpalatable accommodations and flawed arrangements, despite the fact that such compromises are often necessary to achieve peace. While these shortcomings are noted, they serve to remind us that peace agreements are only one aspect of "the complex and prolonged process of war-termination,"[78] and the law is but one lens through which we view only part of the picture. Nevertheless, efforts to resolve conflict without the formalizing influence of the law are substantially complicated by its absence.[79] While some accounts argue that it is unlikely that formal agreements are superior to their less precise counterparts,[80] this thesis suggests that the opposite is in fact true, and reasserts the role of law in conflicts characterized by its absence.

1. IV. THE RELEVANCE OF THE THESIS

The need for attention to agreement design is particularly acute because agreement *quantity* continues to outweigh agreement *quality*. Indeed, speaking in the context of the conflict in Ukraine, Ivan Sukhov noted how legal values have become so inflated that the conclusion of a ceasefire agreement is now more important than the ceasefire itself.[81] A ceasefire in Syria in February 2016 was the subject of much acclaim, despite the fact that it had no enforcement mechanisms in a conflict zone

[75] 'Reflecting on the IGAD peace process - An interview with Nicholas (Fink) Haysom' in Mark Simmons and Peter Dixon (eds) *Peace by piece – Addressing Sudan's Conflicts* (Accord Conciliation Resources 2006) 29.
[76] ibid.
[77] Abiodun Alao and Comfort Ero, 'Cut short for taking short cuts: the Lomé peace agreement on Sierra Leone' (2001) 4(3) Civil Wars 117, 118.
[78] Vinjamuri and Boesenecker (n 68) 30.
[79] Schneider (n 41) 319.
[80] Suzanne Werner, 'The Precarious Nature of Peace: Resolving the Issues, Enforcing the Settlement, and Renegotiating the Terms,' (1999) 43(3) American Journal of Political Science 912, 929.
[81] Ivan Sukhov, 'A Very Modern Type of War Is Raging in Ukraine' The Moscow Times (18 February 2015).

where the need for such mechanisms was obvious.[82] The disparity between the political praise heaped on these agreements and the legal standard they are held to is "practically schizophrenic,"[83] and has served to undermine existing structures for managing conflict. The duration of the conflict in Syria, and the lack of a unified response to conflicts in Mali and the Central African Republic among others, underscore the increasing fragmentation of international crisis management systems,[84] of which peace agreements can be key components. Unilateral state interventions—such as Russia's intervention in Ukraine and the annexation of Crimea, or the United States-supported Saudi Arabian intervention in Yemen—also highlight the fading relevancy of the existing legal framework for the legitimate use of force, and suggest that the improvements to Fortna's 'technologies of peace' have been steadily rolled back in recent years.

Closer attention to agreement design is just one way of recalibrating these technologies of peace, and putting them to work in a world that is increasingly in need of them. In 2016, the United Nations High Commissioner for Refugees recorded the highest number of persons forcibly displaced by conflict in its history.[85] Of the contributory factors that have created this contemporarily unprecedented displacement crisis, two stand out in particular: the conflicts that are driving large numbers of people from their homes are generally lasting longer, and particularly complicated conflicts are erupting or recurring more frequently.[86] The migration crisis itself has eroded elements of the international legal order, diminishing human rights norms in parts of the European Union, and inspiring deeply unsettling arrangements with increasingly repressive regimes in states such as Sudan and Turkey. However, as Jean-Marie Guéhenno—CEO of the International Crisis Group—has noted, the crisis is one borne of war.[87] Combatting the factors that have created this situation is central to mounting any sustainable response, and reaffirming

[82] Roy Gutman, 'Syria Cease-Fire Brings Turkey Closer to War,' Foreign Policy (16 February 2016) <http://foreignpolicy.com/2016/02/16/syria-ceasefire-brings-turkey-closer-to-war> accessed 17 February 2016.
[83] Levitt (n 47) 531.
[84] Richard Gowan, 'Nigeria, Yemen Wars Mark New Era of Ad Hoc Crisis Management,' World Politics Review (30 March 2015) <http://www.worldpoliticsreview.com/articles/15406/nigeria-yemen-wars-mark-new-era-of-ad-hoc-crisis-management> accessed 30 March 2015.
[85] UNHCR Press Release, 'With 1 human in every 113 affected, forced displacement hits record high' (20 June 2016) <http://www.unhcr.org/news/press/2016/6/5763ace54/1-human-113-affected-forced-displacement-hits-record-high.html> accessed 21 June 2016.
[86] ibid.
[87] Guéhenno (n 4).

the normative values upon which the international legal framework was founded.

Such is the decline of the international order that in 2015, the US National Military Strategy identified other states as a greater threat to US security than terrorism for the first time since the end of the Cold War.[88] Indeed, increasing provocations between the US and Russia – and tensions in the South China Sea between China, Japan, the Philippines, Malaysia and others – suggest that the likelihood of interstate conflict persists today in a way that it has not done since the Cold War. In such an environment, diplomats, mediators, and scholars alike must be experts in crafting the agreements that will prevent and resolve such conflicts. The need to understand agreement design in the context of interstate conflict has been more recently advocated by as unlikely a figure as US President Donald Trump, who has referred to a potential settlement of the Israel-Palestine conflict as "the ultimate deal."[89] Though such a label belies the historical intricacies of one of the world's longest running conflicts—and the difficulties of peace-making generally—even the academic literature is guided by the pursuit of the "win-win,"[90] the ground-breaking compromise that appeases both sides and brings an end to violence. While combatants generally perceive military victory or peace on their terms as the optimum outcome in a conflict, war is a costly endeavour, and there is always the chance that one party may lose.[91] The law can provide pacific alternatives to war by providing mechanisms that overcome the security dilemma and address key issues through redesigned political structures. By focusing on how these agreements are designed and drafted, we can optimise these legal mechanisms to the point that peace becomes the parties' mutual number one preference—to the point that the signatories' pen can be mightier, or at least more efficient, than the sword.

1. V. STRUCTURE OF THE THESIS

This thesis begins by laying out the legal framework, the normative context, and the methodology that informs the research, before examining each of the case

[88] Richard Weitz, 'New U.S. Military Strategy Signals Return of State-Based Threats,' World Politics Review (7 July 2015) <http://www.worldpoliticsreview.com/articles/16160/new-u-s-military-strategy-signals-return-of-state-based-threats> accessed 13 July 2015.
[89] Monica Langley and Gerard Baker, 'Donald Trump, in Exclusive Interview, Tells WSJ He Is Willing to Keep Parts of Obama Health Law,' The Wall Street Journal (11 November 2016).
[90] Werner (n 81) 913-914.
[91] Fortna (n 19) 340.

studies in detail. Chapter 2 examines the formal legal status of peace agreements under some of the principle instruments and structures of the international legal order: the Vienna Convention on the Law of Treaties, and the International Court of Justice. Chapter 3 addresses the consequences of peace agreements' ambiguous status. It explores the argument that denying formal legal status to these documents complicates peace-making efforts generally, and infringes upon the normative values upon which the international order was originally founded. It concludes by advocating an alternative conceptualisation of peace agreements that better reflects their nature as pragmatic political instruments that trigger deeply legal processes (negotiation, interpretation, dispute resolution) and structures (constitutions, organs of governance, socio-economic and political rights). Chapter 4 introduces a theory of legalization as a method of visualising peace agreements in this manner. It explains how legalization theory accounts for the most common features of peace agreements, and how the theory further highlights what Bell refers to as a 'law of the peacekeepers,' or a formative *jus post bellum*.

Chapters 5-7 utilise this methodology to analyse the substantive/framework agreements resulting from the Moro campaign in the Philippines, the civil war in Sierra Leone, and the North/South conflict in Sudan. These examples, despite their distinct geographic, political, and cultural contexts, are linked by commonalities that suggest a strong correlation between the design of certain legal provisions (autonomous arrangements, inclusive measures, and forums for dispute resolution) and the sustainability of peace. These chapters each conclude with a comment on the legal structures or features that had a major impact on how those respective peace processes were (or were not) implemented, before Chapter 8 examines the features common to each of the case studies. By applying a legalization framework to these case studies, the research offers original insight into the peace agreement patterns that recur in vastly different contexts, with particular regard to autonomous and economic arrangements. The thesis concludes with valuable, but generally applicable lessons on the specific role that law plays in shaping short-term bodies for conflict management, and the long-term processes that influence the transition to sustainable peace, thereby advancing a more nuanced framework for legalized peacebuilding.

2.

THE STATUS OF PEACE AGREEMENTS UNDER THE LAWS AND INSTITUTIONS OF THE INTERNATIONAL LEGAL ORDER

Chapter 1 introduced the central role that the law can play in building and maintaining peace. But is formal legal status an imperative to achieving goals in these key areas? How does an agreement benefit from being interpreted not as a political document, but as a legal instrument?

By invoking the 'rules, practices, and institutions' of the international legal order,[1] signatories to peace agreements that take the form of international treaties bind themselves to established principles of international law. These principles contribute to the law's normative influence and compliance-pull, channeling state conduct in such a manner as to provide an element of certainty with regard to how the signatories might behave.[2] The agreement can thus be advanced on this basis of certainty, with international courts providing recourse where state behavior diverges from the agreement's provisions.

However, legal status and party behavior is less certain in situations of internal (or non-international) conflict. Agreements aimed at terminating these conflicts can involve a mix of state, non-state, and international actors in an environment where the state's capacity to govern, or legitimacy to represent, is no longer certain. This asks difficult questions of a legal order built upon the sovereignty of state actors: questions that existing legal instruments do not answer adequately. As such, many peace agreements float in what Bell calls "a Hartian penumbra with regard to positive law categories."[3] We will now examine the status of peace agreements under two of the principle instruments of the positivist legal system: the Vienna Convention on the Law of Treaties (VCLT), and internationally mandated Courts.

[1] Andrej Lang, ''Modus Operandi' and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution' (2008) 40 New York University Journal of International Law & Politics 107, 149.
[2] ibid at 110.
[3] Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008) 17.

2. I. UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties serves as the "leading contemporary source of treaty law," and "sets out the law and procedure for the making, operation and termination of legal treaties between states."[4] Under Article 2, an international agreement is only granted the status of a treaty where it is concluded by two or more states.[5] Furthermore, Article 3 explicitly states "that the present Convention does not apply to international agreements concluded between States and other subjects of international law."[6] This represents a significant obstacle for intrastate peace processes that necessitate the involvement of rebel groups, militias and political actors who are without legal standing comparable to that of the state.[7] It effectively means that these actors cannot be a direct party to an agreement if they wish to attain international treaty-status for that accord, "even though the non-state actor's compliance lies at the heart of the agreement's implementation."[8] Thus, intrastate conflicts involving non-state actors—which are arguably in greater need of recourse to the 'rules, practices and institutions' of the international legal order—are deprived of the advantages associated with formal legal status. Such a conclusion seems counterproductive to processes of peace and to the utility that the law may bring to bear in that regard. The failure to acknowledge the legal standing of these key actors undermines the potential compliance-pull of the law, "by offering those who would later renege an opportunity to dismiss the agreement as not binding."[9] This, in turn, greatly undermines "the utility of internationally brokered settlements as a device for ending civil strife."[10] The formal inapplicability of the VCLT to intrastate peace agreements involving non-state actors thus limits its impact as an appropriate model of legal definition for the purposes of this thesis.

The difficulties in categorizing many peace agreements under traditional concepts of international legal agreement do not deny such agreements legal force

[4] Seth Benjamin Orkand, 'Coming Apart at the Seamline - The Oslo Accords and Israel's Security Barrier: A Missed Opportunity at the International Court of Justice and the Israeli Supreme Court' (2007) 10 Gonzaga Journal of International Law 390, 419.
[5] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) The American Journal of International Law 373, 375.
[6] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS, Article 3.
[7] Scott P Sheeran, 'International Law, Peace Agreements and Self Determination: The Case of the Sudan' (2011) 60(2) International and Comparative Law Quarterly 423, 433.
[8] Bell (n 5) 390.
[9] ibid at 486.
[10] David Wippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62(2) The University of Chicago Law Review 607, 642.

altogether, however. The VCLT's preamble states "that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention."[11] Indeed, Orkand argues that recourse to modern customary treaty law is to be preferred, as it is "broader in its definition of what parties may conclude binding treaties."[12] As an instrument that codifies and clarifies several principles of international customary law, Antonio Cassese argues that the VCLT may be utilized to inform the adoption of general principles in the interpretation of non-treaty agreements.[13] The VCLT confirms as much, stating that an agreement between a State and a non-state actor will not preclude the application "of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention."[14] Thus, Article 26—the principle that every agreement in force is binding upon the parties thereto and must be performed by them in good faith[15]—is presumed to apply to the signatories of peace agreements between state and non-state actors.[16]

While many peace agreements may not meet the definition of a binding treaty under narrow conceptions of statehood and the law, a peace agreement remains an agreement between two subjects of international law.[17] As such, their lack of treaty status does not preclude them from giving rise to legally binding obligations.[18] Cassese maintains that states can enter into negotiations with rebel groups in the same way that "they do with other states or with international organizations, or such *sui generis* categories as the International Committee of the Red Cross."[19] Indeed, the denial of treaty status to agreements between States and non-state actors does not deprive those agreements of their legal effect under the VLCT.[20] A growing body of work suggests that human rights conventions, the Geneva protocols, and prohibitions against the use of certain weapons may also apply to non-state actors, without

[11] Vienna Convention on the Law of Treaties (n 6) Preamble.
[12] Orkand (n 4) 421.
[13]Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30(2) The International and Comparative Law Quarterly 416, 423.
[14] Vienna Convention on the Law of Treaties (n 6) Article 3(b).
[15] ibid at Article 26.
[16] Steven R Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict after the Cold War* (Palgrave MacMillan 1995) 26.
[17] Orkand (n 4) 424.
[18] Sheeran (n 7) 429.
[19] Antonio Cassese, 'The Special Court and International Law – The Decision Concerning the Lomé Agreement Amnesty' (2004) 2 Journal of International Criminal Justice 1130, 1134.
[20] Vienna Convention on the Law of Treaties (n 6) Article 3.

compromising their legal status.[21]

Non-state actors may incur legal responsibility following their categorization as rebels, insurgents, or belligerents, respectively.[22] Rebels are unrecognized insurgents with few established legal obligations under international law. However, rebels can graduate to insurgency and acquire international rights and obligations, provided they exercise control over some part of a nation's territory and the conflict passes a certain threshold of intensity and duration.[23] At that point, it is a matter for individual states to assess whether the rebel group has satisfied the criteria for recognition.[24] Traditionally, insurgents that were recognized by the state against which they were fighting as not just insurgents, but belligerents, acquired the rights and duties that accrue to states under the laws of armed conflict.[25] However, governments against which the rebellion is directed are often loath to grant rebel groups such recognition in practice, as to do so implies that the state has lost the capacity to govern, whereas the status of the rebels has been elevated.[26] The position of non-state actors vis-à-vis treaty obligations thus remains subjective and indefinite. Yet the mounting scholarship on the importance of binding non-state actors to certain normative obligations suggests a tentative desire to grant such groups a degree of treaty-making capacity or legal standing. Illegal acts by insurrectionist movements that become the new government of a state—or that establish a new state within the territory of the former state—are deemed acts of state at international law. Should peace agreements that share power with the same actors not be conferred with a similar status?

Despite the law's power to compel under these alternating bodies of international law, intrastate peace agreements remain disadvantaged "because of a non-state's incapacity to resort to international mechanisms available to a state to

[21] See Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Bloomsbury 2016) and Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' (2014) 20(1) Journal of Conflict and Security Law 101. Ray Murphy has also written on the extent to which humanitarian law applies to alleged combatants of non-state armed groups. See Ray Murphy, 'Contemporary Challenges to the Implementation of International Humanitarian Law' (2004) 3(3) Connections: The Quarterly Journal of the Partnership for Peace Consortium 99, and Ray Murphy, 'Prisoner of War Status and the Question of the Guantanamo Bay Detainees' (2003) 3(2) Human Rights Law Review 257.
[22] Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations' (2006) 88(863) International Review of the Red Cross 491, 491-492.
[23] Antonio Cassese, *International Law* (2nd edn, OUP 2005) 125.
[24] ibid.
[25] Clapham (n 22) 492.
[26] ibid at 493.

secure compliance by an errant treaty partner."[27] Formal legal status presents further difficulties with regard to the eligibility of peace agreements as sources of law before international courts, including the International Court of Justice (ICJ).[28] The ICJ's authority as an interpreter of international law is likely to influence how the parties perceive peace agreements as legally binding documents,[29] and denying them as a source of law is thus hugely detrimental to the goal of ensuring compliance with these agreements. Indeed, Lang argues that the ICJ could play a crucial role in giving legal effect to "an emerging type of peace agreement that includes state and non-state actors."[30] But as we shall see below, the ICJ has found such a role to be unworkable within the confines of the present legal system.

2. II. BEFORE INTERNATIONAL COURTS

The decisions of adjudication bodies such as the ICJ and other specialized courts further evidence the theoretical difficulties in categorizing peace agreements under traditional concepts of legal agreement. Article 38 of the Statute of the International Court of Justice limits the sources of law it may invoke to "international conventions, international custom, the general principles of law recognized by civilized nations," and "the judicial teachings of the most highly qualified international legal scholars."[31] It can be difficult to accommodate peace agreements and their many variants under these headings. While the ICJ has often generated the political inertia necessary to conclude negotiated settlements outside of the courtroom,[32] it has been reluctant to develop a definitive jurisprudence on peace agreements. This reluctance is best exemplified by the ICJ's interpretation of the Lusaka Agreement in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda).*[33]

[27] John Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' (1997) 30 Cornell International Law Journal 717, 734.
[28] Orkand (n 4) 418.
[29] Lang (n 1) 110.
[30] ibid.
[31] Ratner (n 16) 26.
[32] Aloysius P Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice,' (2008) 18(5) European Journal of International Law 815, 848-849.
[33] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports, 168.

2. II. A. THE LUSAKA AGREEMENT

In the *Armed Activities* case, the Democratic Republic of the Congo (DRC) claimed that Uganda had perpetrated several acts of armed aggression within the territory of the DRC in violation of the international legal principle of non-intervention. In its defence, Uganda relied upon certain provisions of the Lusaka Agreement. The Lusaka Agreement was a conflict resolution instrument involving a number of state and non-state actors, and was a landmark agreement in the Second Congolese War.[34] The agreement provided for a ceasefire between the parties, processes of disarmament and demobilization, and the deployment of a UN observer mission to the area. The agreement also set out a framework for the withdrawal of all foreign troops from the DRC within 180 days of its adoption—a provision upon which this case turned.

In responding to the allegations that it had violated the legal principle of non-intervention, Uganda argued that the DRC had failed to demobilize and disarm armed groups within its borders (particularly anti-Ugandan insurgents who were active within the Congolese territory), in accordance with the Lusaka Agreement. Uganda claimed that the threat to its security legitimized its military activities on Congolese territory. Uganda argued that the Lusaka Agreement's timeframe for the withdrawal of all foreign troops had "implicitly legalized the Ugandan presence on Congolese territory"[35] for 180 days. However, the Court could not find anything in the terms of the Lusaka Agreement that could be deemed "an affirmation that the security interests of Uganda required its presence on Congolese territory on a continuing basis."[36] The Court held that the agreement merely reflected the reality that Ugandan units were active on Congolese territory at the time that it was concluded; it did not attempt to qualify the Ugandan presence in any legal terms.[37] The Court thus proceeded to interpret the Lusaka Agreement not as a legally binding agreement, but as a *modus operandi*: a set of terms that defined how the Ugandan withdrawal was to operate.[38]

Accordingly, the Court dismissed the Ugandan counterclaim on the grounds that there was a factual distinction between the claims advanced by the parties. The

[34] Lang (n 1) 111-112.
[35] ibid at 113.
[36] Phoebe N Okawa, 'Case Concerning Armed Activities on the Territory of the Congo' (2006) 55 International Law & Comparative Quarterly 742, 746 [original citation omitted].
[37] *Armed Activities on the Territory of the Congo* (n 33) 211 [99].
[38] Lang (n 1) 116-117.

Court reasoned that where the DRC sought to establish Uganda's responsibility based on violations of the international legal prohibitions on the use of force, Uganda sought "to establish the Congo's responsibility based on the violation of specific provisions of the Lusaka Agreement."[39] In dismissing the Ugandan counterclaim on this basis, the ICJ inferred that it was not possible to establish a justiciable claim on the basis of the Lusaka Agreement.[40] The Court regarded the agreement as a practical framework for "progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned,"[41] but it did not view these objectives as justiciable or legally binding.

In demoting the Lusaka Agreement to a *modus operandi*, the ICJ significantly underestimated the influence that formal legal status can have on the parties to a conflict.[42] Such a decision begs the question as to whether the Court had considered the effect that depriving the agreement of its legal force would have on that particular conflict. Indeed, Okawa notes that the Court's decision was unlikely "to contribute to the settlement of the dispute in any meaningful way," and may have ultimately caused "untold damage" to the already fragile peace process that was taking place in the Great Lakes region at the time.[43]

However, the *Armed Activities* case presented a number of legal challenges that necessitated imperfect solutions. Had the ICJ interpreted the Lusaka Agreement as permitting a Ugandan military presence on Congolese territory, Uganda would not have been liable for its subsequent breaches of international law.[44] This would have been a dangerous precedent to set, as it may have promoted similar conflict resolution instruments as a means of excluding state responsibility for internationally wrongful acts.[45] Alternatively, had the Court attempted to uphold the Lusaka Agreement as a legally binding agreement, it might have encouraged states "to avoid their international responsibility through the conclusion of peace agreements that include explicit liability-excluding provisions."[46] By relegating the legal status of the Lusaka Agreement to that of a *modus operandi*, it would not be possible for that peace agreement to prescribe liability-excluding provisions, irrespective of what the

[39] ibid at 122.
[40] ibid.
[41] *Armed Activities on the Territory of the Congo* (n 33) 211.
[42] Lang (n 1)131.
[43] Okawa (n 36) 753.
[44] Lang (n 1) 125.
[45] ibid at 131.
[46] ibid at 127.

parties agreed.[47]

The Court was faced with a similarly "impossible dilemma" with regard to Uganda.[48] As Judge Parra Aranguren reasoned in his dissenting opinion, had Uganda complied with the framework for withdrawal envisioned under the Lusaka Agreement, the continuing presence of its military forces in the DRC within the 180-day timetable would have been seen as a violation of international law.[49] Conversely, had Uganda attempted to withdraw its military from Congolese territory in a manner that contravened the Lusaka Agreement, it would have violated its treaty obligations, and duly violated international law.[50] By defining the Lusaka Agreement as a *modus operandi*, the agreement did not possess the formal legal status necessary to create such a conflict of laws, and this impasse was avoided. Accordingly, the Court deigned to interpret the agreement not as a legal document, but as "a political instrument whose consequences had to be confined in that field."[51]

The *Armed Activities* case highlights the difficulties in defining peace agreements under existing systems of international law.[52] While labelling the Lusaka Agreement a *modus operandi* may have assuaged the volatile political and military factors that necessitated that agreement, it failed to promote the role that the law played in that particular context: prescribing ceasefire mechanisms, and negotiating state-sovereignty in light of the deployment of UN monitors and the withdrawal of external military actors. While the implications of the *Armed Activities* decision should be considered in light of its particular political and legal context, the likening of the highly-technical Lusaka Agreement to a *modus operandi* poses significant interpretive challenges for peace agreements that routinely fail to meet a similar technical standard. The ICJ did not take this opportunity to elaborate on the differences between a *modus operandi* and a legally enforceable peace agreement, thus confining instruments similar to the Lusaka Agreement to an ambiguous legal status "that renders them largely irrelevant in the realm of international law."[53]

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[47] ibid at 128.
[48] *Armed Activities on the Territory of the Congo* (n 33) 294 [8] (separate opinion of Judge Parra-Aranguren).
[49] Okawa (n 36) 747.
[50] ibid.
[51] Okawa (n 36) 746.
[52] Lang (n 1) 125.
[53] ibid at 124 and 125. Lang lists "the inclusion of non-state actors as signatories," the process oriented-character of peace agreements, and their application in the context of an armed conflict, as their "peculiar" features.

2. II. B. THE LOMÉ ACCORD AMNESTY

A decision of the Special Court for Sierra Leone (SCSL) further obscures our understanding of peace agreements as international legal documents. The *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*[54] turned on Article IX of the Lomé Agreement, which was signed by the RUF (Revolutionary United Front) and the Government of Sierra Leone on July 7, 1999. "In order to bring lasting peace to Sierra Leone," and "to consolidate the peace and promote the cause of national reconciliation,"[55] Article IX granted all members of the RUF an amnesty from judicial action "in respect of anything done by them in pursuit of their objectives" between March 1991 and July 1999.[56] However, in June 2000, following repeated violations of the agreement by the RUF, President Kabbah petitioned the United Nations for the establishment of a Special Court that would try members of the RUF and their accomplices for the ongoing atrocities that were being continually committed against the civilian population of Sierra Leone. Upon conducting its own independent assessment of the situation, the UN granted this request and adopted Resolution 1315 (2000), which mandated the Secretary-General "to negotiate an agreement with the Government of Sierra Leone to create an independent special court."[57] On January 16, 2002, the Special Court for Sierra Leone was established "for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law."[58] Morris Kallon, a former leader of the RUF, was brought before the Special Court on July 5, 2004, facing 17 counts of war crimes, crimes against humanity, and several other violations of international humanitarian law.

In his defence, counsel for Kallon submitted that the Lomé Agreement was a legally binding instrument of international law "because it was signed by six states and a number of international organizations."[59] As such, Article IX of the agreement legally obligated the State "not to prosecute beneficiaries of the amnesty under the

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[54] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (2004) SCSL-2004-16-AR72(E) 539-574.
[55] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (the Lomé Accord), 7 July 1999 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf> Article IX, s1 and s.3 respectively.
[56] ibid at Article IX, s3.
[57] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 54) 546 §10.
[58] ibid at 546 §13.
[59] ibid at 554 §30.

Agreement."[60] Counsel for the defence further noted that because the Lomé Agreement significantly altered the law of the State, the Parliament of Sierra Leone was obligated to formally ratify it under Section 40(4) of the Constitution of Sierra Leone 1991. Ratification was necessary where "the President has entered a 'Treaty, Agreement or Convention' in the name of Sierra Leone."[61] Accordingly, counsel for the defence submitted that the ratification of the Lomé Agreement inferred its status as a Treaty.

In considering the points raised by the defence, the Court believed it would be appropriate to first consider the legal nature of the Lomé Agreement. While the Court accepted that the signatures of six non-contracting states and several international organizations could internationalize an agreement and create legal obligations at international law, that had not occurred in this instance. The Court held that these non-contracting signatories were merely "moral guarantors of the principle that… 'this peace agreement is implemented with integrity and in good faith by both parties.'"[62] According to the Court, the Lomé Accord necessitated moral guarantors because the RUF had no legal or stately status and was essentially a criminal military faction within Sierra Leone.[63] The moral guarantors did not assume any legal obligation by virtue of their role, and thus, could not be found to have internationalized the agreement.[64]

The Court held that internationalization is only possible where an agreement creates rights and obligations that are regulated and enforced by international law. The Lomé Agreement did not create these rights and obligations. The Court accepted that a breach of the provisions of the Lomé Agreement could have caused the UN to mandate military action pursuant to Chapter VII in order to address the situation, but such an 'enforcement' process would have stemmed from the *factual* merits of the situation: from the fact that a threat to international peace and regional security existed, not from the *legal* obligations prescribed by the Lomé Agreement.[65] Because such an intervention could not be regarded "as a remedy for the breach" of the

[60] ibid at 554 §31.
[61] ibid at 552 §25.
[62] ibid at 557 §41.
[63] ibid.
[64] The legal implications of the moral guarantors' prescribed role will be discussed further in chapter 6.
[65] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 54) 558 §42.

provisions of the agreement,[66] it could not be said that the Lomé Agreement created rights and obligations at international law.

The Court further distinguished the Lomé Accord on the basis that it was an intrastate agreement between the Sierra Leonean state and the RUF (a non-state actor). As such, it could not be characterized "as an international instrument."[67] Such a narrow interpretation overlooked the role that the law could play in maintaining the Lomé Accord's stability in favour of affecting peace through justice, or prosecution. The resulting decision thus reflects competing approaches to legalized peacebuilding. Indeed, as the analysis in chapter 6 suggests, the decision to nullify the Lomé Accord's amnesty was partly precipitated by structural flaws in the Lomé Accord's design – that is, the provision of an amnesty in the particular context of the Sierra Leonean conflict, the omission of punitive measures for non-compliance with the agreement, and other features further detailed in chapter 6. Such an adverse conclusion highlights the unsuitability of purely legal perspectives and traditional legal concepts in the systematic analysis of peace agreements. This is particularly true of the SCSL, whose mandate as a criminal court renders it predisposed to neglect the broader aims of conflict resolution in pursuit of accountability.[68] One study found that the SCSL's sentencing procedure was primarily informed by retribution and deterrence, much to the detriment of restorative ideologies such as rehabilitation and reconciliation, and mitigating factors such as family circumstance and age.[69] An arbiter of criminal law was thus ill-suited to determining the legal status of a peace agreement with a rebel group, and perhaps removed from the consequences such a finding would have in the long-term.

The Court then proceeded to address the extent to which insurgent parties are endowed with treaty-making capacity, a question that "no longer arose, given that the Court had already held that the Agreement was not an international treaty."[70] While the Court acknowledged that the Sierra Leonean state recognized the RUF as an entity with which it could enter into negotiations, it also noted that no other State had recognized the RUF as a legal entity with which it could do the same, nor had the

[66] ibid.
[67] ibid.
[68] See generally, Wayne Jordash and Scott Martin, 'Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone' (2010) 23(3) Leiden Journal of International Law 585.
[69] Shahram Dana, 'The Sentencing Legacy of the Special Court for Sierra Leone' (2014) 42(3) Georgia Journal of International and Comparative Law 615, 680.
[70] Cassese (n 19) 1132.

Government of Sierra Leone regarded the RUF as anything other than a rebel group within its borders.[71] As such, it was not regarded as an entity with treaty-making capacity. However, Cassese contests that this view is much too narrow. He argues that insurgents may acquire the capacity to enter into treaty negotiations "if they show effective control over some part of the territory and the armed conflict is large-scale and protracted."[72] The civil war in Sierra Leone arguably satisfied these criteria, leaving few areas of the country unscathed and necessitating the involvement of British, UN and ECOMOG (the Economic Community of West African States Monitoring Group) units by its eventual end. However, the Court distinguished the factual question as to whether the insurgents demonstrated control and organization, from the legal question as to whether international law regarded the RUF and the legitimate government as having treaty-making capacity.[73] As the answer to the legal question was negative, the Court duly concluded that the Lomé Agreement was not a treaty and did not establish binding obligations on the parties at international law. The Court did note, however, that this did not prevent the agreement from creating rights and obligations between the parties in domestic law. Yet this finding is of little use in other intrastate conflicts where the rule of law has been implicated and is in need of rehabilitation and recourse to principles of international law. The Court's disregard for the role of law in such processes further underscores its unsuitability to make a determination of this nature. While criminal prosecution may have played a role in cementing "short-term peace" in Sierra Leone,[74] criminal law does not provide a suitable yardstick against which one can measure the intricacies of peace agreement design. It has been noted that the SCSL displayed a conviction bias against the RUF, and tended to be more lenient in its sentencing of state forces who were responsible for human rights abuses.[75] It was highly unlikely that the same court was going to confer some sort of legitimacy on the RUF by granting it a degree of treaty-making capacity.

It is also questionable whether this conclusion represents the most faithful application of international legal doctrine. Bell, for one, notes that rejection of the international legal status of the Lomé Agreement was not entirely necessary in order

[71] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 54) 559-560 §47.
[72] Cassese (n 19) 1134.
[73] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 54) 560 §48.
[74] Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) 32(3) Michigan Journal of International Law 395, 451.
[75] Dana (n 69) 681.

to nullify the contentious amnesty provision at the heart of the *Lomé Accord Amnesty* proceedings.[76] She contends that the same result could have been achieved by applying traditional concepts of treaty breach, as the RUF had blatantly violated their ceasefire commitments by continuing to commit acts of violence.[77] Cassese shares a similar opinion, arguing that the agreement became void "following repeated material breaches of the treaty by one party, the rebels (the other party, the Government, also contravening the treaty, although less blatantly)."[78] Bell further posits that the amnesty provision could have been invalidated by recourse to preemptory norms of international law, which prohibit crimes against humanity, serious war crimes and torture.[79] Provisions that violate these norms are considered void at international law, so the amnesty provision could have been nullified for contravening international law. However, denying international legal status to the Lomé agreement was in keeping with the views of the (then) Attorney-General, Solomon Berewa, who was outspoken in his perception of the agreement as a purely political document, and was "less concerned with the 'fine niceties of the law.'"[80] The Court's narrow legalistic approach to the problem at hand thus disregarded the practical objectives that peace agreements seek to achieve and the pivotal role that international law can play in achieving them.

2. III. CONCLUSION

As shown above, traditional concepts of international law do not accurately account for the variation in peace agreement form and substance. This is because "the different forms of legalization in international law are mostly framed as a binary option between hard international law and pure politics."[81] Such a perspective is overly black and white and displays a stubborn inflexibility in the face of a multidisciplinary challenge that requires versatility and tact. By overly prescribing the rules of international law as they apply to peace agreements,"[82] lawyers and judges of international law alike may overlook the effect that legal status has on

[76] Bell (n 5) 388.
[77] ibid.
[78] Cassese (n 19) 1138.
[79] Bell (n 5) 388.
[80] Priscilla Hayner 'Negotiating peace in Sierra Leone: Confronting the justice challenge' (Centre for Humanitarian Dialogue 2007) 16.
[81] Lang (n 1) 162.
[82] Sheeran (n 9) 458.

"whether peace lasts or war resumes,"[83] much as the ICJ had done in the *Armed Activities* case. In order to resituate the role of law in such processes, Sheeran calls for a "dynamic but coherent international legal order,"[84] through which the power of law can be harnessed to provide practical solutions to high-stakes problems such as peace agreements. The law has proven flexible in this regard on previous occasions, and it is arguable that in the interest of peace, the international community is beginning to accept compromises within the legal discipline. The current Colombian peace process illustrates how absolute standards of accountability and justice must be reconsidered in light of what is politically pragmatic. Unpalatable political transitions that envision a role for criminally culpable heads of state—as suggested in Sudan with Omar al-Bashir, and Syria with Bashar al-Assad—further highlight the need to advance a reconciliatory, rather than adversarial peace/justice framework. Elsewhere, diplomatic figures have advocated sustained engagement with non-state actors of dubious legitimacy.[85] Indeed, where such engagement takes place, it often highlights how legal concepts of legitimacy are indeterminate and subject to change. In the next chapter, we will look at the legal basis for pragmatic conflict resolution efforts, and explore some notable examples from the international sphere.

[83] Lang (n 1) 109.
[84] Sheeran (n 9) 458.
[85] See Jean-Marie Guéhenno, *The Fog of Peace* (Bookings Institution Press 2015) 271, and Jonathan Powell, *Talking to Terrorists: How to End Armed Conflicts* (Vintage 2015).

3.

BENDING THE LAW, KEEPING THE PEACE

> [T]he formation, transformation and dismemberment of States as a result of revolutions and wars creates situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law.[1]

3. I. OVERVIEW

The positivist legal order regards only the incumbent government of a 'legitimate' state actor as having "the exclusive authority to represent the state in its treaty and other international relations."[2] Yet internal conflicts are often fought over the legitimacy of the state apparatus, and peace agreements often inform notions of post-conflict legitimacy, particularly where non-state actors have been promoted to positions of public office in redesigned political structures. Any legally informed approach to conflict resolution must duly confront the "legal fiction" that the state is wholly a legitimate representative of its people,[3] and account for non-state actors' ability to articulate genuine political grievance and contribute to pluralistic governance.[4]

The state-centric view that dominates international relations and international law "served the interests alike of third world governing elites and of superpowers" throughout the Cold War.[5] However, that position became legally untenable in the 1990s, as neo-liberal norms guaranteed by US hegemony ushered in "[d]emands for democratization, and respect for basic human rights" that challenged the state's previously unfettered 'sovereignty' over their own domestic affairs.[6] Advancements in human rights machinery meant that human rights abuses by both state and non-

[1] James Crawford, *The Creation of States* (2nd edn, OUP 2007) 124
[2] David Wippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62(2) The University of Chicago Law Review, 607, 624.
[3] ibid at 625.
[4] Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008) 114.
[5] Christopher Clapham, 'Rwanda: The Perils of Peacemaking,' (1998) 35(2) Journal of Peace Research 193, 194.
[6] ibid.

state actors could be aired before the international community.[7] "[T]he balance of moral advantage" shifted to non-state actors and armed groups,[8] who could invoke "the state's violations of the rights of the group concerned" by way of justification for their actions.[9] Civil conflicts thus came to be perceived not as struggles between legitimate governments and morally-bereft insurrectionists, but as "inevitable and indeed justifiable resistance to state oppression."[10] The international legal order was forced to adjust to the practical implications of this paradigm-shift, as it became evident that "any opposition group that could muster evident support now had to be admitted to that process on terms of broad equality with existing regimes."[11]

The legitimacy of state and non-state actors alike is determined at international law by their capacity to govern effectively.[12] Accordingly, non-state actors are often granted limited legal standing where a conflict has been fought to a stalemate, where a non-state actor exercises de facto control over territory, or where the incumbent government has disappeared altogether.[13] Wippman argues that at this point, the leaders of armed opposition groups are accepted as the political leaders of those groups, for the purpose of negotiations and processes of peace: "As a practical matter, no other solution is possible."[14] Indeed, the political necessity of such recognition is evidenced by the Irish Republican Army's (IRA) participation in the Good Friday Agreement, the African National Congress's (ANC) participation in the Convention for a Democratic South Africa, and more recently, the Revolutionary Armed Forces of Colombia's (FARC) participation in the Colombian peace deal of 2016.[15] However, 'effectiveness' remains indeterminate as a criterion of legitimacy.[16] Applying it to extremist groups such as the Islamic State (IS) in Iraq/Syria, Boko Haram in Nigeria, and al-Shabab in Somalia/Ethiopia, one could argue that they have deprived those states of significant portions of their territory so

[7] Bell (n 4) 33.
[8] Clapham (n 5) 195.
[9] Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context - Law, Politics, Morals* (3rd edn, OUP 2007), 1414.
[10] Clapham (n 5) 195.
[11] ibid at 194.
[12] Karsten Nowrot and Emily W Schabacker 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 American University International Law Review 321, 388-389 [original citations omitted].
[13] Wippman (n 1) 626-627.
[14] ibid at 642.
[15] Fareed Zakaria, 'Talking to terrorists is the only way to defeat them,' The Washington Post (9 July 2015).
[16] Antonio Cassese, *International Law* (2nd edn, OUP 2005) 125.

much so as to qualify as legitimate actors. While diplomatic engagement with these actors remains unlikely, it cannot be ruled out entirely.[17] Legitimacy remains subject to political whims, as evidenced by FARC and the IRA's erstwhile status as terrorist organizations, and their current legacy as peacemakers. Existing positivist legal structures have failed to control the debate as to how non-state actors transition from illegitimate to legitimate, and have neglected the role that legal structures plays in (de)legitimizing them as a result.

In an international system where the sovereignty of states remains paramount, peace and order cannot be maintained "if some states are too weak to assert their sovereignty and be the trusted custodians of their own people."[18] Some scholars duly argue that states that violate human rights or commit atrocities against the civilian population rights forfeit their domestic and international legitimacy.[19] This reasoning has informed concepts of legitimacy in the Syrian and Libyan contexts, and continues to deny legitimacy to non-state actors with little regard for the rule of law. Bashar al-Assad's increasingly forceful repression of legitimate political dissent in Syria led to the United States and 100 other countries recognizing the Syrian National Council (a non-state actor comprised of 'moderate' militant groups) as the legitimate representative of the Syrian people.[20] In the vacuum created by the downfall of Muammar Gaddafi, a number of countries moved to recognize the National Transitional Council as the legitimate representative of the Libyan people, amid the myriad armed groups that dotted the political landscape. The tendency to bestow a degree of legal capacity on these previously restricted actors as a matter of political necessity reflects how "the divide between insurgents and the legal government has reached such a point that the former have a standing, albeit limited, in the international community."[21]

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[17] See Stephen Starr, 'Bringing Terrorists to the Bargaining Table,' Ozy.com (8 January 2015) <http://www.ozy.com/fast-forward/bringing-terrorists-to-the-bargaining-table/38357> accessed 16 February 2016: "[H]istory is a great educator: After more than a decade of fighting the Taliban, the United States succeeded in bringing it to the negotiating table in 2013."

[18] Jean-Marie Guéhenno, *The Fog of Peace* (Bookings Institution Press 2015) 316.

[19] Fernando R Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishing 1988) 15-16.

[20] Rosa Brooks, 'So You Want to Intervene in Syria Without Breaking the Law?' (Foreign Policy, 20 June 2013) <http://www.foreignpolicy.com/articles/2013/06/20/so_you_want_to_intervene_in_syria_without_breaking_the_law?> accessed 25 July 2013. This recognition was somewhat diminished following the Syrian state's conclusion of the 2013 Chemical Weapons Agreement, which legitimated the Assad regime as the representative of the Syrian people.

[21] Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International

Somalia and Liberia provide particularly interesting examples in a conflict resolution context. Following the demise of Mohammed Siad Barre's government to a coup in January 1991, "only the collective will" of the parties to the Somali Civil War could be accepted as the will of the state.[22] Consequentially, these groups were accepted as parties to the major agreements that attempted to secure peace in the Somali Civil War.[23] A similar arrangement was necessary in Liberia, where the deposal of Samuel Doe's government left the expression of the state's collective will in the hands of the United Liberation Movement of Liberia for Democracy, and the National Patriotic Front of Liberia. As a result, both groups were the key political parties to the Abuja Agreement of August 1995, which attempted to implement a ceasefire between the major parties to the conflict, and the Abuja Accord of August 1996, which eventually brought an end to the First Liberian Civil War.

Peace agreements have thus been a vehicle for these changing notions of legitimacy. Peacebuilding mechanisms, such as autonomy and power sharing, have advanced a theory of legitimacy that does not automatically attach to the state, but is dependent on the state's ability to provide pluralistic participation and equality.[24] Secession—previously prohibited in all but the most exceptional circumstances—became a permissible form of conflict resolution in the dissolution of the former Yugoslavia,[25] as legal norms on territorial integrity gave way to the rights to self-determination owed to distinct peoples and claimed on their behalf by non-state actors. State sovereignty—generally sacrosanct in international law—was qualified in the context of conflicts in Cambodia, Kosovo, and East Timor, in order to facilitate international trusteeship of those states' executive functions, and a similar solution has more recently been proposed in the context of South Sudan.[26] These complex legal frameworks—and the extent to which non-state actors participate in them—are not unprecedented in international practice. We will now explore some notable examples in detail.

Armed Conflicts' (1981) 30(2) The International and Comparative Law Quarterly 416, 416-417.

[22] Wippman (n 1) 627.

[23] See The General Agreement signed in Addis Ababa, 8 January 1993, and the Agreement on Implementing the Cease-fire and on Modalities of Disarmament (Supplement to the General Agreement signed in Addis Ababa on 8 January 1993), to which the principle actors are parties.

[24] Bell (n 4) 114-115.

[25] Clapham (n 5) 194.

[26] Kate Almquist Knopf, 'Savaging South Sudan's Sovereignty (and Ending its Civil War)', Council on Foreign Relations (26 April 2017) <http://blogs.cfr.org/patrick/2017/04/24/salvaging-south-sudans-sovereignty-and-ending-its-civil-war> accessed 29 June 2017.

3. I. A. THE SUPREME NATIONAL COUNCIL OF CAMBODIA

One particularly striking example of a legal anomaly being accepted in international relations is the Supreme National Council (SNC) of Cambodia in 1990—an "unprecedented" entity, that was created solely to serve the peace process in that country.[27] The concept of the SNC arose as a response to the United States and Australian delegations' suggestions that Cambodia should be placed under UN administration. In the absence of a "single government accepted by all states as politically legitimate and legally able to… delegate power to the Organization or otherwise indicate Cambodia's consent to the operation," this was not possible under the UN Charter.[28] The practical solution to this problem was thus to create such an entity, that would include representatives of all the parties to the conflict and would be perceived internationally as the legitimate political and legal authority of Cambodia.[29]

As a result, the SNC was created as "the unique legitimate body and source of authority in Cambodia," in which national sovereignty and the ability to represent Cambodia internationally, were enshrined.[30] Article 5 of the comprehensive settlement to the Cambodia conflict also provided that the SNC would take the Cambodian seat at the UN.[31] Thus, the SNC—which was essentially a band of non-state actors who possessed no legal standing individually—was granted legal standing and control of the major organs of state. The UN Security Council and all of the parties to the Cambodian peace process recognized the authority of the SNC to express the collective will of the state, despite the fact that none of these parties recognized it as the government of Cambodia. Indeed, as Ratner notes, the recognition of this entity was not in line "with traditional notions of recognition of governments based on effective control and prospect of permanence."[32]

As such, the SNC remains "*sui generis* as a matter of international law," insofar as its unprecedented creation is independent of any established principles or

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[27] Steven R Ratner, 'The Cambodia Settlement Agreements' (1993) 87(1) The American Journal of International Law 1, 9.
[28] ibid.
[29] ibid.
[30] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Preamble (23 October 1991) <http://peacemaker.un.org/sites/peacemaker.un.org/files/KH_911023_FrameworkComprehensivePoliticalSettleentCambodia.pdf> accessed 30 June 2017.
[31] ibid at Article 5.
[32] Ratner (n 27) 11 [original citation omitted].

procedures in international legal doctrine.[33] Ratner posits that it is perhaps best understood "as an entity created by the Cambodian factions and later given a special status—a type of international recognition—by the community of nations," through a UN Security Council resolution and the comprehensive settlement agreement itself.[34] Though it served solely as a means through which the UN could assume trusteeship of Cambodia, the SNC remains a perfect example of the flexibility of the law in circumstances where its strict application would frustrate the objectives of a dearly bought peace process.

3.B. THE ABYEI AWARD

Similar legal dilemmas characterized the dispute over the Abyei region of Sudan, following the conclusion of the civil war between the Sudanese government and the Sudan People's Liberation Movement/Army (SPLM/A). Abyei is an oil-rich region that straddles the border between Sudan and South Sudan. Politically and ethnically, it remains divided between the two polities, thus making it an extremely contentious issue during the negotiation of the 2005 Comprehensive Peace Agreement (CPA). The CPA provided that an Abyei Boundary Commission (ABC) would demarcate the territory of the region.[35] However, when the ABC presented its report, its findings were immediately rejected by the government. Following renewed violence in the Abyei region, parties mutually agreed to refer the dispute to the Permanent Court of Arbitration in The Hague. The political situation at the time prompted the International Crisis Group to comment that "[w]hat happens in Abyei is likely to determine whether Sudan consolidates the peace or returns to war."[36]

In its pleadings before the Court, the Government submitted that the ABC had exceeded its mandate by consulting post-1905 sources that did not reflect the territory of Abyei as it originally existed.[37] While the Tribunal held that the ABC had

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[33] ibid at 10.
[34] ibid.
[35] The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (Comprehensive Peace Agreement), Chapter IV, Part 5, Article 5.1, 9 January 2005 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf> accessed 18 May 2016.
[36] International Crisis Group, 'Sudan: Breaking the Abyei Deadlock,' Africa Briefing N°47 (Nairobi/Brussels 2007), 11.
[37] See Comprehensive Peace Agreement (n 35) Chapter IV, Part 5, Article 5.1: The Abyei Region was comprised of "the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area."

indeed exceeded its mandate, it argued that the ABC had done so only *partially*, "by failing to state reasons for some of their findings."[38] In establishing that the ABC had only partially exceeded their mandate, the Court did not disregard the border proposed by the ABC in its entirety, but annulled the specific parts of the border that were affected by the ABC's *ultra vires* breach.[39] As such, the Tribunal's judgments represented "a sophisticated piece of diplomatic and political pragmatism,"[40] insofar as it considered the political realties on the ground and "made 'everyone a winner' by pulling Sudan back from the brink of war along parts of its north–south border."[41]

However, concessions in legal doctrine were necessitated by the Tribunal's flexible application of the law. Böckenförde likens the decision to that of a reconciliation committee, rather than that of a judicial body,[42] and concedes that "legal scholars might argue that the award was rendered at the expense of legal accuracy."[43] He maintains that it is doubtful whether the Commission's mandate ever required the explicit statement of reasons in its report, and points out that no provisions of the Abyei Protocol explicitly obligated the Commission in this regard.[44] Similarly, the Court's determination of partial nullity lacks decisive authority. Dissenting arbiter, Judge Awn Al-Khasawneh, pointed out that no provision of the Arbitration Agreement that referred the dispute to the Court permitted a finding of partial nullity.[45] Under Article 2 of the Agreement, "the Tribunal could only provide a binary answer" to the dispute.[46] In ruling that the ABC had exceeded its mandate only partially, the Court had thus exceeded its own mandate. As a result, the Abyei award remains littered with legal uncertainties and, as Judge Awn Al-Khasawneh maintained, "self-contradicting and result oriented" conclusions.[47]

However, Böckenförde argues that the Court's judgment displays an awareness of the pragmatism necessitated by the situation: "On the one hand, it had to find a solution both parties could live with. On the other hand, it was expected to

[38] Markus Böckenförde, 'The Abyei award: Fitting a Diplomatic Square Peg into a Legal Round Hole' (2010) 23(3) Leiden Journal of International Law 555, 567.
[39] ibid at 567-568.
[40] ibid at 556 [original citation omitted].
[41] ibid at 569.
[42] ibid at 556 [original citation omitted].
[43] ibid.
[44] ibid.
[45] ibid at 567-568.
[46] ibid.
[47] ibid at 568.

base its judgment on legal grounds. In the end, it neglected the latter for the benefit of the former."[48] While some argue that the pragmatism of the court was to the detriment of the refined technicalities of the law, it was much to the benefit of the CPA that ended "the longest civil war in Africa."[49] The decision of the Tribunal "was accepted by both sides and saved the CPA from collapse,"[50] thus evidencing the extent to which the law can bend before it allows a peace agreement to break.

3. I. C. THE DAYTON AGREEMENT

The Dayton Agreement is another notable example of how the law can be flexible where the situation warrants maneuverability. The Dayton Agreement brought an end to three and a half years of conflict in Bosnia and Herzegovina, which had been a federal republic within the former Yugoslavia. The Agreement constituted "an intricate legal web" that wove ethnic, religious, political and military elements closely together.[51] Its detailed provisions established "an international ceasefire," and provided for "peacekeeping and international boundaries, as well as for elections and a constitution for the new State of Bosnia and Herzegovina."[52]

Yet the Dayton Agreement represented another legal anomaly, insofar as some of its signatories were non-state entities. The Federation of Bosnia and Herzegovina, and Republika Srpska, were merely constituent parts of the Federal Republic of Yugoslavia, and were thus lacking in international legal personality.[53] Croatia and the Federal Republic of Yugoslavia—the other principle signatories to the Dayton Agreement—appear to have assumed that these non-state entities were endowed with international legal personality, "albeit an extremely limited one," based on their de facto control of specific territory.[54] This assumption of legal personality allowed these non-state entities "to conclude all the agreements annexed to the General Framework Agreement," and "to undertake international obligations by means of unilateral declarations."[55]

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[48] Ibid at 569.
[49] ibid at 555.
[50] ibid at 556.
[51] Paola Gaeta, 'The Dayton Agreements and International Law' (1996) 7 European Journal of International Law 147, 148-149.
[52] Scott P Sheeran, 'International Law, Peace Agreements and Self Determination: The Case of the Sudan' (2011) 60(2) International and Comparative Law Quarterly 423, 447.
[53] Bell (n 4) 146 [original citations omitted].
[54] Gaeta (n 51) 158-159.
[55] ibid.

However, this assumption may well be rebutted. A positivist legal framework does not explain how two sub-state federal entities had the legal standing to establish a single independent state on the basis of the Dayton agreement.[56] The Federation of Bosnia and Herzegovina did not actually exist as a political entity, nor a geographic territory, prior to the conclusion of the Dayton Agreement, but was merely "created in 1994 at the instigation of the United States for political reasons."[57] Furthermore, it is debatable whether Bosnia and Herzegovina possessed effective control over enough territory to qualify as a *de facto* government deserving limited legal personality.[58] A significant portion of Bosnia and Herzegovina's territory fell under direct control of the Croatian military. As much was confirmed by the unilateral declarations undertaken by Croatia, which referred to "'personnel and organizations in Bosnia and Herzegovina... under its control.'"[59]

Nevertheless, the Dayton Agreement was internationally recognized as an agreement that was legally binding upon the parties. The non-state entities, having been endowed with limited international legal personality, became willing parties to a number of agreements that subsequently deprived them of that status.[60] Under the provisions of the new Constitution of the Republic of Bosnia and Herzegovina, which was annexed to the General Framework Agreement, both the Federation of Bosnia and Herzegovina and Republika Srpska accepted that they were federal states within the Republic, and as such, were "not endowed with international legal rights and powers."[61] Gaeta thus submits that the Federation of Bosnia and Herzegovina was a non-state entity that was regarded as having legal personality "only as long as it participated in the peace negotiations."[62] The Republika Srpska, on the other hand, was a non-state actor which, "having acquired international status on account of its effective control over a part of the territory of Bosnia and Herzegovina," effectively used that status to terminate itself.[63]

The flexibility of the law in this regard was central to the attainment of a stable peace in the former Yugoslavia. The Dayton Agreement is thus another example of how the law may be flexible in application and in theory—providing a

[56] Sheeran (n 52) 447.
[57] Gaeta (n 51) 158-159
[58] ibid at 158-159 [original citations omitted].
[59] ibid.
[60] ibid at 159.
[61] ibid.
[62] ibid.
[63] ibid.

practical solution to the conflict where the strict application of traditional concepts of law would have been counterproductive to objectives of the agreement itself.

3. II. THE SQUARE PEG & THE ROUND HOLE: 'MAKING THEM FIT'[64]

The examples above all support a claim purported by Sheeran: that the international community "has clearly manifested a desire" to accept legal arrangements entered into by non-state entities as binding upon "the communities in whose name they enter into political settlements."[65] However, the existing positivist framework continues to deny legal status to these agreements, making it much easier for signatories to renege, and "undermining the utility of internationally brokered settlements as a device for ending civil strife."[66] Avnita Lakhani has duly argued the need for a realist, "progressive international legal system that alleviates the problem of the procedural handicap that has, to date, prevented non-state actors from being part of the solution."[67] Sheeran also warns that "it would be dangerous" to preclude agreements concluded between States and non-state actors from attaining legally-binding status at the international level.[68] He maintains that some peace agreements "create a strong expectation of compliance under international law," despite lacking the formal status of a treaty.[69] Given the lack of fit between positivist categories of international law and the common features and normative functions of peace agreements, scholars should continue to consider the myriad ways in which international law impacts those agreements, "regardless of whether they fit within traditional legal categories."[70]

However, one must question whether peace agreements are ill-suited to international law, or whether international law, through its rigid and outdated application, has lost sight of the peace-oriented purposes that underpin it. As Nowrot argues, "the normatively binding force of international law" was originally based on the necessity of that legal order "for the "'satisfaction of needs and the pacification

[64] The title of this section is inspired by Böckenförde (n 38), and Bell (n 4) 22.
[65] Sheeran (n 52) 433.
[66] Wippman (n 1) 642.
[67] Avnita Lakhani, 'The Role of Citizens and the Future of International Law: A Paradigm for a Changing World' (2006) 8 Cardozo Journal of Conflict Resolution 159, 174 [original citations omitted].
[68] Sheeran (n 52) 455.
[69] ibid.
[70] Bell (n 4) 136.

of social life.'"[71] However, increasingly internationalized threats have borne crises with domestic roots that the international system is often powerless to address.[72] These crises include forced displacement and mass migration, the threat posed by weakened states, terrorism, and the proliferation of internationalized conflict. It is a global imperative that the international legal system adapts accordingly to "the changing realities on the international scene."[73] Anne-Marie Slaughter and William Burke-White have stressed that the international legal system must "influence the domestic policies of states and harness national institutions in pursuit of global objectives."[74] Peace agreements are an ideal example of how international law can serve this purpose. To achieve optimum outcomes, agreements must extend beyond traditional categories to include non-state actors, however.[75] By relegating peace agreements and non-state actors to ambiguous categories of legal definition, it is "not possible to regard these influential entities as being normatively integrated in the international legal order in the sense of being legally required to contribute to the promotion of global" values.[76] Nowrot duly submits that the failure to subject these "influential entities" to international law "creates intolerable gaps in the structure of the international normative order and 'imposes unnecessary risks on the inherently frail international legal system.'"[77]

Chris Okeke once hypothesized that "'[i]f international law failed to influence and to regulate adequately the course of international relations, it would have lost its value.'"[78] The increasing fragmentation of existing conflict management systems over the past five years is a testament to the inapplicability of the legal status quo. Similarly, the decisions in the *Armed Activities Case* and the *Lomé Accord Amnesty* demonstrated how the strict application of legal doctrine has had negative effects for the pacific purposes of peace agreements—purposes that international law is supposed to regulate. The way in which the SCSL undermined the Lomé Accord to

[71] Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities' (2006) 80(4) Philippine Law Journal 563, 569.
[72] Anne-Marie Slaughter and William W Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law),' (2006) 47(2) Harvard International Law Journal 327, 328.
[73] Nowrot (n 71) 572.
[74] Slaughter and Burke-White (n 72) 328.
[75] Lakhani (n 67) 200.
[76] Nowrot (n 71) 571.
[77] ibid at 571-572.
[78] Chris N Okeke, *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-making Capacity* (University Press 1973) 217, in Nowrot (n 71) 572.

attain conviction further highlights the inapplicability of existing legal systems to conflict resolution contexts. While of course, perpetrators of mass violence must be held to account, a preoccupation with justice can isolate international law from the pursuit of peace. As former South African President Thabo Mbeki has written, there is a time and a place for special criminal courts such as the SCSL, "but it is not in the midst of conflict or a non-functioning political system."[79] Aside from innocence, guilt, or formal legal status, legally informed approaches to conflict resolution must account for the relationship between law and politics; and find ways to check and balance their respective influences.

Accordingly, this thesis seeks a methodological framework that accounts for the normative influence of the law on peace agreements, without disregarding their status as legal instruments. While categorizing peace agreements under existing conceptions of law may be akin to fitting a diplomatic square peg into a legal round hole, Bell has argued that "[i]n making them fit we make choices about the nature of law and politics and the relationship between the two."[80] Existing work in the field of conflict resolution has been mutually detrimental, adopting either an exclusive definition that views peace agreements as purely political, or a positivist legal framework that neglects the political objectives of peace agreements entirely.[81] The failure to grasp the multi-faceted and multi-disciplinary aspects of peace agreements has only served "to cut-off a host of ways to view not only the conflict of the past but also the accommodation of the future."[82] The practical realities of peacebuilding reveal that between the poles of "consent and coercion,"[83] between the binary choice of hard and soft law, there are various combinations of legal form and substantive content that can bring the normative power of international law to bear on peace agreements. The theory of legalization put forward by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal[84] is an

[79] Thabo Mbeki and Mahmood Mamdani, 'Courts Can't End Civil Wars,' The New York Times (5 February 2014) <http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html> accessed 26 July 2016.
[80] Bell (n 4) 22.
[81] Antonia Potter 'The Rule of Law as the Measure of Peace? Responsive policy for reconstructing Justice and the Rule of Law in post conflict and transitional environments' (Centre for Humanitarian Dialogue 2004), 12-13.
[82] Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66(3) The Modern Law Review 317, 345.
[83] David Morriss, 'From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations' (1996) 36 Virginia Journal of International Law 801, 831.
[84] Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, 'The Concept of legalization' (2000) 54(3) International Organization 401.

ideal example of a versatile, multidisciplinary framework that accounts for these variations in agreement design and sustainability. In the next chapter, we will unpack this legalization framework, and explain its utility in highlighting recurring processes of agreement design – what Bell refers to as an emerging *lex pacificatoria*. Chapter 4 explores these concepts, and establishes Abbott et al's theory of legalization as an appropriate model for the analysis of the case studies that follow in chapters 5 – 7.

4.

LAW, LEGALIZATION AND THE LEX PACIFICATORIA

4. I. LEGALIZATION THEORY

Rather than "a binary option between hard international law and pure politics,"[1] Abbott et al.'s concept of legalization envisions a much broader spectrum of definition for legal instruments that do not conform to positivist categories of public international law. Their theory does not undertake a jurisprudential analysis so as to ascertain legal validity, nor is it "proposing a definitive definition or seeking to resolve age-old debates regarding the nature of law or whether international law is 'really' law."[2] Instead, Abbott et al. argue that a statute can attain legal status, or compensate for ambiguous legal form, by undergoing a distinct process of institutionalization, or legalization. A legalized instrument, they argue, is comprised of three characteristics: obligation, precision and delegation.

Obligation refers to the extent to which parties to a statute are legally bound by the rules prescribed by the statute's text. More specifically, the obligation limb measures the degree to which the signatories' behaviour "is subject to scrutiny under the general rules, procedures, and discourse" of domestic and international law.[3] While an obligation prescribed by a peace agreement between a state and non-state actor may not be binding under traditional categories of international law, legalization theory looks to the substantive content of that obligation and the degree to which it may still be binding under the 'rules, practices and institutions' of the international legal order.

Precision measures the degree to which the statute unambiguously prescribes authorized or prohibited behavior, establishes new political structures, or addresses finer details such as scheduling and financing. A rule that would register high on the

[1] Andrej Lang, ''Modus Operandi' and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution' (2008) 40 New York University Journal of International Law and Politics 107, 162.
[2] Kenneth Abbott et al., 'The Concept of legalization' (2000) 54(3) International Organization 401, 403.
[3] ibid at 401.

precision matrix would ideally state "what is expected of a state or other actor" clearly, "in terms of both the intended objective and the means of achieving it."[4] Accordingly, rules that are high on precision are usually "highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behaviour in numerous situations."[5] As Bell notes, "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."[6] Precision narrows the scope for self-serving interpretation by the contracting parties and limits the space for deviation from projected behavior: "[t]he more the exact terms of an agreement are spelled out explicitly, the less probability there is for misunderstandings by the parties themselves or by international actors reacting to perceived violations."[7] These characteristics are particularly important in a conflict-resolution context, where parties are divided by trust-deficits and security dilemmas. Clear and unambiguous instructions thus become a practical necessity when establishing ceasefires, and regulating processes of demobilization and demilitarization,[8] for "nothing invites aggression like ambiguity."[9] Precise and coherent provisions promote compliance by providing clarity with regard to implementation and possible breach of the agreement, while ambiguously worded agreements can decrease compliance-pull, despite the legal form of the agreement itself.[10]

Finally, delegation refers to the third party actors or institutions to which the authority to implement, interpret and enforce the rules of the agreement has been delegated. Delegation is typically characterized by various forms of third-party dispute resolution: actors or institutions that are "authorized to interpret rules and apply them to particular facts (and therefore in effect to make new rules, at least interstitially) under established doctrines of international law."[11] Highly delegated

[4] ibid at 412.
[5] ibid at 413.
[6] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) The American Journal of International Law 373, 395.
[7] Virigina Page Fortna, *Peace Time – Cease-Fire Agreements and the Durability of Peace* (Princeton University Press 2004) 28.
[8] Bell (n 6) 396.
[9] Robert Kagan and Karen Donfried (eds), 'Strengthening the Liberal World Order,' A World Economic Forum White Paper (Geneva 2016) <http://www3.weforum.org/docs/WEF_US_GAC_Strengthening_Liberal_World_Order_White_Paper_US.pdf> accessed 14 July 2016.
[10] Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008) 162.
[11] Abbott et al (n 2) 415.

provisions would ideally provide for interpretative authority to be vested in courts, arbitrators and mediatory or *ad hoc* tribunals, all of which may serve as dispute resolution mechanisms. While binding court decisions are perceived as an ideal form of high delegation, Bell contests that precisely worded peace-keeping mandates are just as valuable in a conflict-resolution context. Detailed mandates that are "underwritten by Security Council resolutions" may provide for "peacekeeping and monitoring" and "for oversight and verification of security guarantees."[12] Such roles are central "to establishing ceasefires and consequent processes of demobilization, demilitarization, and reintegration."[13] Indeed, third-party actors can ease the combatants' mutual vulnerability by mediating between them, "increasing the information flow between the parties, verifying the agreements, and assisting in the development of institutions capable of reducing security dilemmas for both sides."[14] In turn, Security Council resolutions can bring the binding force of law to legalized peace agreements by "establishing mechanisms for monitoring compliance that stand independently of the status of the agreement itself, which nevertheless forms their raison d'être."[15] Just as high levels of obligation and precision result in "the minimization of wiggle room to make excuses,"[16] effective grants of delegation increase "the incentives for cooperation and the costs of opportunism."[17] As Gopalan posits, delegation thus "limits state behaviour to a narrowly circumscribed range of conduct" that is precisely prescribed for by law and is implemented, interpreted and enforced by the actors to which such authority is delegated.[18]

When considered collectively, the dimensions of obligation, precision and delegation thus provide a useful barometer against which to gauge the legal status of an agreement or statute. Agreements that rank high on all three dimensions are said to exemplify 'hard legalization,' i.e., those agreements that bear the character of hard law. Agreements that exhibit 'soft legalization' are more akin to soft law, or 'purely political' instruments. In their example, Abbott et al. point cite domestic legal

[12] Bell (n 6) 402.
[13] ibid.
[14] Mark Peceny and William Stanley, 'Liberal Social Reconstruction and the Resolution of Civil Wars in Central America' (2001) 55(1) International Organization 149, 156-157.
[15] Bell (n 6) 394.
[16] Sandeep Gopalan, 'India-Pakistan Relations: Legalization and Agreement Design' (2007) 40 Vanderbilt Journal of Transnational Law 687, 693.
[17] ibid at 711.
[18] ibid.

systems "as prototypical of hard legalization."[19] They refer to a statute ratified by a legislative process which is legally binding on all of the nation's citizens (obligation), is clear and unambiguous in the behaviour that it requires or proscribes (precision) and is subject to judicial interpretation by the judiciary and enforcement by the organs of the police force (delegation). [20] This study adopts their example as the standard for a highly legalized agreement. Conversely, an agreement that is largely rhetorical, lacking in substantive legal effect, and ambiguous with regard to its enforcement and interpretation is considered to be an example of soft legalization. Variation among agreements is not considered a binary choice between hard and soft legalization, but may depend on the extent to which the institutions established under the agreement are comprised, mandated and established, or the degree to which the implementation of the agreement is precisely laid out. Such variation is readily observable in the case studies analyzed herein.

The theory of legalization moves away from traditional thinking that regarded international law as requiring a coercive sovereign to ensure compliance.[21] Instead, Abbott et al stress the importance of institutionalized means of promoting compliance, such as normative pressure and compliance-pull, thereby advancing a multidisciplinary approach that "creates common ground for political scientists and lawyers."[22] Goldsmith and Posner argue that the legalization of an agreement increases the normative strength of its provisions as a whole by increasing the parties' sense of obligation.[23] Drawing from a similar analogy to that made above regarding domestic and international legal spheres, they argue that just as a binding contract signifies a more serious commitment on behalf of the parties than a letter of intent, "which in turn is a more serious commitment that a hand-shake," a legalized international agreement signifies a more credible commitment and a greater intention to be bound than a purely political, non-legalized instrument.[24] Peace agreements often serve as unique examples of institutionalized compliance-pull. Indeed, Bell argues that peace agreements adopt legal protocols in order to be *seen* as imposing substantive legal obligations on the signatories, i.e., to increase the likelihood that the parties will comply, regardless of the actual legal status of such obligations. Bell

[19] Abbott et al (n 2) 402.
[20] ibid.
[21] ibid.
[22] ibid.
[23] Jack L Goldsmith and Eric A Posner, *Limits of International Law* (OUP 2005) 83.
[24] ibid at 98.

argues that such adherence to established legal form "suggests that the parties mutually view them [peace agreements] as legal documents,"[25] despite their ambiguity under established doctrines of international law.

The concept of legalization provides an attractive framework for the categorization and study of peace agreements as legal documents. While treaty status remains reserved exclusively for agreements between states, Bell argues that state and non-state parties may conclude treaty-like agreements that compensate for their ambiguous legal form through provisions that are high on obligation, precision and delegation.[26] By legalizing peace agreements, Bell argues that state and/or non-state actors "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."[27] Indeed, Abbott et al. maintain that where parties want to signify the significance of their commitments, there are few equally effective alternatives to legalization.[28] Hard legalization in peace agreements can channel the behaviour of parties towards compliance and away from divergence. Detail and precision in an agreement's text serve to constrain self-serving interpretation by the parties, "and accepted modes of legal discourse and argument all help limit such opportunistic behaviour."[29] Effective grants of delegation to interpretative bodies such as courts and tribunals further limit "wiggle room to make excuses."[30] Where non-compliance is difficult to detect, as in most arms control situations and processes of demobilization and demilitarization, effective grants of delegation serve to compensate "for the reduced likelihood of detection by increasing the costs of detected violation."[31]

It is thus unsurprising that several academics have identified a positive correlation between hard legalization and compliance. Gopalan, for one, has repeatedly pointed to the link between hard legalization on all its dimensions, and the sustainability of agreements between states that are prone to conflict.[32] While not guided by a legalization framework, Fortna has also repeatedly underscored the

[25] Bell (n 6) 378.
[26] ibid at 389.
[27] ibid at 386.
[28] Abbott et al (n 2) 427.
[29] ibid.
[30] Gopalan (n 16) 693.
[31] Abbott et al (n 2) 429.
[32] Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55(2) Buffalo Law Review 403, 454.

correlation between 'strong' ceasefire agreements and peace durability.[33] Following a review of ceasefire arrangements between India and Pakistan, and Syria and Israel; Fortna concluded that 'strong' agreements made it easier to maintain peace, and that more specific (or precise) agreements produced more sustainable periods of peace.[34] Contrary to other empirical studies that have applied a legalization framework, Gopalan concludes that "there is room for cautious optimism about the positive correlation between hard legalization and compliance when the actors are high conflict states."[35] Gopalan's research begs the question as to how pervasive this correlation may prove after an empirical examination of similar case studies, and invites further scholarly work on the subject.[36] This thesis makes important advancements in that regard, finding a similarly positive correlation by extending existing analyses to agreements between state and non-state actors, and probing the consequences of legalization for non-state actors of questionable legal standing. While lessons from Gopalan and Fortna's work cannot be applied to conflicts involving non-state actors without due regard to the differences between interstate and intrastate war, "the general strategies of changing incentives, reducing uncertainty, and managing accidents are likely to apply in both contexts."[37] Legalization theory thus provides a highly versatile framework that reveals the overlap between Gopalan and Fortna's work, extends to fit the parameters of this thesis, and reflects how the interdisciplinary exchange of scholarship can "promote the dialogue needed to craft better peace agreements, in turn promoting brighter and more stable futures for post-conflict countries."[38]

As demonstrated in Chapter 3, legal academics and practitioners alike "have deferred for too long to the view that politics, rather than law, is the answer" to the riddle of sustainable peace.[39] Gopalan posits that such an assumption "is fundamentally flawed and an examination of the agreements using legalization theory may help to bridge the gap between law and politics."[40] Indeed, legalization certainly represents an attempt to reconcile the interests of both disciplines and to

[33] See Fortna (n 7) and Virginia Page Fortna 'Scraps of Paper? Agreements and the Durability of Peace' (2003) 57(2) International Organization 337.
[34] Fortna (n 7) 172, 199.
[35] Gopalan (n 16) 726.
[36] ibid.
[37] Fortna (n 7) 216.
[38] Emily E. Bartholomew, Constructing Durable Peace: Lessons from Sierra Leone (2007-2008) 38 California Western International Law Journal 117, 173.
[39] Gopalan (n 32) 404-405.
[40] ibid.

reveal how "legal and political considerations combine to influence behaviour."[41] Kahler surmises that "legalization, in creating new institutional forms, mobilizes different political actors (such as non-state actors) and shapes their behaviour in particular ways."[42] It is thus a particularly appropriate lens through which the effects of legalization on non-state actors can be viewed: how the law can serve to legitimate these actors that previously had limited legal standing, or alternatively, how it can isolate and pacify them through structurally biased political structures that present a superficial legal aesthetic.

Furthermore, in defining the complex process of legalization along the dimensions of obligation, precision and delegation, Abbott et al. have radically simplified a broad spectrum of values. Simplicity allows for variation in agreements to be easily identified[43] and for widespread empirical analysis "between different peace processes as regards how best to promote compliance."[44] The simplicity of the tripartite legalization framework further allows peace agreements to be "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."[45] Thus, the inherent advantages in applying legalization theory to the study of peace agreements offset the difficulties in characterizing such agreements under traditional concepts of law, and "point to the importance of legalized models as an alternative to formal legal status."[46]

4. II. THE LEX PACIFICATORIA

The adoption of common combinations of obligation, precision and delegation in peace agreement design led Bell to conclude that a *lex pacificatoria*, or 'law of the peacemakers,' is emerging through consistent practice.[47] She identifies four distinct features that comprise a process of legalization unique to peace agreement design. These features are: their provisions on self-determination; their tendency to include both state and non-state actors, thereby "straddling international

[41] Abbott et al (n 2) 419.
[42] Miles Kahler, 'The Causes and Consequences of Legalization' (2000) 54(3) International Organization, 661.
[43] Abbott et al (n 2) 403.
[44] Bell (n 6) 375.
[45] ibid at 395.
[46] ibid.
[47] ibid at 407.

and domestic legal categories"; distinctive forms of obligation, including "both treaty-like/contractual and value-driven/constitutional provisions"; and consistently employed forms of delegation, "involving multiple intertwined and overlapping legal and political mechanisms."[48] Bell argues that these features form the theoretical basis of an emerging *lex pacificatoria,* similar to the distinct *lex mercatoria* (law of the merchants) advanced by the consistent practice of international merchants. Like the *lex mercatoria,* the *lex pacificatoria* is not a self-contained regime that applies solely in the realm of international law to the exclusion of the domestic realm, but instead, represents "a source of law made up of custom, practice, convention, precedent—and many national laws."[49] A comparative study of peace processes as presented in the next three chapters reveals commonalties in the prescription of certain provisions that could comprise a *lex pacificatoria*, thereby highlighting "the unique ways that peace agreements "assert their own legalization across international and domestic spheres."[50]

There are certainly advantages to the characterization of peace agreement legalization as a distinct legal practice. Conceptualizing the *lex pacificatoria* as a coherent body of law allows scholars to account for the peculiar features of peace agreements that are ill-suited to positivist categories of international law, while tracking innovations in agreement design and best practice. Studying the features of peace agreements in this manner can inform the 'borrowing' of successful mechanisms across peace processes.[51] Furthermore, such study allows for "engagement with social science debates on the factors affecting an agreement's success or failure,"[52] and can contribute to the growing scholarship on a *jus post bellum*—a law for post-conflict management. The *jus post bellum* is envisioned as a legal template for post-conflict transition and rehabilitation: a set of criteria which, at the very least, would provide certain fundamental guarantees and a standard against which new legal systems and political structures could be judged.[53] While peace agreements themselves are in effect an application of the *jus post bellum*—insofar as they are legal instruments concluded after war that regulate the post-conflict order—

[48] ibid.
[49] Andreas F Lowenfeld, 'Lex Mercatoria: An Arbitrator's View' in Thomas E Carbonneau (ed), *Lex Mercatoria and Arbitration,* 84-85 (Revised edn, Juris 1998) in Bell (n 6) 407.
[50] Bell (n 6) 409.
[51] ibid at 410.
[52] ibid at 375.
[53] Inger Österdahl, 'Just War, Just Peace and the Jus post Bellum' (2012) 81(3) Nordic Journal of International Law 271, 281

scholars maintain that "the world has far to go before there can be said to be… a jus post bellum that is worthy of the name."[54] Viewing common processes of legalization as a distinct *lex pacificatoria* thus represents a novel attempt to elaborate on a potential *jus post bellum*, and establish a theoretical framework for sustainable agreement design.

Indeed, if we are truly understand the process-orientated character of peace agreements, then Abbott et al's theory of legalization needs to be updated to reflect its application in a conflict resolution context. Bell's *lex pacificatoria* is an attempt in this regard, as it accounts for aspects of legalization theory that do not sit comfortably with the unique character of peace agreements at present. For example, precision will not always be an accurate barometer for gauging agreement success or failure, particularly where precisely written provisions do not represent mutual agreement between the parties.[55] In the absence of political well and genuine consensus, precision alone may be "insufficient to providing incentives to cooperation."[56] Furthermore, precision can be restrictive and rigid in the face of long-term peacebuilding objectives, the requirements and repercussions of which cannot be accurately predicted.[57] While the law can play a pivotal role in enforcing the short-term goals of a peace agreement, Bell argues that "the longer-term goals of peace agreements must be achieved through the deeper constitutionalization of the commitments they embody."[58] This thesis presents interesting findings in this regard, and reveals distinct features of legalized peace agreements that can transition a document from short-term to long-term processes of peacebuilding.

The *lex pacificatoria* also provides a basis for further research into the implications of third party delegation. Bell raises several questions as to how the text of a peace agreement may influence political discourse within the realm of parties to the agreement, and indeed, how the international community's involvement in the drafting of the agreement may have significant implications for that relationship.[59] Taken together, the *lex pacificatoria*, and the processes of legalization that comprise

[54] Stephen C Neff, 'Conflict Termination and Peace-Making in the Law of Nations: A Historical Perspective,' in Carsten Stahn and JK Kleffner (eds), *Jus Post Bellum – Towards Law of Transition From Conflict to Peace* (TMC Asset Press, 2008) 88.
[55] Bell (n 6) 397.
[56] ibid.
[57] ibid.
[58] ibid at 398.
[59] ibid at 411.

it, thus signal a "range of new inquiries"[60] and present a formative framework that is advanced by the analyses presented in this thesis.

However, Andrej Lang voices a significant dissenting opinion on the *lex pacificatoria* that surmises the traditional legal perspective on peace agreements. Lang initially accepts that the *lex pacificatoria* is an important concept that might help our understanding of the peace agreement phenomenon by accommodating "the different rationales and mechanisms that are associated with the peculiar nature of modern peace agreements."[61] However, Lang dismisses Bell's theory on the basis that it relegates peace agreements to "a distinct, somewhat self-contained category of transnational law."[62] In Lang's view, peace agreements are thus denied the compliance-inducing effects of international law.

Lang errs, however, by conceptualizing the *lex pacificatoria* as a mere label, a political definition applied to peace agreements that are only posing as legal contracts. This is to neglect the common legal features, processes and practices emanating from these agreements, and the coherent processes of legalization that give rise to them. Lang disregards this formative body of law by arguing that peace agreements can only have the character of law if they produce "credible legal effects,"[63] and rely "on the availability of effective adjudication and integration with other norms of international law."[64] Lang concludes that the *lex pacificatoria* does not satisfy these criteria, and as such, remains in the category of soft law.[65] Accordingly, he stresses the need for peace agreements to be defined under established and recognized doctrines of hard international law.[66] Ironically, in pursuing this outcome, Lang categorizes peace agreements under the "binary option between hard international law and pure politics,"[67] which he himself identified.

In purporting this view, Lang restricts the analytical potential behind legalization to what Abbott et al. described as a "narrow view of the law as requiring enforcement by a coercive sovereign."[68] Lang claims that processes of legalization

[60] ibid.
[61] Lang (n 1) 148.
[62] ibid at 144.
[63] ibid at 149.
[64] ibid at 168.
[65] ibid at 163.
[66] ibid.
[67] ibid at 162.
[68] Abbott et al (n 2) 402-403.

lack "the normative and institutional quality of the international legal system,"[69] but in doing so, he fails to consider how the legalization of a peace agreement may still produce 'credible legal effects' through provisions that are high on obligation, precision and delegation. Lang's dismissal of the parallel between the *lex mercatoria* and the *lex pacificatoria* evidences this. He contests that a legal regime unto peacemakers, which is comprised by both state and non-state parties to a conflict, cannot operate in the same way as the *lex mercatoria*, which is based on mutual self-interest among its parties.[70] Unlike the *lex mercatoria*, the "security dilemma dynamics"[71] that are inherent in an armed conflict context incentivize opportunism among the parties and prevent self-enforcement of a *lex pacificatoria* in the absence of a coercive sovereign. However, this reasoning is negated by the positive correlation that exists between hard legalization and peace agreement success.[72] Where security dilemmas present themselves, hard legalization can bridge trust deficits by stipulating the costs of non-compliance before the breach occurs.[73] High precision narrows the scope for self-serving interpretation by the contracting parties and limits the space for deviation from projected behaviour. Provisions that are high on both obligation and precision further reduce "wiggle room to make excuses,"[74] while provisions that are high on delegation do not incentivize opportunistic behaviour, but rather, increase its costs by providing for third-party enforcement mechanisms.[75] Thus, the peculiar dynamics of legalization do not preclude the existence of a *lex pacificatoria*, but form its raison d'être.

Though Lang asserts that Bell has 'insulated' peace agreements from the international legal system by creating a separate label for processes of peace agreement legalization,[76] this is not the case. The *lex pacificatoria* is merely an attempt to account for distinct processes of legalization that continue to give rise to deeply legal processes and institutions, in the absence of positivist legal frameworks that could better regulate them. Thus, the *lex pacificatoria* is not an attempt to isolate peace agreements from the existing norms, rules, practices and institutions of the international order, but an attempt to identify the coherent processes of peace

[69] Lang (n 1) 153-154.
[70] ibid at 152.
[71] ibid.
[72] See Gopalan (n 32).
[73] Gopalan (n 32) 454.
[74] Gopalan (n 16) 693.
[75] ibid at 711.
[76] Lang (n 1) 149-150.

agreement design that are emerging through practice, precedent and custom, and to recognize these processes as legal. Furthermore, there is little evidence to suggest that the theory of legalization is incompatible with customary international law; and international legal principles on the recognition of non-state actors and their obligations under human rights treaties.

Finally, Lang contends that Bell's 'softening' of the law renders peace agreements non-justiciable before the ICJ.[77] However, an adherence to legal positivism has not been advantageous to the enforcement of peace agreements as legal documents, as the decision in the *Armed Activities* case arguably demonstrates. As Lang himself has noted, the ICJ's rejection of the Ugandan counterclaim in that case was based on the assumption "that it is not possible to establish legal responsibility on the basis of violations of the Lusaka Agreement."[78] The Court's reasoning in this regard implies that the Lusaka Agreement and other such peace agreements do not create binding obligations at international law, nor are they justiciable before the ICJ. Such an outcome highlights the dangers inherent in applying international law too rigidly to peace agreements, and reiterates the need for alternative conceptions of the law that can account for the peculiar features of such agreements. When the strict application of international law serves only to frustrate the goals of peace agreements (which are central to the social objectives that necessitated the establishment of the international legal order),[79] then the priorities of the international system are inherently called into question.[80] The interpretation and application of international law should involve the promulgation and attainment of common values and goals.[81] Indeed, even Lang concedes that where the opposite occurs, one should acquiesce to Bell's *lex pacificatoria* approach.

But the *lex pacificatoria* does not represent a 'softening' of traditional legal concepts, nor a last resort. It is merely a recognition of the distinct processes of

[77] ibid at 163.
[78] ibid at 122.
[79] See Karsten Nowrot, 'Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities' (2006) 80(4) Philippine Law Journal 563, 569: "[I]t is the underlying purpose of the international legal order to pursue international stability and to avoid disputes and the arbitrary use of power."
[80] See Philippe Sands, *Lawless World – America and the Making and Breaking of Global Rules* (Allen Lane 2005) 238: "[N]ew circumstances—failed states, terrorism and the emergence of non-state actors in particular— … require the existing global rules to be continually assessed, and to be modified where necessary to ensure that states feel that their vital needs are being met."
[81] Scott P Sheeran, 'International Law, Peace Agreements and Self Determination: The Case of the Sudan' (2011) 60(2) International and Comparative Law Quarterly 423, 456.

legalization that are effecting legal outcomes and normative influence, irrespective of their formal legal status. The concept of legalization itself is a model of legal definition for peace agreements that reiterates the normative power of international law and resituates its role as central to an agreement's stability, not its voidability. As Bell argues, if we do not attempt to define the emerging consistencies in peace processes in legal terms, we risk losing sight of the role that international law should play in the international realm: "we they risk losing sight… of the moral and normative underpinnings of the emerging *lex*."[82] Inger Österdahl has similarly claimed that scholars have a duty to systematize existing and developing "norms for the governance of societies in transition."[83] In querying the correlation between hard legalization and agreement stability within the parameters of this thesis, the research reveals common innovations with regard to precision, obligation and delegation that contribute to sustainable processes of peace. This somewhat affirms and contributes to the theory of a *lex pacificatoria*, which presents a more pragmatic approach to making principles of law serve processes of peace, not vice versa. We will now look at how these innovations emerged through processes of conflict, negotiation, trial, and error in the Philippines, Sierra Leone and Sudan.

[82] Bell (n 6) 412.
[83] Österdahl (n 53) 292.

5.

‘THE MORO PROBLEM’ – CONFLICT IN MINDANAO

> “The tenacity and seriousness of the conflict remains complicated with the unremitting inability of the state to substantially and decisively address, over a long period, its core causes: insubstantial political autonomy; socio-economic grievances and deprivation; and perceived injustice, discrimination, and alienation of the people from the mainstream of Philippine political and economic development. The issue boils down to political and economic equity and social justice, the crux of the state’s responsibility and kernel of nation’s spirit.”[1]

> “The theories that run the gamut from religion to misgovernment were relevant only in so far as they were all pieces of an enormously complex jigsaw. To pick any one of them as the outstanding cause of the upheaval would be a hindrance to understanding the total picture.”[2]

5. I. INTRODUCTION

The conflict in the southern Philippines can be traced along a social and cultural fault line which first ruptured upon the introduction of Christianity under colonial Spain, and is still observable in the contemporary “dichotomization of Philippine society between the Christian majority and Muslim minority.”[3] Colonial efforts to pacify the predominantly Muslim Moro people of Mindanao by force were largely ineffective, prompting the Christian Filipino elite to adapt administrative policies of political exclusion, “systematic marginalization” and ethnic “minoritization” in the post-independence period.[4] As a result, contemporary Mindanao has consistently lagged behind other urban centres in the Philippines in

[1] Rizal G Buendia, ‘The State-Moro Armed Conflict in the Philippines – Unresolved National Question or Question of Governance?’ (2005) 13(1) Asian Journal of Political Science 109, 145.
[2] T J S George, *Revolt in Mindanao: The Rise of Islam in Philippine Politics* (OUP 1980) in Soliman M Santos, Jr, ‘Delays in the Peace Negotiations between the Philippine Government and the Moro Islamic Liberation Front: Causes and Prescriptions’ (2005) 3 East-West Centre Washington Working Papers, 2.
[3] Jeffrey Ayala Milligan, ‘Reclaiming an Ideal: The Islamization of Education in the Southern Philippines’ (2006) 50(3) Comparative Education Review 410, 412 [original citations omitted].
[4] ibid.

terms of socio-economic development.[5] Provinces with a Muslim majority continue to rank among "the poorest, least educated, and most dangerous places in the Philippines,"[6] with the little infrastructural and educational opportunities that these provinces receive "disproportionately going to serve Christian areas."[7]

In the late 1960s, the Moros began to chafe under "the perennial discrimination against [them] in many levels of the national life as well as the misrepresentation or distortion of their true image as a historic people."[8] The call for secession was originally articulated by Dr. Nur Misuari and the Moro National Liberation Front (MNLF), before finding a more Islamic expression in its splinter group, the Moro Islamic Liberation Front (MILF). After President Ferdinand Marcos imposed martial law in 1972, the MNLF took up arms against the state to further their claim to the Moro homeland. However, asserting that claim came at a staggering price. 30 years of conflict between the state and the MNLF alone claimed the lives of some 100,000 civilians.[9] More than one million others were rendered homeless and/or destitute, with the ongoing conflict creating an estimated 200,000 to 300,000 Muslim refugees.[10] The internal displacement caused by the fighting contributed to the process of Moro minoritization in Mindanao, and today, many of the major cities in Mindanao remain crippled by the effects of protracted conflict.[11]

This chapter begins with a brief examination of the features that the Bangsamoro peace process has successfully 'borrowed' from other international processes, and what this tells us about peace agreement design generally. Section II analyses the systematic policies of 'Minoritization,' 'Filipinization,' and marginalization that have been brought to bear on the Moro people throughout

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[5] Nathan Gilbert Quimpo, 'Options in the Pursuit of a Just, Comprehensive, and Stable Peace in the Southern Philippines' (2001) 41(2) Asian Survey 271, 275.

[6] Astrid S Tuminez, 'Neither Sovereignty Nor Autonomy: Continuing Conflict in the Southern Philippines' (2008) 102(1) American Society of International Law 122, 122-123.

[7] Aijaz Ahmad, 'Class and Colony in Mindanao' in Eric Gutierrez (ed) *Rebels, Warlords and Ulama: A Reader on Muslim Separatism and the War in Southern Philippines*, (Institute for Popular Democracy 2000) in Stuart J Kaufman, 'Symbols, Frames, and Violence: Studying Ethnic War in the Philippines,' (2011) 55(4) International Studies Quarterly 937.

[8] Muslim Leaders in the Philippines, "Muslim Leaders' Consensus of Unity," in Cesar Adib Majul, '*The Contemporary Muslim Movement in the Philippines*' (Mizan Press 1985) 31 in Quimpo (n 5) 275.

[9] Jacques Bertrand, 'Peace and Conflict in the Southern Philippines: Why the 1996 Peace Agreement Is Fragile' (2000) 73(1) Pacific Affairs 37.

[10] Rizal G Buendia, 'A Re-examination of Ethnicity and Secessionist Movements In the Philippines and Indonesia: The Moros and Acehnese' (2002) 23(46) Philippine Political Science Journal 3, 14.

[11] Soliman M Santos Jr. 'Evolution of the Armed Conflict on The Moro Front,' A Background paper submitted to the Human Development Network Foundation for the Philippine Human Development Report 2005, 13.

history, and how these polices contributed to the advent of a militant Moro identity and the outbreak of conflict in Mindanao in 1972. The major agreements concluded between the state and the alternating Moro secessionist groups are analyzed in detail in Section III. The way in which these agreements were worded reveals valuable lessons about including the relevant stakeholders and addressing the key issues fueling a conflict. The role that legal language and legal guarantees play in incorporating these peacebuilding principles into sustainable processes of peace is explored in Section IV.

The history of conflict resolution efforts in Mindanao has mirrored "the complexity of the Philippines' physical geography—an archipelago with differing concentrations of conflict and social organisation, where even the history of negotiations is disjointed and diverse."[12] The protracted peace process has produced an abundance of conflict resolution instruments aimed at ending the conflict, but "peace talks have been highly volatile, tenuous, and insubstantial," and generally limited to ceasefires, declaratory statements and framework agreements.[13] In the diplomatic intervals between negotiations, a "no war, no peace" situation persisted, characterized by minor skirmishes, despite the periodical signature of ceasefire agreements.[14] In perpetuation of a vicious cycle, every breakdown in negotiations was succeeded by the outbreak of violence, which only served to "reinforce the high distrust and the deep cleavages" that already permeated Philippine society.[15] Upon returning to the negotiating table, both state and Moro actors treated renewed peace talks "as but a continuation of the power struggle by other means," using ploys and maneuvers to better their own position, or to force the opposition to make concessions.[16]

The 40-year history of the conflict in the Mindanao region of the Philippines is thus ripe with potential for academic analysis within the parameters of this project. First, though the struggle in Mindanao is tied to broader issues of wealth and power sharing between the minority and the majority, the conflict remains characterized by ethnic division, "compounded by religious identities that are more tied to cultural

[12] Mara Stankovitch and Andy Carl, 'One step towards peace: The 'Final Peace Agreement' in Mindanao,' Accord: Compromising on autonomy: Mindanao in transition (March 1999), 5.
[13] Buendia (n 1) 128.
[14] Santos Jr (n 11) 14.
[15] ibid.
[16] Quimpo (n 5) 285.

ideologies and their popular expressions, including the use of violence."[17] Mindanao therefore presents an ideal opportunity to further examine Gopalan's correlation between ethno-religious conflicts and highly legalized agreements.[18] Indeed, the Bangsamoro is serving as a guinea pig of sorts for pragmatic approaches to conflict resolution and the creation of legal anomalies in the interest of peace. As Mastura notes, the creation of the autonomous Bangsamoro region is not unlike the creation of Kosovo, or the establishment of the Federation of Bosnia-Herzegovina,[19] both of which served as unusual, if not unprecedented, solutions to intractable ethnic conflicts.

The Bangsamoro peace process also supports Bell's claim that peacebuilding mechanisms can be transferred across peace processes.[20] The 2014 Comprehensive Agreement on the Bangsamoro (CAB) was influenced by commendable features from various other peacebuilding initiatives, including provisions pertaining to ethnic groups (the peace process between the Acehnese and the Indonesian state in Aceh), systems of governance (devolution in Scotland and power-sharing in Catalonia and the Basque country, Spain), and third-party monitoring (as in the North-South conflict in Sudan).[21] During negotiations on the ill-fated 2008 Memorandum on Ancestral Domain (MOA-AD), the Sudanese experience was frequently cited as an appropriate model for third-party monitoring,[22] and its effects are now observable in the adopted best practices of the International Monitoring Team envisioned under the CAB.[23]

Negotiators also consulted experts from conflicts zones such as Colombia, Myanmar, and perhaps most evidently, Northern Ireland.[24] Both Mindanao and Northern Ireland share similarities with regard to the sectarian relationship between minority and majority communities, and the core-periphery nature of the relationship

[17] Jun Mercado OMI, 'Negotiating the Good Friday Agreement' (GMA News Online, 11 October 2011) <http://www.gmanetwork.com/news/story/235009/opinion/blogs/negotiating-the-good-friday-agreement> accessed 19 August 2017.
[18] See generally Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55(2) Buffalo Law Review 403.
[19] Ishak V Mastura, 'Philippines: Bangsamoro, A Triumph of Western Diplomacy?' (2013) 9(1) Small Wars Journal.
[20] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) The American Journal of International Law 373, 410.
[21] Mastura (n 19).
[22] International Crisis Group interview, Manila, 7 September 2008 in International Crisis Group, 'The Philippines: The Collapse of Peace in Mindanao,' Asia Report N°83 (Jakarta/Brussels 23rd October 2008), 5-6.
[23] Mastura (n 19).
[24] ibid.

between the national government the conflict area.[25] Northern Ireland's Good Friday Agreement—itself a conscious product of various peace processes borrowing 'best practice' from one another[26]—has thus served as a template for addressing particularly sensitive and contentious issues in Mindanao, including decommissioning: "It is a very similar situation to us... In Northern Ireland they had a commission. Maybe we should, too."[27] Teresita Quintos Deles, presidential adviser to the peace process, also admitted that the negotiators' approach to policing and decommissioning had been influenced by the British experience in Northern Ireland.[28] Article 4 of the Framework Agreement on the Bangsamoro calls for the establishment of an independent commission to advise on policing within the region, similar to the commission established by Section 9 of the Good Friday Agreement on Policing and its Annex on the Commission on Policing for Northern Ireland. Article 5 of the Framework Agreement also states that the MILF will undertake a programme of demobilization to put their weapons 'beyond use,' which mirrors the language used by the parties to the peace process in Northern Ireland.[29] Though Deles was quick to point out that there are "no fixed templates that can aid with the peace process" in Mindanao,[30] the applicability of peacebuilding mechanisms from one conflict zone to another highlights how the study of various agreements has positive implications for peace processes globally. While no single agreement can address the unique peculiarities of any given conflict, successful agreements can inform and inspire the adoption of certain provisions "in the search for implementation,"[31] a vision surmised by Fr. Jun Mercado: "Though we are not 'copy cats' of Northern Ireland, no doubt, we can draw concrete lessons from it if we are looking for a fresh wind blowing our own peace story…."[32]

Finally, the protracted peace process in Mindanao is ample evidence in itself of Gopalan's claim that our ignorance in the field of agreement design has seen the

[25] Mercado (n 17).
[26] Roger Mac Ginty, Orla T Muldoon and Neil Ferguson, 'No War, No Peace: Northern Ireland after the Agreement' (2007) 28(1) Political Psychology 1, 3 [original citation omitted].
[27] Jun Mantawil of the MILF negotiating team in Simon Tisdall, 'Philippines moves close to historic peace deal with Islamist rebels' *The Guardian* (London, 13 February 2013).
[28] Tisdall (n 27).
[29] ibid.
[30] 'Deles: PH can learn a lot from N Ireland's Good Friday Agreement' (Office of the Presidential Adviser on the Peace Process, 3 March 2011) <http://archive.peace.gov.ph/news/deles-ph-can-learn-lot-n-irelands-good-friday-agreement> accessed 19 August 2017.
[31] Bell (n 20) 410.
[32] Mercado (n 17)

repetition—or indeed, the omission—of the same features in agreements, despite the evidence of their failure (or success) in previous instances.[33] All sides in this conflict have seen agreements rich in potential—conceived at an opportune time with the good faith of all of the parties involved—fall flat at the last moment, due to their repeated failures to meaningfully address the substantive issues that underpin the conflict. For example, the sustainability of, and support for, the Bangsamoro peace process has repeatedly been dogged by a lack of consensus among those who inhabit the ancestral domain of the Moro people. This "is partly due to the lack of participation of other stakeholders," [34] i.e., other Moro ethnic groups, Lumads (the non-Islamised indigenous tribal people of Mindanao), Christians, and key civil society actors. This negligence failed to generate any enthusiasm among the key stakeholders with regard to implementation, and failed to adequately address the interests of the respective groups.[35] Similarly, or perhaps because of this lack of national consensus, the issue of land ownership was repeatedly neglected over 30 years of renewed negotiations. The land issue had been identified as a root cause of the conflict, and there was agreement among commentators "that land must be part of a strategic, sustainable solution."[36] Indeed, as early as 2002—before the breakdown of the MOA-AD and the resumption of hostilities in 2008—Paul Oquist of the United Nations Development Programme identified land as the most likely source of post-conflict conflict in Mindanao.[37] These issues have repeatedly proven themselves to be "major gaps" in the state-Moro peace talks,[38] and academics and practitioners alike can learn much from the negotiators' inability to achieve consensus on these problems. Thus, Mindanao—as was written of Northern Ireland before it—is an ideal region for further study, as it "provides a state-of-the-art laboratory of peacemaking and peace building that may offer positive and negative lessons to other societies attempting to emerge from protracted civil conflict."[39]

[33] Gopalan (n 18) 404-405.
[34] Soliman M Santos Jr, 'Delays in the Peace Negotiations between the Philippine Government and the Moro Islamic Liberation Front: Causes and Prescriptions' (2005) 3 East-West Centre Washington Working Papers, 12.
[35] ibid.
[36] ibid at 18.
[37] Paul Oquist, "Mindanao and Beyond: Competing Policies, Protracted Peace Process and Human Security" (October 23, 2002) in Santos Jr (n 34) 18.
[38] Santos Jr (n 34) 12.
[39] Mac Ginty, Muldoon and Ferguson, (n 26) 3 [original citation omitted].

5. II. HISTORICAL CONTEXT

5. II. A. THE COLONIAL PERIOD

The Republic of the Philippines' unique status as the sole Asian state with a Christian-majority stems from the Spanish colonial conquest of the islands between 1565 and 1898.[40] The Spanish introduced Christianity to the sprawling archipelago in the mid-sixteenth century, and for the next three centuries, attempted to proselytise the indigenous peoples through education and force. As a result, Christianity is practiced by ninety per cent of the population today.[41] However, Islam has actually enjoyed a longer presence in the country's southern peripheries. Almost two centuries before the arrival of the Spanish colonial power, Islam was beginning to take hold in the southernmost reaches of the Philippines, "fostering the evolution of more complex and cohesive cultural communities with the power to successfully resist Spanish attempts to extend political control and Christianity throughout the archipelago."[42] In parts of south-western Mindanao, "where Spanish control came late and remained tenuous," indigenous political constructs and processes of state-building were well-developed, "undergirding a tradition of resistance to alien rule."[43] By the mid-16th century, the Spanish invaders had to contend with "small but fiercely independent sovereign nation-states in the form of sultanates of the main Moro ethnolinguistic tribes."[44]

The Moro's resilience reminded the Spanish of the Afro-Muslim enemy they had repeatedly faced on their home front. The Muslims of the southern Philippines were thus labelled 'Moros,' after the Moors of North Africa. The term is not derogatory, but is in fact "articulated and self-ascribed" by the Moro as a rejection of the Filipino nation, and a claim of ancestry to the "unsubjugated" and "uncolonised" peoples of the Southern Philippines.[45] Unlike those who identify themselves as Filipino, the Moro believe "that their people have never been part of the Philippines," and that "their current struggle is a continuation of their ancestors' war for

[40] Santos Jr (n 34).
[41] ibid.
[42] Jeffrey Ayala Milligan, 'Faith in School: Educational Policy Responses to Ethno-Religious Conflict in the Southern Philippines, 1935-1985' (2005) 36(1) Journal of Southeast Asian Studies 67, 67-68.
[43] Santos Jr (n 34).
[44] Santos Jr (n 11) 1.
[45] Rizal G Buendia, 'The State-MILF Peace Talks: Quo Vadis?' (2004) Southeast Asian Affairs 205, 211.

independence."[46] The Filipino natives who had been converted to Christianity were compelled by the Spanish to help suppress the Muslim rebellion.[47] The Moro thus felt the need to declare themselves separate from Christian Filipinos, "who reduced them to a state of poverty and underdevelopment; and subjected them to injustice and prejudice."[48] They declared themselves a new people, under a new nation: the Bangsamoro, or 'land of the Moro.'

Spanish dominion over Muslim Mindanao was almost complete by the latter half of the nineteenth century. However, it was not brought under the administration of a centralized, Manila-based government until the first decade of the twentieth century,[49] when the United States took Manila from the Spanish during the Spanish-American war. By then, the once powerful sultanates had ceased to exist as political entities.[50] The US colonial administration was characterized by two alternating strategies: the use of brute military force "to subdue resistance in Muslim communities," and "the systematic deployment of a public educational system" that served to demonise the Moro nation and attempted to restructure their ethnic identity "in accordance with ideals embodied in white, Western, Christian norms."[51] The use of seemingly contrasting policies in Mindanao elicited a similarly contradictory range of responses from the Moro people, "ranging from acceptance to accommodation to outright resistance."[52] Indeed, the secessionist stance that informed the ideology of the contemporary Mindanao Muslims was fomented while the Philippines were still subject to US colonialism.[53]

However, the creation of the Philippine Commonwealth (1935-1946)—a forerunner to Philippine independence—took precedence over the issue of Moro self-determination.[54] Under the Commonwealth, "the Moros lost special provisions protecting Islamic and traditional laws, the institution of the sultanate and socio-economic programmes."[55] They were not represented proportionately in the national parliament, and they steadily continued to lose both their native territories and

[46] Buendia (n 1) 109-110.
[47] Quimpo (n 5) 274.
[48] Buendia (n 45) 211.
[49] Milligan (n 42) 68.
[50] Tuminez (n 6) 122.
[51] Milligan (n 42) 68 [original citations omitted].
[52] ibid.
[53] Buendia, (n 1) 109.
[54] ibid at 116.
[55] Bertrand (n 9) 43.

systems of government.[56] For the Moros, the Commonwealth thus equated to "being ruled by their former enemies," and served only to reaffirm their ethnic identity.[57]

In the later years of US dominion, the administration encouraged significant Christian-Filipino settlement in traditional Muslim areas of Mindanao, which was labelled as "the land of promise."[58] Christians who settled in the region even received financial support from the government for doing so.[59] The influx of Christian Filipinos irreparably altered the ethnic makeup of the region: by the late 1960s, Muslims, who had made up 75% of the region's population at the dawn of the 20th century, only constituted 25% of the Mindanao populace.[60] Christian transmigration accelerated throughout the 1950s and 1960s, transforming "the demographic picture of Mindanao completely," and breeding resentment among the Moros.[61]

5. II. B. PHILIPPINE INDEPENDENCE & MORO REVIVAL

When the Philippines gained independence in 1946, the Moro could not relate to their new found 'independence,' nor identify with the Republic, "whose laws were clearly derived from Western or Catholic moral values and whose public school system was too Americanized and alien to Islamic tradition."[62] Minoritization of the Moros, and attempts to reconfigure their identity in line with that of the Christian Filipino majority, intensified during this period. Christian migration into the region was so significant that the ethnic and social realities of modern Mindanao no longer supported the Moro claim to their ancestral homeland.[63] By 1990, Muslims made up less than 18% of the region's population,[64] and today, only five of Mindanao's 25 regions have a Muslim majority.[65] Surprisingly, "[t]he legitimacy of the Philippine state to govern the Muslim areas of the country was neither questioned nor challenged by any of the Muslim elite" during this period.[66] This was mainly due to the concentration of political power in an aging Muslim *ulema* (educated scholars),

[56] ibid.
[57] ibid.
[58] Quimpo (n 5) 274.
[59] Bertrand (n 9) 43.
[60] Quimpo (n 5) 274.
[61] ibid.
[62] ibid at 274.
[63] Tuminez (n 6) 122-123.
[64] Quimpo (n 5) 274.
[65] Santos Jr (n 34) 48.
[66] ibid.

and the absence of an educated, radicalized youth, which did not come to the fore until the 1970s.

Yet, despite their apparent pacification, conciliation for the Moros did not equal contentment, nor did it bring about "the resolution of the Muslim-Christian dichotomisation of society in Mindanao."[67] The effects of economic inequity and political isolation were evident in everyday life in Mindanao, and nurtured a common "deepening sense of alienation" among all those who identified themselves as Moro.[68] In the late 1950s, provinces with a Muslim majority had the lowest literacy rates, while boasting the highest unemployment rates.[69] The effects of decades of minoritization meant that land disputes between Christians and Muslims, and indeed, between Muslims themselves, became increasingly frequent.[70] State-led investigations into social unrest in Muslim-dominated areas established that land ownership was the primary cause of Moro discontent,[71] which can hardly have been surprising given the extent to which government policy favoured Christian landowners. Indeed, by the early 1980s, decades of state-led discrimination and minoritization had reduced an estimated 80% of Muslims to the status of "landless tenants."[72]

Yet despite the Filipino elite's monopoly on the policy agenda, by the late 1950s and early 1960s, significant social change was taking place within the Muslim community, "which government policymakers failed to notice or understand."[73] With support from Abdel Nasser's Egypt, thousands of Muslims had the opportunity to pursue scholarships at Al-Azhar University—itself a celebrated centre for Islamic teaching.[74] Many of these young scholars studied in some of Egypt's most prestigious military academies and professional schools.[75] While abroad, these young people were exposed to the "reformist tendencies" taking place in the broader Muslim world, particularly in Nasser's Egypt.[76] When they returned to the Philippines and their local communities, they possessed a revived Islamic

[67] Milligan (n 42) 68.
[68] Buendia (n 1) 137.
[69] Cesar Adib Majul, 'The Moro Struggle in the Philippines' (1988) 10(2) Third World Quarterly 897, 899.
[70] ibid.
[71] ibid.
[72] Kaufman (n 7) 937.
[73] Majul (n 69) 901.
[74] ibid.
[75] ibid.
[76] ibid.

consciousness and a deeper understanding of Islam itself. Their education allowed them to be openly critical of the traditional leaders in their communities, "especially those holding political offices,"[77] who were not doing enough to address the social and economic issues that plagued Mindanao.[78] This younger, radical *ulema* began to actively engage in student seminars, and attended "public demonstrations involving international issues."[79] Islam had thus embodied the Moro Muslims with a sense of dignity, and reaffirmed their ethnic identity within a predominantly Filipino nation.[80] By the late 1960s, Majul asserts that the Moro Muslim youth "had greatly increased its political sophistication,"[81] and the push for an independent Moro homeland returned with a renewed vigour.

5. II. C. THE RISE OF THE MNLF

In March 1968, a single event cast the "differences between Muslim traditional leaders and the youth" into the background, and propelled the 'Moro problem' to the fore.[82] 180 Muslims from the southern peripheries of the Philippines were recruited by the Armed Forces of the Philippines (AFP) for the purpose of fermenting political discontent in neighbouring Sabah, Malaysia. The ultimate aim of this operation was to create a political situation that would warrant a Philippine annexation of Sabbah. However, the recruits mutinied and demanded their return home. Some argue that the mutiny followed the ongoing non-payment of the recruits' salaries and "complaints on their living conditions in training camps."[83] Other accounts claim that the true purpose of the Sabah mission dawned on the recruits—that they would have to kill their fellow Muslims in the region—and they refused to do so.[84] Whatever their motives, the military brass reacted by executing some of the mutineers—though accounts vary as to how the massacre occurred and how many soldiers were killed. The event came to be known throughout the Philippines as 'the Jabidah massacre,' or 'the Corregidor massacre,' and "the mass execution inflamed

[77] ibid.
[78] ibid at 902.
[79] ibid at 901.
[80] ibid at 902.
[81] ibid at 901.
[82] ibid at 902.
[83] Marites Danguilan Vitug and Glenda Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (Institute for Popular Democracy 2000) 2-23 in Buendia (n 10) 14.
[84] Kadir Che Man, *Muslim Separatism: The Moros of Southern Philippines and the Malays of Southern Thailand* (OUP 1990) 75 in Bertrand (n 9) 43.

Christians and Muslims alike."[85] A Congressional investigation proved inconclusive, and "no culprit was held responsible for the ghastly massacre."[86] Officially, the matter was forgotten—but not by Muslims.[87]

The Jabidah massacre was the catalyst that mobilized young Muslims—those who constituted the new *ulema*—to organise their resistance against a state which they perceived to be politically illegitimate and morally bankrupt.[88] One of the most prominent leaders was a young professor of political science at the University of Philippines, Dr. Nur Misuari. In 1969, Misuari and other young, secular-educated Moros founded the Moro National Liberation Front (MNLF) and established the organization as "the main vehicle for placing the Moro cause on the national and international agenda."[89] Misuari's MNLF did not call for an Islamic state; in fact, the movement was "emphatically secular in orientation."[90] Instead, Misuari rallied the masses behind a nationalist claim to the 'Bangsamoro,' or 'Moro nation,' which, he claimed, had been illegally incorporated into the Philippine state.[91] Misuari called upon the peoples of the Bangsamoro to renounce their uncertain, and often contradictory, identity as Muslim-Filipinos and declare themselves 'Moro', "a reincarnation of the pre-colonial identity as the descendants of the 'unsubjugated' and 'uncolonised' peoples" of Mindanao.[92] In doing so, Misuari had formulated a means for Moros to "separate themselves from those against whom they [were] judged unfavourably," and to establish themselves as a "new people."[93] Through Misuari's vision, what had initially been perceived as state discrimination against the Muslims had found a much broader, more inclusive appeal in the form of the Moro nation.[94]

The declaration of martial law in September 1972 only broadened the MNLF's base of support, "and determined the timing of the warfare by the core of Muslim radicals."[95] Military rule forced the MNLF's hand by restricting the range of

[85] Buendia (n 9) 15.
[86] ibid at 14.
[87] Majul (n 69) 903.
[88] Bertrand (n 9) 44.
[89] Santos Jr (n 34) 2.
[90] Buendia (n 1) 119.
[91] ibid.
[92] Buendia (n 45) 211.
[93] Brackette Williams, 'A Class Act: Anthropology and the Race to Nation across Ethnic Terrain' (1989) 18 Annual Review of Anthropology 429 in Buendia (n 10) 15.
[94] Buendia (n 1) 119.
[95] Lela Gardner Noble, 'The Moro National Liberation Front in the Philippines' (1976) 49(3) Pacific Affairs, 411-412 in Buendia (n 10) 20.

legitimate political activities to a binary choice of acquiescence or violence.[96] When the state attempted to remove all arms and ammunitions from the public domain, it encountered fierce resistance from Muslim communities supported by the MNLF.[97] The MNLF quickly established itself as a fighting force to be reckoned with, "displaying all the earmarks of a military operation by an organized army."[98] One month after the initial declaration of martial law, the Marcos regime launched full-scale military operations against the MNLF, initiating what would soon become the first conventional war in a series of protracted conflicts that ravaged the southern islands of the Philippines for over four decades.[99] For the MNLF, the outbreak of conventional warfare in their homeland "crystallised the notion of separatism from the state" as the only viable alternative to Moro citizenship within a Filipino state.[100]

5. III. THE AGREEMENTS

5. III. A. THE TRIPOLI AGREEMENT (1976)

The Bangsamoro question was initially addressed by the Tripoli Agreement of 1976, which was brokered by the Organization of Islamic Cooperation (OIC). Between 1972 and 1976, the OIC issued several diplomatic resolutions decrying "the problem of Muslims in the Philippines" and "the plight of the Filipino Muslims."[101] In 1974, the OIC officially acknowledged their support for Misuari's MNLF, despite the MNLF's secular outlook.[102] The resolution was crucial to the peace process, insofar as it recognized the MNLF as representative of the political wishes of the Moro community.[103] Having suffered heavy losses during the military campaign against the MNLF, the state realized that if it wanted to pacify the secessionist south,

[96] Noble (n 95) 411-412.
[97] Majul (n 69) 906.
[98] Santos Jr (n 34) 3.
[99] Milligan (n 42) 80.
[100] Buendia (n 10) 20.
[101] Resolution No 4 of the Fourth Islamic Conference of Foreign Ministers (Benghazi, 24-26 March 1973), Resolution No 20 of the Ninth Islamic Conference of Foreign Ministers (Dakar, Senegal, 24-28 April 1978), and Resolution No 18 of the Fifth Islamic Conference of Foreign Ministers (Kuala Lumpur, Malaysia, 21-25 June 1974), respectively.
[102] Resolution No 18 of the Fifth Islamic Conference of Foreign Ministers, Kuala Lumpur, Malaysia, 21-25 June 1974, 'The Plight of the Filipino Muslims.' Para 4 "[u]rges the Philippines Government to find a political and peaceful solution through negotiation with Muslim leaders, *particularly with the representatives of the Moro National Liberation Front* in order to arrive at a just solution to the plight of the Filipino Muslims within the framework of the national sovereignty and territorial integrity of the Philippines" [emphasis added].
[103] Santos Jr (n 11) 13.

it would have to negotiate under OIC auspices.[104] However, neither the Tripoli Agreement, nor Marcos' military regime in its entirety (1972-1986) would secure self-rule for the Moro people.[105]

The Tripoli Agreement begins with an acknowledgement of the vital role that the OIC played in bringing the belligerents to the negotiating table. However, the rest of the agreement failed to delegate authoritative power to the organization in any way. Though Article 3(12) tasked the OIC's Council of Foreign Ministers with helping to set up a Joint Committee comprised of the two parties to the agreement, no role was delegated to the OIC to help the Committee achieve its mandate, e.g., the release of political prisoners, the supervision of a ceasefire and the resettlement of refugees.[106] Granted, the OIC was perhaps reluctant to act as a third party to the agreement, having expressed an awareness of how complicated the situation was in an earlier resolution—"the more so as it concerns the internal affairs of an independent sovereign state."[107] Nevertheless, several of the objectives that the Joint Committee were charged with could have been more appropriately assigned, or readily achieved, by the OIC or a similar third-party actor. Guaranteeing the release of all political prisoners, and the freedoms of movement and assembly of the internally displaced could also have been more appropriately delegated to a neutral third-party actor, rather than a joint committee comprised of the belligerents themselves. In the absence of any such grants of delegation, the imprecision and ambiguity expressed in Article 3(12) left the Joint Committee without an objective authority to refer to if and when it disagreed about its mandate.

Though the OIC played a vital role in bringing the warring parties to the negotiating table, it was also responsible for compelling the MNLF to relinquish its demand for total independence.[108] The Marcos administration would only accept a political solution to the Moro problem that upheld the territorial integrity of the Philippines within a unitary state.[109] This was first acknowledged by the OIC in 1974, when it called for "a just solution to the plight of the Filipino Muslims within the framework of the national sovereignty and territorial integrity of the

[104] Majul (n 69) 907.
[105] Buendia (n 10) 23.
[106] The Tripoli Agreement, Article 3(12), (12b) and (12c), 23 December 1976 <https://peace.gov.ph/2016/01/1976-tripoli-agreement> accessed 19 August 2017.
[107] Resolution No 4 of the Fourth Islamic Conference of Foreign Ministers (n 197).
[108] Buendia (n 10) 23.
[109] ibid.

Philippines."[110] When the Council of Foreign Ministers proposed a plan of action that upheld the territorial integrity of the state, the OIC acknowledged it as "the fundamental basis for any settlement of the problem."[111] The OIC went on to note "with satisfaction" the MNLF's acceptance of this plan as basis for negotiations, and praised "the initiative of the Government of the Philippines to accept autonomy for Muslim Mindanao, Basilan, Soulo and Balwan."[112] Though Misuari was violently opposed to Marcos' design to "dilute" Moro self-determination,[113] the OIC supported Marcos' diplomatic compromise. Threatened with the withdrawal of the OIC's vital aid and support, Misuari and the MNLF were compelled to abandon their strategic goal of complete sovereignty for the Bangsamoro, and settle instead for autonomy within the Philippine Republic.

This compromise is very clearly expressed throughout the Tripoli Agreement. Article 1 states that the establishment of autonomy in the Southern Philippines will be "within the realm of the sovereignty and territorial integrity of the Republic of Philippines."[114] The area of autonomy in the Southern Philippines is expressly defined in Article 2 as encompassing 13 provinces, namely: Basilan, Sulu, Tawi-tawi, Zamboanga del Sur, Zamboanga del Norte, North Cotabato, Maguindanao, Sultan Kudarat, Lanao del Norte, Lanao del Sur, Davao del Sur, South Cotabato and Palawan. Article 3(16) also obligates the state to follow all necessary constitutional procedures in implementing the agreement.[115] Essentially, these limitations preserved the legal and territorial status quo of the existing Philippine state—an entity with which the Moro people had become politically disillusioned and alienated from. In accepting these conditions, the MNLF was attempting to affect change through the same institutions that it had perceived as failing its constituency in the past, inadvertently paving the way for the state's unilateral interpretation and implementation of the agreement later.[116]

Nevertheless, Article 3 appeared to promise genuine autonomy for the Moros on paper. The Agreement envisioned executive and legislative organs with

[110] Resolution No 18 of the Fifth Islamic Conference of Foreign Ministers (Kuala Lumpur, Malaysia, 21-25 June 1974), Para 4.
[111] Resolution No 10 of the Sixth Islamic Conference of Foreign Ministers (Jeddah, Kingdom of Saudi Arabia, 12-15 July 1975).
[112] ibid.
[113] Buendia (n 10) 23.
[114] The Tripoli Agreement (n 106).
[115] ibid, Article 3(16).
[116] Santos Jr (n 11) 9-10.

competence over education, regional administration and finance,[117] "in compliance with the objectives of the autonomy and its institutions."[118] However, the relationship between these competences and those of the central government in Manila was postponed for discussion at a later date, making it impossible for these institutions to function on the basis of the Tripoli Agreement alone. Similarly, the Agreement detailed how the executive and legislative organs were to be enacted, and how they would function,[119] yet the composition of these organs of governance was left to be determined "later on." The Agreement did bestow the Moro with the right to set up their own Sharia courts.[120] Article 3(3) also states that Muslims from the autonomous region would be represented in all the courts of the centralised judicial system, "including the Supreme Court,"[121] and the procedure for their appointment was precisely set out under that provision.

Article 3(7) acknowledges the Muslims' right to representation and participation "in the Central Government and in all other organs of the State,"[122] in addition to their own political autonomy. However, discussion of "the number of representatives and ways of participation" is once again postponed to a later date, paving the way for claims of broken promises, and grounds for misunderstanding.[123] The Tripoli Agreement similarly postpones the discussion of contentious policy areas in order to advance the peace process. National defense was to remain within the competence of the central government, on the condition that "the arrangements for the joining of the forces of the MNLF with the Philippine Armed Forces be discussed later." This language did not guarantee that the MNLF forces would be assimilated into the AFP, nor did the Agreement provide a contingency should the later discussions break down—as they did during the agreement's implementation. If the parties concerned could not agree on the joining of their armed forces, would national defense remain exclusively reserved by the central government? Would the parties have to go back to the negotiating table?

Similar imprecision plagued the central government's competence over mines and mineral resources. A "reasonable percentage" of revenues raised from mines and

[117] The Tripoli Agreement (n 106), Article 3(4), (5) and (6).
[118] ibid, Article 3(5).
[119] ibid, Article 3(9).
[120] ibid, Article 3(3).
[121] ibid.
[122] ibid, Article 3(7).
[123] ibid.

mineral resources were to "be fixed for the benefit of the areas of the autonomy."[124] The term 'reasonable percentage' was not quantitatively defined in the agreement, however, and in the absence of provisions delegating interpretative authority to a third-party, it remained open to contention and subjective interpretation. Though the Agreement prescribed a Special Regional Security Force for the autonomous area, "composed of Muslim officers and men responsible in maintaining peace and order,"[125] no mechanism under which this special force would be established was suggested, and "the relationship between these forces and the Central security forces" remained a key talking point to be "fixed later."[126] The lack of precision in these paragraphs allowed the parties to feign accord in the absence of genuine agreement. The short-term gains of this tactic would come at the cost of long-term peacebuilding,

These major postponements rendered the Tripoli Agreement a framework agreement at best. In the absence of precise, more developed terms, the parties to the agreement could not meaningfully commit to anything of substantive legal effect; they were merely declaring mutually-shared principles, ambitions and vagaries. The agreement itself recognized this, and Article 3(11) provides that a Mixed Committee composed of representatives of both parties would meet "to study in detail the points left for discussion in order to reach a solution thereof in accordance with the provisions of this agreement."[127] On paper, this would have further developed the provisions of the Tripoli Agreement and paved the way for the signing of a final agreement by the state, MNLF and OIC, in accordance with Article 3(14).

Unsurprisingly, the imprecision that plagued the Tripoli Accord caused it to become bogged down in implementation, and eventually, it came apart. Discussions aimed at clarifying the finer details of the agreement led to differences of opinion and frustration,[128] feelings which were exacerbated by the state's ambivalence on the issue.[129] The lack of detail in the agreement had necessitated a great deal of trust on the MNLF's behalf, and when negotiations became difficult, the absence of any genuine agreement and lack of an effective third-party mediator led to its unravelling. When President Marcos insisted upon ratification of the Agreement by

[124] ibid, Article 3(10).
[125] Buendia (n 10) 41.
[126] The Tripoli Agreement (n 106) Article 3(8).
[127] ibid, Article 3(11).
[128] Santos Jr (n 34) 4.
[129] Bertrand (n 9) 39.

plebiscite in the areas of autonomy, Misuari denounced the state's interpretation of the text, and the political process accordingly.[130]

To some, it appeared that Marcos had merely used the Tripoli Agreement "to divide the ranks of the MNLF" and allow the traditional Muslim *ulema*—most of whom were members of Marcos' political party—to retain control of the autonomous region.[131] Indeed, the imprecise and open-ended language that comprises the majority of the agreement's text substantiates this claim. Several provisions on the region's political institutions and key policy areas outwardly convey authority and autonomy, when in reality, any power given to the Moros is subordinate to the sovereignty and territorial integrity of the state, in accordance with Article 1. As a result, many of the institutions envisioned under the Tripoli Agreement "were cosmetic creations with no real legislative authority and no independent operating budget."[132] The President's active role in administering the region was further evidence that Marcos intended to maintain control over the Southern Philippines. The President retained control over Muslim appointments to the Supreme Court, as well as appointments to the provisional government of the autonomous region, which would prepare the region for elections.[133] Those appointed to positions of power within these institutions were not representative of the Moro struggle, but were, in fact, "martial law collaborators and rebel defectors, many of whom were *datus* (cultural or tribal leaders of ancient royal families) and all of whom were absent from the province more often than not."[134]

Interestingly, the provisions that were the most purposive and definite in tone were perhaps the most forcefully dismissive of conciliation between the parties. The limitations imposed by upholding the territorial integrity of the Philippines and maintaining the existing Constitutional processes prevented Moro participation in the peace process. The Agreement failed to empower the Moros with any form of political autonomy—particularly, the capacity to implement their side of the agreement. Instead, the Tripoli Agreement actually became the legal and legitimate

[130] ibid.
[131] Buendia (n 10) 23.
[132] Thomas McKenna, *Muslim Rulers and Rebels: Everyday Politics and Armed Separatism in the Southern Philippines* (University of California Press 1998) 166 in Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror* (Lynne Rienner Publishers 2003, 39.
[133] The Tripoli Agreement (n 106), Article 3(3) and (15), respectively.
[134] McKenna (n 132) 166.

basis for state unilateralism with regard to the Moro conflict.[135] When Misuari decried the state's interpretation of the agreement and the subsequent plebiscite on the area of autonomy, the state simply proceeded to implement the agreement on its own terms. Because the agreement was born of the existing legal structures of state, the MNLF had no recourse to adjudication or an alternative interpretation.

In March 1977, President Marcos issued Proclamation No. 1628, and in July 1979, Presidential Decree No. 1618, which created two autonomous regions on the basis of the plebiscite.[136] The provinces of South Cotabato, Davao del Sur, and Palawan were omitted from these autonomous regions, as the state argued that Muslims were a minority in each.[137] This was contrary to the single autonomous region as envisioned under the agreement. Though the omissions upheld the territorial integrity and constitutional processes of the Republic, the state had not implemented the agreement as signed. For Misuari, the omissions were proof that Marcos had never intended to be bound by the Agreement.[138] Once again, secession was perceived as the only viable alternative, and fighting resumed in 1977, though this time, with less tenacity.

On the whole, the Tripoli Agreement was low on precision, obligation and delegation. The agreement had left too many details to be clarified at a later date for it to be considered a precisely-worded basis for lasting peace. This omission merely postponed the inevitable disagreement between the parties and presented a quasi-agreement in its stead. The text was only legally obligating inasmuch as the parties' good faith sustained the process that flowed from it. But by paving the way for state unilateralism and failing to delegate any power away from state sovereignty, the agreement was open to subjective interpretation, and could therefore be moulded to any purpose that the state wished. Without any effective role in its implementation, the MNLF was free to walk away from the process and resort to armed conflict to further its aims. Despite failing to achieve lasting peace, the Tripoli Accord was, for a time, "the most significant juncture" in the state-MNLF peace process,[139] and the "main term of reference" for all future negotiations.[140] The agreement reframed the Moro problem as a question of autonomy rather than independence. From 1976

[135] Santos Jr (n 11) 9-10.
[136] Majul (n 69) 908.
[137] ibid at 908.
[138] ibid at 909.
[139] Santos Jr (n 11) 3.
[140] Santos Jr (n 34) 3.

onward, all negotiations between the state and the myriad Muslim groups took place within a framework that preserved the sovereignty and territorial unity of the Philippine state.

The Tripoli Agreement is also noteworthy for being the catalyst that ushered in a split in the MNLF ranks. Dissatisfaction with the Agreement bred discontent among the MNLF's supporters, which culminated with a split in the movement's ranks under MNLF Vice-Chairman Hashim Salamat in 1981. Salamat's 'new leadership' remained heavily influenced by Misuari's appeal to the Moro nation and territory, but the overt influence of religion was evident in the splinter group's aim to secure "an independent Islamic state for the optimum practice of Islam as a way of life and governance in predominantly Muslim areas."[141] Salamat attempted to win political and financial support for his Islamic-oriented faction from the OIC,[142] but the organization remained committed to the Tripoli Agreement that it had brokered, and reiterated its support for the MNLF as the sole legitimate representatives of the Muslims in Mindanao in several resolutions.[143] Salamat relocated his organisation to Pakistan, and christened 'the new leadership' as the Moro Islamic Liberation Front (MILF) in 1984. The split between the MNLF and the MILF was a watershed moment in the conflict that would have a significant impact on the way the peace process was to evolve.[144]

5. III. B. THE FINAL AGREEMENT (1996)

The twenty-year interval between The Tripoli Agreement (1976) and The Final Agreement (1996) was characterized by tentative talks, joint declarations, and repeated ceasefire violations, though the fighting never returned to the intensity of the period preceding the Tripoli Agreement. The peaceful ouster of President Marcos and the replacement of his autocratic regime with a democracy headed by President Corazon Aquino, "opened for the first time the possibility of genuine compromise."[145] Discussions on the basis of the Tripoli provisions led to the signing

[141] ibid at 6.
[142] Buendia (n 10) 24.
[143] Paragraph 19, Resolution No 20 of the Ninth Islamic Conference of Foreign Ministers, Dakar, Senegal, 24-28 April 1978, "Problems of Muslims in the Southern Philippines," Paragraph 1, Resolution No 25 of the Fifteenth Islamic Conference of Foreign Ministers, Sanaa, Yemn Arab Republic, 18-22 December 1984, "On the Question of Bangsamoro Muslims in South Philippines."
[144] Santos Jr (n 34) 4.
[145] Bertrand (n 9) 39.

of the Jeddah Accord by the state and the MNLF in 1987, but difficulties surrounding interpretation and implementation recalled bitter memories of Tripoli, and ultimately led to its downfall.[146]

The Aquino administration continued to pursue Muslim autonomy, albeit unilaterally. The Autonomous Region in Muslim Mindanao (ARMM) was created pursuant to an act of Congress in August 1989. However, the ARMM as it existed then was not enough to appease the MNLF's demands. Despite extending institutional autonomy to Muslim areas and endowing these regions with executive and legislative powers, the ARMM was essentially an inflated bureaucracy that was described as "oversized, demoralized and mostly inept…,"[147] and encompassed a much smaller territory than the MNLF had hoped for.

The strengthening of the diplomatic regime under the Ramos administration increased the MNLF's confidence that the government would abide by any commitments it undertook in the event of a peace agreement.[148] Several factors had also made the MNLF more open to the idea of a compromise peace. Years of prolonged conflict with the AFP had weakened the MNLF militarily, and the proliferation of actors claiming to represent Mindanao's Muslims had greatly impacted their political base. They duly seized the opportunity to make peace in order to reaffirm their position as the sole legitimate representative of the Muslims of Mindanao—at a time when this was becoming increasingly uncertain.[149]

Following preliminary meetings in Libya in 1992 and West Java in 1993, the parties agreed to negotiate on the basis of the Tripoli Agreement, including "those portions of the Agreement left for further discussion…."[150] Indeed, the preamble of the resulting Final Agreement recognizes the Tripoli Agreement as a basis for a comprehensive solution to the Moro problem, albeit "within the framework of the Philippine Constitution."[151] The legacy of Tripoli is reiterated in the penultimate recital of the preamble, which states that "the parties affirm the sovereignty,

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[146] Quimpo (n 5) 276.
[147] Eric Gutierrez and Marites Danguilan-Vitug, "ARMM After the Peace Agreement: An Assessment of Local Capability in the Autonomous Region of Muslim Mindanao," Occasional Paper Number 3 (Manila: Institute for Popular Democracy, February 1997) in Bertrand (n 9) 45.
[148] Bertrand (n 9) 38.
[149] ibid at 42.
[150] The Final Agreement, Preamble, 2 September 1996 <http://www.opapp.gov.ph/sites/default/files/The-Final-Peace-Agreement-on-the-Implementation-of-the-1976-Tripoli-Agreement-Between-the-STATE-and-the-MNLF.pdf>
[151] ibid.

territorial integrity and the Constitution of the Republic of the Philippines…..”[152] Article. 153, the Totality Clause, also provides that any conflict in the interpretation of the agreement would be resolved “in the light of the Philippine Constitution,”[153] which bound Moro aspirations to the Constitutional framework as it existed then.[154] Article 153 further states that the Final Agreement constitutes the full implementation of the Tripoli Agreement, and supercedes all communications “not referred to or embodied in this Agreement.”[155]

The Final Agreement proposed a phased implementing structure that is detailed in Parts II and III of the Agreement. Part I provides a general overview of the agreement and broadly timetabled its implementation. Phase 1 would cover a three year period, during which time the key organs of the new autonomous region would be established.[156] Phase 2 would consist of a legislative process and a regional plebiscite to confirm the territorial remit of the ARMM.[157] Aside from the relatively broad timetables for the completion of legislative and procedural tasks, Part I of the Final Agreement is low on precision, but high on obligation. It set out a clear roadmap of the transitional period, summarising the crucial aspects of the peace settlement and the legislative means to achieve them.

Part II elaborates on the three year Transitional Period, and the way in which Phase 1 was to be implemented. A Special Zone of Peace and Development in the Southern Philippines (SZOPAD) was to channel public and private investment into the region “to spur economic activities and uplift the conditions of the people therein.”[158] A Southern Philippines Council for Peace and Development (SPCPD) was tasked with monitoring and promoting “development efforts in the area, including the attraction of foreign investment, specially [sic] from OIC countries and the Association of South East Asian Nations (ASEAN).”[159] Article 18 further expounds upon the role of the SPCPD, charging it with improving peace and order in the new autonomous region with particular attention to the most depressed areas of Mindanao. To this end, the SPCPD is conferred with extensive powers over existing

[152] ibid.
[153] ibid, Part III, F, Article 153.
[154] Buendia (n 10) 27.
[155] The Final Agreement (n 150) Part III, F, Article 153.
[156] ibid, Part I, Article 1.
[157] ibid, Part I, Article 2.
[158] ibid, Part II, Article 3.
[159] ibid, Part II, Article 8.

agencies already "engaged in peace and development activities in the area."[160] Article 18 also allowed for the expansion of the powers under the SPCPD's remit by the President, and the creation of "such offices or instrumentalities," as was necessary "for the effective implementation of its mandate."[161] The SPCPD was to be assisted by an advisory council and a Consultative Assembly.[162] The Consultative Assembly was to serve primarily as a "forum for consultation and ventilation of issues and concerns," but was also granted vague policy formulation and development regulation roles under the Agreement.[163] Both the Consultative Assembly and the SPCPD would serve three year terms that would "coincide with the three-year term of office of the officials of the ARMM elected in 1996."[164]

The provisions establishing the major organs of the new autonomous region exhibited a high degree of precision with regard to their composition, their mandate and their competences. However, the means by which these organs were to achieve these objectives were not so clearly defined. The SPCPD and Consultative Assembly's roles were to promote development projects in the autonomous region by coordinating a number of organisations that were already engaged in development activities prior to the Final Agreement.[165] How these new organs were going to fundamentally alter the socio-economic issues plaguing Mindanao was not explained by the Final Agreement.[166] Furthermore, funding for the operation of the SPCPD and the Assembly was to be sourced directly from the Office of the President and Congress.[167] The absence of an independent operating budget thus undermined the extent to which the Final Agreement bestowed genuine autonomy on the Moro people.

Articles 19 and 20 addressed the integration of MNLF into the Philippine National Police (PNP) and the AFP. 1,500 places were made available for MNLF combatants in the PNP, with a further 250 places available in special or auxiliary services.[168] 5,750 MNLF were to be absorbed into the AFP, with another 250 to be

[160] ibid, Part II, Article 7.
[161] ibid, Part II, Article 18(d) and (f).
[162] ibid, Part II, Articles 5 and 10, respectively.
[163] ibid, Part II, Article 11.
[164] ibid, Part II, Articles 16 and 17.
[165] ibid, Part II, Article 7.
[166] It should not be surprising therefore that Moro communities complained about the lack of improvement in their livelihoods following the conclusion of the peace agreement and the creation of the SPCPD. See Bertrand (n 9) 48.
[167] The Final Agreement (n 150) Part II, Article 15.
[168] ibid, Part II, Article 19(a).

absorbed by the auxiliary services.[169] The Agreement further obligated the government to exert the "utmost efforts" in integrating the maximum number of the remaining MNLF forces into the ARMM's Special Regional Security Force (SRSF).[170] While these displayed some precision, they were not so clear on the ex-combatants who were deemed surplus to the AFP, PNP, or SRSF. The Agreement envisioned a vague socioeconomic, cultural and educational program for demobilized combatants, with the ultimate aim of preparing them for alternative livelihoods.[171] However, the programme seemed implicitly linked to the broader development projects intended under the SPCPD and its assortment of existing organisations, which had failed to bring prosperity and development to Mindanao prior to the Final Agreement. The Agreement's text was not clear as to how the outcome would be different on this occasion. This was indicative of a broader trend in the Final Agreement: the good faith of its signatories afforded enough precision to the aspects that they believed would go to plan, but failed to sufficiently provide in the event that they did not. Any issues on reintegration that the Agreement failed to address were made subject to the President, as Commander-in-Chief of the AFP,[172] thereby depriving the Moro of their autonomy should things go awry.

Part III of the Agreement represented the second phase of its implementation, which would take place after the amendment of the existing ARMM was ratified by the people in the affected areas in a plebiscite. Part III, Section A details the executive, legislative and administrative organs of the new autonomous region. Executive power was vested in the head of the government of the autonomous region, elected by direct vote of the people.[173] A Vice Head would be elected in the same manner. Three Deputies, appointed by the Head, completed the Executive Council of the autonomous region.[174] Legislative power was vested in the Legislative Assembly, which was to be comprised of 3 members from each of the districts that opt into the region.[175] The Assembly was granted legislative authority in all areas, except foreign affairs, national defense and security, fiscal and monetary policy and

[169] ibid, Part II, Article 20(a).
[170] ibid. The mandate and organisational structure of the SRSF was set out under Part III, B.
[171] ibid.
[172] ibid, Part II, Article 20(f).
[173] ibid, Part III, A, Article 21.
[174] ibid.
[175] ibid, Part III, A, Articles 23 and 24.

citizenship, which were retained by the central government.[176] Under the Agreement, the Assembly had power to dictate the functions, responsibilities and structure of the autonomous region's administrative organs, and to adopt its own rules of procedure.[177] Several other provisions exhibited high precision and high obligation in this regard, providing for a parliamentary quorum and penalties with regard to absenteeism.[178] The legislative process was explicitly detailed under Articles 51 and 52.

The latter articles of Part III, Section A clarified the Moro peoples' rights to representation and participation in the national government and all its organs of state, including the national assembly, the Supreme Court and the Court of Appeals.[179] While these articles exhibited a moderate degree of precision and elaborated somewhat on the unspecified relationship between the regional and federal governments, they remained low on obligation. The provisions for Moro representation in the national government were merely phrased as items on the policy agenda of the national government, and they recall the central government's previously unsuccessful methods of implementing agreements unilaterally and attempting to integrate Moro peoples into existing, and majority Filipino, state structures.

Part III, Section C elaborated on an integrated system of education for the Philippine archipelago and ultimately recognized the Moro peoples' right to their own educational and cultural values. The Agreement envisioned a regional educational system that would promote both Filipino *and* Islamic "ideals and aspirations," producing "patriotic citizens, conscious of their Filipino and Islamic values and Islamic cultural heritage under the aegis of a just and equitable society."[180] As a result, the curriculum under the regional educational system was far from revolutionary, nor was it overtly Islamic on paper. For the most part, these provisions assumed that the national educational system—which had historically been based on Christian morality and Western values—remained a superior model, and that any arrangement specific to the Moro people should be construed (somewhat restrictively) within this system. Article 101 only permitted the gradual

[176] ibid, Part III, A, Article 27.
[177] ibid, Part III, A, Articles 33 and 36, respectively.
[178] ibid, Part III, A, Article 37.
[179] ibid, Part III, A, Articles 65, 66, 68 ad 69.
[180] ibid, Part III, C, Article 95 (emphasis added).

introduction of Islamic values into the curriculum after the conclusion of "research and studies" as to its effect on education,[181] thus further limiting the educational autonomy of the regional government.

Though the educational autonomy granted to the Moro people under the Final Agreement was far from revolutionary in practice, it was unprecedented in terms of Philippine policy, and is thus hugely symbolic. The Final Agreement "recognizes the Muslims' right to difference and to self-government where, in the past, policies of assimilation and subjugation denied even recognition of a difference from Christian Filipinos."[182] While educational autonomy remained subject to the minimum requirements and standards imposed by a majority Filipino government,[183] the Final Agreement explicitly recognized the Moro minority and their right to assert their identity within a heterogeneous society. "In doing so," Bertrand contends, "it partially removes the recurring threat to the Muslim way of life, which had repeatedly been under attack by past policies of Christianization, immigration of Christians and repressive policies of the government."[184]

Part III, Section D set out the economic and financial system of the Autonomous region. The Regional Government could enact its own system of taxation; contract loans, foreign and domestic; and had the right "to formulate economic and financial policies and implement economic and financial programs, taking into account national laws and policies."[185] In practice however, the Autonomous Government remained almost totally dependent on the national government for revenue. Under Article 145, the central government pledged to provide "a sufficient amount… for infrastructure projects" for an unspecified period of time.[186] The vague and imprecise wording of this provision effectively left the financing of the autonomous region to the whim and fancies of the Manila-based government. Such handouts, "unpredictable in amount and timing," were unlikely to pave the way for true autonomy for the Moro people.[187] While Section D also granted residents of the Autonomous Region "preferential rights over the

[181] ibid, Part III, C, Article 101.
[182] Bertrand (n 9) 44.
[183] The Final Agreement (n 150) Part III, C, Articles 97-100.
[184] Bertrand (n 9) 44.
[185] The Final Agreement (n 150) Part III, D, Articles 132, 135 and 140, respectively.
[186] ibid, Part III, D, Article 145.
[187] Tuminez (n 6) 124.

exploration, development and utilization of natural resources" within the territory,[188] it failed to specify a more elaborate wealth-sharing arrangement that might have assured their financial self-sufficiency.

In many ways, the Final Agreement represented a turning point in the Moro conflict, and the beginning of the end of an era in the Bangsamoro peace process. 20 years after Tripoli, the Final Agreement managed to assimilate the MNLF into the Philippine state. Pursuant to the Agreement, Misuari became Governor of the ARMM "and pledged to defend the Constitution of the Republic and promulgate its laws."[189] A total of of 7,250 MNLF combatants—at least half of whatever force strength it had—were integrated into the AFP and PNP as result of the Agreement's confidence building measures, prompting one leading commentator to conclude "that the MNLF has been substantially defanged."[190]

However, problems with implementation proved, once more, "that there was nothing 'final' in the Final Peace Agreement: it was just a prelude to more detours on the rocky road ahead."[191] Indeed, less than a month after its signature, the compromise entailed by the agreement was proving too good to be true. The presidential decree initiating Phase I of the Agreement (Executive Order 371) was guilty of notable omissions and imprecisions, failing to specifically allocate funds for the transitional organs and displaying a lesser degree of precision than the agreement that preceded it.[192] As a result, the key institutions of the autonomous region—the SPCPD and the Consultative Assembly—were created in an environment that restricted their overall impact and made them powerless: "[t]hey had very limited funding, no police powers, no control over national projects and programmes that were supposed to be within their remit…,"[193] and no function other than to make recommendations to the Office of the President. This is unsurprising, given how ambiguous the SPCPD's brief remained under the agreement's text. When the SPCPD failed to produce tangible benefits for Mindanao society, public support for the Final Agreement began to wane.[194] Furthermore, the ARMM bureaucracy was

[188] The Final Agreement (n 150) Part III, D, Article 143.
[189] Buendia (n 10) 27.
[190] Santos Jr (n 11) 15.
[191] Rufa Cagoco-Guiam, 'Negotiations and detours: the rocky road to peace in Mindanao' Accord: The Mindanao peace process: A supplement to Compromising on autonomy (2003), 4.
[192] Eric Gutierrez, 'The politics of transition,' Accord: Compromising on Autonomy - Mindanao in Transition (1999) 66, 66-68.
[193] ibid at 66-67.
[194] Bertrand (n 9) 48 [original citations omitted].

not a good example of how non-Muslim peoples could benefit under MNLF leadership, nor did it showcase the transitional institutions in their best light.[195] When Misuari became Governor of the ARMM, it was already "tainted by charges of corruption, internal wrangling and waste."[196] The failure to involve non-Muslims in the negotiating and drafting of the institutions envisioned under the Final Agreement meant that they received little support from the various minority groups that inhabited the region.[197] As an agreement between the government and any single rebel group, the Final Agreement was "exclusive by definition and was always vulnerable to falling short of meeting the disparate aspirations not just of the other armed Moro groups but also of those of the unrepresented civil society organisations."[198] The Philippine experience thus bears the same lessons relevant to conflict zones the world over: in order for a more comprehensive peace to be achieved and the causes of conflict abated, all the relevant stakeholders must be a party to the agreement.[199] The failure to include Christians and Lumads in the negotiation and administration of the autonomous institutions isolated them from the benefits of that process, and eroded support for the transitional structures from the get-go.

Autonomy was once more pushed to the forefront of the Final Agreement as a cure-all formula for the conflict in Mindanao, but this proved to be to the detriment of the other factors that fuelled the conflict. Though the Final Agreement bestowed autonomous institutions and competences that aped the political make-up of the central Philippine state, the correlation between these institutions and the causes of the conflict was so weak that they did little to quell Moro discontent in Mindanao. Even when these measures proved effective, they remained irrelevant. For example, the agreement focused on developing Mindanao socio-economically, but these measures failed to address the real causes for chronic underdevelopment in Mindanao: systematic policies of discrimination that were tied to issues of land ownership. Though the Agreement's provisions on socio-economic development received an eager response from the international community,[200] particularly the OIC

[195] ibid at 37.
[196] Gutierrez and Danguilan-Vitug (n 147) in Bertrand (n 9) 45.
[197] ibid.
[198] Santos Jr (n 11) 6.
[199] Gopalan (n 18) 455.
[200] Bertrand (n 9) 45.

and the Association of Southeast Asian Nations,[201] they failed to achieve the result that the agreement anticipated. Without addressing the broader systematic and institutionalised reasons for Mindanao's impoverishment and underdevelopment, these measures would fail to make a lasting improvement in the region, despite the good will displayed by willing donors.

The Final Agreement is high on precision and medium-high on obligation, bearing the potential for a broad range of autonomous organs of governance. However, the legislation charged with implementing the initial phases of the agreement—Executive Order 371—did not adopt as high a degree of legalization as the agreement itself did. These mistakes could have been avoided had the implementation of the Final Agreement not been so dependent on the domestic legislative process, unlikely as the Philippine state was to delegate its sovereignty to a third party actor. Unfortunately, the Final Agreement, like its predecessor, was notably low on delegation—providing for the support and assistance of the OIC and ASEAN, but not going far enough to steer the state away from a unilateral process. As the process progressed, dissatisfaction grew within the MNLF over their perceived marginalisation from the implementation of the agreement. They accused the state of implementing the agreement "unilaterally without completely and satisfactorily implementing the important socio-economic development requirements of the process."[202] The Final Agreement did not appear to have been legalized to the extent that such an outcome could have been prevented.

As a result, 'autonomy' became something of a dirty word in Muslim Mindanao: an empty political formula that had "failed to deliver genuine political power, representation, or economic development."[203] Instead, the failings of the Final Agreement highlighted the need to focus attention on the root causes of the Mindanao conflict: the relationship between Christians, Muslims and other minority peoples; and land ownership. Despite a much publicized consultation process, the discussions that informed the Final Agreement "were largely limited to the negotiating parties, except for a few token efforts to communicate with civil society organisations."[204] In this guise, the Agreement could not achieve the myriad of aspirations tangled up in the ethnic politics of Mindanao.

[201] Gutierrez (n 192) 66.
[202] Santos Jr (n 11) 16.
[203] Tuminez (n 6) 124.
[204] Stankovitch and Carl (n 12) 8.

For the MNLF, the Final Agreement swept away the little political power and military will that it possessed prior to the negotiations. Buendia claimed, somewhat prematurely, that following the Final Agreement and their integration into Philippine government and society, the MNLF liberationists had "re-constituted their identity as Filipino-Muslim of the pre-1971 period."[205] However, to claim that the flawed Final Agreement had successfully stifled the Moro call to nation is to ignore the re-emergence and reinvigorated fervour of the Moro cause under the MILF, almost entirely because of the dissatisfaction with that agreement. Shortly after the Final Agreement was signed, the MILF also entered into negotiations with the state with a view to securing a better compromise than their MNLF counterparts—an opportunity made possible by the shortcomings of the Final Agreement.

5. III. C. THE COMPREHENSIVE AGREEMENT ON THE BANGSAMORO (2014)

Throughout the late-nineties, the MNLF continued to decline in military and political power, while the MILF's popularity grew in tandem with criticism of the Final Agreement. Because the MILF was not associated with either of the Tripoli or the Final Agreement, its standing among Muslims was boosted when the autonomous institutions promised under their terms failed to materialize.[206] In an environment where Misuari, the MNLF, the ARMM and the implementation of the Final Agreement were beginning to unravel, the MILF emerged as the new standard bearer of Moro aspirations.[207] By virtue of a stop-start process of peace-making, the Moro people became hopeful that "a better, and more effective agreement" than the 1996 settlement could be achieved.[208] However, many obstacles remained on the path to peace. Negotiations were often threatened by "lawless elements" and rogue commanders that continued to operate within the MILF's ranks.[209] Ceasefire violations were common, and the lack of perceivable progress eventually led to an "all-out war" against MILF forces in March 2000.[210] Conflict again interrupted the

[205] Buendia (n 10) 27.
[206] International Crisis Group, 'Southern Philippines Backgrounder: Terrorism and the Peace Process,' Asia Report N°80 (Singapore/Brussels 13 July 2004), 5 [original citations omitted].
[207] Samuel K Tan, *The Internationalization of the Bangsamoro struggle* (Centre for Integrative and Development Studies and University of the Philippines Press 1993) 79 in Santos Jr (n 34) 6.
[208] Bertrand (n 9) 50.
[209] International Crisis Group (n 22) 1.
[210] Quimpo (n 5) 271-272.

state-MILF peace process in 2003 and 2008.[211] Santos Jr claims that the survival of the peaceful dialogue, despite outright conflict between the belligerents, "is a testament to its secure place in the whole peace process," and further evidences the MILF's "sincerity in the negotiations by persisting in its strategic (not just tactical) decision to give peace a maximum chance."[212]

The first milestone on the road to a more comprehensive peace was the Agreement for the General Cessation of Hostilities (AGCH) in 1997. The agreement became a point of reference for all subsequent accords between the state and the MILF, and remained "the principal ceasefire monitoring mechanism" throughout the fighting that interspersed negotiations up until 2014.[213] Following exploratory talks in 2003, the parties agreed to a tentative framework for negotiations, centred on security, rehabilitation and ancestral domain.[214] Significant progress had been made with regard to the first two aspects when renewed fighting once more interrupted the process in February 2003.[215] When the parties did return to the negotiating table, the issue of ancestral domain—which would prove the most difficult topic—had yet to be agreed upon.[216]

It was not until 2008 that both the state and the MILF reached consensus on the territorial scope of the homeland for the Moro people – the Bangsamoro. The Memorandum of Agreement on Ancestral Domain (MOA-AD) set out the parameters for a final peace agreement, and envisioned extensive powers and territory for a future autonomous region. Most significantly, the text provided for an "associative relationship" between the autonomous area and the state, suggesting the status of "almost-equals."[217]

However, a subsequent Supreme Court judgment struck the MOA-AD down for granting the proposed autonomous area "the status of an associated state, or, at any rate, a status closely approximating it,"[218] in violation of the unitary state enshrined under the Philippine constitution. The Supreme Court judgment destroyed

[211] International Crisis Group, 'The Philippines: Breakthrough in Mindanao,' Asia Report N°240 (Jakarta/Brussels 2012) (i).
[212] Santos Jr (n 34) 20.
[213] International Crisis Group (n 211) 6.
[214] International Crisis Group (n 211) 7.
[215] ibid.
[216] ibid at 8.
[217] ibid at 1.
[218] The Province of North Cotabato and others v The Government of the Republic of the Philippines Peace Panel on Ancestral Domain [2008] GR No 183591 <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> accessed 19 August 2017.

much of the progress embodied in the MOA-AD, so much so that when negotiations began to gather pace in 2012, the MILF accepted a risky territorial formula that would decide the scope of the Bangsamoro territory from scratch. Under the Philippine Constitution, all of the suggested provinces of a new Bangsamoro would have to vote for inclusion in the region by plebiscite, including the provinces within the core territory of the existing ARMM. Such a gambit ran the risk of losing territory that the Moro had fought for over the course of 40 years. However, the potential for expansion of that territory was much greater under this arrangement, and it enabled the MILF to claim that they had not surrendered any territory.[219]

As a direct result of this significant concession, the parties were able to agree upon the Framework Agreement on the Bangsamoro (FAB) on October 15, 2012, which became the anchor agreement for the ensuing CAB and a basis for the basic law that would govern the Bangsamoro. The FAB sketched out—in general terms—the institutional and procedural necessities of "a genuinely autonomous region in Muslim-majority Mindanao... with more powers, more territory and more control over resources," that would be able to "raise its own revenues and have its own police and judiciary."[220] Supplementary annexes addressing, and precisely detailing, the most contentious issues (transitional arrangements and modalities, revenue generation and wealth sharing, power sharing and normalization) were negotiated over the next 17 months. In March 2014, the CAB, representing the totality of the FAB and its annexes, was finally signed by the MILF and the Philippine government.

The FAB begins with an acknowledgement that the existing political situation in Mindanao is unacceptable, and proposes radical institutional change as an alternative. The Bangsamoro is to be governed by a political system based on the norms of most liberal western democracies, including democratic participation, ministerial government, a multi-party political system and accountability for all political officers. Legislative power is vested in a Bangsamoro Assembly, composed of at least 50 members, with the finer details of election and term of office to be defined by the Bangsamoro Basic Law.[221] The Bangsamoro government will be

[219] International Crisis Group (n 211) 7 and 8: "The plebiscite is a gamble, but otherwise the terms are better for the MILF than they first appear... [A]n additional article in the framework agreement [Section V, Article 3] leaves the possibility of further expansion open...."
[220] ibid at (i).
[221] Comprehensive Agreement on the Bangsamoro, Annex on Power Sharing, Part II, Article 3, 27 March 2014 <http://www.opapp.gov.ph/sites/default/files/Comprehensive_Agreement_on_the_Bangsamoro.pdf>.

headed by a Chief Executive, which will exercise executive authority on its behalf.[222] The Annex on Power-Sharing also precisely provides for the tabling of a vote of no confidence and the functioning of government in the absence of the Chief Executive.[223]

The FAB defines the relationship of the central government and the Bangsamoro government as "asymmetric."[224] The International Crisis Group deems this definition crucial, as it steers clear of the language that led to the collapse of the MOA-AD.[225] On that occasion, the term "associative" was perceived to imply "a relationship between two sovereign entities, or transitory phase for an entity that would later become independent."[226] However, the CAB's Annex on Power Sharing distinguishes asymmetry from association, defining asymmetric as "reflective of the recognition of the Bangsamoro identity and their aspiration for self-governance."[227] It is thus implied that the asymmetric relationship acknowledges the Moro identity within the confines of the Philippine nation-state, and not as a stepping stone on the road to independence. This is evident from the broad definition of the Moro people

Under the FAB, both Moro and indigenous peoples have the right to identify as "[t]hose who at the time of conquest and colonization were considered natives or original inhabitants of Mindanao and the Sulu archipelago and its adjacent islands… and their descendants…."[228] The right of indigenous peoples to identify as Bangsamoro is explicitly acknowledged by the agreement.[229] Indeed, the inclusivity of the Bangsamoro is enshrined under the provisions of the CAB. The Annex on Power Sharing provides that representation in the assembly shall reflect the diversity of the Bangsamoro, thereby taking non-Moro communities, women and settler communities into account.[230] To this end, a council of leaders—chaired by a Chief Minister and comprised of representatives of the non-Moro and settler communities, women and other sectors—is envisioned under the Annex on Power Sharing.[231]

Part II of the FAB states that there will be a Bangsamoro Basic Law, which will govern the Moro homeland. The Basic Law will be drafted by a Transition

[222] ibid, Annex on Power Sharing, Part II, Article 5.
[223] ibid, Annex on Power Sharing, Part II, Articles 6 and 8, respectively.
[224] ibid, Framework Agreement on the Bangsamoro, Part I, Article 4.
[225] International Crisis Group (n 211) 8.
[226] ibid.
[227] Comprehensive Agreement on the Bangsamoro (n 221) Annex on Power Sharing, Part I, Article 1.
[228] ibid, Framework Agreement, Part I, Article 5.
[229] ibid, Framework Agreement on the Bangsamoro, Part I, Article 5.
[230] ibid, Annex on Power Sharing, Part II, Article 2.
[231] ibid, Annex on Power Sharing, Part II, Article 7.

Commission, which is explicitly detailed and mandated to serve as "the central transitional mechanism for the MILF's participation in the joint tasks required under the FAB."[232] The Transition Commission would propose the Basic Law to the President of the Republic, who would initiate it in the domestic legislative process.[233] Once enacted by Congress, the basic law would be made subject to public plebiscite within the constituencies that opt-in to the Bangsamoro territory.[234] Upon ratification, the Basic Law would apply throughout the Bangsamoro, providing for the creation of a provisional Bangsamoro government (the Bangsamoro Transition Authority) and the abolition of the existing ARMM.

Part III of the FAB provides for the exclusive, concurrent and shared powers of both the central and Bangsamoro governments, the particulars of which are set out in the Annex on Power Sharing. Under Part III, Article 2 of the FAB, the Central Government reserves several powers, most notably with regard to defense and external security, foreign policy, monetary policy, and the common market and global trade. Both the Central and Bangsamoro governments exercise concurrent powers in the Bangsamoro territory on issues of practical or mutual importance. These powers include quarantine, human rights protection, the penal system and the relationship of the Sharia justice system to the central Supreme Court.[235] Perhaps most notably, both governments will exercise concurrent powers with regard to land registration, government funding for infrastructure and customs and tariff laws—all of which are factors that had previously rendered Mindanao underdeveloped and thus created conditions conducive to conflict.[236] Granting the Moro people autonomy to address these issues, and coupling that empowerment with the practicality of government funding, is a big step towards pacifying the factors that had previously bred conflict in the region.

The Annexes' 58 sections on the exclusive powers of the Bangsamoro government are exhaustive, and grant the Bangsamoro government competences in key areas, including trade, industry investment, labour, budgeting, education, culture and language, customary laws, the justice system, and natural resources.[237] The Annex on Power Sharing also entrusts the Bangsamoro government with the

[232] ibid, Annex on Transitional Arrangements and Modalities, Part II, A, Article 2.
[233] ibid, Annex on Transitional Arrangements and Modalities, Part I, C-E.
[234] ibid, Annex on Transitional Arrangements and Modalities, Part I, E.
[235] ibid, Annex on Power Sharing, Part Three, Article II, sections 2, 5, 6 and 11, respectively.
[236] ibid, Annex on Power Sharing, Part Three, Article II, sections 3, 12 and 10, respectively.
[237] ibid, Annex on Power Sharing, Part Three, Article III.

protection of the rights of indigenous peoples in the Bangsamoro in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.[238] The issue of land management, land distribution and land reclassification is also granted to the Bangsamoro government—an unprecedented acknowledgement of an issue that has been at the core of conflict in Mindanao for centuries and a step towards lasting peace in the region.[239]

Further to the powers conferred in the Annex on Power Sharing, Part III of the FAB also grants the Bangsamoro government competence over the Sharia justice system, its formal institutionalization and the expansion of its jurisdiction within the Bangsamoro.[240] The supremacy of the Sharia legal system shall only apply to Muslims however,[241] though the agreement does not define who 'Muslims' are for this purpose—does this include practicing religious Muslims or all of those who come from a traditionally Muslim ethnic group? The rights and traditions of indigenous peoples must also influence the formation of the system of justice available in the Bangsamoro.[242] The FAB thus provides for the prescription of alternative dispute resolution systems,[243] including "indigenous processes," customary laws and historical and community traditions.[244]

The FAB recognizes that "wealth creation (or revenue operation and sourcing) is important for the operation of the Bangsamoro."[245] This addresses the failure to provide independent funding for the Bangsamoro's predecessor, the ARMM, and appears to be an implicit acknowledgement of the static institution's resulting redundancy. Despite this, the content of the FAB's provisions on revenue generation are remarkably similar to those of the 1996 Final Agreement. The Bangsamoro is endowed with the power "to create its own sources of revenues and to levy taxes," and "to receive grants and donations from domestic and foreign sources," in the same way that the Final Agreement empowered the ARMM.[246] However, the key distinction on this occasion is the emphasis on bilateral implementation. Previous agreements had allowed the government to implement

[238] ibid, Annex on Power Sharing, Part Three, Article III, section 30.
[239] ibid, Annex on Power Sharing, Part Three, Article III, section 31.
[240] ibid, Framework Agreement, Part III Article 5(a).
[241] ibid, Framework Agreement, Part III Article 3.
[242] ibid, Framework Agreement, Part III, 6.
[243] ibid, Framework Agreement, Part III Article 5(c).
[244] ibid, Annex on Power Sharing, Part Three, Article III, section 39.
[245] ibid, Framework Agreement, Part IV, Article 1.
[246] ibid, Framework Agreement, Part IV, Articles 2 and 3, respectively.

agreements on its own terms and at its own pace, thus reducing the ARMM to a body dependent on unpredictable grants and handouts. The CAB, however, commits to making the government and MILF co-dependent partners in peacebuilding, providing for an intergovernmental fiscal policy board "to address revenue imbalances and fluctuations in regional financial needs."[247] Such a forum allows for periodic review of the development needs of the Bangsamoro,[248] and provides a sustainable alternative to conflict in the event of a dispute. The central government also commits to "extending assistance to the Bangsamoro Government in the matter of tax administration and fiscal management," including the provision of capacity building and training programs.[249] Ideally, this practical support should encourage the independent development of an autonomous Bangsamoro region, rather than another mismanaged and dependent successor to the ARMM. To this end, the FAB provides for a regular block grant from the central government to the Bangsamoro government,[250] which will be enshrined under the Basic Law.[251] This notable provision attempts to avoid the unpredictable and sporadic funding that the ARMM received, which only reinforced Moro dependency as opposed to autonomy.

The provisions on taxing powers, as set out in the Annex on Revenue Generation and Wealth Sharing, are high on precision—even more so than the 1996 Final Agreement. The Annex even details the distribution of central government taxes collected in the Bangsamoro territory, with 25% being retained by the central government and the remaining 75% accruing to the Bangsamoro government.[252] Under Part II, extensive powers are devolved to the Bangsamoro government, including "control over existing government-owned and controlled corporations and financial institutions operating exclusively in the Bangsamoro territory."[253] Government income derived from the operation of these corporations shall be returned to the Bangsamoro government.[254] Interestingly, the participation of the Bangsamoro government in the operations of these corporations will be determined by the intergovernmental fiscal policy board, and the share of the Bangsamoro

[247] ibid, Framework Agreement, Part IV, Article 7.
[248] ibid, Annex on Revenue Generation and Wealth Sharing, Part X.
[249] ibid, Annex on Revenue Generation and Wealth Sharing, Part I, A, 7.
[250] ibid, Annex on Revenue Generation and Wealth Sharing, Part II, E.
[251] ibid, Annex on Revenue Generation and Wealth Sharing, Part V, A. Part V, B further obligates the Central government to provide for a Special Development Fund for the immediate rehabilitation and development of the Bangsamoro region.
[252] ibid, Annex on Revenue Generation and Wealth Sharing, Part I, A, 4.
[253] ibid, Annex on Revenue Generation and Wealth Sharing, Part II, B.
[254] ibid, Annex on Revenue Generation and Wealth Sharing, Part II, A.

government in the income of these corporations will be calculated accordingly.[255]

Part IV of the FAB also addresses the issue of wealth sharing with regard to the natural resources of the Bangsamoro region. Article 4 envisions "a just and equitable share in the revenues generated through the exploration, development or utilization of natural resources."[256] The Bangsamoro government is entitled to 100% of all non-metallic minerals within the territory, 75% of all metallic minerals, and 50% of all fossil fuels and uranium, with the remainder to be retained by the central government.[257] The Bangsamoro and central government would jointly exercise the power to grant exploration and development rights to fossil fuels, "giving preferential rights to qualified citizens who are bona fide inhabitants of the Bangsamoro."[258] The CAB is much more precise than its predecessors on this issue, and the provision of precise wealth-sharing formulae is a first in the protracted Bangsamoro peace process.

Part V of the FAB defines the territorial scope of the Bangsamoro, which encompasses the existing geographical area of the ARMM, the municipalities that voted for inclusion in the ARMM in a 2001 plebiscite, the cities of Cotabato and Isabela, and any other contiguous land unit where the local government—or at least 10% of the qualified voters in the area—wish to be included in the Bangsamoro.[259] This last aspect is crucial as it allows any contiguous land unit to "opt-in" to the Bangsamoro territory at any time, so long as the majority of the residents therein approve the decision by plebiscite.[260] The territorial scope of the Bangsamoro has yet to be confirmed by popular plebiscite,[261] and thus runs the risk of reducing the Bangsamoro to a smaller tract than it appears on paper. On the other hand, the formula envisioned under the CAB will allow the largest Moro constituency ever recognized by the Philippine state to express its demand for an ancestral Moro territory and self-governing polity. Though difficulties with implementation have thus far prevented this, the CAB provides a commendable legal process for establishing a sustainable autonomous unit.

Part VI of the FAB enumerates the basic rights of citizens of the Bangsamoro

[255] ibid, Annex on Revenue Generation and Wealth Sharing, Part II, E.
[256] ibid, Framework Agreement, Part IV, Articles 4.
[257] ibid, Annex on Revenue Generation and Wealth Sharing, Part VII.
[258] ibid, Annex on Power Sharing, Part Four, Article 2.
[259] ibid, Framework Agreement, Part V, Article 1.
[260] ibid, Framework Agreement, Part V, Article 3.
[261] ibid, Framework Agreement, Part V, Article 2.

"as directly enforceable law."[262] This includes many of the norms of most liberal democracies, including the right to freedom of expression, belief, speech, the right to privacy and the right to equal opportunity and non-discrimination. The FAB provides that "[v]ested property rights shall be recognized and respected,"[263] and proceeds to acknowledge the "unjust dispossession" of the Bangsamoro of "their territorial and proprietary rights." The acknowledgment of previous injustices against the Moro is very significant. Not only does this provision once more address the contentious issue of land, it also provides a legal basis for the Moro people to seek restitution, and a practical means to further their own development. Under the Annex on Normalization,[264] a Transitional Justice and Reconciliation Commission is to undertake a study in the field of transitional justice, and "produce a set of recommendations on the appropriate mechanisms to address legitimate grievances of the Bangsamoro people, correct historical injustices, and address human rights violations and marginalization through land dispossession…."[265] In theory, the mechanisms that result from this study may yet serve as a legal basis for the Moros to assert their ancestral rights, though the absence of more precise provisions renders this outcome uncertain. It is a certainty, however, that if the issue of land is not resolved by this means or another, the sustainability of the CAB is in jeopardy.[266]

Elsewhere, Part VI continues in a similar vein of addressing the shortcomings of previous agreements vis-à-vis indigenous peoples' rights. Article 3 explicitly provides for their protection,[267] which is supplemented by the many provisions throughout the Annex on Power Sharing that provide for the protection of the rights of indigenous peoples, their customary rights and their traditions. In this manner, the CAB uses legal protections to assuage the concerns of minority groups, and ensure their participation in new political structures.

Under Part VII of the FAB, a third-party monitoring team is tasked with monitoring the implementation of the agreement and all of its annexes.[268] The team is to furnish the parties and the Malaysian facilitator with a report on the progress of

[262] ibid, Framework Agreement, Part VI, Article 1.
[263] ibid, Framework Agreement, Part VI, Article 2.
[264] ibid, Annex on Normalization, Part H, Article 1.
[265] Terms of Reference for the Transitional Justice and Reconciliation Commission, Article V, 22 March 2014 <http://www.opapp.gov.ph/sites/default/files/2014-03-22%20TOR%20for%20TJRC.pdf>
[266] Oquist (n 37) in Santos Jr (n 34) 18.
[267] Comprehensive Agreement on the Bangsamoro (n 221) Framework Agreement, Part VI, Article 3.
[268] ibid, Framework Agreement, Part VII, Article 11.

the agreement's implementation.[269] However, the parties are not bound by the team's recommendations in this regard. Instead, the third-party monitoring team relies upon the good will and good faith of the parties towards the peace process, which is perhaps guaranteed by the high-precision evident throughout the rest of the CAB.

Section VIII of the FAB addresses the 'Normalization' of post-conflict Mindanao, and the need for both parties to work together to secure "peace on the ground."[270] To this end, the FAB establishes a Joint Normalization Committee to oversee the various normalization bodies,[271] including the Joint Peace and Security Committee (which would co-ordinate the security component of the normalization process)[272] and the Joint Peace and Security Teams (units comprised of the various ex-combatants, charged with maintaining peace, order and stability in certain areas).[273] These various bodies are mandated with a medium-high degree of precision throughout the Annex on Normalization,[274] though it is envisioned that these transitional mechanisms will cease to exist once a Bangsamoro police force becomes operational.[275] An impartial and accountable Independent Commission on Policing is tasked with recommending "appropriate policing" in this regard.[276] The FAB also laid out a precise consultative role for the MILF in the appointment, employment and deployment of existing police forces in the Bangsamoro.[277] As part of a peacetime society, former MILF combatants would be decommissioned and transitioned to "productive civilian life."[278] In contrast to previous agreements that addressed this issue, the CAB provides for the socio-economic rehabilitation and development of these former combatants, proposing "a comprehensive needs assessment" of MILF members and their communities.[279]

The transferability of successful peacebuilding mechanisms across peace processes is also highlighted by the CAB's normalization provisions. The influence of the Good Friday Agreement's provisions on a professional, impartial, and

[269] The Third Party Monitoring Team (TPMT) and its Terms of Reference, Article 5, 25 January 2013 <http://www.hdcentre.org/fileadmin/user_upload/Our_work/Peacemaking/Philippines_Mindanao/Supporting_documents/The-Third-Party-Monitoring-Team-_TPMT_-and-its-Terms-of-Reference.pdf>
[270] Comprehensive Agreement on the Bangsamoro (n 221) Annex on Normalization, Part B, Article 1.
[271] ibid, Annex on Normalization, Part B, Article 2.
[272] ibid.
[273] ibid, Annex on Normalization, Part B3, Article 1.
[274] ibid, Annex on Normalization, Parts B, B1, B2 and B3.
[275] ibid, Annex on Normalization, Part B, Article 3.
[276] ibid, Framework Agreement, Part VIII, Articles 3 and 4.
[277] ibid, Annex on Normalization, Part A, Articles 4 and 5 respectively.
[278] ibid, Annex on Normalization, Part C, Article 2.
[279] ibid, Annex on Normalization, Part C, Article 3.

accountable police force is evident in the values that the CAB prescribes to guide its Independent Commission on Policing.[280] An independent commission was also established to oversee the disarmament of combatants and decommissioning of weapons in Northern Ireland.[281] Under the CAB, a similarly independent decommissioning body is established to "[p]lan, design and implement techniques and technologies for weapons collection or retrieval, transport, and storage and putting weapons *beyond use*,"[282] a phrase that echoes the commitments of the parties to the peace process in Northern Ireland. This example of 'borrowing' successful provisions from another peace processes supports one of the principle arguments underpinning this thesis: that attention to successful aspects of agreement design can inform potential solutions in different contexts and settings.

The need to "intensify development efforts" in the Bangsamoro is also recognized in the FAB, which refers to the need for multi-donor financial support in the same way that that the 1976 and 1996 agreements had done.[283] On this occasion, however, development efforts are much more precisely detailed under Part G of the Annex on Normalization, which refers particularly to the need for programmes that reinforce social cohesion and the unity of communities, and the specific needs of indigenous peoples, and the needs of decommissioned women auxiliary forces from the MILF.[284] A Trust Fund is envisioned to channel multi-donor investment towards priority sectors of Bangsamoro society with efficiency, accountability and transparency.[285] The government further pledges to fund the normalization process.[286] While low on precision with regard to how this funding might be distributed or indeed, generated, this provision is high on obligation, and its inclusion is wholly practical when one consider how funding issues ultimately sunk the ARMM.

The FAB's provisions on normalization also address the AFP's presence in Mindanao, and provide for the gradual withdrawal of the AFP from the Mindanao

[280] The Good Friday Agreement, Section 9, Article 2, 10 April 1998 <http://www.taoiseach.gov.ie/attached_files/Pdf%20files/NIPeaceAgreement.pdf>.
[281] ibid, Section 9, Article 3 and Section 7, Article 3, respectively.
[282] Comprehensive Agreement on the Bangsamoro (n 221) Annex on Normalization, Part C, Article 6(c) [emphasis added].
[283] ibid, Framework Agreement, Part VIII, Article 10.
[284] ibid, Annex on Normalization, Part G, Articles 4 and 3, respectively.
[285] ibid, Annex on Normalization, Part G, Article 5.
[286] ibid, Annex on Normalization, Part I, Article 1.

region, "consistent with a normal and peaceful life…."[287] The possible influence of the British experience in Northern Ireland is again evident here, as the text is very similar on issues such as the reduction of the numbers and role of the Armed Forces and the removal of security installations.[288] Crucially, the Annex on Normalization, together with Article 8 of the FAB's provisions on normalization, addresses the need for both groups to disarm private armed groups,[289] "using diverse and appropriate approaches or methodologies…."[290] These groups had been responsible for the flaring of tensions throughout Mindanao's long road to peace, and on several occasions, had brought the peace process to the brink of collapse. The inclusion of these provisions is a valuable countermeasure against potential spoilers, and the derailing of a dearly bought agreement.

Finally, the FAB concludes with a vow that this agreement will not be implemented unilaterally.[291] This provision is not merely a recognition of previous mistakes, nor a political expression of good will. The body of text and annexes that comprise the CAB speak to the value of partnership between the Philippine state and the MILF, and give effect to a range of political mechanisms that necessitate their cooperation. The intergovernmental fiscal policy board, the intergovernmental Relations body, the Transition Commission, the Joint Normalization Committee, the Joint Peace and Security Committee and the Joint Peace and Security Teams established under the process of normalization, are all central to the bilateral implementation of the CAB and the establishment of good governance in the Bangsamoro. These bodies also serve as the primary forum for the resolution of disputes with regard to the specific mandate of each body. Disputes are only referred to the peace panels if they cannot be resolved at this level, allowing each specialized problem to be compartmentalized and addressed bilaterally, without undermining the overall peace process. The provision of, and emphasis on, this dispute resolution aspect evidences a higher degree of precision than that of previous agreements.

Even where precision is not so evident, however, the emphasis remains on

[287] ibid, Annex on Normalization, Part D, Article 1.
[288] ibid, Annex on Normalization, Part D, Article 1. Just as the CAB refers to the redeployment of AFP units "consistent with a normal and peaceful life," the Good Friday Agreement provides for "the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland *to levels compatible with a normal peaceful society*" [emphasis added]. See The Good Friday Agreement (n 426) Section 8, Article 2(i).
[289] Comprehensive Agreement on the Bangsamoro (n 221) Annex on Normalization, Part F and Part C, Article 10.
[290] ibid, Annex on Normalization, Part F, Article 2.
[291] ibid, Framework Agreement, Part IX, Article 1.

bilateralism. Though not expressly detailed, a consultative role for the MILF in establishing police measures in the Bangsamoro gives the MILF a cooperative role in a task that will largely be undertaken by the government. Though it is not explicitly identified who will carry out the special socio-economic development programmes in the Bangsamoro, the parties' bilateral commitment to intensify development efforts in the region imply that they will undertake this task together. The Central government's commitment to extending capacity building and training programmes with regard to fiscal management, and the role of the Transition Commission in providing for fund transfers to the Bangsamoro government from the Central government, is further evidence in this regard. The emphasis is no longer on unilaterally granting autonomy to the Moro people—a precedent which had been established by the Tripoli Agreement and inadequately achieved by the Final Agreement—but on bilaterally establishing the institutions through which the Moro can one day exert their own agency.

This move away from unilateral implementation is indicative of an overarching shift in the way that the parties' perceived the conflict. Autonomy could not serve as a sustainable solution to the Moro problem unless it granted the Moro the power to grapple with the factors that fueled conflict in their homeland for some 40 years. Thus, throughout the CAB, the emphasis is no longer on the autonomous political institutions—similar incarnations of which had been espoused in the Final Agreement, with little practical effect—but rather, on the contentious issues that underpinned the conflict. Land ownership, ancestral domain, wealth sharing, the ownership of natural resources, the rights of indigenous and minority peoples and their relationship with the Moro people: these issues had not been adequately addressed prior to the CAB, and this shortcoming was central to the downfall of previous agreements. In particular, the failure to consider the interests of minority groups in the negotiations leading up to the Final Agreement meant that the agreement came into being with its popular support already limited. With the CAB, the emphasis was placed on achieving a truly comprehensive settlement that addresses each of the key issues with a degree of precision that is notably more sophisticated than any of the agreement's predecessors. The rights of indigenous peoples are expressly guaranteed under the Agreement, and their choice to opt-in or out of the Moro identity is respected. Provision is made for the establishment of alternative dispute resolution systems, should indigenous peoples and Christians not

wish to obey Sharia law, and their customary rights and traditions will be respected. Crucially, the vested property rights of all Bangsamoro citizens, including indigenous and Christian peoples, and the legitimate grievances of the Moro people are both recognized and respected. The CAB also lays the basis for the Moro to assert their ancestral rights through restitution and transitional justice procedures.

Ultimately, the CAB is high on precision and high on obligation when compared to any of its predecessors. Granted, many of the institutions and features envisioned under the CAB are not entirely novel or creative departures from those that came before. Autonomous executive and legislative organs, reformed security forces, and generous economic provisions had been included in previous agreements, but they did not produce a sustainable peace. This suggests that the degree of precision employed in crafting the CAB has had a significant impact on sustaining the relevant parties' consensus, thereby encouraging expectations that this agreement may finally bring about peace in Mindanao. Not only have the omissions and failings of previous agreements been addressed in the CAB: they have been considered *in detail*. This degree of precision may yet prove responsible for realizing the potential that many of these key institutions bore under the Tripoli and Final Agreements.

Drafting the CAB with precision has further sustained the parties' consensus by limiting the scope for unilateralism. State-driven implementation of the Tripoli and Final Agreements led to disputes over the implementation of the agreements, a return to entrenched positions despite the consensus embodied on paper, and, in the absence of adequate dispute resolution systems, the eventual collapse of the peace process. The level of detail prescribed in the CAB severely restricts the scope for state unilateralism, creating bipartisan mechanisms charged with some of the most sensitive details of the peace process, including disarming, decommissioning, restructuring the police force, maintaining peace and security during the transitional phase, and drafting a basic law for application after it. Each of these bodies also serve as the primary forum for the resolution of disputes specific to their field, before elevation to the parties' peace panels. This gives the MILF a significant voice in every stage of the implementation process, which takes place entirely within the domestic legal sphere of the Philippine Republic. Precision thus ensures participation in the process, encourages continued dialogue between former combatants, and avoids the escalation of minor disputes into potential spoilers.

For all of its precision and obligation, it is all the more notable that there is

not much to say on the CAB with regard to the third limb of the legalization troika: delegation. A third-party monitoring team is established under the CAB (as under the Final Agreement, though higher on precision on this occasion), though its recommendations to the peace panels on the implementation of the agreement are not binding on the parties. This is perhaps a significant setback, given that problems with implementation have been to the detriment of two previous agreements. Similar setbacks beset the Independent Commission on Policing and the Independent Decommissioning Body, which lack any significant enforcement mechanisms and exist solely to make recommendations to the peace panels.

However, the potential damage made possible by a lack of delegation is mitigated by the CAB's high-precision, which provides for bipartisan implementation mechanisms at every stage of the process and a radical network of communications for the resolution of disputes. This greatly limits the scope for unilateralism with regard to the Agreement. Furthermore, building peace in an established Republic such as the Philippines is decidedly different from building peace in states with little central authority or a concentration of authority in an unrepresentative elite (as is explored in Chapters 6 and 7). The demands of established domestic constituencies—such as the Moro, Christian and indigenous communities—"are more important in the calculations of an elected government than the opinions of some international experts on the peace process, development, and diplomacy."[292] This is an important point to remember when considering the respective roles that law and politics play in promoting compliance. The CAB empowers these political communities to an unprecedented extent, ensuring the relevant stakeholders' inclusion through legal provisions that are high on precision.

Though it would be premature to call the burgeoning process a success, the MILF's participation in the legislative debate on the BBL in February 2016 is an encouraging sign that the conflict has shifted from the battlefield to the parliament. It remains to be seen whether the CAB's text, which bears so much promise, can stand the test of time. History has demonstrated that low-delegation to third party actors and an insistence on constructing peace within the limits of the Philippine domestic legal system does not bode well for peace efforts in Mindanao. However, the CAB's

[292] Steven Rood, 'Internationals, Malaysia, and Negotiations for Peace in the Philippines' The Asia Foundation (17 October 2012) <http://asiafoundation.org/in-asia/2012/10/17/internationals-malaysia-and-negotiations-for-peace-in-the-philippines> accessed 19 August 2017.

co-operative approach to peacebuilding has sustained itself to date. Despite a fatal 'mis-encounter' between state and MILF forces in January 2015 and the defeat of the proposed BBL in Congress in February 2016, the parties have continued to pledge their support to the CAB, and have renewed the mandates of several of its multilateral bodies to that end.[293] More recently, the imposition of martial law and an escalating conflict with extremist militants linked to the Islamic State have made Mindanao an increasingly volatile region in which to build peace. Yet the stability of the CAB's implementing mechanisms may yet prove strong enough to weather the political storm that is blowing ill in the Philippines.

5. IV. CONCLUSIONS

A striking feature of over 40 years of negotiations in Mindanao is how the whole process gradually inched towards a more inclusive, precise and comprehensive settlement. From the initial Tripoli Agreement to the Comprehensive Agreement on the Bangsamoro, each agreement between the militant Moro groups and the Philippine state marked a small, cumulative step towards peace.[294] It is reasonable to suggest, on this basis, that the lessons learned from the shortcomings of previous agreements were central to the peacemakers' ability to move the peace process forward. This was a process that "time and again reinvented itself when stumbling blocks arose,"[295] necessitating legal creativity that cannot be attributed to a more amiable political climate alone. The international community is now eager to learn from the Philippine experience, so what lessons, if any, can be gleaned from this legal analysis?

Perhaps the most obvious lesson imparted by the conflict in Mindanao is the value of precision in designing peace agreements. Based on the Philippine experience alone, it is apparent that agreements that are high on the precision matrix encourage more stable and durable settlements that legally bind the parties to a greater extent than their imprecise relatives. The low-precision evident in the Tripoli Agreement rendered it an uncertain roadmap to peace at best. Its ambiguity with

[293] Gene Carolan, 'Botched Raid, Missing Stakeholders Mar Philippines Peace Process,' *World Politics Review* (12 February 2015).
[294] International Crisis Group (n 211) 6.
[295] Kristian Herbolzheimer and Emma Leslie, 'Preserving for Peace: PH leads, world watches' *Philippine Daily Inquirer* (9 October 2012) <http://opinion.inquirer.net/38404/persevering-for-peace-ph-leads-world-watches> accessed 19 August 2017.

regard to the key issues was ultimately not constructive: it undermined the parties' tenuous consensus when these issues had to be discussed in more detail. Similarly, the Final Agreement, though wholly more precise than its predecessor, came apart due to a lack of precision in the legislation charged with implementing the agreement. Finer details with regard to the funding of the autonomous institutions and the region itself were postponed to a later date that never came to pass, and it is therefore unsurprising that these institutions became static and ineffective.

The CAB was also guilty of postponing its finer details to an uncertain date in the future. The finer details of post-conflict society in the Bangsamoro had to be clarified under the Basic Law, which had yet to be drafted when the CAB was concluded. However, this imprecision is mitigated by the precision evident throughout the rest of the CAB. The bipartisan implementation bodies precisely prescribed under the CAB provide a means through which the parties can transition from short-term to long-term commitments. These bodies allow both parties to settle their disputes over imprecisions in the agreement within the legal limits of the peace process, and to clarify these provisions together as partners in peace-making. The parties can anticipate the outcomes due under the agreement with certainty, and challenge errant behaviour in established political forums. This precisely detailed peacebuilding infrastructure underscores the importance of legal language and legal instruments as a means to resolve conflict and bridge trust-deficits between estranged communities.

Another important lesson one can take from Mindanao is "the value of open, structured and inclusive negotiations to end conflict."[296] The Philippine experience has charted a broad spectrum of inclusivity, from the closed negotiations that brought about the unilateral Tripoli Agreement, to the widely consultative negotiations that resulted in the bipartisan structures of the CAB.[297] Agreement stability can also be charted on this same spectrum. The Tripoli Agreement was the product of exclusive negotiations between the Marcos administration and the MNLF under Nur Misuari. Misuari's highly centralized leadership provided little room for input from dissenting

[296] Michael Vatikiotis, 'Why peace in Muslim Mindanao and how it was reached matters' *Minda News* (28 January 2014) <http://www.mindanews.com/mindaviews/2014/01/28/commentary-why-peace-in-muslim-mindanao-and-how-it-was-reached-matters> accessed 19 August 2017.

[297] For more on the extensive consultation process, see The Mindanao Think Tank, 'Strengthening the Peace Process by Facilitating Dialogue with Stakeholders,' Centre for Humanitarian Dialogue (30 September 2010) <http://eprpinformation.org/files/peaceprocesses/community-participation/mindanao-think-tank-1of3.pdf> accessed 19 August 2017.

voices, thereby engendering a split in the MNLF ranks and a gradual decline in the MNLF's influence on the peace process. The Final Agreement, though perhaps acknowledging the failures of Tripoli before it, also came under fire for its "much vaunted 'consensus and consultations,'" which "were largely limited to the negotiating parties, except for a few token efforts to communicate with civil society organisations."[298] Because minority groups were not consulted during the negotiations of the agreement, they had little support for the institutions that resulted from it, which predominantly catered to the aims and aspirations of the Moro nation. A failure to consult any minority groups also felled the landmark MOA-AD.

The CAB, in contrast, envisioned a homeland for the Moro people that expressly guaranteed the rights of indigenous and minority peoples within the territory. Minority peoples also had the right to (refuse to) identify themselves as Moro—a provision that is crucial to the minorities' perceptions of inclusion and recognition within a predominantly Moro entity. Political representation of marginalized groups is guaranteed under the CAB, which provides that indigenous peoples and women—often neglected throughout the texts of previous agreements—shall be represented in the assembly and the Council of Leaders. Development efforts are much more focused on the specific needs of women on this occasion, and the CAB makes particular reference to the needs of decommissioned women auxiliary forces from the MILF. Overall, development efforts throughout the CAB take account of the needs of non-Moro communities, and any resulting programmes must have social cohesion and the unity of communities as their central thrust. As a result of the CAB's inclusivity, the agreement takes a comprehensive account of the broader social problems that have beset Mindanao—chronic underdevelopment, the distribution of wealth and resources—and not just the ethno-nationalistic cause of the Moro people which had dominated the focus of previous agreements.

Inclusion also featured notably in the implementation mechanisms of the CAB. While the agreement remains rooted in the realm of Philippine domestic law, the bipartisan structures charged with some of the most sensitive details of the peace process included the MILF as a political partner in peace in ways that previous agreements did not. These structures allowed the MILF to express its dissatisfaction with the process at the most radical level and subject any discrepancies to international scrutiny through the third-party monitoring team. This level of inclusion

[298] Stankovitch and Carl (n 11) 8.

is unmatched by the Tripoli and Final Agreements, which attempted to realise Moro aspirations through state unilateralism. In the absence of a legitimate role in the implementation of the Tripoli Agreement, the MNLF resorted to illegitimate means to express their grievances with the process. Similarly, the unilateral implementation of the Final Agreement meant that the MNLF could not shape the emerging ARMM, which pandered to Manila's system of governance and remained dependent on it for funding. Thus, the Philippine experience teaches us that when making peace, it is crucial that all of the relevant parties are involved at every key stage of the process—that they undertake bilateral obligations as partners in peace and do not defer to unilateral declarations of intent where precision is lacking.

The importance of precision and inclusion came together to great effect in the form of the CAB, and thereby revealed another key lesson in peace-making—that sustainable processes of peace must address all the key issues relevant to the conflict. While this may seem obvious, the desire to postpone or evade difficult and contentious issues has been a glaring omission from over 40 years of peace-making in the Philippines, and is a marked feature of conflicts the world over. The CAB, however, explicitly addresses the issues that originally ignited the conflict in Mindanao and repeatedly fuelled it, despite several negotiated agreements. It directly addresses land ownership, providing a legal basis for the Moro people to seek reparation and a practical means to further their own development. The CAB addresses the contentious issue of religion in a manner more satisfactory than its predecessors, granting the Bangsamoro government exclusive competence over education and justice so that they may establish Islam as a way of life and governance. Indeed, the CAB also clarifies the overall relationship between Moros, Christians and Lumads and their respective place within the Bangsamoro nation. The Final Agreement paid little attention to this relationship, and was thus perceived among the different ethno-linguistic groups as a document that catered solely to the needs of the MNLF's ethnic base. Crucially, the CAB grants the Moro people the autonomy to address these issues themselves, empowering them to challenge the structures of inequality that had made violence an enduring vehicle for political expression.

As a crucial limb of the legalization methodology, the role of delegation in sustaining processes of peace merits further discussion within the Philippine context. Though the OIC played a valuable role in finding a diplomatic solution to the Moro

problem, neither the Tripoli Agreement nor the Final Agreement gave the organization any practical role in the implementation of that solution. Sensitive tasks such as the release of political prisoners, the supervision of a ceasefire, and the resettlement of refugees were not delegated to the OIC under the Tripoli Agreement, and the state's relationship with the OIC under the Final Agreement remained diplomatic, but in no way legal. It is tempting to suggest, on this basis, that the omission of robust delegation strands in these agreements ultimately caused their collapse. However, a lack of third-party delegation throughout the Final Agreement did not derail its implementation, nor could have it affected a substantially different outcome.

Likewise, the examination of the CAB above has revealed that delegation is not always essential in the search for sustainable peace, particularly in the context of established states. The absence of a sovereign third party with the ability to enforce can be mitigated by a precisely detailed agreement that provides for bipartisan implementation mechanisms at every stage of the process and a radical network of communications for the resolution of disputes. Had the Tripoli and Final Agreements provided for more inclusive means of bilateral implementation, the parties to the conflict may have made peace on the basis of their own good faith and the "good offices" of willing third-party actors. That the CAB has sustained itself to date on this basis substantiates this claim. While the success rate of provisions that are high on delegation cannot be judged from a study of the Philippine experience alone, this analysis does suggest an interdependence between the headings of obligation, precision and delegation, and how a proficiency in one may make up for a deficiency in the other. By exploring these headings and their various combinations, one can take account of the unique features and peculiarities of a given conflict, and tailor our conflict resolution instruments to its needs accordingly.

As a case study, the conflict in Mindanao is both a warning and an example. Four decades of conflict, hundreds of thousands dead and displaced, and several failed agreements all underscore the consequences should we fail to learn from the mistakes of our past. But 'the Moro problem' is also a success story: a process that reinvented itself repeatedly, despite renewed hostilities and entrenched positions; a process that reiterates the claim that there are lessons to be learned from conflict zones like Northern Ireland that are applicable to processes of peace on the other side of the world. If there is a silver lining that sheds light on over 40 years of conflict and

human suffering in the Philippines, it is the knowledge that their efforts, innovations and lessons learned will serve as "invaluable examples to those engaged in comparable conflicts around the world."[299] The duration of the conflict in Mindanao and the elusive search for a sustainable solution underscores the value of legal precision in addressing these conflicts—that "[i]t is better to be cautious and meticulous rather than to rush up things only to repent later."[300]

[299] ibid.
[300] 'Peace talks is alive and kicking, MILF says' (2004) 24(10) Maradika 1, 4 in Santos Jr (n 34) 21.

6.

‘A Better Destiny’: The Pursuit of Peace in Sierra Leone

> The search for peace in Sierra Leone has been pursued against daunting odds. Implementation got underway in a complex context that affected *how the words and ideas in the agreement could be translated into reality in a severely damaged nation*. The physical devastation within the country, the exodus of skilled Sierra Leoneans, the disruption of schooling, high numbers of traumatized war victims, the destruction of authority systems, and deeply rooted social problems, particularly the neglect of youth, were all part of the environment in which the Lomé Agreement was to succeed or fail.… If the war had really been waged on the grounds of an ideology of some sort, perhaps the agreement could have addressed substantive issues and then might have enjoyed a better destiny.[1]

6. I. INTRODUCTION

The civil war in Sierra Leone surpassed all expectations of its potential scope and eluded expectations of a peaceful end to the conflict for a significant period of time. When the Revolutionary United Front (RUF) launched its insurgency in the eastern part of Sierra Leone in March 1991, the group’s raids were perceived as spill over from the internal conflict in neighbouring Liberia—isolated incidents that would be short-armed in reach and short-lived in duration. What followed, however, was “a degree of social collapse more alarming than anywhere else in the region.”[2] In the absence of conventional battles—“except those for control of diamond mines or strategic bridges or highways”[3]—the amputation and maiming of civilians became a ghastly feature of the conflict, and the indiscriminate violence claimed between 30,000 and 50,000 lives.[4]

However, as J Peter Pham notes, “a fixation on the manifestations of violence

[1] Dennis Bright, ‘Implementing the Lomé Peace Agreement’ in David Lord (ed) *Paying the Price - The Sierra Leone peace process* (Accord Conciliation Resources 2000) 40 [emphasis added].
[2] Stephen Ellis, ‘War in West Africa’ (2001) 25(2) The Fletcher Forum of Word Affairs 33, 37.
[3] David Lord, ‘Introduction: the struggle for power and peace in Sierra Leone’ in David Lord (n 1) 13.
[4] David J Francis, ‘Torturous Path to Peace: The Lomé Accord and Postwar Peacebuilding in Sierra Leone’ (2000) 31(3) Security Dialogue 357.

during the civil war… risks obscuring the fact that the conflict neither began with the invasion of eastern Sierra Leone" by the RUF in March 1991, nor did it end with the conclusion of the Lomé Accord in July 1999.[5] The conflict can be perceived as the culmination of a process of decline characterised by the lack of a cohesive national identity, weak governance structures and capacity; rampant corruption, and economic mismanagement.[6] Even before the RUF invaded the country from neighbouring Liberia, the country had struggled to assert its statehood. After gaining independence from colonial oppression in 1961, Sierra Leone went from being a promising democracy that was the envy of the region, "to being the exemplar of Africa's post-colonial 'neo-patrimonial' malaise."[7] Political reform in the early 1990s looked encouraging, and allowed the government to conclude the 1996 Abidjan Agreement with the RUF. When a military coup derailed the agreement's implementation, it drew international criticism for "cutting short one of West Africa's 'most promising political evolutions.'"[8] By the time the civil war was officially declared over in January of 2002, it had outlasted several political attempts to resolve the fighting peacefully, and precipitated military intervention by a range of external actors. Post-conflict, the country became host to the largest UN mission of its time.[9] The conflict is an example of how "the seemingly 'low intensity' conflicts of state sovereignty and order" can easily evolve into "full-blown geopolitical crises of the first order" through ineffective engagement,[10] and thus, an ideal case study in a conflict resolution context.

This chapter begins with a general overview of the conflict in Sierra Leone: the factors that made it susceptible to civil war, the difficulties that it posed to peace-making efforts, and the lessons that can be learned from those efforts. Section II offers a more elaborate analysis of the state's colonial and post-independence experience, which set a prolonged period of decline in motion and culminated with

[5] J Peter Pham, 'Democracy by Force?: Lessons from the Restoration of the State in Sierra Leone' (2005) 6 The Whitehead Journal of Diplomacy and International Relations 129, 137 [original citations omitted].
[6] ibid.
[7] ibid at 130-131 [original citations omitted].
[8] James Rupert, 'Civilian Rule Overturned in Sierra Leone' Washington Post (26 May 1997) in Karsten Nowrot and Emily W Schabacker 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 American University International Law Review 321, 325.
[9] UN.org, 'Sierra Leone - UNAMSIL – Background' <http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html> accessed 19 August 2017.
[10] Pham (n 5) 145-146.

the outbreak of civil war in 1991. The peace agreements that sought to end the fighting are analysed in detail in Section III. Each agreement highlights valuable lessons with regard to prescribing short-term and long-term commitments, dealing with errant partners-in-peace, and building peace in a state in the midst of collapse. These conclusions are discussed in detail in Section IV.

For some, the difficulties of negotiating peace in Sierra Leone "uncovered the fragility of peace processes,"[11] and highlighted the central role the international community would have to play if peace agreements were to prove effective as a means to terminate conflict. The conflict eluded ideas of "what a war should be,"[12] and asked many questions of the applicability of legal instruments to a group that "appeared less interested in politics than plunder, and who, therefore, were extremely difficult to accommodate in any rational political settlement."[13] The RUF was a particularly errant partner-in-peace, and the Front's leadership promising one thing and doing another "became a common feature of the peace process."[14] This, in turn, encouraged the perception that the RUF was not negotiating in good faith, and was merely using negotiations as a means to regroup and re-arm.[15] The frustration with the peace process through this time is perhaps best surmised by a damning report by the International Crisis Group, which recommended the abandonment of the Lomé Agreement, the cessation further political engagement with the RUF, and the use of military force against any remaining rebels.[16] The same frustration may be keenly felt in western and wider Africa today, where non-state actors continue to violently challenge the rule of law in Mali, Nigeria and Libya.

Despite the fact that the RUF had repeatedly shown that it could not be trusted,[17] agreements that resulted from the Sierra Leonean peace process continued to rely on the cooperation of rebel leaders. The Lomé Accord, in particular, was

[11] Abiodun Alao and Comfort Ero, 'Cut short for taking short cuts: the Lomé peace agreement on Sierra Leone' (2001) 4(3) Civil Wars 117.
[12] Paul Richards, 'War and Peace in Sierra Leone' (2001) 25(2) The Fletcher Forum of Word Affairs 41.
[13] Lansana Gberie, 'Bringing peace to West Africa: Liberia and Sierra Leone' (2007) <https://www.africaportal.org/documents/2928/Bringing_Peace_to_West_Africa.pdf> accessed 19 August 2017, 65.
[14] Bright (n 1) 40.
[15] International Crisis Group, 'Sierra Leone: Managing Uncertainty,' Africa Report N°35 (Freetown/Brussels 24 October 2001), 2: "[The RUF's] commitment to the current process… *is fairly consistent with* [their] *track record of using peace agreements tactically to gain military respite and advantage*." [Emphasis added].
[16] See International Crisis Group, 'Sierra Leone: Time for a New Military and Political Strategy,' Africa Report N°28 (Freetown/London/Brussels 11 April 2001).
[17] Bright (n 1) 39.

overly generous to the RUF leader Foday Sankoh, and assumed he would be able to exercise a sufficient degree of centralised control over the rebels.[18] This assumption proved to be "tragically flawed," and "[t]he inconsistencies of the RUF leader in word and deed were largely responsible" for the agreement's difficult implementation.[19] The insistence on using Sankoh as a means to resolve the conflict—despite the evidence to suggest this would not work—reveals that certain provisions within the agreements themselves were "defective," and could not be expected to work.[20] This once more validates Gopalan's claim that a lack of attention to agreement design has seen the repetition of the same features in agreements, despite the evidence of failure in previous instances,[21] and "underscores the importance of looking again at the process and outcome of past accords."[22] If we are to garner some kind of positive lesson from "the tragedy of Sierra Leone,"[23] then a reflection on the principal outputs of its troubled peace process is necessary.

An in-depth analysis of the process's principle agreements—the Abidjan Accord, the Conakry Peace Plan and the Lomé Accord—points to structural flaws within the agreements themselves, which were ultimately unsuccessful despite incorporating an arsenal of accepted transitional justice mechanisms and post-conflict processes.[24] One such feature is the idea of 'power-sharing,' which emerged in the immediate post-Cold War era "as a standard mechanism for rebuilding sharply polarised societies and those torn by wars, most of which have turned out to be unwinnable and of doubtful ideological pedigree."[25] In their analysis of power-sharing in the Sierra Leonean context, Binningsbø and Dupuy cite conflicting authorities as to whether power-sharing contributes to sustainable peace,[26] or "on the contrary," to renewable cycles of violence.[27] They argue, in turn, that the Sierra

[18] ibid at 40.
[19] ibid.
[20] Alao and Ero (n 11) 117.
[21] Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55(2) Buffalo Law Review 403, 404-405.
[22] James A Obita, 'Foreword' in Lord (n 1) 9.
[23] Pham (n 5) 145-146.
[24] Emily E Bartholomew, 'Constructing Durable Peace: Lessons from Sierra Leone' (2007) 38 California Western International Law Journal 117, 121.
[25] Yusuf Bangura, 'Reflections on the 1996 Sierra Leone Peace Accord' United Nations Research Institute on Social Development (16 February 1999).
[26] Caroline A Hartzell and Matthew Hoddie, *Crafting Peace. Power-Sharing Institutions and the Negotiated Settlement of Civil Wars* (Pennsylvania State University Press 2007) in Helga Malmin Binningsbø and Kendra Dupuy, 'Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone' (2009) 44(3) Africa Spectrum 87, 88.
[27] Denis M Tull and Andreas Mehler, 'The Hidden Costs of Power-Sharing: Reproducing Insurgent

Leonean experience "is a crucial case when it comes to understanding the relation between power-sharing and peace."[28]

The Sierra Leonean example also offers a unique opportunity to acutely highlight the importance of economic provisions in peace agreements—a dimension that is particularly relevant to each of the case studies analysed in this thesis. Aning and Atuobi posit that provisions that directly address economic issues give the warring parties the opportunity "to contribute to the successful implementation of peace agreements and the peace building processes that follow" by tackling those factors that are conducive to conflict.[29] However, in their analysis of the economic dimensions of peace agreements in Liberia, Sierra Leone and the Ivory Coast, they conclude that "economic issues, including the illegal exploitation of natural resources to finance conflicts, were not given serious attention."[30] This is despite the fact that "the region has experienced years of violent conflict, the causes and sustenance of which have included both the management and the looting of natural resources."[31] Neither the economic inequalities that fuelled the conflict nor the illegal exploitation of natural resources by the warring factions were appropriately addressed during the peace process in Sierra Leone. The Lomé agreement did, however, address the importance of natural economic resources and their centrality to the conflict, and provided for a manner in which those resources could be managed in its aftermath. Both Aning and Atuobi contend that this was a "critical measure" in the Lomé agreement, and argue accordingly that Sierra Leone "therefore provides a useful template for addressing economic issues in peace agreements in West Africa."[32] This analysis bears important lessons in that regard, both for the management of such resources in similar conflicts, and for the purpose of comparison with the case studies explored herein.

In many ways, "Sierra Leone is a test case for international responses to disorder and the consequences of state collapse elsewhere,"[33] and as such, it is at the centre of this project's aims of learning from the failures of the past and applying

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Violence in Africa,' (2005) 104 (416) African Affairs 375 in Binningsbø and Dupuy (n 26) 88.
[28] Binningsbø and Dupuy (n 26) 88.
[29] Kwesi Aning and Samuel Atuobi, 'The Neglected Economic Dimensions of ECOWAS's Negotiated Peace Accords in West Africa' (2011) 46(3) Africa Spectrum 27, 28.
[30] ibid at 40.
[31] ibid at 29.
[32] ibid at 40.
[33] Will Reno, 'No Peace for Sierra Leone' (2000) 27(84) Review of African Political Economy 325, 328.

those lessons to contemporary conflicts. As a case study, it facilitates debate on the role that international law can play in such instances, and serves as an interesting counter-argument for those "who increasingly doubt that civil wars can be resolved through negotiations."[34] Indeed, writing in 2005, Pham noted that "in discerning the way forward through the tangled thickets of the years ahead," a reflection upon the pursuit of peace in Sierra Leone "and the-for once-forceful and perseverant international response that turned the tide might indeed be salutary."[35] That kind of reflection is even more necessary over a decade later as we look for novel ways to resolve increasingly porous interstate conflicts with a myriad of armed groups with diminishing respect for the rule of law.

6. II. HISTORICAL CONTEXT

6. II. A. COLONIZATION & INDEPENDENCE

The modern-day republic of Sierra Leone is rooted in the efforts of British philanthropists who established a colony on the West African coast in 1789 as a haven for emancipated black slaves. From this settlement, the state of Sierra Leone slowly emerged over the next 150 years, making the country one of the oldest modern polities in Africa.[36] In order to assert control, the British used parochial tribal networks as local government units, thus inadvertently encouraging the development of a patron-client system of governance whereby those "at the top end of the chain needed to keep the chiefs and 'big men' on board by supplying them with resources and favours."[37] This patron-client system of governance persisted post-independence, cultivating the social inequalities and gross disparities in wealth that became at least one of the factors fuelling conflict in Sierra Leone in the 1990s.

In the wake of World War II, a desire for self-determination and a demand for independence swept across much of Africa. Britain was acutely aware of "these new realities,"[38] and began to devolve more and more power to the Sierra Leonean people, culminating with independence in 1961. The nation's "push for independence was rather muted," with "more parochial matters, such as chieftaincy

[34] ibid.
[35] Pham (n 5) 145-146.
[36] Pham (n 5) 129.
[37] David Harris, *Sierra Leone: A Political History* (Hurst & Company 2013) 46.
[38] ibid at 33.

and elite divides" dominating the agenda, much to the detriment of the bigger goals of nation and state-building.[39] Indeed, Harris argues that the Westminster-styled parliamentary democracy that Sierra Leone inherited from Britain "had already been thoroughly compromised in its reliance on 'traditional' authorities to pacify the hinterland."[40] The post-colonial state that emerged was not an all-inclusive nation built on a shared understanding of identity and culture, but "a politically and economically over-centralised, institutionally weak, somewhat patronising and numerically restricted regime."[41] Thus, as Pham notes, while Sierra Leone's descent "into state failure and civil war may have come slowly over several decades," the seeds of its destruction were rooted in its origins and the decline was steady.[42]

In 1967, Siaka Stevens' All Party Congress (APC) defeated the incumbent Sierra Leone People's Party (SLPP), which had led the country since independence six years previous. Stevens, however, was prevented from taking power by a military coup that attempted to preserve the SLPP's leadership. The attempt was overthrown by another coup instigated by junior officers in the Sierra Leonean army (SLA) just 48 hours later, which itself gave way to an interim military regime. This rapid turn of events signified "the emergence of the military as a force too-often ready to interfere in Sierra Leone's politics,"[43] another insidious element of the state apparatus that would play a key role in its civil war. When Stevens was restored to power in 1968, he used the political instability to transition Sierra Leone to a one-party state. Stevens styled the state as his own "personalised dictatorship,"[44] which placed him at the centre of a patron-client system that "increasingly starved the formal state of resources."[45] Perhaps most notably, Stevens disempowered the key organs of the state apparatus, including the legislature, the civil service, and crucially, the police and the military, thereby "disabling agencies of restraint and institutions for conflict management."[46] It was in this environment that the proximate causes of war—"economic decline and poverty, high youth unemployment, violations of the rule of law, government dysfunction, rural isolation, and regional and ethnic grievances"—

[39] ibid at 45.
[40] ibid at 31 [original citations omitted].
[41] ibid at 31.
[42] Pham (n 5) 143.
[43] Lord (n 1) 79.
[44] Victor AB Davies 'Sierra Leone: Ironic Tragedy' (2000) 9(3) Journal of African Economies 349, 351.
[45] Harris (n 37) 71.
[46] Davies (n 44) 351.

flourished.[47]

However, Stevens' despotic rule did not go unchallenged. From 1977 onward, Stevens' regime faced increasing public pressure from students at Fourah Bay College in Freetown, which became a seedbed for anti-government sentiment throughout the following decade.[48] Some scholars argue that the foundations of the RUF lie in this environment, where youths were either brutalised at the hands of APC security forces or radicalised by anti-APC sentiment.[49] Indeed, many of the radical students expelled from Fourah Bay found their way to Libya, where they received support for an anti-APC revolution.[50] By 1987, these would-be founders of the RUF were actively recruiting students and alienated youths to their cause.[51] The tragedy of these youths lies in the "salient political message" they expressed prior to their militarization: "they were dissatisfied with APC government corruption, the elite's exploitation of Sierra Leone's military wealth, and the inaccessibility of the urban economy."[52] While this message was somewhat compromised by a wave of indiscriminate violence, these philosophical beliefs continued to fuel the RUF's sense of victimhood and apathy for the state throughout the conflict that was to come.

6. II. B. THE RUF: PEDAGOGY AND PRACTICE

Initially rallying under the banner of 'No More slaves, No More Masters. Power and Wealth to the People,' the RUF's populist message gained traction with those "who were confronted with terrible social and economic conditions and lacked any means of changing the situation politically."[53] For many young followers, the RUF's promise of free education and health-care[54]—basic services long neglected by the APC government—was an immediately more attractive option than unemployment and poverty. As a result, "there was no shortage of potential recruits initially and the organisation's ranks were soon swelled by idle and violent youths

[47] ibid.
[48] Davies (n 44) 357-358 [original citations omitted].
[49] Harris (n 37) 70.
[50] Davies (n 44) 357-358 [original citations omitted]. Guerrilla training camps had been set up in Libya to espouse Gaddafi's *Green Book* pan-African ideology and militancy.
[51] ibid.
[52] Bartholomew (n 24) 144 [original citation omitted].
[53] Andrew M Dorman, *Blair's Successful War: British Military Intervention in Sierra Leone* (Ashgate Publishing Group 2009) 37.
[54] Pham (n 5) 132.

from Freetown's slums."[55]

The RUF's ranks also swelled due to the number of youths forcibly recruited by Sankoh and his followers. Loyalty was often ensured through fear, and the effects of drugs and alcohol, which were readily provided to child soldiers. Other particularly young recruits had nowhere else to go. But the RUF's ideology had a potent effect of its own on disillusioned youths. Young abductees from the rural fringes of Sierra Leone, "accustomed to being looked down upon by a distant urban elite," found relevance in a rebel movement that "analyzed Sierra Leonean politics in terms of a neglect of rural education...."[56] The APC's ongoing exploitation of the state apparatus in tandem with a depletion of the nation's living standards[57] merely provided an adequate backdrop against which the RUF could claim, at least ostensibly, that it was fighting "for a redress of the iniquities of Sierra Leonean society...."[58] Though the RUF did little to actually achieve a just redistribution of wealth, its revolutionary rhetoric managed to find resonance with "significant segments of the country's population."[59]

The RUF's attempts at managing the territory it gained highlight how its revolutionary programme did not translate into equality and prosperity in practice, however. The movement's 1995 pamphlet, 'Footpaths to democracy: Toward a New Sierra Leone,' contained some rhetorical references to "social justice and pan-Africanism,"[60] but it gave little indication of what sort of government would replace the incumbent APC. Unlike several other revolutionary groups—e.g., the Irish Republican Army in Northern Ireland and the Rwandan Patriotic Front in Rwanda—the RUF did not have a formal political wing until the conflict had been concluded, and the group was not politically styled as a "government-in-waiting" with cabinet positions and a clear plan of action.[61] In the absence of a clear political ideology or alternative model of governance, the group made no attempt to administer the territory it controlled, "except with cursory gestures such as the appointment of compliant chiefs."[62] No legitimate tax system was put in place for the provision of services, nor did the RUF attempt to win grassroots support by building "parallel

[55] Dorman (n 53) 37.
[56] Dorman (n 53) 37.
[57] Pham (n 5) 132.
[58] ibid.
[59] ibid at 145.
[60] Dorman (n 53) 37 [original citations omitted].
[61] Reno (n 33) 326.
[62] ibid.

political institutions."[63] Instead, the RUF sought to use the public state apparatus to pursue private aims, "to claim its prerogatives for personal gain."[64] Thus, as Reno notes, the RUF's idea of what constituted politics was not so different from that of the APC's.[65] Indeed, the military strategy of the RUF supports this argument. When the rebels began to make meaningful gains in the east of the country in the mid-1990s, they made certain to capture the region's key diamond fields in the process.[66] As the conflict waged on, the RUF's revolutionary programme was revealed to be tainted by the same corruption it supposedly opposed, and their campaign soon came to be perceived as one of "'greed' not 'grievance.'"[67] In time, the overtly revolutionary aims of the RUF were "jettisoned in favour of brutality against civilians and the looting of mineral resources (especially diamonds),"[68] and "the rebels themselves soon became a by-word for terror...."[69]

6. II. C. The Sierra Leonean Civil War

By the late 1980s, the general decline of the Sierra Leonean state was clear for all to see, "and basic utilities like electricity and water supply had virtually collapsed even in Freetown…."[70] Liberal economic reforms—originally introduced as austerity measures by the IMF and World Bank in 1977—were institutionalised as 'structural adjustment programmes' that continued to informalise and scale back the state apparatus. In no sector was this more apparent than the military. Austerity measures and neo-liberal conditionalities on aid had taken their toll on the armed forces, and by the early 1990s, the SLA lacked the capacity and infrastructure necessary to resist any form of invasion or insurrection.[71] With the military unable to protect the state's borders, and the state itself unable to assert itself effectively within those borders, the APC government became "a virtual sitting target awaiting its

[63] ibid.
[64] ibid at 327.
[65] ibid.
[66] Aning and Atuobi (n 29) 31.
[67] Richards (n 12) 49. Richards attributes this quote to the World Bank, which "tried to persuade itself that educational collapse, and armies of angry young men fighting… for want of better work, demonstrates a new economics of African war." For more, see Paul Collier and Anke Hoeffler, Greed and Grievance in Civil War (World Bank Policy Research Working Paper – 1999) <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2355> accessed 8 May 2017.
[68] ibid [original citations omitted].
[69] Pham (n 5) 132.
[70] Davies (n 44) 364.
[71] Harris (n 37) 81.

fate."[72] On 23 March 1991, the RUF—with the apparent support of Liberian warlord, Charles Taylor—invaded eastern Sierra Leone from positions in Liberia, sounding the death knell for the APC government and the beginning of the Sierra Leonean civil war.

By April 1992, SLA soldiers fighting the RUF advance had not been paid in three months.[73] On 29 April 1992, disgruntled young officers led by 27 year old Captain Valentine Strasser staged a military coup and installed a military government, the National Provisional Ruling Council (NPRC). Though the NPRC coup was allegedly regarded as a welcome development by the RUF,[74] the NPRC moved quickly against the rebels in order to reinforce their own legitimacy.[75] In the absence of an effective military force of its own, the NPRC employed non-conventional forces to counter the RUF threat. Local militias—known as *kamajors*, and based on traditional African hunters' guilds—had been set up voluntarily at the beginning of the conflict as "village self-defence groups, armed only with hunting rifles."[76] Unlike the conventional SLA units, the *kamajors* were not afraid to follow the RUF into the bush, thus countering the effectiveness of the rebels' guerrilla campaign as the war waged on. As their military successes against the RUF mounted, the burden of military defence was increasingly shifted on to these localised militias.[77] The NPRC also turned to mercenary groups, principal of which was the South Africa based Executive Outcomes (EO). In exchange for diamond mining contracts and a share in resource revenues,[78] EO were tasked with re-capturing the diamond and mineral mines and destroying the RUF's headquarters. Within two weeks of its arrival in March 1995, the technological superiority of EO had succeeded in pushing the rebel advance back into the country's interior, and following a major *kamajor* offensive (logistically supported by EO) in October 1996, the RUF headquarters were destroyed.[79]

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[72] Pham (n 5) 140.
[73] Gberie (n 13) 18.
[74] Chris Coulter, *Bush Wives and Girl Soldiers: Women's Lives Through War and Peace in Sierra Leone* (Cornell University Press 2009) 46.
[75] ibid [original citations omitted].
[76] Ellis (n 2) 37.
[77] Richards (n 12) 42.
[78] Dorman reports that Executive Outcomes was "guaranteed £840,000 in profits from the Kono diamond mines in return for clearing the RUF." William Fowler, *Operation Barras: The SAS Rescue Mission: Sierra Leone 2000* (Weidenfeld and Nicolson 2004) 40 in Dorman (n 53) 40.
[79] Ibrahim Abdullah, 'Bush Path to Destruction: The Origin and Character of the Revolutionary United Front/Sierra Leone' (1998) 36(2) The Journal of Modern African Studies 203, 228.

The military intervention by EO stalled the conflict for a time and allowed the normality of peacetime to return to Sierra Leone, so much so that civilian elections could take place in February and March of 1996. Elections produced a reputable President in the form of Ahmad Kabbah, a retired UN bureaucrat. Kabbah took up peace talks that would culminate with the Abidjan Accord in November of that year, "[b]ut, as subsequent events were to reveal, the signing of the agreement was one thing, its implementation quite another."[80]

6. III. THE AGREEMENTS

6. III. A. THE ABIDJAN PEACE ACCORD (1996)

The Abidjan Accord underscored a period of relative peace between 1996 and 1997.[81] However, the structural causes of conflict were not abated, nor adequately addressed by the agreement. Socio-political factors that pre-dated the Accord put a sustainable agreement "out of reach from the start,"[82] and ambiguities in the agreement's text, particularly regarding re-integration of RUF combatants and the delegation of peacekeeping duties, "rendered the Abidjan Accord a non-starter."[83]

Following initial talks in Abidjan in February 1996, Kabbah's government concluded a ceasefire agreement with the RUF. Talks continued throughout the summer of 1996, but despite the significant leeway given by the government, Sankoh's signature on the draft agreement was not forthcoming. Speaking before the UN General Assembly in New York, Kabbah ominously opined that Sankoh appeared "'to be unwilling to honour his commitment to sign the agreement, manufacturing several excuses to justify his prevarication.'"[84] Kabbah also warned "that RUF intransigence could lead to a 'full-scale resumption of the hostilities, given the current level of distrust between the two sides,'"[85] a fateful prediction that the Abidjan Accord did little to nullify. Eventually, the government consented to the expulsion of EO forces from the country, which some argue was the primary

[80] ibid.
[81] International Crisis Group, 'Sierra Leone: Time for a New Military and Political Strategy,' Africa Report N°28 (Freetown/London/Brussels 11 April 2001) 2.
[82] Bartholomew (n 24) 120 [original citations omitted].
[83] ibid at 120.
[84] Fifty-first Session of the UN General Assembly, 29th Plenary Meeting, A/51/PV.29 (10 October 1996) <http://www.un.org/ga/search/view_doc.asp?symbol=A/51/PV.29> accessed 8 May 2017.
[85] ibid.

objective that the RUF sought to achieve from the talks.[86] Sankoh finally signed the agreement on 30 November 1996, nearly 8 months after negotiations had begun and just before Kabbah's self-instated deadline of 1 December.

The Abidjan Accord begins with a call for "a total cessation of hostilities" and "the establishment and consolidation of a just peace."[87] A Commission for the Consolidation of Peace was to serve as a "verification mechanism responsible for supervising and monitoring the implementation of and compliance with all the provisions" contained in the agreement.[88] The Commission was tasked with establishing and coordinating the expansive peacebuilding infrastructure set out under the agreement, but its means to do so was not expressly stated. The Commission appeared to lack any executive, legislative or legally binding power, and the language mandating the institution was vague and inconsistent. The Commission had "the power to prepare preliminary legislative drafts," and "to recommend the preparation of enabling measures,"[89] but it lacked the authority to legally bind the signatories in these regards. The signatories "undertake to comply with the conclusions of the Commission," or "undertake to consult the Commission before taking decisions on measures relating to the present Peace Agreement."[90] Thus, the declarations of the Commission remained dependent on the continued good will of the signatories in an environment where trust and security concerns have not been guaranteed.

Many of the Abidjan Accord's more practical provisions addressed the issues of disarmament, demobilization and reintegration, though the extent to which these complex processes were mapped out was left wanting. The Accord provided that disarmament would begin upon the combatants' entry into "designated assembly zones," which were not identified under the agreement.[91] The processes of demobilization and reintegration were to begin "as soon as practicable thereafter,"[92] under the supervision of a Neutral Monitoring Group comprised of international

[86] Harris (n 37) 105.
[87] Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front (RUF/SL) (Abidjan Accord) Articles 1 and 2 respectively, <http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_961130_PeaceAgreementSierraLeone-RUFSL.pdf> accessed 19 August 2017.
[88] ibid, Article 3.
[89] ibid at Articles 4 and 3, respectively.
[90] ibid.
[91] ibid at Article 5.
[92] ibid at Article 5.

monitors.[93] However, the scope of its mandate and its powers were penned ambiguously, as the monitors were not expressly identified in the agreement, and had yet to be drawn from the broadly defined "international community."[94] As part of the demobilization manoeuvres, surplus SLA units would be confined to barracks, and EO forces would be withdrawn from Sierra Leone within five weeks of the deployment of the Neutral Monitoring Group.[95] Article 12 on the withdrawal of EO is notably more precise than many other articles throughout the Abidjan Accord, lending credence to Harris' claim that the expulsion of EO forces from Sierra Leone was what the RUF sought most of all from the Accord.[96]

The Accord's provisions on reintegration evidenced a rather casual approach to one of the most significant concessions granted by the government to the RUF: the promise of livelihoods in policing, military and civil capacities.[97] The provisions on reintegration were extremely vague, providing no disclaimer as to how it would not be possible to assimilate all RUF forces into the nation's military, nor any suggestion as to what would become of those ex-combatants that did not qualify for assimilation.[98] This is particularly striking when one considers that reintegration outside of the policing and military sectors is not adequately addressed anywhere else in the Abidjan Accord.

Regardless, the Abidjan Accord does attempt to supplement political processes and address the populist elements of the RUF's basic ideology. The RUF is granted freedom of the press and access to the media, as well as freedom of assembly and expression, so as to "ensure the full and unrestricted participation of the RUF/SL in the political process…."[99] The parties also appeal to the international community for funds that will enable the RUF to transform itself into a political party.[100] To further facilitate RUF participation in Sierra Leonean society, "and to promote the cause of national reconciliation," the Accord grants an amnesty "in respect of *anything* done by [the RUF] in pursuit of their objectives as members of that

[93] ibid at Article 8.
[94] ibid, Article 11.
[95] ibid, Article 10 and 12, respectively.
[96] Harris (n 37) 105.
[97] Gberie (n 13) 23: In October 1996, President Kabbah told the UN General Assembly of Sankoh's willingness to sign a peace agreement after the government had promised "jobs to the RUF leader and his followers, including their absorption into the army, the police and other government institutions."
[98] Abidjan Accord (n 87) Articles 9 & 10 respectively.
[99] ibid, Article 19.
[100] ibid, Article 17.

organization."[101] Similarly, Article 19 provides that "*All* political prisoners and prisoners of war" shall be released.[102] Inherently controversial due to the particularly brutal nature of the conflict in Sierra Leone, amnesty provisions became a staple of all of the peace agreements that emerged from the country, though their role in sustaining processes of peace—and/or denying access to justice—is a matter of fervent academic debate.

The Abidjan Accord also makes notable attempts to address the systematic corruption that catalysed the state's descent into conflict and fuelled the RUF's populist appeal. Article 16 acknowledges Sierra Leone's modern history of corruption, and proposes an office of Ombudsman to promote the accountability of public services.[103] However, the provision is notably low on precision, and relatively low on obligation. It is unclear what powers the office should have, or how the office of Ombudsman is to be comprised. Similarly, Article 18 acknowledged the history of electoral corruption in Sierra Leone and vowed to reform present electoral processes through a National Electoral Commission.[104] However, the composition of the Electoral Commission was postponed to a later date. As these provisions are notably lacking in precision and low on obligation, they do little to alleviate the root causes of corruption in Sierra Leone, and in a state in the midst of collapse, they do less still to inspire radical change in the country's governance structures.

Elsewhere, the Abidjan Accord addresses the "socio-economic dimension to the conflict which must also be addressed in order to consolidate the foundation of peace."[105] To this end, the Accord sets out a number of guiding principles that will inform the socio-economic policy of the country, "taking into account available resources."[106] Many of these 'principles' attempt to alleviate the root causes of the conflict in Sierra Leone: economic mismanagement, systematic corruption, exploitation of natural resources, and an idle, "marginalized youth easily prone to violence given their alienation from traditional societal restraints."[107] Yet, in the absence of more precise provisions, these principles are only 'guiding,' not binding.

[101] ibid, Article 14 [emphasis added].
[102] ibid, Article 19 [emphasis added].
[103] ibid at Article 16.
[104] ibid, Article 18.
[105] ibid, Article 26.
[106] ibid, Articles 22 & 26. Under Article 22, the parties pledge to source resources for socio-economic development programmes internationally, while Article 26 states the parties' intention to obtain debt relief in order "to meet the urgent requirements of rebuilding a war-torn society."
[107] Pham (n 5) 137 [original citations omitted].

This language does not suggest that the principles are high on the obligation matrix. Though several human rights and economic rights instruments are referenced throughout the agreement,[108] they are not explicitly recognized as guiding frameworks for the resolution of socio-economic issues. Furthermore, the agreement's provisions for addressing these root causes are entirely dependent on uncertain funding sources.[109] When coupled with the fact that the Abidjan Accord's plan for economic reconstruction already had to take available resources into account, it did not amount to an entirely reliable nor sustainable method of addressing the conflict's root causes.

The agreement does boast some particularly noteworthy sections however. The Abidjan Accord's provisions on human rights are quite strong, perhaps as a result of the gross human rights violations that characterised the conflict in Sierra Leone. The agreement guarantees the rights set out in the Universal Declaration of Human Rights and the African Charter on Human and People's Rights,"[110] giving those rights hard law effect in accordance with the 1991 Constitution.[111] To ensure protection of these rights, the Accord called for the establishment of a National Commission on Human Rights with "the power to investigate human rights violations and to institute legal proceedings were appropriate."[112] The Commission on Human Rights was not further elaborated upon, though it seemed that its functions would be heavily dependent on "technical and material assistance" from the UN and the African Commission on Human and People's Rights.[113] The Commission did not get an opportunity to carry out its mandate due to "the speedy collapse of the Abidjan Accord,"[114] but many of the provisions pertaining to human rights and international humanitarian law were carried over to the Lomé Accord. This suggests that stakeholders considered strong human rights guarantees to be

[108] Under the African Charter on Human and People's Rights (which Sierra Leone ratified on 21 September 1983), the state was obligated to acknowledge the right to work; to education; to free disposal of the wealth and natural resources of the state; and to economic, social and cultural development. This arguably added a greater sense of obligation to the provisions of the Abidjan Accord.
[109] Abidjan Accord (n 87) Articles 22 and 26(iii)(j).
[110] ibid, Article 19.
[111] Sierra Leone ratified the African Charter on Human and People's Rights on 21 September 1983, and the 1991 Constitution gives effect to many of its core provisions. The state acceded to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 23 August 1996, and so these treaties applied domestically when the Abidjan Accord was signed.
[112] Abidjan Accord (n 87) Article 20.
[113] ibid.
[114] Gberie (n 13) 25.

central to a sustainable peace process.

The Abidjan Accord concludes with the proviso that the Ivory Coast, the UN, the Organisation of African Unity (OAU) and the Commonwealth "shall stand as moral guarantors that this Peace Agreement is implemented with integrity and in good faith by both parties."[115] Given the ambiguous role of a 'moral guarantor,' it is perhaps unsurprising that the agreement was neither negotiated nor implemented in good faith. The RUF was slow to disarm in accordance with the agreed schedule, and the process "was handicapped by poor planning, corruption, mismanagement, and lack of funds."[116] Despite a general ceasefire in March 1996, RUF attacks on villages and road traffic continued during negotiations,[117] prompting devastating responses from EO and government forces.[118] Following the conclusion of the Abidjan Accord, the ceasefire was not firmly re-established, by January of 1997, the RUF was accusing the government of waging all-out war against it.[119] Many of the key aspects of the Abidjan Accord were not implemented, "except that in February 1997… in mistaken expectation of the imminent arrival of a UN force, the contract with Executive Outcomes was terminated."[120] Owing to the absence of a conventional disciplined and well-trained national army, the withdrawal of EO created a vacuum that opportunistic parties soon moved to fill. Three months to the day after EO departed Sierra Leone, the ill-disciplined SLA—which had been largely neglected in the efforts to contain the RUF—mutinied,[121] overthrowing Kabbah's democratically elected government, and bringing an end to the Abidjan Accord.

While the Abidjan Accord committed many good standards and principles to paper, an analysis with the benefit of hindsight reveals several fatal flaws that hastened the agreement's premature collapse. For the most part, the Abidjan Accord is a substantively ambiguous document, leaving many procedural aspects to be clarified at a later point in time. For example, the composition of the Commission for the Consolidation of Peace—the body bearing chief responsibility for implementation of the agreement—was not detailed under the agreement, other than that it would "comprise representatives of the Government and the Revolutionary

[115] Abidjan Accord (n 87) Article 28.
[116] Gberie (n 13) 25.
[117] ibid at 23.
[118] Richards (n 12) 44-45.
[119] Gberie (n 13) 25.
[120] Harris (n 37) 105.
[121] Pham (n 5) 142.

United Front of Sierra Leone."[122] Similar imprecisions plagued the Demobilization and Resettlement Committee, the National Electoral Commission, and the broad-based Socio-Economic forum. Such a lack of detail increased the likelihood of post-agreement conflict by broadening the scope for misinterpretation and disagreement. By neglecting to explicitly provide for the appointment of individuals to any of these bodies, the parties jeopardized these bodies as long-term forums for non-violent conflict resolution.

Delaying the discussion of more substantive issues until the post-agreement stage also allowed the security situation to deteriorate in the meantime. The articles on disarmament and demobilization perhaps best exemplify this counter-productive strategy. By postponing the identification of appropriate assembly zones for the disarmament of combatants to a later date, the Abidjan Accord preserved an unstable and uncertain security situation that might have been somewhat abated had the assembly zones been discussed as part of the negotiations and incorporated into the agreement. The failure to identify neutral third-party monitors further destabilized the agreement during implementation. The agreement did not explicitly establish that the neutral monitors would in fact be UN 'blue helmets,' opting instead to clarify this detail at a later date. This omission was critical, as Bartholomew argues that the provision of UN monitors would have been a deal breaker for Sankoh, who "'was perennially suspicious of the UN.'"[123] Omitting to identify the neutral monitors as UN personnel in order to circumvent Sankoh's concerns merely postponed the inevitable disagreement on the issue to a later point, and heightened tensions around the demobilization process. Such imprecision allowed the Abidjan Accord to be presented as an agreement born of consensus, when in reality, many of the more contentious aspects had yet to be clarified post-agreement.

Similar imprecisions and vagaries plagued the issue of reintegration and the provision of jobs for ex-combatants. Under the Abidjan Accord, the framework for the assimilation of ex-combatants and RUF members into the SLA was not explicitly set out, but was left to be clarified by the Commission for the Consolidation of Peace.[124] Such uncertainty was not likely to assuage the RUF recruits who were seeking post-conflict livelihoods, nor the SLA soldiers whose already-uncertain

[122] Abidjan Accord (n 87) Article 3.
[123] Bartholomew (n 24) 148 [original citations omitted].
[124] Abidjan Accord (n 87) Article 9.

livelihoods would be threatened by the prospect of RUF and *kamajor* assimilation. The Abidjan Accord made several token references to the reintegration of combatants in civilian society,[125] but the agreement did not identify any particular programmes that would achieve this. Bartholomew argues that the uncertainty around reintegration opportunities was particularly damaging to the prospect of sustainable peace, because "RUF member inclusion (such as opportunities to participate in the urban economy) was of paramount concern for the rebels since the outset of the conflict."[126] Imprecision thus increased the likelihood of misunderstanding among the former combatants,[127] which had further negative effects on issues of trust and security.

One such negative effect becomes quite clear when one compares the language used in the articles on reintegration to those on demobilization and disarmament. The provisions on the reintegration of former combatants are severely lacking in precision and substance, void of any method or timeframe for the creation of employment opportunities. The articles pertaining to the disarmament and demobilization of RUF combatants, in contrast, are quite detailed, even by the general terms of the Abidjan Accord. The agreement's primary purpose thus appears to be moving the 'defeated' RUF soldiers into designated assembly zones, rather than providing them with alternative livelihoods once peace is achieved. This arrangement cannot have assuaged legitimate security concerns for ex-RUF combatants. The unilateral focus on demobilizing the rebels "likely increased RUF anxiety and, by extension, the likelihood of future hostilities."[128] Of course, one can accept that issues surrounding demobilization and disarmament are a more pressing peacetime necessity, and that the provisions on demobilization were duly drafted more precisely with short-term objectives in mind. However, it is the sum of the Abidjan Accord's imprecise parts—and how these various parts relate to each other—that left the agreement lacking in detail and in good faith. Without such characteristics, assuaging security and trust concerns becomes very difficult indeed.

As a result of the many imprecisions that litter the Abidjan Accord's key provisions, the agreement was made overly reliant on an inflated bureaucracy that

[125] ibid at Article 26(iii)(e), which provides for the provision of "job opportunities in a systematic and sustainable way for the people."
[126] Bartholomew (n 24) 148.
[127] ibid.
[128] ibid at 146-147.

failed to account for the accelerated decline of the Sierra Leonean state during the conflict. With the state on the brink of collapse, and the agreement lacking precisely worded provisions and concrete guarantees, who was going to guide the combatants through the complex process of making peace? The Abidjan Accord is silent on this question. The 'moral guarantors' appointed under Article 28 are not granted any substantive power, and their role in ensuring that the agreement "is implemented with integrity and in good faith by both parties" appears to re-emphasise a moral, as opposed to legal, role.[129] Indeed, in a later judicial finding on a similar provision in the Lomé agreement, the Special Court for Sierra Leone found that moral guarantors did not assume any legal obligation by virtue of their role. Instead, they were to ensure the compliance of the RUF, who, as a non-state actor, had no legal standing within Sierra Leone.[130] The Abidjan Accord thus remains low on substantive delegation provisions, which is surprising given the vulnerable condition of the state at the time, and the ambitious programme for peace that the agreement set out to achieve.

In the absence of clearly identified and explicitly empowered third-parties, the term 'international community' is often used throughout the Abidjan Accord as a means to feign a feasible peace-making strategy. This is exemplified by the Abidjan Accord's ambitious provisions on funding the peace process, which made the agreement reliant on an uncertain amount of funding that had yet to be raised from international donors. This was a potentially disastrous oversight that was repeated in relation to the provision of unidentified monitors for the demobilization process. Article 26 of the agreement seems to recognize this, providing that the government's socio-economic policy will have to take "available resources… into account."[131] This disclaimer devalues the obligations undertaken by the government to address some of the root causes of the conflict, and reiterates Richards' claim that neither party appeared sincere in negotiating the Abidjan Accord.[132]

The Abidjan Accord does feature several peacebuilding standards and guiding principles, however, some of which further support the correlation between certain legal provisions and agreement sustainability. The provision of strong human

[129] Abidjan Accord (n 87) Article 28.
[130] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (2004) SCSL-2004-16-AR72(E) 546, 557 §41.
[131] Abidjan Accord (n 87) Article 26.
[132] Richards (n 12) 44-45.

rights guarantees complements other peace-making mechanisms set out elsewhere in the Abidjan Accord – most notably the provisions on amnesty, national unity and reconciliation,[133] and the provision of participatory measures as a feature of the agreement.[134] Yet despite the potential for sustainable peace that these provisions bore, they were let down by the sum of the Abidjan Accord's parts. In the absence of more elaborate guarantees, the agreement's provisions on participation amount to little more than token rhetoric. The imprecision that plagued the agreement's text failed to assuage legitimate trust concerns in the immediate aftermath of its conclusion, thereby failing to establish a stable security situation in which the institutions charged with peacebuilding and conflict transformation could flourish.

Following an informed historical analysis some 20 years after the agreement's conclusion, the Abidjan Accord now appears low on precision, obligation and delegation. Though it employed many of the concepts associated with a sustainable peace process, the Abidjan Accord was born into an extraordinarily unstable environment that the agreement's imprecise text did little to change. In failing to precisely provide for these often sensitive and contentious issues, many of the agreement's finer details were delegated to weak institutions that were not mandated with enough specificity to weather a resumption of hostilities. Such a critical shortcoming reiterates the importance of precision in sustaining peace agreements, but also highlights the unique challenges of legalized peace agreements. In wording these agreements in a precise manner, there is a need to strike a balance between short-term objectives, which can be precisely provided for, and long-term goals, which may require more flexibility. The Abidjan Accord failed to adequately achieve its short term objectives (e.g., a cessation of hostilities, followed by demobilization and disarmament), which made the more long-term commitments an impossibility.

With regard to obligation, the Abidjan Accord employs weak and often inconsistent language in relation to the signatories' commitments. In "undertaking to comply" with the decisions of the Commission for the Consolidation of Peace, the agreement's text implied that the parties were merely taking part in the peace process on the basis of their own good faith. However, an agreement cannot be implemented on good faith alone when serious security concerns and trust deficits divide the

[133] Abidjan Accord (n 87) Article 14 and 15.
[134] ibid, Articles 14 and 19, respectively.

former combatants. When the implementation of the agreement became bogged down, and the guarantees provided for by the agreement were not forthcoming, the rebels—whose role in the implementation of the Abidjan Accord was dependent on the process moving forward—were free to reject the obligations that they freely 'undertook' as per the agreement. Similarly, many of the obligations undertaken by the government of Sierra Leone were accompanied by disclaimers or limitations that substantially undermined the weight of the obligation that the government was agreeing to. For example, the government's unambiguous obligation to withdraw its units to barracks was subject to "the security needs of the country."[135] Similarly, the principles that are to guide the government in formulating socio-economic policy must take "available resources" into account,[136] thus rendering many of these obligations merely rhetorical. If the implementation of the ambitious Abidjan Accord was to be primarily undertaken by the Sierra Leonean government, the agreement should have been much more obligating, thereby decreasing the scope for "wiggle room to make excuses"[137] and the reason for good faith alone.

Finally, as with many aspects of its text, the Abidjan Accord is wholly imprecise with regard to delegation. This is a critical flaw for an agreement that is so dependent on the assistance of the 'international community.' Particularly sensitive issues, such as the demobilization, disarmament and reintegration aspects of the agreement—which arguably formed the backbone of the Abidjan Accord—were written with the international community in mind, but the agreement did not explicitly identify the actor that would provide the monitoring envisioned under these provisions. This only broadened the scope for mistrust and disagreement further down the line.[138] Similarly, the provisions on donor funding and socio-economic development are overly reliant on the generosity of the international community. The limitations that the agreement imposed on the government's post-conflict socio-economic policy could have been avoided had the agreement not so loosely delegated the issue of funding to as uncertain an actor as 'the international community.'

A final key omission with regard to delegation concerns the expulsion of EO

[135] ibid.
[136] ibid, Article 26.
[137] Sandeep Gopalan, 'India-Pakistan Relations: Legalization and Agreement Design' (2007) 40 Vanderbilt Journal of Transnational Law 687, 693.
[138] Nowrot and Schabacker (n 8) 326-327.

from Sierra Leone. EO's intervention had bolstered an ill-equipped SLA, pushed the RUF back, and brought Sankoh to the negotiating table.[139] Having failed to provide for an organisation that would be capable of replacing EO and securing the Sierra Leonean state, the Abidjan Accord failed outright once EO withdrew and good faith was no longer enough to hold the agreement together. It was not until the intervention of another external military power, the Economic Community of West African States (ECOWAS), that another peace plan could be put forward.

6. III. B. THE CONAKRY PEACE PLAN (1997)

The government's pivot towards EO and *kamajor* units fostered the belief among SLA soldiers "that the threat of elimination of the army as an institution was real."[140] Seizing upon the security vacuum created by EO's departure, these disgruntled SLA elements moved against Kabbah's government and openly revolted on 25 May 1997. The rogue elements established a military junta, known as the Armed Forces Ruling Council (AFRC), and appointed Major Johnny Paul Koroma as its head. Major Koroma had previously fought the RUF on the frontlines of the civil war, but was subsequently imprisoned for his part in an attempted coup. Somewhat sympathetic to the populist message propagated by the RUF,[141] he immediately invited the rebel group to partake in a power-sharing arrangement in Freetown.

The coup was met with outright opposition and criticism from its inception, however. In a country where political upheaval was not unusual, Abraham labelled the AFRC's junta as "the most unpopular coup ever staged in the history of Sierra Leone."[142] The OAU, whose annual summit meeting occurred just days after the coup, granted a mandate for the restoration of the legitimate government for the first time in its history.[143] The OAU appealed to the geopolitical bloc ECOWAS "to assist the people of Sierra Leone to restore constitutional order to the country" and to "implement the Abidjan Agreement which continues to serve as a viable framework

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[139] Pham (n 5) 142.
[140] Position Statement of the SLA and AFRC (18 September 1999) in Arthur Abraham, 'Dancing with the Chameleon: Sierra Leone and the Elusive Quest for Peace' (2001) 19(2) Journal of Contemporary African Studies 205, 215.
[141] Binningsbø and Dupuy (n 26) 90.
[142] Abraham (n 140) 216.
[143] Decisions adopted by the Sixty-Sixth Ordinary Session of the Organization of African Unity's Council of Ministers (28-31 May 1997) <https://au.int/web/sites/default/files/decisions/9622-council_en_28_31_may_1997_council_ministers_sixty_sixth_ordinary_session.pdf> accessed 10 May 2017.

for peace, stability and reconciliation in Sierra Leone."[144] ECOWAS responded to its mandate by deploying its military monitoring group, ECOMOG, which forced the AFRC junta to the negotiating table in July 1997. However, negotiations hit a snag when Koroma announced a transitional programme for government that would see the AFRC in powers for four years.[145] After further talks in Conakry in October 1997, the parties eventually agreed to a six month transitional agreement.

Bartholomew argues that Conakry Peace Plan is evidence of the lessons learned from the failures of the Abidjan Accord, citing the provisions on reintegration and peacekeeping as more detailed variations on the issues that had left the previous agreement open to misinterpretation and dispute. Though Bartholomew notes that the Conakry Peace Plan is "comparatively sparse," she commends the agreement's short text for its "minimal preamble," and "functional quality."[146] Indeed, the preamble explicitly provides for identified peacekeepers and monitors and timeframes for implementation. Despite these improvements however, the Conakry Peace Plan would also fail "as a result of the parties' reciprocal mistrust and misunderstanding."[147] While this could be attributed to a lack of legal detail in the agreement's sparse text, it was more likely the result of ECOMOG's prominent and inherently political role in implementing the agreement, which could hardly be seen as impartial.[148]

The Conakry Peace Plan begins with a preamble that sketches out a six-point plan and a schedule for its implementation. Article 1 called for a cessation of hostilities with immediate effect.[149] In contrast to the Abidjan Accord, the Conakry agreement established a monitoring and verification regime that explicitly tasks ECOMOG and United Nations military observers with monitoring the ceasefire.[150] The ceasefire and verification mechanism was to come into force from the date of the agreement and continue until the termination of the peace plan in April 1998.

Article 2 sets out "a simple and uncomplicated procedure"[151] for the

[144] ibid.
[145] Abraham (n 140) 216.
[146] Bartholomew (n 24) 153.
[147] ibid at 120.
[148] Francis (n 4) 361.
[149] Economic Community of West African States six-month peace plan for Sierra Leone (Conakry Peace Plan), Annex II, Preamble, Article 1(a) <http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_971023_ConakryPeacePlan.pdf> accessed 19 August 2017.
[150] ibid, Annex II, Preamble, Article 1(b).
[151] ibid, Annex II, Elaboration of the ECOWAS Peace Plan, Article 2.

disarmament and demobilization of combatants. In order to effectively carry out these processes, a thirty day window was envisioned during which military personnel could report to designated centres "in order to be engaged in the disarmament process."[152] These centres were not explicitly identified under the Conakry Peace Plan, nor had they been under the Abidjan Accord. While the disarmament process was quite detailed in relation to scheduling and third-party monitoring, it was somewhat lacking with regard to obligation. The agreement recognized this, acknowledging that "incentives may have to be provided to encourage the voluntary participation of combatants in all this process."[153] Accordingly, disarmed combatants were to be provided "with either job training to fit them for alternative employment or given scholarship and grants for further education."[154] Education at all levels was to be made available to ex-combatants, and assistance to facilitate their reintegration into their communities would also be provided.[155] The agreement recognized that achieving these goals would be heavily dependent on funding from the UN, the OAU, ECOWAS "and indeed the international community."[156]

The provisions on reintegration reflect the shortcomings of the Conakry Peace Plan generally: the plan is ideal in the context of framework agreement, but imprecise in the context of implementing a comprehensive settlement. Economic rehabilitation and social reintegration were again made dependent on an uncertain amount of donor funding, yet the incentives for disarming prioritized former combatants in an environment where resources were very scarce indeed. The Conakry plan thus failed to take into account the opportunity cost for civilians and non-combatants who never took up arms against the state. The tension created by this situation could not serve as a long-term solution to the conflict, and would only infringe upon an effort to rehabilitate Sierra Leonean society.[157]

Humanitarian aid flow was subject to monitoring by ECOMOG and United

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[152] ibid.
[153] ibid.
[154] ibid, Annex II, Elaboration of the ECOWAS Peace Plan, Article 6.
[155] ibid.
[156] ibid, Annex II, Elaboration of the ECOWAS Peace Plan, Articles 6 and 7.
[157] See Paul Collier, V L Elliott, Håvard Hegre, Anke Hoeffler, Marta Reynal-Querol, Nicholas Sambanis, *Breaking the Conflict Trap - Civil War and Development Policy* (World Bank and OUP 2003) 179: "In some conflict situations civilians view combatants as robbers and rapists rather than as fighters for a just cause, and the provision of a higher level of reintegration support for ex-combatants than for other groups is likely to provoke negative reactions. [Demobilization, disarmament, and reintegration] activities therefore need to be designed as an integral part of the broader post-war recovery and peace-building process."

Nations military observers under the Conakry Peace Plan.[158] A mechanism to facilitate the flow of humanitarian assistance was to be set out "within the context of a Security Council resolution,"[159] but this was not forthcoming prior to the 14 November 1997 start date, nor the ultimate collapse of the plan in February 1998. The repatriation and resettlement of refugees and displaced persons was to begin on 1 December 1997, in conjunction with the United Nations High Commissioner for Refugees (UNHCR).[160] Despite the provision of these precise timeframes, however, the Conakry Peace Plan—like the Abidjan Accord before it—did not elaborate on how these objectives could be achieved. In omitting these details, these mechanisms assumed the existence of certain preconditions which the agreement did very little to create. For example, successfully repatriating refugees and delivering humanitarian assistance would require an assured ceasefire and the absence of ongoing fighting around the country. While the Conakry text provided for these conditions on paper, it did not provide for any confidence-building or cost-increasing measures that might have supported and encouraged the implementation of a ceasefire. Accordingly, the ceasefire was not strictly adhered to and the provisions on humanitarian and refugee assistance never materialised, despite their precise schedules.

The Conakry text recognized the restoration of President Kabbah's democratically elected government as "the heart of the ECOWAS peace plan."[161] The text recognized that "for an enduring peace to be restored," the development of "an all-inclusive government" must be ensured.[162] To that end, Article 5 set out a number of "power-sharing formulae," recommending "that the new Cabinet should be a cabinet of inclusion," and that civil service appointments should reflect the broad national character.[163] However, these recommendations are not unlike the guiding principles set out under the Abidjan Accord, and in the absence of a precise power-sharing formula, there is little detail as to how these changes can be ensured. Furthermore, as recommendations of an external actor (ECOWAS), these provisions remain subject to the approval of Kabbah's government, and are therefore low on obligation. Finally, Article 8 of the Conakry Peace Plan recognizes it as essential "that unconditional immunities and guarantees" be extended to all those involved in

[158] Conakry Peace Plan (n 149) Annex II, Elaboration of the ECOWAS Peace Plan, Article 3.
[159] ibid.
[160] ibid, Annex II, Preamble, Article 4.
[161] ibid, Annex II, Elaboration of the ECOWAS Peace Plan, Article 5.
[162] ibid.
[163] ibid.

the AFRC coup, with effect from 22 April 1998.[164] Despite the provision of amnesty and the recognition of the need for inclusion, President Kabbah's eventual restoration would be "marred by a personal desire for revenge."[165]

The Conakry Peace Plan is a very short text, bearing similarity to framework agreements that anticipate a more comprehensive settlement in the near future. The Joint Communiqué issued by both parties upon the conclusion of the Conakry negotiations seemed to recognize this, acknowledging the need "to continue negotiations towards effective and prompt implementation of the peace plan."[166] However, this was not to be the case. Within six weeks of the signing of the Conakry Peace Plan, the UN Secretary General was reporting on increased military activity around the country.[167] In February 1998, Koroma conceded "that the Conakry Agreement was not being implemented."[168] Events came to a head on 8 February, when an ECOMOG vehicle on patrol in east Freetown struck a landmine, "whereupon it came under concentrated fire from the junta forces."[169] Convinced that the AFRC had reneged on its commitment to the peace plan, ECOMOG launched a full-scale offensive and ejected the AFRC/RUF from Freetown on 15 February 1998. The Conakry Peace Plan had been cut short by a full two months. The remnants of the military junta retreated to Sierra Leone's dense interior, "excellent guerrilla country where fighting could continue indefinitely."[170] In the aftermath of the Conakry Peace Plan, the Economist correctly predicted that ECOMOG forces would soon find "that Freetown, on a peninsula, is easy to control, while the rest of Sierra Leone is a harder prospect."[171]

Under the legalization framework, the Conakry Peace Plan is medium on precision, obligation and delegation. The agreement's more precise language is immediately evident from the provisions on ceasefire monitoring and the demobilization of combatants, which explicitly identified UN military observers and

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[164] ibid, Annex II, Elaboration of the ECOWAS Peace Plan, Article 8.
[165] Abraham (n 140) 217. 34 military personnel were convicted of treason by court martial, and sentenced to death by firing squad. Though Kabbah commuted 10 sentences to life imprisonment, "the execution of 23 men and one woman which was carried out in a chaotic atmosphere of random shooting on October 19."
[166] Conakry Peace Plan (n 149) Annex I, Article 8.
[167] Nowrot and Schabacker (n 8) 403.
[168] ibid.
[169] Abraham (n 140) 216.
[170] 'Sierra Leone: Putting a country together again,' The Economist (19 February 1998) <http://www.economist.com/node/604308> accessed 19 August 2017.
[171] ibid.

ECOMOG units as the monitors for the respective processes. This is a crucial detail, given the fact that ambiguity in relation to third-party monitoring was one of the major stumbling blocks that brought about the downfall of the Abidjan Accord. In other instances, the Conakry Peace Plan is also a much more practical document than its predecessor. Instead of the incredibly ambitious programmes for socio-economic reconstruction and rehabilitation envisioned under the Abidjan Accord, the Conakry agreement proposed small-scale processes supported by incentives and functional programmes of implementation. Most striking of these is perhaps the provision on the reintegration of combatants. In contrast to the sparse provisions on the reintegration of ex-combatants in sectors other than the military under the Abidjan Accord, the Conakry Peace Plan set out a programme for training and re-education through grants and scholarships in order to incentivise the demobilization of combatants. The Conakry Peace Plan is thus more specific than the Abidjan Accord, not only as to *what* its primary objectives were, but as to *how* these objectives would be achieved. Though its short-term focus limits its applicability as a template for long-term peacebuilding, the Conakry Peace Plan's precision and pragmatism is instructive of how a peace agreement should transition from the immediate need to establish peace, to the more constitutive effort of reconstructing a state.

Indeed, Bartholomew argues that by drafting the agreement with a higher degree of precision than its predecessor, "the authors of the Conakry Peace Plan promoted compliance with this second peace agreement."[172] But that was not necessarily the case. Bartholomew identifies the provisions on third-party monitoring and the reintegration of ex-combatants as being particularly precise, but neglects the fact the ceasefire provided for under the Conakry Plan was not adhered to, despite being worded in a similarly precise manner. Thus, many of the promising provisions on the resettlement of refugees, the provision of humanitarian assistance and the reintegration of former combatants, never materialised despite their precise timeframes. The successful implementation of many of these sensitive provisions was dependent on a total ceasefire throughout the country, which the Conakry Peace Plan alone could not enforce. The reality of the situation was best summarised by the UN Secretary General, who concluded that the ultimate success of the peace process depended "on the creation of conditions that would enable the deployment of ECOMOG throughout the country and to begin the demobilization exercise as soon

[172] Bartholomew (n 24) 156.

as possible."[173] As later events would illustrate, these peaceful conditions could not be guaranteed nor enforced on the basis of the Conakry text alone, but ultimately by the forceful military intervention of ECOMOG in February 1998. This suggests that the precision in the Conakry Peace Plan did not count for much in the absence of more elaborate cost-increasing and/or confidence-building measures, which may have supported the implementation of the ceasefire. These omissions also highlight the potential downfalls of drafting a peace agreement in an overly functional manner. While the Conakry Peace Plan was highly commendable as an immediate solution to the political and humanitarian crisis that engulfed Sierra Leone at the time, its goal-oriented approach failed to consider the social and political nuances that created a situation of mutual mistrust around the implementation of the agreement.

Though the Conakry agreement is written through with language that entails legal obligation, there are several irregularities that limited the extent to which the agreement obligated its signatories. For the most part, the Conakry Peace Plan was a plan of action imposed upon the AFRC: many of the substantive obligations prescribed by the agreement were undertaken unilaterally by ECOWAS or ECOMOG, e.g., the supervision of demobilization, the monitoring of ceasefire violations, and the facilitation of humanitarian assistance. Thus, the Conakry Peace Plan was only high on obligation with regard to ECOWAS and its organs. There were very few, if any, provisions that explicitly obligate the AFRC or RUF. Indeed, the processes of demobilization and disarmament were incentivised under Articles 2 and 6 of the plan, implying that combatants are not compelled to disarm under the agreement—that they did so voluntarily. When these processes never materialized, it soon became clear that ECOWAS "lacked mechanisms for enforcing compliance or guaranteeing that parties to the conflict 'will be protected, terms will be fulfilled, and promises will be kept.'"[174]

This begs the question as to ECOWAS's suitability as a third-party actor in the conflict in Sierra Leone. The extensive grant of delegation afforded to ECOWAS and its monitoring organ under the Conakry Peace Plan could be interpreted as dooming the agreement to failure, "as ECOWAS was hardly perceived by the

[173] Second Report of the Secretary-General on the Situation in Sierra Leone (1997) UN Doc S/1997/958.
[174] Barbara F Walter, 'The Critical Barrier to Civil War Settlement: Demobilization, Democratization, and Commitment to Peace,' (1999) 24(1) International Security 127 in Francis (n 4) 361.

RUF/AFRC as an impartial mediator."[175] ECOWAS's active role in fighting the AFRC junta can only have contributed to the major trust deficit that existed between the signatories and prevented the implementation of the Conakry Peace Plan. As a unilaterally obligating peace plan with no explicit trust or confidence building measures, the Conakry agreement was not likely to survive in this environment on the basis of its text alone: ECOMOG's subsequent forceful restoration of President Kabbah is a testament to this.

As a footnote to this analysis of the Conakry Peace Plan, one must consider the legality of ECOWAS's military intervention under the terms of the agreement. Within the parameters of this thesis, particularly, it is important to consider ECOWAS's actions in terms of how the Conakry Peace Plan was perceived as a political or legal document, and what this means for conflict resolution instruments and peace agreements more generally. ECOMOG's intervention cut the implementation of the Conakry Peace Plan short by a full two months, in direct contravention of the agreement's terms and its principles on power-sharing, democratic participation and inclusion.[176] However, the terms of the Conakry Peace Plan had long been breached before ECOWAS used force to expel the AFRC junta. Skirmishes between the signatories had persisted throughout Sierra Leone, despite the fact that the plan called for a general ceasefire. By February 1998, the two foremost provisions of the agreement—the cessation of hostilities and the beginning of the demobilization processes—had not been established.[177] Because many of the Conakry agreement's subsequent provisions were entirely dependent on the total cessation of hostilities, the failure to establish an immediate ceasefire had the effect of "crippling the Agreement almost from birth."[178] The Conakry Peace Plan thus necessitated military action to ensure compliance with its terms, and this in fact may have been the only way to ensure that the broader goals of the agreement were accomplished. But though the ECOWAS intervention would provide for Sierra Leone's transition back to democracy under the Conakry plan, it would not serve as a resolution of the civil conflict in the country, as events over the following year would prove.

[175] Francis (n 4) 361.
[176] Nowrot and Schabacker (n 8) 402.
[177] ibid at 402.
[178] ibid.

6. III. C. THE LOMÉ PEACE ACCORD (1999)

Over the course of 1998, the RUF steadily reversed the gains made by the ECOWAS intervention.[179] By the end of the year, the rebels had advanced within touching distance of Freetown, "and notwithstanding repeated protestations to the contrary by the government, the United Nations chief military observer, and others, it became clear that an attack on the city was likely."[180] Freetown was thus ill-prepared when the RUF and AFRC jointly launched Operation 'No Living Thing' on 6 January 1999. Over the course of a few days, the rebels unleashed an unprecedented wave of violence on the civilian population of Freetown, killing an estimated 5,000-6,000 people and maiming, raping and abducting thousands more. Though the rebels were unsuccessful in capturing Freetown, the violent assault was a critical moment in the evolution of the peace process. The violence and barbarity of the attack altered the way in which the conflict was perceived socially, politically and militarily, so much so that it was perceived that an accommodation with the rebels was the only way to resolve the civil conflict.[181]

The resulting Lomé Accord was an agreement preoccupied with peace at any cost; conceding more to the RUF than the Abidjan Accord and foregoing "issues of justice and the fundamental grievances that led to the war."[182] In order to encourage his participation in the peace process, the distribution of diamond resources was entrusted to Sankoh—the very man who had enriched himself and funded the RUF rebellion on illicit diamond trading. Furthermore, the decision to grant amnesty to the RUF was the source of much controversy, given the wanton violence that characterised the conflict. Such was the international community's outrage at Article IX that the UN added a disclaimer to the Lomé Accord, declaring the amnesty to be "outside the bounds of international law and acceptable practice,"[183] though the disclaimer was added after Sankoh had signed the agreement and it does not appear on the text available to the public.[184] Thus, while the Lomé Accord can be seen as an

[179] Bartholomew (n 24) 159 [original citation omitted].
[180] Michael O'Flaherty, 'Sierra Leone's Peace Process: The Role of the Human Rights Community' (2004) 26 Human Rights Quarterly 29, 31.
[181] ibid at 33 [original citations omitted].
[182] Francis (n 4) 364.
[183] Priscilla Hayner 'Negotiating peace in Sierra Leone: Confronting the justice challenge' (Centre for Humanitarian Dialogue – 2007) 6.
[184] "[I]t is worth noting that neither the UN nor any non-official sources of the agreement can now produce the copy of the agreement with the rider, and its very existence remains shrouded in doubt and mystery." Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008) 247. The Special Court for Sierra Leone subsequently held that the amnesty "is

extension or elaboration of many of the Abidjan Accord's key provisions, Rashid argues that "its immediate origins" lay in the RUF and AFRC attack on Freetown.[185]

From a legal perspective, the Lomé Accord is a much more compelling document than its predecessors. Daase commends that the agreement "was drafted in a conspicuously legal-looking format, including a preamble and an operative part."[186] While this is not altogether an unusual feature of the peace process in Sierra Leone, what sets the Lomé Accord apart from previous peace efforts is its considerable detail and much stronger language in terms of legal obligation. As the lengthiest of the three peace agreements, the Lomé Accord was also the longest lasting peace settlement to the conflict in Sierra Leone.[187] However, the agreement alone did not establish an immediate end to hostilities. Military enforcement of the Lomé Accord's ceasefire was necessary over a year after the agreement's conclusion, and it was necessary to supplement the original text with subsequent agreements.[188] These unanticipated interventions highlight the legal omissions that allowed the Lomé Accord to be overtaken by political and military events on the ground , and explain why "an answer to the conflict in Sierra Leone cannot be found within the four corners of this document."[189]

Part One of the Lomé Accord calls for "a total and permanent cessation of hostilities" between the government and the RUF.[190] Crucially, Annex 2 to the Lomé Accord precisely defines what the parties accept as ceasefire violations,[191] evidencing a very high degree of precision in prescribing what behaviour is prohibited under the agreement, and increasing the sense of obligation by compelling the parties to refrain from such behaviour. The ceasefire obligates both parties to communicate "the terms of the present Agreement, and written orders requiring

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ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction." *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 301) 573, §88.

[185] Ismail Rashid, 'The Lomé peace negotiations' in Lord (n 1) 26.

[186] Cindy Daase, 'The Redistribution of Resources in Internationalized Intra-Sate Peace Processes by Comprehensive Peace Agreements and Security Council Resolutions' (2011) 3(1) Goettingen Journal of International Law 23, 34.

[187] Bartholomew (n 24) 161-162.

[188] ibid at 163-164 [original citations omitted].

[189] ibid at 133.

[190] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (the Lomé Accord), 7 July 1999 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SL_990707_LomePeaceAgreement.pdf> Article I.

[191] ibid at Annex 2 – Definition of Ceasefire Violations.

compliance" to their respective forces,[192] and to reveal the strength and location of all combatants and all or military hazards to the ceasefire monitoring bodies.[193] The explicit provision of these orders highlights the high degree of precision and obligation with which the Lomé Accord was drafted, and hints at previous instances when miscommunications and ongoing skirmishes rendered ceasefires meaningless. A Ceasefire-Monitoring Committee (CMC) chaired by the United Nations Observer Mission in Sierra Leone (UNOMSIL) is given an active field-role in monitoring, verifying and reporting all violations of the ceasefire.[194] While verification mechanisms were provided for under previous agreements, the provisions on ceasefire monitoring under the Lomé Accord are unparalleled in their scope and detail. Unlike Conakry, the Lomé Accord identifies a neutral monitor in the form of UNOMSIL and provides for the representation of the key belligerents in the monitoring process.[195] However, UNOMSIL's role as originally envisioned under the Lomé Accord was that of an observer only.[196] It arguably lacked the enforcement measures necessary to implement a rehabilitative power-sharing agreement such as the Lomé Accord.[197]

Part Two of the Lomé Accord provides for a power-sharing arrangement that allows the RUF to share "the responsibility of implementing the peace,"[198] at least on paper. Article III provides for the transformation of the RUF into a political party,[199] and mirrors many of the "rights, privileges and duties" set out previously in the Abidjan Accord, e.g., the freedom to publish, unhindered access to media and freedom of association.[200] The Lomé Accord displays a greater degree of precision in these provisions, tabling the clarification of potentially contentious issues—such as RUF appointments to the civil service—for immediate discussion on a specified date.[201] Article V specifically sets out the appointments that would allow the RUF to

[192] ibid at Article XX.
[193] ibid at Article XIX.
[194] ibid at Article II, s.1.
[195] ibid at Article II, s.1 and s.2.
[196] See the Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone (30 July 1999) 2/1999/836, para 39: "For the time being, these military observers would operate under security provided by ECOMOG."
[197] Barbara F Walter, *Committing to Peace: The Successful Settlement of Civil Wars* (Princeton University Press 2002) in Binningsbø and Dupuy (n 26) 102.
[198] Lomé Accord (n 190) Part Two – Governance.
[199] ibid, Article III, s.3 and s.4. S.4 calls for the setting up of a trust fund for the RUF, but also calls for "Training for RUF/SL membership in party organization and functions…."
[200] ibid, Article III, s.2.
[201] ibid, Article IV, s.3.

take part in a power-sharing government. Sankoh was to become Vice-President of Sierra Leone and Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD). A further senior cabinet appointment, three cabinet positions and four additional Deputy Ministerships were also made available to the RUF.[202]

Many Sierra Leoneans felt that making Sankoh the Vice President of the country and giving him Chairmanship of the CMRRD took the Lomé Accord's plea for "genuine national unity and reconciliation"[203] a little too far.[204] However, the agreement may have been worded so as to give Kabbah's government "more room to manoeuvre than the RUF probably understood."[205] Though the RUF were granted significant cabinet positions under the agreement, these positions would be terminated at the date of the next general election. This limited the RUF's political tenure to a period of two years.[206] Furthermore, though the agreement over-compensated the RUF in its provisions, the government was able to under-compensate the Front in the agreement's implementation.[207] Instead of granting the RUF "[o]ne of the senior cabinet appointments such as finance, foreign affairs and justice;"[208] the government assigned the less-senior portfolios of Trade and Industry, Land, Housing and Central Planning, Energy and Power, and Tourism and Culture to the RUF. When the RUF protested, the government relied on a semantic argument, pointing out that the portfolios *suggested* under Article V should not be construed as *guaranteed*.[209] According to their interpretation of the text, the government "could therefore designate any posts considered to be of the same standing as those indicated."[210] In this manner, the government was able to retain a close grip on the implementation of the Lomé Accord and subtly influence its outcome. Such a strict interpretation of the text reiterates the importance of how a peace agreement is worded and how minor textual and linguistic details can affect the sustainability of an agreement.

A Commission for the Consolidation of Peace (CCP) was envisioned as the

[202] ibid, Article V, s.2, s.3 and s.4, respectively.
[203] ibid, Preamble.
[204] Alao and Ero (n 11) 124.
[205] Binningsbø and Dupuy (n 26) 98.
[206] ibid at 96.
[207] ibid at 103.
[208] Lomé Accord (n 190) Article V, s.3(i).
[209] Binningsbø and Dupuy (n 26) 97.
[210] Francis (n 4) 38.

principle vehicle "for supervising and monitoring the implementation of and compliance with the provisions" of the agreement.[211] The agreement granted the CCP considerable powers over many of the peacebuilding bodies envisioned under the agreement, including the right "to inspect any activity or site" connected with implementation, and the authority "to organize its work in any manner it deems appropriate."[212] Under s.9, the Commission is entrusted with the preparation of any protocols that may be required to elaborate upon the Lomé Accord. Furthermore, the CCP can make recommendations for improvements to the President of Sierra Leone, and bodies that fail to fulfil their duties under the agreement can be brought to the attention of the President.[213] This is a crucial detail, which allows for a process of dispute resolution through the Council of Elders and Religious Leaders, as provided for by Article VIII. The composition of the CCP and the duration of its mandate is also explicitly set out under Article VI.[214] Though the CCP is the same body envisioned under the Abidjan Accord, the crucial difference—as with many of the Lomé Accords provisions—is the level of detail afforded to it on this occasion. In explicitly providing for quasi-legislative powers, consequences in the event of a breach or non-compliance, and a form of dispute resolution, the Lomé Accord provides for many of the details that were postponed for further discussion under the Abidjan Accord, and empowers the CCP as a body capable of implementing the agreement with immediate effect.

A crucial addition in the Lomé Accord's text is the provision of a dispute resolution process in the form of the Council of Elders and Religious Leaders. Article VIII provides that "any conflicting differences of interpretation" of the entire agreement or any of its implementing protocols may be resolved through that body.[215] The decisions of the Council were to be binding, provided that there was consensus among four members of the Council and that an appeal procedure to the Supreme Court was afforded to the aggrieved party.[216] The omission of an official dispute resolution mechanism had been fatal to previous agreements in Sierra Leone, and its provision in the Lomé Accord provided a forum where "potentially explosive

[211] Lomé Accord (n 190) Article VI, s.1.
[212] ibid, Article VI, s.3 and s.4, respectively.
[213] ibid, Article VI, s.7.
[214] ibid, Article VI, s.5 and s.10, respectively.
[215] ibid, Article VIII, s.1.
[216] ibid, Article VIII, s.2.

misunderstandings could have received special attention."[217] Ultimately, however, the government did not opt to establish the Council, "even though its establishment would not have been costly."[218] Though the resurgence of the RUF's military campaign throughout 2000 questions the utility of a dispute resolution process, the absence of such a mechanism allowed the RUF's grievances to escalate into violence, and the omission of a proper forum remains a "fundamental negligence on the part of the government…."[219]

Article VII sets out an impressively detailed method of managing Sierra Leone's natural resources through an autonomous public body—the first such provision to explicitly address diamonds in any of the peace accords that grappled with the conflict in Sierra Leone. A Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD) is given "full control over the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone,"[220] and the government is strongly obligated to provide for its establishment under s.13 of Article VII.[221] The body of Article VII sets out the CMRRD's mandate and addresses a broad range of issues pertaining to illegal possession, security and the exportation or local resale of state resources.[222] Under s.2, the government is obligated to make the "exploitation, sale, export, or any other transaction of gold and diamonds" illegal, save for those made by the CMRRD.[223] Furthermore, the CMRRD is equipped with significant powers of enforcement. Further to the provisions obligating the relevant security forces to take "all necessary measures against unauthorized exploitation,"[224] s.7 permits the Government to "seek the assistance and cooperation of other governments" to prosecute the illegal exploitation of strategic resources.[225] This level of detail, taken together with the precision afforded to the CCP's mandate, is evidence of the progress throughout the conflict in Sierra Leone to ever more legalized peace agreements.

Part Three of the Lomé Accord addresses 'other political issues,' the most

[217] Bright (n 1) 39.
[218] ibid.
[219] ibid.
[220] Lomé Accord (n 190) Article VII, s.1.
[221] ibid, Article VII, s.13.
[222] ibid, Article VII, s.3, s.4 and s.5, respectively.
[223] ibid, Article VII, s.2.
[224] ibid, Article VII, s.4.
[225] ibid, Article VII, s.7.

controversial of which was "the absolute and free pardon and reprieve"[226] granted to the RUF under Article IX. The international community's reaction to Article IX was somewhat surprising, given that blanket amnesties had been a feature of both the Abidjan Accord and the Conakry Peace Plan, and their provision had not been a cause for as much concern on those occasions.[227] While Article IX is clearly influenced by Article 14 of the Abidjan Accord, the insertion of the word 'reprieve' could be construed as "a veiled threat to the RUF leadership"[228]—a warning that if the group did not abide by the agreement, its members would face prosecution for their crimes at a later date. That a Truth and Reconciliation Commission and a Special Court for Sierra Leone were established after repeated violations of the Lomé Accord by the RUF somewhat validates this interpretation. In any event, Article XI's contribution to the sustainability of the Lomé Accord is a moot point. Some would argue that the amnesty only encouraged the RUF to pursue their goals by violent means in the aftermath of the agreement.[229] However, omitting the amnesty provision would not have counteracted this, nor the myriad factors that nearly felled the Lomé Accord in May 2000.[230] Though the political development of the Special Court for Sierra Leone certainly influenced the sustainability of the Lomé process—and the vitality of peace versus justice debates—it is unlikely that the wording or inclusion of an amnesty was solely responsible for the difficulties that the Lomé Accord endured in its implementation.

The other political issues covered under Part Three of the Lomé Accord include a schedule for the next elections,[231] as well as provision for a Constitutional Review Committee and a new National Electoral Commission. The Constitutional Review Committee is tasked with reviewing the Constitution of 1991 and recommending amendments so that "no constitutional or any other legal provision

[226] ibid, Article IX, s.1 and s.2, respectively.
[227] It is possible that by 1999, the political narrative on amnesties and peace versus justice debates had shifted, perhaps as a response to the foundation of the International Criminal Court (1998), or increased international attention to the scale of RUF-driven violence against the civilian population.
[228] Francis (n 4) 368.
[229] Hayner (n 183) 24. However, see Kenneth A Rodman, "Intervention and the 'Justice Cascade': Lessons from the Special Court for Sierra Leone on Prosecution and Civil War" (2015) 16(1) Human Rights Review 39, 43: "This use of [the Lomé Accord] by anti-impunity advocates conflates symptoms and causes. Amnesty was the inevitable result of the political decision to seek a negotiated end to the civil war... [T]he case for peace with justice could not be made on purely legal grounds. It required the rejection of a political settlement in favor of a military solution."
[230] Hayner (n 183) 24. Hayner notes that the near-collapse of the Accord can be attributed to the military inadequacy of the United Nations Mission in Sierra Leone (UNAMSIL), and the questionable sincerity of the RUF's commitment to the agreement.
[231] Lomé Accord (n 190) Article XI.

prevents the implementation of the present Agreement…."[232] Article XII provides for a new independent National Electoral Commission, though its provisions replicate much of what the Abidjan Accord had to say on reconstituting the Commission, without elaborating upon its mandate.[233] S.4, however, additionally requests the assistance of the UN, OAU, ECOWAS and the Commonwealth of Nations in monitoring the next scheduled elections in the country. In formally identifying these actors and annexing their role as monitors to the agreement, the Lomé Accord once again displays a higher degree of precision and obligation than its predecessors.

Part Four of the Lomé Accord addressed the considerable post-conflict military and security issues that faced Sierra Leone at the time, and the depth of this section evidences some of the lessons learned from previous attempts to resolve the conflict. Under Article XIII, the ECOMOG mandate was expanded to include a peacekeeping role and to provide protection for UNOMSIL observers and disarmament, demobilization and reintegration personnel.[234] The security of these persons was further guaranteed by Article XV, which displays high precision and obligation in committing the government and the RUF to the "safety, security and freedom of movement" of UNOMSIL staff and property throughout Sierra Leone.[235] The explicit provision of an identified actor (ECOMOG) to provide further security as part of the agreement once more evidences a higher degree of precision, obligation and delegation in the Lomé Accord than in its predecessors, and highlights the difficulties that beset previous agreements in this regard.

The process of disarmament, demobilization and reintegration was to be carried out by a peacekeeping force—comprised of ECOMOG and UNOMSIL—and coordinated by the National Commission on Disarmament, Demobilization and Reintegration (NCDDR).[236] Article XVI avoids previous mistakes in relation to the demobilization process, explicitly providing for identified actors to carry out disarmament and identifying the *kamajor* militias and other "paramilitary groups" as elements also requiring demobilization.[237] The disarmament of civil militias and mercenaries was a necessity that had consistently neglected under both the Abidjan Accord and the Conakry Peace Plan. Article XVI also obligates UNOMSIL to be

[232] ibid, Article X.
[233] See Lomé Accord (n 190) Article XII, s.1-3 and Abidjan Accord (n 227) Article 18.
[234] Lomé Accord (n 190) Article XIII.
[235] ibid, Article XV, s.1, s.3 and s.4, respectively.
[236] ibid, Article XVI.
[237] ibid, Article XVI, s.1 and Article XVIII.

present "in all disarmament and demobilization locations to monitor the process and *provide security guarantees* to ex-combatants."[238] The express provision of these guarantees, coupled with the security guarantees extended to peace monitors under Article XV, set the Lomé Accord apart as a highly legalized document, given that no such provisions were included under the Abidjan or Conakry agreements. However, Article XVI also reiterates the urgent need for funding, which repeatedly jeopardised peace efforts in Sierra Leone. Indeed, despite the fact that the NCDDR received "the lion's share" of external funding, there remained a US$20 million shortfall in funding for the process of disarmament, demobilization and reintegration some nine months after the agreement was signed.[239] As a result, progress in relation to these processes was extremely slow. Suspicion of the disarmament process was also rife among the leadership of former combatants. Battalion leaders felt "that only faction leaders could really and truly disarm those they had armed, and should therefore be entrusted with the wherewithal to do so."[240]

Efforts at reintegrating former rebels into the new SLA were similarly poor.[241] This is unsurprising, given the lack of detail on the issue in the Lomé Accord. The imprecision that plagues Article XVII on restructuring the SLA bucks the Lomé Accord's trend of improving on earlier agreements. Like the Abidjan Accord, the Lomé Accord did not establish any criteria for reintegration, and no cap was set on the amount of units that may be absorbed into the demobilized military. This lack of detail allowed for misunderstanding in relation to post-conflict opportunities for ex-combatants. The restructuring of the armed forces is worded so as to avoid the mistakes of Abidjan in other respects, however. Under Article XIII, the withdrawal of ECOMOG forces is scheduled to be phased in accordance with the "creation and deployment of the restructured armed forces."[242] This avoids the disastrous consequences of the Abidjan Accord, which precisely provided for the withdrawal of EO without providing for an appropriate authority to fill the security vacuum left by its departure.

Part Five of the Lomé Accord addresses the Humanitarian, Human Rights and Socio-Economic issues of the conflict. This includes provision for the release of

[238] ibid, Article XVI, s.3 [emphasis added].
[239] Bright (n 1) 39.
[240] ibid.
[241] Binningsbø and Dupuy (n 26) 98.
[242] Lomé Accord (n 190) Article XIII, s.3.

all prisoners of war and abductees under Article XXI, and the repatriation, reintegration and security of refugees and displaced persons under Article XXII. The influence of the Abidjan Accord is evident in Part Five, with Articles XXIV and XXV replicating almost entirely the Abidjan Accord's human rights guarantees. The only significant difference is that the Human Rights Commission originally envisioned under Abidjan was now mandated as "an autonomous quasi-judicial" body "for addressing grievances of the people in respect of alleged violations of their basic human rights."[243] In order to further strengthen the protection of human rights, an empowered Truth and Reconciliation Commission was also envisioned to address "the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.[244]

The 'carrying over' of the more commendable aspects of the Conakry Peace Plan is evident from Article XXVII, which provides for the delivery and security of humanitarian relief in a much more detailed manner than the Conakry document. Both obligation and precision rank high throughout this article, with both parties guaranteeing the security and freedom of movement of security personnel.[245] An Implementation Committee is tasked with identifying safe routes for the transport and delivery of humanitarian assistance.[246] Notably, neither Article XXVII nor Annex 4 explicitly identify an appropriate body to "facilitate the implementation of these guarantees of safety,"[247] which is surprising given the tendency to explicitly delegate such tasks to the appropriate bodies elsewhere in the agreement.

The latter articles of Part Five address critical funding issues, which once again prove difficult in the Sierra Leonean context. Like Abidjan, the Lomé Accord provides for "financial and technical resources for post-war rehabilitation, reconstruction and development,"[248] as well as a special fund for the rehabilitation of war victims.[249] The special needs of women, as well as child soldiers—both of whom endured unique experiences of suffering and loss during the conflict—is recognized for the first time in the conflict by the Lomé Accord, which provides for their

[243] ibid, Article XXV.
[244] ibid, Article XXVI, s.2.
[245] ibid, Article XXVII, s.2.
[246] ibid, Annex 4 – Statement by the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone on the Delivery of Humanitarian Assistance in Sierra Leone, Article 2(b) and Article 3(b), respectively.
[247] ibid, Article XXVII, s.4.
[248] ibid, Article XVIII.
[249] ibid, Article XXIX.

consideration in relation to social reconstruction and reintegration efforts.[250] The agreement also prescribes the provision of basic education and affordable health care for all Sierra Leoneans.[251] However, all of these essential provisions are made somewhat dependent on ("the support of") the international community. Funding these provisions is thus made difficult under an agreement that pledges dedicated resources to almost every aspect of the peace process, making competition for the scarce domestic resources "almost anarchical."[252] The ability of the state to deliver on these promises is called into question by Article XXXI's language, which states that the government can only "endeavour" to provide free basic education and affordable health care.[253] These practical realities make the promise and potential of the Lomé Accord dependent on the support and capability of the international community, which may explain why implementation of the agreement proved so difficult.

The extent to which the Lomé Accord is dependent on the international community is codified by Article XXXIV, which provides for "Moral Guarantors" to ensure the implementation of the agreement in good faith and integrity.[254] The Special Court for Sierra Leone later held that Article XXXIV merely made the "non-contracting signatories" of the agreement "moral guarantors of the principle that… 'this peace agreement is implemented with integrity and in good faith by both parties.'"[255] The moral guarantors assumed no legal obligation as part of this role.[256] Further to the formal role of the moral guarantors, Article XXXV issues a plea for international assistance in implementing the Lomé Accord in the same spirit of integrity and good faith. Article XXXV is once again evidence of the extent to which the implementation of the peace process is almost entirely dependent on external actors. The article states that the many states and organizations that supported the Lomé process believe "that this Agreement must protect the paramount interests of the people of Sierra Leone in peace and security,"[257] and reiterates the dire need for financial and technical assistance in achieving this goal. However, the unique difficulties of implementing peace in an environment where the state institutions of

[250] ibid, Article XXVIII, s.2 and Article XXX, respectively.
[251] ibid, Article XXXI.
[252] David Richards, 'Sierra Leone—Pregnant with lessons?' (2004) 62(1) Whitehall Papers 9, 19.
[253] Lomé Accord (n 190) Article XXXI.
[254] ibid, Article XXXIV.
[255] *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty* (n 130) §41.
[256] ibid.
[257] Lomé Accord (n 190) Article XXXV.

administrative, economic and military power are profoundly weak became apparent in the wake of the Lomé Accord once more.

The final Part Eight of the Lomé Accord provides for its registration, publication and immediate entry into force. However, despite the Lomé Accord's comprehensive provisions and considerable detail, its immediate implementation proved problematic, and the Accord's text soon highlighted the peculiar challenges to peace-building that Sierra Leone posed. Though the agreement promulgated gestures of good faith and a generous power-sharing arrangement, the implementation of the Lomé Accord continued to be plagued by mutual mistrust. Ongoing clashes between the belligerent parties continued in the provinces, and delayed the deployment of the bolstered United Nations Mission in Sierra Leone (UNAMSIL) and the effective implementation of the disarmament and demobilization procedures. By late January of 2000, only 13,000 combatants had been disarmed, in stark contrast to the 45,000 envisioned by the deadline of 15 December 1999.[258]

The UN forces charged with these procedures under the Lomé Accord also proved largely ineffective. On 4 May, 208 peacekeepers were taken hostage by the RUF, and their 13 armoured personnel carriers were seized.[259] Two days later, the number of UN hostages rose to 500, as UN forces under the command of Indian Major General Vijay Jetley "apparently surrendered to the rebels without firing a shot."[260] Effectively rearmed with UN weaponry, the RUF began to advance on Freetown in the captured armoured personnel carriers. Events came to a head when civil society groups organised a protest outside Sankoh's residence in Freetown, demanding the release of the UN peacekeepers and a halt to the RUF advance on the capital.[261] The RUF soldiers guarding the residence opened fire on the protestors, killing 21 civilians in the process and causing Sankoh to flee.[262] This prompted the arrest of all RUF representatives in the government, and upon his capture ten days later, the arrest of Sankoh. Less than a year after its signature, the power-sharing provisions envisioned under the Lomé Accord had collapsed.[263]

The situation inspired British military intervention in Sierra Leone, with the

[258] Binningsbø and Dupuy (n 26) 98.
[259] Richards (n 252) 13.
[260] Pham (n 5) 135.
[261] Binningsbø and Dupuy (n 26) 98.
[262] ibid.
[263] ibid.

British mission expanding to reinforce the beleaguered UNAMSIL. In November 2000, under renewed military pressure from the British-backed SLA, the RUF entered into negotiations with the Sierra Leonean government once more. This process culminated with the Abuja Agreement, which reaffirmed the ceasefire provisions and the political process envisioned under the Lomé Accord. UNAMSIL forces—which had previously been prevented from deploying in RUF-controlled areas—were able to deploy nationwide, and this allowed the implementation of the Lomé Accord to properly begin. The adoption of Resolution 1343 (2001) by the UN Security Council in March 2001 finally sounded the death knell for the RUF's decade-long campaign by threatening economic sanctions against Charles Taylor's Liberia if it did not desist in funding the RUF and harbouring its members.[264] Having lost the support that had sustained the group for almost 10 years, the RUF had no other option but to enter into the peace process. The RUF soon agreed to a simultaneous disarmament with the *kamajor* militias under a reviewed Abuja Agreement.[265] At an arms destruction ceremony celebrating the ultimate success of the disarmament provisions, the UNAMSIL Force Commander declared the civil war officially over on 17 January 2002.[266]

The fundamental mistake underpinning the Lomé Accord appears to be the flawed assumption that Sankoh and the RUF were genuinely interested in making peace. Though there existed "a desperate desire" to make peace with the RUF in 1999,[267] an agreement born of such circumstances could hardly be expected to produce a sustainable peace.[268] The Lomé Accord appeased the RUF with political and personal reward, in the hope that "it would be willing to end the fighting and reinvent itself as a legitimate political movement ready to vie for power in a democratic context."[269] The Lomé Accord did very little to ensure this outcome, however. The agreement lacked mechanisms to deter RUF non-compliance, despite the fact that the rebels' insincerity toward the peace process was evident after the Abidjan Accord.[270] Concerns about the RUF's commitment to the peace process could have been somewhat assuaged by providing for sanctions or other compliance-

[264] UN Security Council Resolution 1343 (2001) S/RES/1343.
[265] Dorman (n 53) 121.
[266] Pham (n 5) 136
[267] Hayner (n 183) 24.
[268] Francis (n 4) 367.
[269] Abraham (n 140) 221.
[270] See International Crisis Group (n 15) 2.

ensuring measures, but "the agreement's sponsors and guarantors could not come up with credible threats nor mechanisms for triggering effective sanctions for non-compliance with various deadlines for important steps."[271] Thus, despite the Lomé Accord's high-obligation, the absence of credible threats of enforcement afforded Sankoh "enough room to manoeuvre and eventually blow the accords to pieces" once the RUF's commitment to the peace process began to wane.[272]

However, if certain legal provisions are to make peace agreements more stable and can compel even the most errant of treaty-partners, then blame for the failure of the Lomé Accord cannot be laid squarely at the feet of the RUF. Instead, we must consider the way in which the agreement is legally written, and how the language used may have shaped the implementation of the agreement. The Lomé Accord serves as an interesting example of the effects of precision in this context. The agreement was written through with precise details of these obligations and exact timetables for their accomplishment/implementation, in contrast to previous agreements that had omitted these crucial minutiae. However, such precision was not necessarily an advantage in the Sierra Leonean context, given the unpredictable nature of the RUF and its disregard for the rule of law. For example, the Lomé Accord's detailed provisions on the processes of disarmament and demobilization did not have a contingency plan "should the unexpected happen."[273] Given Sierra Leone's history of conflict resolution efforts, the negotiators should have predicted that unexpected hurdles would jeopardize the stability of the agreement and provided for flexible responses accordingly.[274]

The success of the Lomé Accord was further hampered by its extremely tight implementation deadlines, very few of which were actually accomplished on time.[275] The deadlines envisioned under the Lomé Accord misunderstood post-conflict peacebuilding as a "quick-fix programme" that could be implemented immediately.[276] In providing for such difficult and ambitious targets to meet, the drafters of the Accord failed to consider how "post-war reconciliation and consolidation of peace is a drawn-out process that requires sustained commitment

[271] G Nzongola-Ntalaja, 'Unpacking the Lomé Peace Accord' in Sierra Leone One Year After Lomé, CDD Planning Strategy Series 5 (Centre for Democracy and Development – 2000) 54 in Alao and Ero (n 11) 127.
[272] Alao and Ero (n 11) 127.
[273] ibid at 125.
[274] Bright (n 1) 40.
[275] O'Flaherty (n 180) 35.
[276] Francis (n 4) 363.

without predetermined time frames."[277] The Sierra Leonean experience thus reiterates the need to offset precise instructions and detailed obligations against flexible provisions and reactionary agreements, and forces us to consider the difficulties inherent in maintaining that balance.

The use of precision throughout the Lomé Accord further highlights how the wording of a peace agreement affects the resulting peace process. Indeed, in their analysis of the Lomé Accord's power-sharing provisions, Binningsbø and Dupuy observe that the insertion of several minor provisions allowed Kabbah's government to maintain unilateral control over the implementation of the agreement.[278] For example, by vowing to facilitate RUF political participation "*within the spirit and letter of the Constitution*,"[279] Kabbah's incumbent government were able to maintain the existing political structures enshrined under the Constitution. Because the agreement only unilaterally bound the government to enact measures to facilitate RUF participation in existing political structures, Kabbah's government were able to "control the appointment of ministries and the structure of the post-accord government."[280] Thus, the unilateral implementation of the Lomé Accord was arguably an effective strategy in and of itself, allowing the government to achieve its ultimate goal: "defeat of its adversary through political marginalisation and eventual elimination."[281]

From a comparative perspective, the Lomé Accord is higher on the legalization matrix than any of its predecessors. Even as a more legalized agreement, however, it failed to resolve the conflict on its terms, and more forceful methods of enforcement where required to make the agreement functional. What does this say about our hypothesis that legal guarantees can bridge even the most difficult of trust and security scenarios? Can the pen truly be wielded to greater effect than the sword, even where a party to a conflict has shown little regard for the cost of life and the rule of law? This analysis of such a scenario in Sierra Leone confirms that while certain legal provisions have an influence on the sustainability of emerging peace processes, these provisions only represent one strand of an incredibly complex and slow-burning process, comprising economic, political and deeply social factors. A

[277] ibid.
[278] Binningsbø and Dupuy (n 26) 101.
[279] Lomé Accord (n 190) Part Two [emphasis added].
[280] Binningsbø and Dupuy (n 26) 99.
[281] ibid at 98-99.

legally-informed analysis such as this certainly casts light upon that process however, even if it does not illuminate the entire picture. In this regard, the Lomé Accord reveals a great deal about processes of implementation, and how they can fundamentally alter the written content of an agreement.

For example, the Lomé Accord ranked high on the precision matrix and set out a tightly timetabled process, but it failed to provide for the reactive and bipartisan bodies necessary to make that process work. During the implementation stage, the government neglected to establish the Council of Elders and Religious Leaders—the one body explicitly tasked with resolving different interpretations of the Accord. This was a crucial omission that represented a clear break from the process envisioned under the terms of the agreement. As a result of this neglect, there were no appropriate forums or mechanisms to stop any differences of opinion from descending into conflict. Implementation thus had a significant impact on how the process envisioned under the agreement—which appeared ideal on paper—were was to function in reality.

The obligation strand of the Lomé Accord could also have been bolstered throughout its implementation phase. Though the agreement is much higher on obligation than its predecessors both in terms of scope and depth, RUF-compliance remained elusive regardless. It was only when punitive and coercive measures—such as the revision of UNAMSIL's mandate and the Security Council's Resolution on Liberian assistance to the RUF—were introduced that the implementation of the Accord as envisioned under its terms could proceed. In the absence of these punitive measures and a dispute resolution mechanism, the obligations in the Lomé Accord remained lacking in legally binding power. Despite the form and protocol they adhered to, they did not possess the legal bite necessary to compel a group of proven insincerity, such as the RUF.

In a similar manner, many of the Lomé Accord's delegatory provisions adopted legal-sounding language, though some of the grants of delegation made throughout the agreement were largely ineffective, e.g., the request for international involvement, the provision of moral guarantors. Others, as in the case of UNOMSIL, were defective. Under the agreement, UNOMSIL was tasked with monitoring the ceasefire and disarming the belligerents with the assistance of ECOMOG, but its original mandate was not initially robust enough to allow its units to use force to coerce non-complying actors. The failure to authorise UNOMSIL appropriately had a

significant effect on the way in which the process envisioned on paper panned out in practice. When the UN eventually permitted UNAMSIL to engage the RUF forcefully, "[t]he rebellion died out, the government stabilized, and the peacekeepers went home."[282]

This suggests that the implementation phase of an agreement is absolutely crucial to its sustainability, and that errors in this regard can bring down an agreement rich in potential and high on legalization, such as the Lomé Accord. Once the difficulties of implementation were overcome, the Lomé Accord was utilised as a stable foundation for lasting peace in Sierra Leone: a testament to the vision of the agreement as it existed on paper. Thus, while an analysis of the legal provisions of the Lomé Accord alone may not be enough "to fully comprehend the challenges of peacebuilding transitions,"[283] such an examination does offer valuable insight into how those challenges interact, and the lasting contribution that solid legal foundations can make towards sustainable processes of peace.

6. IV. CONCLUSIONS

The civil war in Sierra Leone profoundly problematizes one of the main hypotheses underpinning this thesis—that providing for proven or 'ideal' legal provisions in a peace agreement will lead to a more sustainable, and ultimately successful, peace agreement. The peace process in Sierra Leone featured many of the tried and tested peace-making mechanisms, none of which secured peace by virtue of their inclusion alone. The repeated attempts to resolve the conflict offer a powerful rebuttal to the arguments that soft accords can serve as a worthy alternative to hard power, and that highly legalized agreements can serve as a substitute for peace agreements bearing the status of hard law. Yet despite the significant complications that it levels against our hypothesis, there remains much to learn from the Sierra Leonean experience. In much the same way, the difficulty of making peace in Sierra Leone does not defeat our argument, but instead offers valuable insights into making peace in seemingly intractable situations. It is to those insights that we now turn.

One of the most obvious trends that emerges from a retrospective view of the

[282] James Traub, 'Can Attack Helicopters Save U.N. Peacekeeping?' Foreign Policy (28 September 2015) <https://foreignpolicy.com/2015/09/28/can-attack-helicopters-save-un-united-nations-peacekeeping-barack-obama> accessed 19 August 2017.
[283] Binningsbø and Dupuy (n 26) 103.

Sierra Leonean peace process is the tendency towards precision as the process wore on. From the initial programme for peace broadly envisioned under the Abidjan Accord to the exacting schedule and elaborate detail of the Lomé Accord, attempts at resolving the conflict took on a more functional and purposeful tone as the conflict raged on. This is immediately observable when one recalls the imprecision that plagues the Abidjan Accord's otherwise ambitious peace plan. Precision was so lacking that even the short-term goals pertaining to security and disarmament failed to materialize, putting the long-term sustainability of the process and the viability of its institutions in a precarious position. The Conakry Peace Plan evidences an awareness of this fact, with its higher degree of precision and its overbearing focus on an immediately workable resolution of the conflict. However, its purpose as an immediately workable, short-term solution to the fighting meant that the precision necessary to navigate the long-term complexities of a post-conflict society in transition was still left wanting.

The Lomé Accord thus exhibits the highest degree of precision out of all the agreements that emanated from the Sierra Leonean peace process. The agreement adopts the long-term ambition of the Abidjan Accord, but elaborates upon many of the most promising provisions with a sense of specificity that was lacking in the preceding agreements. Similarly, the Lomé Accord borrows from the Conakry Peace Plan's functional quality in providing for a precise means of achieving short-term security objectives and humanitarian relief. Though these details did not prevent the major setbacks that befell the agreement, the Lomé Accord did boast the dubious honour of being the longest lasting peace agreement to the Sierra Leonean conflict, and eventually provided a stable foundation upon which the parties could build a sustainable peace. Its ultimate success as a process document somewhat substantiates the positive correlation between highly legalized peace instruments and more sustainable processes of peace.

The tendency towards harder legalization and higher precision as the Sierra Leonean conflict wore on certainly seems to equate to progress towards more stable and sustainable agreements. That this did not result in an immediately successful Lomé Accord is of significant import, however. The Sierra Leonean experience highlights that all of the complexities and unpredictabilities of making peace cannot be accounted for on paper, no matter how precise the terms. Writing agreements through with precision therefore entails a careful balancing act between providing for

a stable, long-term, framework for peace, and affording that process the flexibility to go the distance. This is a balance that stakeholders in Sierra Leone failed to strike. For example, the Abidjan Accord entailed both short-term and long-term objectives, many of which would provide the basis for the negotiations influencing the Lomé Accord. However, precision was so lacking in the agreement that even the most basic and immediate pre-requisites to peace, such as a ceasefire and processes of demobilization, failed to materialize. The Conakry Peace Plan, on the other hand, adopted a higher degree of precision than its predecessor, but it entailed a quick-fix solution to the fighting rather than a transitional process of social rehabilitation and reconciliation.

The Lomé Accord appeared to strike an ideal balance between its two predecessors, envisioning an immediately actionable security plan, a comprehensive solution to the conflict in the long-term, and a seemingly flexible timeframe that varied from precise to open-ended as the process developed. However, the Lomé Accord could not maintain this balance in practice, and though its long-term objectives were eventually realised, the agreement appears to have over-compensated in striving towards a more precise elaboration of the terms initially set forward in the Abidjan Accord. The provisions on demobilisation and disarmament, in particular, have been criticised as "inflexible,"[284] conforming to too strict a timeframe, and proving incapable of reacting to unexpected events.[285]

The entire experience thus offers valuable lessons with regard to reconciling precision and flexibility, two seemingly opposed characteristics of peace-making. Precision is to be preferred in legalized agreements, but agreements must also be equipped with the flexible means to react to events as they develop. In this regard, effective dispute resolution mechanisms—a notable omission from the prolonged peace process in Sierra Leone—could have been valuable. Such vital channels of communication would have allowed the agreement to evolve as a process and transition from short-term to long-term objectives with the input of the stakeholders concerned. In the absence of such bodies, agreements in Sierra Leone became static instead of reactive, and well-intentioned solutions were often overtaken by events.[286] The Sierra Leonean example speaks to the importance of these bodies during the

[284] Bright (n 1) 39.
[285] Alao and Ero (n 11) 125.
[286] Richards (n 252) 18.

implementation stage, which marks the transition of the agreement from a perfectly written document to a lived-in process and fundamentally influences how the words in an agreement are interpreted over time so as to ensure the long-term sustainability of the original text.

Another interesting aspect of the short term/long term discussion is the fact that each of the agreements became immediately bogged down in their short-term implementation. The fact that the Lomé Accord could not achieve its short-term objectives even with its heightened precision calls the sincerity of the signatories into question, and is telling of another crucial omission throughout the Sierra Leonean conflict: cost-increasing provisions in the event of non-compliance. Despite the particularly high levels of mistrust that permeated each of the peace agreements in Sierra Leone, none provided for effective punitive measures where parties did not abide by their commitments. As a result of this omission, a culture of impunity prevailed throughout the Sierra Leonean peace process. This had significant ramifications for the way in which the parties' perceived the peace agreements as legal documents: "since there was no cost for the violation of the provisions of the various peace accords, the warring factions were therefore emboldened to flaunt them."[287] If peace agreements of uncertain legal status are going to serve as effective methods of conflict resolution, then strands of obligation must be strengthened with cost-increasing provisions that empower agreements with threats of consequence and tangible effect. These provisions are essential in conflicts of mutual mistrust and proven insincerity, such as Sierra Leone.

The negative effects of building peace through threats and legal consequences could have been mitigated by more specific confidence-building measures, which could have fostered genuine participation and inclusivity in the peace process. In the absence of such measures, agreements tended to adopt a top-down approach to implementation, with the state—or ECOWAS in the case of the Conakry Peace Plan—encouraged to pursue a strategy of unilateralism. For example, the state, and the incumbent government, was viewed as the primary vehicle for the implementation of the Abidjan Accord. A role as an equal partner in peace was not envisioned for the RUF under the agreement's text, which assumes the RUF's participation without providing for incentives should they follow the political

[287] George Klay Kieh Jr, 'Peace agreements and the termination of civil wars: Lessons from Liberia,' (2011) 11(3) African Journal on Conflict Resolution 53, 76.

process, or consequences should they fail to do so. In much the same way, the Lomé Accord overwhelmingly entrusted the task of implementation to the incumbent government, despite precisely providing for a power-sharing arrangement. Kabbah's incumbent government was thus able to influence the political narrative shaping the emerging peace process and the legal procedures governing RUF participation in government, thereby marginalizing the rebels even further. This speaks volumes to the detrimental effects of unilateralism on agreement stability, and to the potential benefits of inclusive and participatory means of implementation on sustaining processes of peace over the long-term.

Whether a direct consequence of the bilateral nature of negotiations throughout the peace process, or the questionable legitimacy of the RUF's ideology, agreements resulting from the civil war in Sierra Leone repeatedly failed to address the key issues underpinning the conflict. Though the RUF had originated as a battalion-sized instrument of Charles Taylor's bidding, the rebels enjoyed popular support for a time due to its role as a provider in a state void of employment and educational opportunity. The agreements themselves did little to substantially grapple with these difficult issues that provided the context for the RUF's campaign. The Abidjan Accord, for example, made rhetorical reference to the state's contemporary history of corruption and election fraud, and acknowledged the important socio-economic aspects of the conflict. However, the agreement offered very little by way of a concrete programme for economic rehabilitation and societal development. The Lomé Accord, though commendable in providing for power-sharing and addressing the illicit exploitation of diamond resources, was comparatively sparse with regard to reintegration and rehabilitation efforts, leaving many of these issues to be addressed in the volatile implementation phase. Each of the agreements thus failed to offer sustainable solutions to the social problems that had made conflict a viable way of life for those committed to the RUF's campaign.

Many of the conflict's proximate causes—and the government's inability to substantially address them throughout the peace process—stem from Sierra Leone's peculiarly difficult position as a failing state in the period prior to, and during, its civil war. Funding and resource allocation were constant sources of uncertainty that threatened the state's ability to provide basic services and contribute to post-conflict rehabilitation. All of the major agreements that attempted to resolve the civil war underscored the need for financial and technical assistance from the international

community, yet proceeded to commit the government to a range of socio-economic objectives. This created a dangerous precedent whereby many of these objectives were guaranteed on paper, but almost entirely dependent on donor funding in practice. Indeed, even after the war was officially declared over in 2002, the Sierra Leonean economy as a whole remained heavily dependent on donor funding.[288] These features highlight a state in such an advanced state of decline that it could not fulfil even the most essential of obligations it had committed to under several peace agreements.

It is difficult to imagine how any agreement—no matter how carefully worded, or balanced between short-term and long-term commitments—could survive in such an environment. This begs the question as to whether a negotiated settlement was ever going to be the optimum outcome of the civil war in Sierra Leone. Though the conflict had been allowed to fester due to the weaknesses of state institutions that might have contained it, conflict resolution efforts in Sierra Leone repeatedly attempted to resolve the conflict through those same weakened political institutions. The conflict had erupted in a power vacuum, however, and could only be contained when that vacuum was filled, as evidenced by the British military intervention and the UN's nigh-on administration of the country. In a Sierra Leonean context, the answer may lie in confronting root causes through imposed solutions focused on state-building, rather than containing its symptoms through hamstrung peacebuilding bodies.

Dependence on donor funding, high unemployment, and a persistent lack of opportunity in the wake of the Lomé Accord did not give reason for optimism in post-war Sierra Leone. Reno, writing in 2000, regretfully opined that the Lomé Accord would not usher in democracy and prosperity in Sierra Leone, but "return the country to the status of a protectorate in fact, if not in name…."[289] However, the next decade saw "unprecedented reconstruction, reconciliation and phenomenal growth rates,"[290] brought about by significant international engagement with the country and a national commitment to making peace work. This led UN Secretary General Ban

[288] J Andrew Grant, 'Diamonds, foreign aid and the uncertain prospects for post-conflict reconstruction in Sierra Leone' (2005) 94(381) The Roundtable 443, 446 [original citations omitted]. In 2003, 65% of the Sierra Leonean government's budget came from the British Department for International Development.
[289] Reno (n 33) 328.
[290] Tamasin Ford, 'Quarantined: How Ebola Derailed Sierra Leone's Postwar Recovery' World Politics Review (27 January 2015) <http://www.worldpoliticsreview.com/articles/14930/quarantined-how-ebola-derailed-sierra-leone-s-postwar-recovery> accessed 19 August 2017.

Ki-moon to celebrate the nation's efforts, citing Sierra Leone as "one of the world's most successful cases of post-conflict recovery, peacekeeping and peacebuilding."[291] Indeed, despite the many setbacks encountered in the prolonged pursuit of peace in Sierra Leone an examination of the peace process offers valuable lessons in the context of agreement design, and several interesting counterpoints to the central hypotheses underpinning this thesis. Ongoing negotiations involving non-state actors in weak or failing states such as Mali, South Sudan and Libya, can learn much from a case study of conflict and state collapse in the African context, and recent agreements in those countries should be considered in light of the Sierra Leonean experience. Furthermore, the transition of Sierra Leone from "test case on state collapse"[292] to post-conflict success story captures the need for instruments of conflict resolution to articulate both short-term and long-term commitments, and include institutions that foster both peace and state building. Upon as politically unstable a foundation as the Lomé Accord, Sierra Leone managed to make "remarkable economic progress," and transformed itself from a recipient to a donor of peacekeeping operations.[293] Such an achievement further highlights the importance of the implementation stage in sustaining emerging processes of peace, and Sierra Leone serves as an ideal case study of success and failure in that regard.

[291] Transcript of the Secretary-General's remarks at Joint Press Conference with President of Sierra Leone (Freetown, 5 March 2014) < https://www.un.org/sg/en/content/sg/press-encounter/2014-03-05/transcript-secretary-generals-remarks-joint-press-conference> accessed 19 August 2017.
[292] Reno (n 33) 328.
[293] Transcript of the Secretary-General's remarks at Joint Press Conference with President of Sierra Leone (n 291).

7.

A ‘Peace-meal’ approach to peace-making in Sudan

> The Sudan falls sharply into two distinct areas, both in geographical area, ethnic groups, and cultural systems... [T]here is nothing in common between the various sections of the community; no body of shared belief, and above all, the Sudan has failed to compose a single community.[1]

> [T]he Sudan has been looking for its soul, for its true identity. Failing to find it..., some take refuge in Arabism, and failing in this, they find refuge in Islam as a uniting factor. Others... take refuge in separation. In all of these there is a lot of mystification and distortion to suit the various sectarian interests... [W]e need to throw away all these sectarianisms and look deep inside our country and the experience of others... [w]e can form a unique Sudanese civilization that does not have to take refuge anywhere.[2]

7. I. INTRODUCTION

The geographic region of the Sudan is no stranger to violent conflict. From its independence and period as the single largest state in Africa, through its division in 2011 into two separate nations made up of distinct majority and minority ethnic groups, conflict has been the norm rather than the exception in the region. This history of conflict predates Sudanese independence, and some argue that it was woven into the fabric of the nascent Sudanese state.[3] As a pawn in the political manoeuvres of colonial Britain and Egypt, the Sudan was administered as two separate regions, “with political power and control of the country’s extensive natural resources, as well as decisions over education, policy, language and cultural identity, centered in the north.”[4] Inequality between north and south was thus institutionalized

[1] Attendee at the Khartoum Roundtable Conference, 1965 cited in Dunstan M Wai, ‘Political Trends in the Sudan and the Future of the South’ in Dunstan M Wai (ed), *The Southern Sudan: The Problem of National Integration* (Cass Library of African Studies 1973) 146, in Taisier M Ali and Robert O Matthews, ‘Civil War and Failed Peace Efforts in Sudan’ in Taisier M Ali and Robert O Matthews (eds), *Civil Wars in Africa – Roots and Resolution* (McGill-Queen’s University Press 1999), 199-200.
[2] Mansour Khalid (ed), *The Call for Democracy in Sudan* (Kegan Paul International 1989) 127 in Taisier M Ali and Robert O Matthews, ‘Civil War and Failed Peace Efforts in Sudan’ in Ali and Matthews (n 1) 200-201.
[3] Dan Connell, ‘Peace in Sudan: Prospect or Pipe Dream,’ (2003) 228 Middle East Report 2, 3.
[4] ibid.

long before Sudanese independence or the first flames of civil war. Following independence, the government in Khartoum drew on colonial policy in pursuit of stability in the new Republic of Sudan, and adopted it as "an essential term of reference" in response to growing social tensions in the south.[5] Faced with "glaring inequalities" in terms of economic opportunity and political parity,[6] the South took up arms against the central Sudanese state, initially as a myriad coalition of tribes and later, under John Garang's Sudan People's Liberation Movement/Army (SPLM/A). The resulting intrastate conflicts—particularly the First Civil War (1956-1972) and the Second (1983-2005)—caused the deaths of at least 2.3 million civilians.[7] Successive governments in Khartoum actively targeted the southern civilian population by mobilizing tribal militias as proxy forces of the Sudanese state.[8] Civilians also fell victim to famine and disease—the results of an abandoned social infrastructure and a devastated rural economy that was often another target of Khartoum's war of attrition against the South.[9] Indeed, the vast majority of casualties in the Sudanese conflicts were not the combatants themselves, but southern civilians who perished due to the conditions imposed by a protracted state of conflict.

The Sudanese civil wars thus confronted every form of rule in Sudan,[10] and survived a range of peace agreements aimed at preserving the unitary Sudanese state. Though Africa's longest civil conflict was resolved with the conclusion of the Comprehensive Peace Agreement (CPA) in 2005, many of the symptoms of state collapse persist—including a lack of effective state control over considerable swathes of territory—and the failures of peacebuilding remain evident. The Republic of Sudan is still plagued by civil strife in the Blue Nile, South Kordofan and Darfur regions, while South Sudan is engulfed in an ethnically-charged civil conflict of its own. These characteristics make the North-South conflict in Sudan a particularly novel case study within the parameters of this thesis. A critical retrospective of the North-South peace process highlights the conflict dynamics unique to the ongoing

[5] Ali and Matthews (n 1) 201.
[6] Connell (n 3) 3.
[7] Andrew S Natsios, *Sudan, South Sudan and Darfur – What Everyone Needs to Know* (OUP 2012) 78. Natsios' figure comes from the US Committee on Refugees, and only covers the period between 1983 and 2003.
[8] ibid at 72-73. It was believed that the ensuing chaos would trigger "massive population displacements, which would undermine southern culture and society," making southern citizens much more susceptible to systematic policies of Arabization and Islamization
[9] Randolph Martin, 'Sudan's Perfect War' (2002) 81(2) Foreign Affairs 111, 117.
[10] Ali and Matthews (n 1) 193-194: "…from a multi-party system, though the restrictions of one party rule, to the extreme of military dictatorship."

conflicts in the Sudan, and thus advances a more informed approach to resolving them.

This chapter begins with a brief introduction to the popular narratives used to frame the North-South conflict in Sudan. Section II elaborates on Sudan's colonial experience under Anglo-Egyptian rule, and how this period fostered the political, economic, and cultural differences that led to the outbreak of the First Civil War upon independence in 1956. The agreements that attempted to resolve Sudan's recurring civil wars are analysed in Section III. The valuable lessons imparted by the Sudanese experience of peace-making—on the applications and limitations of highly legalized peace agreements and autonomous arrangements—are discussed in Section IV.

The debate on the causes of Sudan's civil wars is—much like the Sudanese conflicts themselves—"divisive and far from settled."[11] The effects of religious differences, economic exploitation, and colonial intervention have all played their part in fuelling the conflict, "but none, by itself, fully explains it."[12] The northern Sudanese elite, for their part, perceived the conflict as a local rebellion confined to the south; a regional mutiny instigated by conspiring international actors,[13] and thus, a southern problem. The Khartoum regime neither recognized the conflict as a civil war, nor a national crisis, and its approach to peace-making lacked any real sense of urgency.[14] South Sudanese people, on the other hand, have largely perceived the conflict as one rooted in ethnicity and religion.[15] Sudan itself has been described as a religious battleground between the Arab-Islamic north and the African-Christian and Animist south, and any attempt to discount this aspect of the conflict "yields an incomplete and distorted picture of the country."[16] From independence onward, the central government repeatedly pursued aggressive policies of Arabization and Islamization in order to create an ethnically-distinct Islamic nation state in Sudan.

[11] Luka Biong Deng, 'The Sudan Comprehensive Peace Agreement: Will It Be Sustained?' (2005) 7(3) Civil Wars 244, 245.
[12] Douglas Johnson, *The Root Causes of Sudan's Civil Wars* (2003) The International African Institute, 1–2 in Amel Aldehaib, 'Sudan's Comprehensive Peace Agreement viewed through the eyes of the Women of South Sudan' (2010) Institute for Justice and Reconciliation Fellows Programme Occasional Paper, 3.
[13] Ali and Matthews (n 1) 196 and 217 claim that the Sudanese conflicts were only ever the focus of external influence *after* the fighting began.
[14] ibid at 195-196.
[15] Francis Deng, *War of Visions: Conflict of Identities in the Sudan* (Brookings 1995) in Deng (n 11) 245.
[16] Natsios (n 7) 6.

Rather than unifying the country, these policies only served to alienate southerners and accelerate "the very centrifugal forces it sought to restrain."[17] The southern rebellion thus represented a fierce resistance to the systematic oppression of their identity, and a demand for a secular 'New Sudan,' or alternatively, an independent South.

However, the simplicity of this clash of cultures discourse belies the complexity of the North-South conflict, upon which a number of factors were brought to bear. El-Battahani explains the fighting in Sudan as a conflict between the centre and the periphery, arising from "economic, resource-based, ethnic, cultural, religious and international"[18] concerns, all of which were exacerbated by the centralized government's "crisis of legitimacy and its utility as a vehicle for economic exploitation."[19] Indeed, power was entirely centred in northern Khartoum and in the hands of a northern, Arab-Islamic elite whose vision rarely extended beyond the borders of its own political constituency and power base in 'the golden triangle' between the Blue and White Niles.[20] In the eyes of this elite, the south was seen only as "an afterthought, an appendage, and a marginalized section of society."[21] Southern leaders soon realized that the chronic underdevelopment and cyclical violence in the south was the product of the northern elite's high-handed policies "and their resolve to retain their grip on the region."[22] When the SPLM/A emerged following the collapse of the Addis Ababa Agreement in 1983, it successfully reframed the conflict as one between the centre and the periphery.[23] The movement was able to popularly articulate how processes of "political marginalization, economic underdevelopment, and cultural domination" in the south had become institutionalized under rule from Khartoum.[24] For the SPLM/A, this abuse of the democratic process made the realization of a 'New Sudan' or an independent South Sudan an imperative.[25]

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[17] ibid at 12.
[18] Atta el-Battahani, 'A complex web - Politics and conflict in Sudan' in Mark Simmons and Peter Dixon (eds) *Peace by piece – Addressing Sudan's Conflicts* (Accord Conciliation Resources 2006) 10.
[19] ibid.
[20] Ali and Matthews (n 1) 199.
[21] Ahmad A Sikainga, 'Northern Sudanese Political Parties and the Civil War' in MW Daly, *Civil War in Sudan* (British Academic Press 1993) 81 in Ali and Matthews (n 1) 199.
[22] Ali and Matthews (n 1) 199.
[23] Natsios (n 7) at 67 argues that the SPLM/A's perception of the conflict in this regard was most likely influenced by John Garang's time as a student of development economics in the US.
[24] Ali and Matthews (n 1) 200.
[25] The capitalized 'South Sudan' is used to denote the transitional Government of South Sudan (GoSS) envisioned under the 2005 CPA, which became the independent State of South Sudan in 2011.

Even prior to the North-South negotiations that culminated with the CPA, commentators noted that a successful agreement would require "a genuine change in the perception of the roots of the conflict."[26] A peaceful end to the North-South conflict proved particularly difficult for that very reason: confronting the root causes of the civil war would necessitate a radical reframing of Sudanese society. As Connell surmises, the conflict did not lend itself to simple solutions, because every issue carried significant political, cultural and economic value—"from the definition of what it means to be a citizen of Sudan to who controls the country's newfound oil wealth…."[27] This represented a particular challenge for the central government in Khartoum, which had, up unto this point, maintained a privileged position with regard to these key aspects of Sudanese society. The state's reluctance to confront these contested ideas of state and society can be readily observed in the peace process, which has time and again omitted or neglected key issues, and "largely explains why many peace agreements have been dishonoured or not sustained."[28] For example, the political implications of land ownership are so acute that peace agreements have declined to address it in any substantive or legal manner, "deferring much of the work to the post-agreement phase."[29] In sacrificing such a key issue in the interests of political expediency, negotiators secured the short-term goal of an immediate cessation of hostilities.[30] However, the long-term implications of that sacrifice were shown up in Abyei in the years following the CPA, and continue to play out in South Sudan and the contested regions of the Republic of Sudan. A retrospective analysis of the Sudanese peace process thus offers an opportunity to further muse on the transition from the short thrift of words on paper to the long view of implementation, and the failure to learn from previous efforts, as per Gopalan.[31]

While the North-South conflict represented a prolonged and violent expression of political grievance, it "was just one part of a broader web of conflicts involving competing claims… to land, water, natural resources, political power or

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The terms 'south Sudan' and 'southern Sudan' are used to denote the regional self-governing units created within the Republic of Sudan under the Addis Ababa Agreement and the Sudan Peace Agreement.

[26] Ali and Matthews (n 1) 217.

[27] Connell (n 3) 3.

[28] Deng (n 11) 245.

[29] Omer Egemi, 'Land and peace processes in Sudan' in Simmons and Dixon (n 22) 54.

[30] ibid.

[31] Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55(2) Buffalo Law Review 403, 404-405.

cultural identity."[32] A study of the North-South conflict thus only reflects one reality in this regard. The conflict in Darfur, for example, was not only a reaction to state-led cultural oppression, but an attempt to force Khartoum to confront the region's systematic neglect, and to "give the people some control over their own futures."[33] Similarly, the ongoing conflict in the Southern Kordofan and Blue Nile regions shares many of its root causes with those of the broader North-South conflict, including "religion, race, resource distribution, and political marginalisation."[34] While the interconnectivity of these conflicts is acknowledged, this chapter adopts the North-South conflict as its exclusive focus. This reflects the "piecemeal regional approach" taken to peace-making by Khartoum,[35] which prevented the myriad rebel groups from mounting a significant challenge to Khartoum's privileged position and downplayed the national appeal of the SPLM/A.[36] Furthermore, because the North-South peace process spanned 40 years and represents the longest paper trail of conflict resolution instruments in Sudan, it affords the opportunity to hypothesize on the centrality of certain provisions to conflict resurgence or peace sustainability. Indeed, the most fruitful product of the North-South process, the CPA, has become the legal standard to which other rebel groups have aspired.[37] A critical analysis of Africa's longest civil war is thus central to unpacking the lessons learned from the Sudanese experience and the consequences they might have for the ongoing conflicts in the region.

7. II. HISTORICAL CONTEXT

7. II. A. COLONIZATION & THE ROAD TO INDEPENDENCE

In his account of the region, Natsios compares Sudan's history to the sudden and deadly sandstorms native to the Sudanic plain: "sporadic and unexpected upheavals [that] sweep violently across its vast human landscape."[38] Christianity was introduced to Sudan as early as the sixth century, though the Islamic faith slowly

[32] Mark Simmons and Peter Dixon 'Introduction' in Simmons and Dixon (n 18) 6.
[33] Natsios (n 7) 13.
[34] International Crisis Group, 'Sudan's Other Wars' (Africa Briefing, Khartoum/Brussels 25 June 2003) 2.
[35] Julian Thomas Hottinger, 'The Darfur Peace Agreement - Expectations unfulfilled' in Simmons and Dixon (n 18) 47.
[36] Jason Matus, 'The three areas - A template for regional agreements' in Simmons and Dixon (n 18) 34.
[37] Hottinger (n 35) 48. Hottinger alleges that rebel groups in Darfur "expected a comprehensive agreement of their own," but this has proven politically impossible under the CPA's power-sharing provisions.
[38] Natsios (n 7) 9.

expanded through cultural exchange with the Arab world and often through conquest. This resulted in the development of several Sultanates throughout the country and the emergence of merchant kingdoms along the Nile River.[39] These political entities, together with the hundreds of Arab and African tribes that populated the rest of Sudan, were collectively amalgamated into one nation-state under the colonial rule of Ottoman-Turkish Egypt and Britain, laying the unstable foundation upon which the modern Sudanese Republic was built.[40] Egypt was the first to do so, having conquered Sudan by 1821.[41] A lasting legacy of this period of Egyptian rule was the development of the Nile valley, much to the detriment of the other areas.[42] What emerged in lieu of effective governance in these peripheral regions was "a pattern of economic exploitation."[43] Thus, even a century before an independent Sudan, a clearly unequal pattern of development and exploitation had been established.[44]

By the mid to late 19th century, the opening of the Suez Canal piqued colonial Britain's interest in Egyptian affairs, and control over the headwaters of the Nile increased Sudan's strategic value. The Anglo-Egyptian Treaty of 1899 ushered in a period of joint rule, whereby Britain recognized Egypt's legal claim to Sudan and administered the country on behalf of the King of Egypt.[45] However, in the 60 years that followed and culminated with Sudanese independence, Egyptian influence waned and Britain demonstrably asserted its authority over Sudan.[46] Any armed opposition to British administration was brutally suppressed, shaping the formative Sudanese state into "a militarist and highly centralized mould."[47] The post-colonial state's over-developed "organs of violence" would later contribute to the advent of military coups as a means of political transition, and the mentality that the conflict in the south was merely a mutiny.[48]

While the British did make lasting contributions to political institutions and transport infrastructure during this time, most of its development projects were

[39] ibid.
[40] ibid at 14.
[41] ibid at 16-17.
[42] ibid at 18.
[43] el-Battahani (n 18) 11.
[44] Natsios (n 7) 18.
[45] ibid at 28.
[46] ibid.
[47] Ali and Matthews (n 1) 201.
[48] ibid.

focused on the Nile River valley.[49] Colonial policy openly reflected this glaring inequality in perception, economy and opportunity. Southerners were barred from working on a number of notable developments in and around Khartoum—including what was then the largest irrigation project in the world.[50] The "discontinuities of 19th century development" thus accelerated under Anglo-Egyptian rule, and the disparity between the centre and the periphery grew even more extreme.[51] On the eve of Sudanese independence, the country existed as two wholly different economic systems: one "was relatively well developed and the other was one of the least developed parts of the British global empire."[52] This institutionalized pattern of underdevelopment and neglect was to be maintained by post-independent regimes in Khartoum, and would haunt Sudan for its entire 20th century history.[53]

Following the conclusion of the First World War, the question of Britain's dominion over neighbouring Egypt became more heated and debates about Sudan's independence began to gain traction. Sudanese nationalism had been fostered by an emerging, educated northern-Arab elite that had long viewed Britain's policy of native administration as "a subtle way of consolidating power and disempowering" the native population.[54] This northern elite would come to dominate the nationalist agenda in the final days of colonial Sudan, paving the way for an Islamic state that did not reflect the needs and wants of its diverse society. Southerners wanted a voice within an independent Sudan, but the north's two major religious parties—the Umma party and the Democratic Unionist Party—dismissed their input as neither Islamic nor Arab, and therefore, of little importance to their vision for Sudan. Southerners also felt that Sudan should be a secular state, as did communists, socialists and secularists in the north.[55] However, the major Islamic parties in the north insisted on a state based on the teachings of Islam, and given their centrality to the independence movement, the emerging Sudanese state came to reflect their influence. State and society remained contested within post-independent Sudan, however, and these issues continued to dominate the ensuing North-South conflict from Sudan's

[49] Natsios (n 7) at 33-34.
[50] Ty McCormick 'Unmade in the USA' Foreign Policy <http://foreignpolicy.com/2015/02/25/unmade-in-the-usa-south-sudan-bush-obama> accessed 26 February 2015.
[51] Natsios (n 7) 27.
[52] ibid.
[53] ibid.
[54] ibid at 30.
[55] ibid.

independence in 1956 up until the conclusion of the CPA in 2005.

With the British administration departing Sudan throughout 1955, hundreds of northerners travelled south to fill the resulting vacancies.[56] Of the 800 posts advertised to replace the colonial administration, 40 were guaranteed for native southerners, though they were received as little as six junior posts.[57] Social unrest spread as the south began to worry about its place within a northern-dominated Sudan. Events came to a head in August 1955, when southern troops from the old British Equatorial Corps mutinied in Torit. Though the mutiny was soon supressed, 300 people—two-thirds of whom were northern Sudanese—were killed as a result of the violence.[58] The declining situation caused the British to accelerate their departure from the country, "since officials there still had responsibility with little corresponding control."[59] This resulted in the premature proclamation of the Republic of Sudan on 1 January 1956, though it lacked the necessary political infrastructure and many of the features of statehood. In their haste to get out of Sudan, the British had left the country with only a temporary constitution that did not address two of the most sensitive issues confronting the independence movement: the status of the south within Sudan and the role of Islam in national politics.[60] Born into civil war, the fledgling state underwent a trial by fire which saw several governments come and go. It was not until 1972 that this tumultuous period was brought to an end, and Sudan enjoyed a period of relative peace under the Addis Ababa Agreement.

7. II. B. THE FIRST SUDANESE CIVIL WAR (1955-1972)

The temporary constitution that Khartoum inherited from colonial Britain declared Sudan a secular republic, which reflected the country's highly diverse population of some 500 tribes and over 150 languages.[61] Successive administrations in the newly independent Sudan proved ineffective at managing these differences in practice, however, and attempted to impose a singular Sudanese identity throughout the country to consolidate control. The dominant Arab-Islamic identity was thus

[56] ibid at 40-41.
[57] Ali and Matthews (n 1) 203. Accounts vary from the six junior positions cited in Ali and Matthews, to the 8 positions granted to southerners in Natsios (n 7) 40-41.
[58] Natsios (n 7) 41.
[59] ibid at 42.
[60] ibid at 42.
[61] Andrew Hammond, 'After Decades of Civil War, Can Sudan Survive Peace?' (2002) 21(8) Washington Report on Middle East Affairs 53. Another account states that Sudan account for some 600 tribes speaking approximately 400 languages. See Aldehaib (n 12) 3.

employed by Khartoum's northern Arab elite as a central tenet of state-building,[62] and institutionalized policies of Arabization and Islamization became a feature of the new republic.[63] However, far from creating the unified identity that the Arab elite visualized for Sudan, these policies often had the opposite effect: "they created a fierce reaction which in many ways solidified and cemented identities along ethnic and cultural lines rather than creating one hegemonic identity."[64] Fleeing from state-oppression, arbitrary detention and torture, increasing numbers of southerners followed their political leaders into exile in neighbouring countries.[65] It was in exile that southern leaders were able to ferment a "simmering southern insurgency" under the banners of the Anyanya—a rebel movement which took its name from the ethnic Madi word for 'snake poison.'[66] By 1964, the Anyanya had a force of about 5,000 irregular troops that continued to cause a security concern in south Sudan, but did not pose a major challenge to the North's effective control over the region.[67]

The initial Anyanya campaign was beset by difficulties, however. From a military and strategic point of view, the movement did not possess a single personality "with the moral authority, experience, intellectual capacity, or fighting ability" to unite the various southern tribes in pursuit of a common goal.[68] The movement was plagued by southern tribal rivalries that encouraged political competition among the Anyanya leaders and prevented the formation of a unified command structure and a coherent plan to defeat the north.[69] The central government would later manipulate these southern rivalries throughout the Second Civil War to divide the southern movement. However, the political and military capabilities of the Anyanya improved dramatically in 1967, when Joseph Lagu—Chief of Staff to the movement's President—formed a bloodless coup and united the various southern tribes under his command. Lagu was able to do so by securing a deal with the Israeli

[62] Arnold Toynbee, *Between Niger and Nile* (Allen and Unwin 1965) 5-6 in Harvey Glickman, 'Islamism in Sudan's Civil War' (2000) 44(2) Orbis 267.
[63] Abel Alier, *Southern Sudan – Too Many Agreements Dishonoured* (2nd edn, Ithaca Press 1991) 24. Christian missionary activities were prohibited, except under license, and Muslim schools sprang up in both urban and rural areas. Arabic became the language of instruction in schools, and southern public servants were made redundant for their lack of Arabic. A recruitment ban for the police and prison forces came into effect in the south, and vacant places in these sectors were filled with recruits from the north.
[64] Anders Breidlid, 'The role of education in Sudan's civil war' (2013) 43(1) Prospects 35, 39.
[65] Alier (n 63) 24-25.
[66] Natsios (n 7) 44.
[67] ibid.
[68] ibid at 46.
[69] ibid.

government for the provision of modern weapons systems and military training.[70] Significantly bolstered by these developments, the Anyanya was able to mount a conventional military campaign against the North, thereby increasing the pressure on Khartoum to come to a political settlement of the 'southern problem.'

Political instability in the capital throughout the 1960s made the pursuit of a diplomatic solution ever more remote, however. Sudan suffered a series of "ineffective and short-lived" civilian governments,[71] though the processes of Arabization and Islamization continued unabated. Meanwhile, the military continued to stoke the flames of civil war, harassing the southern political elite and perpetrating acts of violence against the civilian population.[72] The sustained paralysis of successive civilian administrations provoked military intervention in May 1969. Colonel Gaafar Nimeiry's bloodless coup was largely based on the secular, socialist and pan-Arab ideals of the Egyptian Revolution of 1952, which had brought Abdel Nasser to power.[73] Soon after taking power, Nimiery announced his intention to resolve the conflict in the south through negotiated settlement, and set about devising a system of decentralized government for the south.[74] It was becoming increasingly clear that a military solution to the southern conflict was unlikely.[75] Though Anyanya's attempts to take key garrison cities in the south were repeatedly repulsed, the Sudanese Armed Forces (SAF) were proving incapable of defeating the movement in rural areas (a pattern that would re-emerge during the Second Civil War).[76] By suing for peace, Nimiery could thus present himself as a peacemaker in the south, and consolidate his tenuous political support in the north. However, while Nimiery's political pandering secured the Addis Ababa Agreement in 1972, it would also be responsible for its deconstruction in the ensuing decade.

[70] ibid at 46-47.
[71] ibid at 46.
[72] Robert Collins, 'Civil Wars in the Sudan' (2007) 5(6) History Compass 1778, 1781. This period was marked by the Juba massacre on 8 July 1965, when 1,400 people were murdered after a northern soldier's argument with a local. Four days later, 76 males were slaughtered by government forces at a wedding in Wau.
[73] Natsios (n 7) 47.
[74] ibid.
[75] ibid.
[76] ibid.

7. III. THE AGREEMENTS

7. III. A. THE ADDIS ABABA AGREEMENT (1972)

The Addis Ababa Agreement was heralded as 'an African achievement'[77] that could inspire hope for the reconciliation of a broader African problem: the relationship of the Arab communities of northern Africa to the native population of the sub-Sahara.[78] At an initial meeting in Addis Ababa in January 1971, the indicators of a potential peaceful settlement were encouraging: Nimiery declared a unilateral ceasefire, while Lagu vowed to constrain military action on the part of his commanders.[79] The two did not meet again until February 1972, once more in Addis Ababa. After only 12 days of talks, Nimiery and Lagu were able to initial a peace agreement. Talks had nearly broken down over one key issue—whether the South would be permitted to retain its own army. Indeed, Alier alleges that this was the grounds upon which the real struggle for power between the belligerents was fought.[80] However, with the careful mediation of Haile Selassie, Emperor of Ethiopia, the parties were able to move past this contentious issue.[81] The SAF was to remain united under one government, but with a regional southern command comprised of both southerners and northerners. However, in omitting to confront the issue of religion and its relationship with the state, Nimiery had paved the way for its undue influence over the peace process in the years to come. Furthermore, in granting the South an elected regional assembly, Nimiery permitted the region to enjoy a degree of autonomy unavailable anywhere else in the authoritarian state.[82] This upset the natural balance of Nimiery's regime, prompting a significant shake-up when the odds became stacked against him in the years that followed.

The Addis Ababa Agreement was essentially a legal mechanism to devolve autonomous powers to south Sudan, in realization of Nimiery's stated intention to do so upon acceding to power in 1969. The agreement itself recognized this, describing the agreement as an organic law of the national assembly to be confirmed by a referendum in the South.[83] The agreement created a self-governing 'Southern

[77] Paul Ladouceur, 'The Southern Sudan: a forgotten war and a forgotten peace' (1975) 30(3) 406.
[78] Toynbee (n 62) 6.
[79] Natsios (n 7) 50.
[80] Alier (n 63) 196 in David H Shinn, 'Addis Ababa Agreement: was it destined to fail and are there lessons for the Current Sudan Peace Process?' (2004) 20 Annales d'Ethiopie 239, 246.
[81] Natsios (n 7) 50.
[82] Ali and Matthews (n 1) 208.
[83] Addis Ababa Agreement on the Problem of South Sudan (The Addis Ababa Agreement), Article 2,

Region' of the provinces of Bahr el Ghazal, Equatoria and Upper Nile,[84] as well as any other areas "that were culturally and geographically a part of the Southern Complex as may be decided by a referendum."[85] The Agreement recognized the territorial integrity of the whole of Sudan, however, and obligated both parties to "strive to consolidate the unity of the Sudan and respect the spirit of the National Constitution."[86] The conception of the Southern Region reflected the socialist aspirations of Nimiery's Sudan, guaranteeing equal opportunity of education and employment, and prohibiting discrimination on the grounds of "race, tribal origin, religion, place of birth, or sex."[87] An Appendix on Fundamental Rights and Freedoms elaborated further on the rights that should be protected by the Constitution of the Republic of Sudan, including freedom of religion and cultural freedom for minorities. Though these acknowledgments settled the ethno-religious disputes that had fuelled the civil war in theory,[88] they would not be enough to sustain the conflict's resolution in the long term. Functional political institutions that could bridge the economic divide between the two Sudans would be required, and it is unclear whether the Addis Ababa Agreement delivered in this regard.

Under the Agreement, legislative authority was vested in a People's Regional Assembly.[89] The Regional Assembly could legislate in key areas, including administration of regional finance, public health, and natural resources, "without prejudice to the right of the Central Government in the event of the discovery of natural gas and minerals."[90] However, in other vital areas, including education, policing, regional infrastructure and land use, legislation had to conform to "National Plans,"[91] thereby rendering the Regional Assembly's autonomy somewhat ambiguous.[92] The Assembly possessed many of the features of a liberal democratic government, however, including the power to relieve any member of the Executive from office for reasons relating to the public interest, and could petition the President

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27 February 1972 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_720312_Addis%20Ababa%20Agreement%20on%20the%20Problem%20of%20South%20Sudan.pdf> accessed 19 August 2017.

[84] ibid at Article 4.

[85] ibid at Article 3.

[86] ibid at Article 30.

[87] ibid at Article 32.

[88] Natsios (n 7) 52.

[89] The Addis Ababa Agreement (n 83) Articles 8-9.

[90] ibid at Article 11.

[91] ibid.

[92] Ladouceur (n 77) 415.

to postpone any law—or withdraw any bill, pending the views of the Regional Assembly—that could adversely affect the welfare, interests or rights of the peoples of the Southern Region.[93]

Executive authority was vested in the High Executive Council, which was headed by a Regional President and exercised its power on behalf of the President of Sudan. The Executive Council was charged with directing the various departments in the Southern Region and initiating the laws for the creation of a Regional Public Service.[94] However, the President of the Republic retained significant control over the Regional Executive, having the power to appoint and relieve the President of the Executive and any member of the High Executive Council.[95] Indeed, in the 11 year period of peace following the Addis Ababa Agreement, Nimiery interfered in every election for President of the High Executive Council,[96] suggesting that the southern autonomy espoused on paper was perhaps more restricted than it appeared.

Chapter VII of the Agreement addressed finance and funding for the Southern Region, and permitted the Regional Assembly to levy regional taxes as the primary source of revenue for the Southern Region.[97] However, as Ladouceur notes, the tax base in the area was so small that the regional government was rendered dependent on subsidies from the national treasury and external donors.[98] The central government did undertake to make contributions to a number of development projects in the South, including contributions towards agricultural and industrial projects, and grants for the establishment of education institutions.[99] However, by 1976, the government had only delivered on a fraction of its obligations in this regard.[100] Unspecified funds were also made subject to a vote by the National Assembly and the "requirements of the region" under the agreement,[101] calling the idea of southern economic autonomy into question once more.

Though the Southern Region was not granted its own military, the Agreement provided that southern citizens would be integrated into the national military "in such

[93] The Addis Ababa Agreement (n 83) Articles 13-15.
[94] ibid at Articles 18 and 24.
[95] ibid at Articles 19 and 20.
[96] Natsios (n 7) 57.
[97] The Addis Ababa Agreement (n 83) Article 25.
[98] Ladouceur (n 77) 415.
[99] The Addis Ababa Agreement (n 83) Appendix B: Draft Ordinance on Items or Revenue or Grants-in-Aid for the Southern Region.
[100] Shinn (n 80) 247.
[101] The Addis Ababa Agreement (n 83) Article 25.

reasonable numbers as will correspond to the population of the region."[102] Accordingly, the SAF presence in the Southern Region was to consist of a 12,000-man Southern Command, comprised of 6,000 southern citizens and 6,000 men from outside the region.[103] A Joint Military Commission, comprised of three senior military officers from each side, was to oversee the recruitment and integration of the southern detachment, and disagreements were to be referred "to the respective authorities."[104] The bilateral and precise nature of these arrangements allowed the deployment of the Southern Command to take place in "an atmosphere of peace and confidence,"[105] but the agreement had failed to provide for those who were not assimilated into the meagre vacancies offered by the regional force. This omission would later lead to social unrest and violence during implementation of the agreement.

The Addis Ababa Agreement concludes with ceasefire and transitional arrangements that evidenced a high degree of precision and obligation, and ensured the successful implementation of many of the agreement's short-term objectives. These included provisions for an Interim High Executive Council—which would establish the regional civil service and make arrangements for the establishment of the Regional Assembly[106]—an amnesty for those who took part in any act of mutiny, rebellion or sedition in southern Sudan,[107] and a concrete and structured plan for the repatriation of internally displaced persons and regional refugees.[108] A precise and inclusive ceasefire mechanism with investigative and dispute resolution measures ensured an appropriate security environment for the implementation of the agreement; so much so that by June 1972, southern citizens were in complete control of regional administration.[109] The initially successful implementation of the Addis Ababa Agreement was most likely the result of the agreement's embedment in the Sudanese legal system. Nimiery himself ratified the agreement by executive decree on 3 March 1972,[110] transforming the peace deal into 'The Regional Self-

[102] ibid, Article 26.
[103] ibid at Protocols on Interim Arrangements, Chapter II, Article 2.
[104] ibid at Protocols on Interim Arrangements, Chapter II, Article 4.
[105] ibid at Protocols on Interim Arrangements, Chapter II, Article 3.
[106] ibid, Protocols on Interim Arrangements, Chapter I, Articles 3 and 4, respectively.
[107] ibid, Protocols on Interim Arrangements, Chapter III, Article 1.
[108] ibid, Protocols on Interim Arrangements, Chapter III, Articles 9-13.
[109] Shinn (n 80) 243.
[110] Mohamed Abdel Hai, *Cultural Policy in the Sudan* (UNESCO Press 1982) 16.

Government Act for Southern Sudan.'[111] A year later, the agreement was incorporated into Nimiery's secular and socialist Constitution. By 1976, the Agreement had firmly established "the rules for post-war politics in the South and appeared to be gaining a permanent and functional role in the political system of Sudan."[112]

In the years following the conclusion of the Addis Ababa Agreement, hopes remained high that the agreement had laid the foundations for a sustainable peace. Ladouceur, writing in 1975, praised the agreement's text as a compromise "between unworkable federalism and disintegration on the one hand, and between centralism and repression of local and regional aspirations on the other."[113] Two years later, Kasfir noted that both of the parties remained committed to making peace work through the institutions envisioned under the Addis Ababa Agreement, but conceded that the long-term viability of the process would remain in doubt "for some time."[114] A number of indeterminable variables threatened the delicate implementation of the agreement, principal of which was the text's over-reliance on President Nimiery. The period of stability that the Southern Region enjoyed in the wake of the Addis Ababa Agreement was entirely dependent on Nimiery remaining in power and relying on the south for political support. By 1975, the mounting opposition to Nimiery was already becoming a significant threat to the burgeoning peace process,[115] and some were worried that Nimiery could affect a policy-shift towards the Arab world to shore up his political position. Violent incidents in major southern cities—including the capital, Juba, in 1974—served as a reminder that that conflict between two distinct ethno-religious identities had not been resolved by "a single dramatic gesture,"[116] and proved "an ominous warning" of things to come.[117]

The resurging tension between North and South was complicated further by declining Sudanese economy and the discovery of oil in the Southern Region in 1978. Though Nimiery had embarked on a series of large scale development projects in the years immediately after the Addis Ababa Agreement—including the modernisation of road, rail and telecommunications infrastructure—the projects were

[111] Shinn (n 80) 243.
[112] Nelson Kasfir, "Southern Sudanese Politics since the Addis Ababa Agreement" (1977) 76(303) African Affairs 143, 143 in Shinn (n 80) 244.
[113] Ladouceur (n 77) 426.
[114] Kasfir (n 112) 143.
[115] Ladouceur (n 77) 424.
[116] Kasfir (n 112) 143.
[117] Ladouceur (n 77) 425.

largely ineffective, and the income they were supposed to generate did not materialize.[118] With the nation in rapid economic decline, Nimiery's regime moved to take control of the south's abundant oilfields.[119] When Nimiery introduced proposals to re-draw the North/South border—which had been explicitly delineated in the Addis Ababa Agreement—he found his proposal blocked by the regional assembly. Nimiery's response was to simply divide the Southern Region into three smaller units, thereby abrogating the Addis Ababa Agreement entirely, and returning the South to the way that it had existed prior to the agreement.[120] Republican Order Number One, issued on 5 June 1983, replaced the regional assembly in Juba with three weaker legislative bodies with no independent fiscal autonomy, vested the election of governors in Nimiery alone, removed the proportional representation of southern citizens in the SAF Southern Command, and reinstated Arabic as the official language.[121] "The final nail was driven in the coffin of the Addis Ababa Agreement" in September 1983, when Nimiery introduced the infamous September laws.[122] These laws established Sharia law as the basis of the Sudanese legal system, and underscored the alienation and estrangement of southern Sudan from the Islamized North,[123] triggering the outbreak of the Second Civil War under the banners of the SPLM/A.

The collapse of the Addis Ababa Agreement was not readily observable upon its conclusion in 1972. The Agreement was precisely worded and appeared to guarantee a democratic regional government with considerable autonomy that could exist in tandem with Nimiery's vision for a secular Sudan. However, there is textual and structural evidence to suggest that the Agreement was never intended as a national accord that would endure in the long run.[124] Though Nimiery was certainly eager to bring the civil war to an end, "[h]e had no intention of giving up indirect control over budgets, appointments, natural resources, policy, or military forces deployed in the South."[125] This is reflected by the Addis Ababa Agreement, which placed significant limitations on the Southern Region's autonomy with regard to

[118] Natsios (n 7) 52.
[119] Ali and Matthews (n 1) 209.
[120] Shinn (n 80) 253.
[121] Natsios (n 7) 60.
[122] Ali and Matthews (n 1) 209
[123] ibid.
[124] Francis M Deng, *War of Visions: Conflict of Identities in the Sudan* (The Brookings Institution 1995) 160 in Shinn (n 80) 255.
[125] Natsios (n 7) 57.

these key areas, and allowed Nimiery to directly interfere with the autonomous organs in practice. Precision was thus a means of appeasing the South with the promise of autonomy, "while creating enough ties to bind the region into Sudan as a whole."[126] Though at first glance, the document appears to be a very generous and legally compelling compromise, the unilateral control bestowed upon Nimiery under the agreement's terms reveal the process not as an effort to resolve the conflict on mutually agreeable terms, but to consolidate control over the whole of Sudan under one autocratic regime.

Several other commentators attribute the Addis Ababa Agreement's demise to the chronic underdevelopment and economic neglect of south Sudan over an extended period of time. Beswick, for example, maintains that the Agreement was "doomed in advance because the prevailing social and economic conditions in the South were such that any democratic government would probably have failed."[127] Economic rehabilitation of the south was something which the Addis Ababa Agreement very much took for granted. The long-term viability of the agreement was largely dependent on the Southern Region's ability "to make substantial progress on economic development" in a short space of time.[128] However, the Southern Region's limited tax base made the region dependent on national and international funding, which was inadequate in both cases.[129] The agreement also failed to consider how a systematic process of exploitation had resulted in the South's chronic underdevelopment. The central government did little to address the North-South divide, contributing only a fraction of its obligations towards development of the South,[130] and continuing to locate development projects in the North.[131] Those who returned to the South expecting an autonomous government with an equitable share in the nation's resources found unemployment, starvation and poor medical care instead.[132] Anyanya soldiers, neither demobilized nor reintegrated, roamed the Southern Region, frustrated with the lack of progress achieved by the peace deal.

[126] Peter Woodward, *Sudan 1898-1989: The Unstable State* (Lynne Rienner Publishers 1990) 143 in Shinn (n 80) 243.
[127] Stephanie F Beswick, "The Addis Ababa Agreement: 1972-1983 – Harbinger of the Second Civil War in the Sudan" (1991) 13(2-3) Northeast African Studies 191, 191 in Shinn (n 80) 255.
[128] Shinn (n 80) 247.
[129] ibid.
[130] ibid.
[131] Natsios (n 7) 52. Of the large development projects Nimiery embarked upon with heavy Gulf investment in the mid-1970s, nearly all were in the North, including a new highway system in the Arab triangle.
[132] Shinn (n 80) 245.

Violent incidents followed in Juba (1974) Akobo (1975) and Wau (1974 and 1976),[133] and crime rose to unprecedented highs.[134] The social unrest destabilized the Addis Ababa Agreement, and culminated with the outbreak of the Second Civil War in 1983.

The Addis Ababa Agreement—as the product ultimately of a domestic legislative process—was an example of hard legalization. The Agreement's text evidenced a high degree of precision in particular, setting out the composition, powers and procedures of the Southern Region's autonomous organs in considerable detail, and securing a stable post-conflict environment through detailed and inclusive bodies that would oversee a ceasefire and the repatriation of refugees. Moreover, the Agreement guaranteed a compromise on the South's most pressing concern—i.e., southern proportional representation in the SAF—and appeared to offer a concrete plan for economic development of the region. However, the limitations imposed upon southern autonomy by the text's carefully constructed provisions rendered the process vulnerable to the political manipulation that ultimately derailed the Addis Ababa Agreement. Though the agreement's high precision secured an autonomous Southern Region within months of the Agreement's conclusion, it ensured that that polity would function on terms exclusively and wholly dependent on Nimiery. As soon as it became politically and legally difficult to manoeuvre within the framework of the Addis Ababa process, he simply abrogated the entire agreement.

At best, the Addis Ababa Agreement can be described as a palliative solution,[135] an experiment in conflict containment rather than conflict resolution. If such an outcome was made possible by what was provided for by the Agreement, it is all the more worth noting those provisions that were omitted. Given that the maintenance of a southern military was of the utmost importance to the Anyanya, it is surprising that the Addis Ababa Agreement did not espouse a more concrete plan for the reintegration of southern ex-combatants who were not absorbed into the Southern Command. The Agreement made no reference to the social rehabilitation, education or retraining of these ex-combatants, and this inhibited the growth of a sustainable process under the Agreement's terms. Indeed, several authors note that unemployed Anyanya soldiers comprised one of the most significant threats to peace

[133] ibid.
[134] Beswick (n 127) 211.
[135] ibid at 191.

in Sudan at the time.[136] It is also surprising that the Agreement did not call for the gradual demobilization of Anyanya forces in tandem with the integration of southern citizens into the SAF. Given the widespread dissatisfaction with the Addis Ababa process as time wore on, the maintenance of an armed rebel group posed a threat to the Agreement's stability even in its early years, and remained one of the major factors that led to a resumption of hostilities in 1982.[137] Finally, the failure to recognize the ethno-religious factors underpinning the conflict contributed to the Addis Ababa Agreement's status as a palliative, rather than a progressive, accord. In failing to explicitly address the prominent role that religion had played in Sudanese state and society up unto 1972, the Agreement had no contingency plan in the inevitable event that it would return as a basis for political power. When Nimiery adopted a more Islamic outlook in the mid-1970s, the unresolved antagonistic relationship between African and Arab Sudan resurfaced, revealing the Addis Ababa Agreement as a mere interval in the overarching conflict between North and South.

The unrealized potential of the Addis Ababa Agreement led to the outbreak of the Second Civil War in 1983, and the emergence of a resurgent southern campaign under the banners of the SPLM/A. Under John Garang's leadership, the SPLM/A were able to successfully unite the various southern tribes in their bid "to create a multi-ethnic, multi-religious, secular state and a new political culture for the country or failing that, secede and form an independent state."[138] In May 1983, Garang and some 3,000 other defectors from the Southern Command withdrew to Ethiopia, where they regrouped with the remnants of the Anyanya rebellion and received support from the Ethiopian Government.[139] On 31 July 1983, Garang announced the creation of the SPLM/A, and instated himself as Commander-in-Chief of its military wing. By 1985, Garang had a fighting force of 10,000 troops, with a further 20,000 trained in Ethiopia.[140] By the end of that year, the SPLM/A exerted control over most of the Southern region, with the exception of the major garrison cities which were occupied by some 60,000 SAF troops.[141]

By 1990, the SPLM/A's military campaign had peaked. Over the course of

[136] Elias Nyamlell Wakoson, "Sudan's Addis Ababa Peace Treaty: Why It Failed," (1990) 12(2-3) Northeast African Studies 19, 26 and 35 in Shinn (n 80) 45-47, and Beswick (n 127) 199.
[137] Shinn (n 80) 247.
[138] Natsios (n 7) 12-13.
[139] ibid at 66.
[140] ibid.
[141] ibid.

the next year, however, the movement's fortunes began to turn. The Mengistu regime in neighbouring Ethiopia collapsed in May 1991, effectively depriving the SPLM/A of "its main operating base, its primary military and financial supplier and most of its military momentum."[142] Meanwhile, internal dissent was fermenting over Garang's refusal to delegate power within the movement. In August 1991, three senior commanders—Riek Machar, Lam Akol, and Gordon Kong—announced a coup in the hope that a significant number of Garang's followers would join them.[143] Support for the self-appointed 'Nasir faction' was not forthcoming however, and the opportunistic government of Omar al-Bashir moved quickly to exploit the split in the southern movement.[144] Bashir's government provided the Nasir faction with aid and arms and encouraged them to attack their former allies.[145] The SAF also took full advantage of the SPLM/A's disarray, and captured its headquarters in Torit in July 1992. Garang and the SPLM/A retreated to the Sudd Marshes in the South, which the SAF could not easily penetrate.[146] It would be years before it could mount another successful offensive against Bashir's regime.

7. III. B. THE SUDAN PEACE AGREEMENT (1997)

Having failed to successfully depose Garang, the Nasir faction were forced to turn increasingly towards Khartoum in their struggle for the SPLM/A leadership.[147] The splinter groups' deepening relationship with the central government intensified the fighting between the rival southern groups, prevented a united opposition to Bashir's regime, and added an ethnic dimension to the regional violence in the south.[148] By October 1994, Riek Machar had emerged as a frontrunner for the leadership of the Nasir faction, and renamed the faction the South Sudan Independence Movement (SSIM). Seeking to co-opt Machar's political clout in the war against the SPLM/A, the Bashir regime initiated a self-mediated peace process entitled 'Peace from Within.' The process sought to satisfy international concern about the conflict while avoiding the restrictions of an externally brokered peace

[142] International Crisis Group, 'God, Oil and Country: Changing the Logic of War in Sudan,' Africa Report N°39 (Brussels, 28 January 2002), 15-16.
[143] Natsios (n 7) 98.
[144] ibid.
[145] International Crisis Group (n 142) 16.
[146] Natsios (n 7) 99.
[147] International Crisis Group (n 142) 17.
[148] ibid.

agreement.[149] In reality, 'Peace from Within' was just an extension of the Bashir regime's efforts to keep the southern Sudanese opposition movements divided. The strategy successfully delayed the emergence of a united opposition, and produced the Sudan Peace Agreement—a one-sided, unmediated and imposed settlement "that achieved nothing positive for peacemaking in Sudan."[150]

In April 1996, the dissident SPLM/A officers concluded a 'Political Charter' with Khartoum that identified a federalized system of governance as a potential solution to the North-South conflict.[151] The Charter also espoused respect for cultural diversity and freedom of religion.[152] In April of the following year, the charter was expanded into a more comprehensive settlement, the Sudan Peace Agreement, which provided for a range of constitutional guarantees, fundamental rights and freedoms, wealth and power sharing, and a special administrative status for the South pending a referendum on self-determination after a four year interim period. The Agreement brought the plethora of southern factions that had broken ties with Garang together under the umbrella of the United Democratic Salvation Front (UDSF) and its military wing, the South Sudan Defence Force (SSDF). Garang's SPLM/A—having been excluded from the negotiations leading to the Agreement—duly rejected it as neither a sincere nor sustainable solution to the conflict.

Despite Garang's protestations, el-Affendi contests that the Agreement was initially welcomed "in Africa and beyond" for its rhetorical vision of a secular and multi-ethnic Sudan.[153] Commentary in Europe noted that, on paper, the accord satisfied "virtually all the demands made by the southern rebels since 1983."[154] The political process that had brought about the Agreement had also appeared legitimate enough to warrant "a senior American official scurrying to Khartoum in July to test its sincerity."[155] But the true motives behind Khartoum's quest for peace were soon revealed in the months that followed. To a large extent, the Sudan Agreement was merely a means to appease southern aspirations by assimilating Riek Machar into the

[149] Richard Barltop, *Darfur and the International Community - The Challenges of Conflict Resolution in Sudan* (Tauris 2010) 45.
[150] ibid.
[151] 1996 Political Charter, Article 4, 10 April 1996 <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/sudan1.pdf> accessed 19 August 2017.
[152] ibid at Articles 7 and 8, respectively.
[153] Abdelwahab El-Affendi, 'The Impasse in the IGAD Peace Process for Sudan: The Limits of Regional Peacemaking?' (2001) 100(401) African Affairs 581, 588.
[154] Jean-Louis Peninou, 'Much manoeuvring around Sudan,' *Le Monde Diplomatique* (September 1997) <www.monde-diplomatique.fr/1997/09/PENINOU/4438> accessed 19 August 2017.
[155] 'War and paper peace in Sudan,' *The Economist* (4 September 1997).

Muslim-dominated government.[156] Moreover, Machar—as an ethnic Nuer—was the key to unlocking the Nuer populated and oil-rich Unity State in southern Sudan. Having been co-opted into the central state, Machar's SSDF allowed northern interests to move in and develop the oil industry in the region. The SSDF would subsequently play a central role in defending the resulting oilfields from attacks by the main southern opposition groups.[157] This security role would ultimately destabilize the Sudan Agreement as the myriad southern armed movements vied for control of the oilfields. The resulting factionalism would cause Riek Machar to withdraw his support for the Agreement in December 1999.

The Sudan Peace Agreement begins with the parties' recognition that only a process "based on justice, equality, democracy, and freedom can… assist in the solution of the fundamental problems of the people of Sudan."[158] As a result, the Agreement is considerably detailed in relation to a number of Constitutional guarantees, democratic principles, and fundamental freedoms. The Agreement espouses a new national vision of Sudan as "a multi-racial, multi-ethnic, multi-cultural and multi-religious society," where "freedom of religion, belief and worship shall be guaranteed," and "no citizen shall be coerced to embrace any faith or religion."[159] Though Sharia is recognized as a source of legislation, the Agreement affirms that rights and duties are bestowed as a result of citizenship rather than religion.[160] Furthermore, the parties agree that laws based on common principles will apply throughout the federal system, with States possessing the power to enact complimentary legislation on matters peculiar to them.[161]

The Agreement states the Constitution shall enshrine many of the principles of a liberal democratic society, including the presumption of innocence, protection from arbitrary punishment, provision for judicial review, and access to the courts.[162] These principles were indeed incorporated into the 1998 Sudanese Constitution,[163]

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[156] International Crisis Group, 'The Khartoum-SPLM Agreement: Sudan's Uncertain Peace,' Africa Report N°96, (Nairobi/Brussels, 25 July 2005) 7.
[157] John Young, 'Liberation Movements, Regional Armies, Ethnic Militias & Peace,' (2003) 30(97) Review of African Political Economy 423, 431.
[158] The Sudan Peace Agreement, Preamble, 21 April 1997 <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/sudan2.pdf> accessed 19 August 2017.
[159] ibid at Chapter Three, s2(A)(1), (2) and (4).
[160] ibid at Chapter Three, s2(A)(6)(a) and 2(A)(1), respectively.
[161] ibid at Chapter Three, s2(A)(6)(b).
[162] ibid at Chapter Three, s2(B)(2).
[163] The Constitution of the Republic of Sudan, Part II, Chapter I, 1 July 1998 <http://www.sudanembassy.ca/Docs/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20THE%20SUDAN%201998.pdf> accessed 19 August 2017.

evidencing the highly legalized process afforded to certain aspects of the Agreement. Similarly, many of the basic human rights espoused by the 1997 Agreement were given legal effect by the 1998 Constitution, including the right to life and inviolability of the human person, the right to equality and equal treatment, freedom of religious worship, of expression, of the press, and of association and assembly.[164] The Agreement guaranteed full participation in the political and constitutional processes of state, and planned to realize this through "congresses and national convention or conference."[165] In this vein, the Agreement was also mindful of the need for further balanced representation in the federal organs of state, and provided that a public recruitment office would be based in the capital of the Southern States.[166]

Under the Agreement, south Sudan was to enjoy a special administrative status for four years, at which point, it would exercise its right to self-determination by referendum.[167] The right to self-determination is explicitly affirmed under the Agreement as "the right of the people of Southern Sudan to determine their political aspirations and to pursue their economic, social and cultural development…."[168] To those ends, southern citizens could choose either unity with the Sudanese state or secession from it.[169] In the four year period preceding the referendum, south Sudan would be administered by a Coordinating Council which would oversee the implementation of the Agreement, the social and economic rehabilitation of war affected areas in the south, and the "mobilisation of the people therein for the referendum."[170] The Coordinating Council retained many of the procedural powers granted to the High Executive Council under the Addis Ababa Agreement, including the right to adjourn any legislation tabled in the National Assembly if it adversely affected the interests of the Southern States,[171] and the power to remove any Minister of the Coordinating Council or member of the State governments from office.[172]

However, the central government still retained close control over the internal workings of the southern administration. Throughout the provisions establishing the

[164] ibid at Part II, Chapter I, Articles 20, 21, 24, 25 and 26 respectively.
[165] The Sudan Peace Agreement (n 158), Chapter Three, s2(E)(1).
[166] ibid at Chapter Three, s5(3) and s5(5).
[167] ibid, Chapter One, B(2) and (4).
[168] ibid at Chapter Seven, s10(1).
[169] ibid at Chapter Seven, s10(3).
[170] ibid at Chapter Five, s7(2)(1), s 7(2)(2) and s 7(2)(4).
[171] ibid at Chapter Five, s2(5)(ii).
[172] ibid at Chapter Five, s7(13) and 7(14), respectively.

Coordinating Council, ultimate control over the appointment and removal of any member of the southern administration is clearly vested in the President of the Republic. This includes the position of the President of the Coordinating Council, right down to the composition of the State assemblies.[173] It is thus unsurprising that the central government's failure to cede power to the South posed immediate problems for the implementation of the Agreement. When Riek Machar was elected President of the Coordinating Council, his nomination for Governor of Unity State was blocked by the central government, which supported Paulino Mantieb, a dominant military leader in that region.[174] When Mantieb broke with Riek's leadership in 1998, it weakened Riek's already tentative hold over the Southern States, and fomented further fragmentation in the southern movement.

The Coordinating Council exercised executive and legislative authority over the Southern States in areas including regional security and public order, foreign capital investment, and commercial development.[175] The Coordinating Council also exercised concurrent powers with the central government on matters pertaining to state elections, the public service in the South, and cultural planning.[176] In key areas associated with the expression of autonomy, however, the Coordinating Council's authority was curtailed "in accordance with national policies."[177] For example, the central government retained competence over federal budgeting, economic development, mining, national security, and education policy. Similar restrictions beset the southern state assemblies. States were granted executive and legislative powers in areas including local government, state taxes, industrial and commercial development, and health care, among others.[178] However, in key areas of economic and cultural autonomy, e.g., state economic development and planning, and education management, state power was limited in accordance with "Federal Planning."[179] These restrictions legally limited Southern autonomy in the same way that many of the Addis Ababa Agreement's provisions had done 25 years previously.

In order to "bridge the gap between the various States" and achieve "parity in

[173] ibid at Chapter Five, s7(1)(c) and 7(1)(f).
[174] Young (n 157) 431.
[175] The Sudan Peace Agreement (n 158), Chapter Five, s(7)(3).
[176] ibid at Chapter Five, s(7)(4).
[177] ibid at Chapter Five, s(7)(3)(a) and (c).
[178] ibid at Chapter Three, s(3)(3)(B)(1), (4),(5).
[179] ibid at Chapter Three, s(3)(3)(B).

provision of basic needs…,"[180] the Sudan Agreement proposed an equitable redistribution of federal revenue and natural resources. Major development projects and natural resource refineries were to be considered national wealth and managed accordingly, provided that the State in which the project was located received an equitable share of the returns from the project, and the citizens from that State were recruited to participate in the project.[181] A commission would later recommend an appropriate revenue sharing formula for the entire country.[182] However, the government's unilateral efforts in that regard appear largely rhetorical. Under the terms of the Agreement, the Southern States were to generate revenue through state taxes, excise duties and licences, and each respective state's share in the economic activities conducted within its territory.[183] These provisions repeated many of the Addis Ababa Agreement's flawed provisions on financing the Southern region. Without explicit and exacting guarantees on how the nation's revenue was to be shared, the Sudan Agreement rendered the Southern States' economic sovereignty largely dependent on funding from the Federal government and "foreign sources,"[184] in the same way that the 1972 Agreement had done. The government pledged to establish development projects, just as it had done in 1972,[185] but again, the Sudan Peace Agreement exhibited little detail as to how this would guarantee a more sustainable solution to the conflict. Given how the 1997 Agreement mirrors many of the 1972 Agreement's ineffective provisions on paper, it is difficult to envision how it could have effected an alternative outcome in practice. Having postponed genuine agreement on revenue and wealth sharing, and having failed to delegate any substantive control over natural resources to the South, the Sudan Peace Agreement could not effect a change in the complex economic and cultural relationships that characterised Sudan's civil war.

The Agreement remained ambiguous with regard to sourcing the necessary funding for post-conflict rehabilitation and reconstruction efforts. Despite the Agreement's emphasis on achieving southern self-reliance, the Southern States were repeatedly tasked with sourcing development assistance and donations from foreign

[180] ibid at Chapter Three, s(4)(1).
[181] ibid at Chapter Three, s(4)(3)(a) and (c), respectively.
[182] ibid at Chapter Three, s(4)(4) and (4)(5).
[183] ibid at Chapter Three, s(4)(7)(a), (b), (c) and (g), respectively.
[184] ibid at Chapter Three, s(4)(7)(d), (f), and (e), respectively.
[185] ibid at Chapter Three, s(4)(2)(d).

sources.[186] For its part, the Federal Government was to create a special fund to finance "crash development programmes,"[187] and assist in the development of the South by encouraging the establishment of "public sector institutions, development corporations and specialised banks."[188] The Federal Government also vowed to launch a plan for "the reconstruction, rehabilitation, repatriation and development of the Southern States,"[189] but what this entails remains ambiguous. Under the Chapter on interim arrangements, rehabilitation programmes will be provided with assistance "from the national, regional and international humanitarian agencies."[190] Given the Sudan Peace Agreement's form as the product of a domestic legal and political process, it is surprising that the agreement was so largely dependent on the good will of the international community. With retrospect, this detail was telling of Khartoum's strategy to sell the Sudan Peace Agreement on the international stage as a genuine attempt to bring peace to the country—all whilst retaining unilateral control over an unmediated peace process.

Chapter Six of the Agreement established the security arrangements that would transition Sudan to a functioning post-conflict society. The Agreement granted a general amnesty to all members of the SSDF,[191] and provided for the discharge of all prisoners and detainees, and their freedom of movement within Sudan.[192] The SSDF itself would remain in existence as the defence force for the Southern States, with responsibility for security and public order throughout the region. Personnel working in these sectors would be drawn from the southern States themselves.[193] The SSDF would remain separate from the national army,[194] and the SAF would be gradually demobilized in accordance with the needs of a peacetime force "once peace is established."[195] The Agreement did not specify a timeframe for when peace might be established, however, nor did it envision what peace might look like in a nation engulfed in several intra-regional conflicts. This omission should have called

[186] ibid at Chapter Three, s(7)(e) and s(6)(a).
[187] ibid at Chapter Three, s(5)(e).
[188] ibid at Chapter Three, s(10).
[189] ibid at Chapter Three, s(6)(a) and (b).
[190] ibid at Chapter Six, s(9)(xii).
[191] ibid at Chapter Six, s(9)(ix).
[192] ibid at Annexe 2 – General Amnesty Proclamation Order 1997, Article 4 & 5. Under Chapter Six, s(9)(xi) of the Agreement, A Joint Amnesty Committee and Special Amnesty Tribunal would be responsible for implementing the amnesty and dictating who would be covered by its terms.
[193] ibid at Chapter Six, s(9)(ii).
[194] ibid at Chapter Six, s(9)(i).
[195] ibid at Chapter Six, s(9)(ii).

the long-term viability of the Agreement into question from the outset.

The Agreement did establish committees that would oversee and supervise the security and ceasefire arrangements during the transitionary phase, however. Annexe 1 called for "a total cessation of all forms of hostilities," and obligated the parties to refrain from any policies that might conflict with processes of peace,[196] including hostile military operations, acts of violence against civilians, and interference with the free movement of the civilian population.[197] The ceasefire was to be enforced and consolidated by a Joint Ceasefire Commission, comprised of 10 officers from each of the belligerent parties,[198] with the authority to investigate alleged breaches and "to take appropriate measures" in response.[199] Local commissions, comprised of military personnel, local chiefs and community leaders, would support the work of the Joint Ceasefire Commission.[200] Parties were obligated to communicate the details of their troop movements to the ceasefire commissions, and were obliged to carry the necessary departure orders for these manoeuvres on their person.[201] Despite the precision evident in the Annexes to the Sudan Agreement, however, the text displayed little substantive power to compel. The Agreement recognizes the Annexes as guidelines to be considered "with a degree of flexibility,"[202] thereby stripping the Agreement's more precisely worded provisions of their obligatory language. Without an established timeframe for the peace process to follow, this degree of flexibility left the Agreement's fate to be decided unilaterally by the central government.

A Joint Military Committee served as the oversight mechanism for all military manoeuvres during the transitionary period, and it had ultimate control over the movement of the armed parties.[203] The Committee was representative of both of the belligerent parties,[204] and decisions of the Committee were to be made unanimously.[205] Crucially, the Joint Military Committee was headquartered at the SAF Army General Headquarters, which would coordinate the provision of training,

[196] ibid at Annexe 1 – Agreement on Cessation of Hostilities and Cease-Fire between South Sudan Defence Force (SSDF) and the Government of Sudan, Article 2.
[197] ibid at Annexe 1, Article 7.
[198] ibid at Annexe 1, Article 4.
[199] ibid at Annexe 1, Article 5(c).
[200] ibid at Annexe 1, Article 6(b).
[201] ibid at Annexe 1, Article 8(b) and (c).
[202] ibid at Chapter Six, s(9)(xiii).
[203] ibid at Chapter Six, s(9)(viii).
[204] ibid at Annexe 1, Article 3(a).
[205] ibid at Annexe 1, Article 3(c).

armaments and facilities for the SSDF.[206] SAF military intelligence prevented the movement from developing any cohesive command structure or substantive political clout, however.[207] This grossly undermined the SSDF's capacity to participate in the peace process—much like the text of the Sudan Peace Agreement had done—and prevented the movement from applying any political pressure that would ensure the implementation of the Agreement's key provisions.[208]

As a result, the peace process emanating from the largely rhetorical Agreement came under significant strain when the provisions it espoused on paper failed to materialise in reality. In December 1999, Riek Machar resigned from his position as President of the Coordinating Council and withdrew his support for the Sudan Peace Agreement, throwing the south into open conflict once more. Some SSDF commanders—including Machar himself—eventually returned to the SPLM/A, while others remained committed to the Agreement because of the financial benefits, or "the conviction that they alone were committed to southern self-determination."[209] With the escalation of violence and the return of southern in-fighting after the Agreement's collapse, a Sudanese government official reflected that "[i]t was the right agreement but the wrong party as far as peace in Sudan was concerned."[210]

However, the tendency to attribute the Sudan Peace Agreement's failure to the SSDF's lack of political clout[211] obscures a more nuanced understanding of how the Agreement's text reflected Khartoum's political manipulation of the process. Moreover, the Sudan Agreement was far from 'the right agreement' for resolving the North-South conflict in any sustainable manner. Granted, the Agreement appeared to satisfy southern aspirations on paper: it provided for freedom of religion and belief, a more equitable distribution of wealth and power, further representation in the federal government, and regional self-government pending a referendum on secession from northern Sudan. However, the Sudan Agreement stopped short of taking full account of almost all of these issues, and ultimately failed to deliver on many of them.

For example, even though the Agreement established the Coordinating

[206] ibid at Chapter Six, s(9)(vi).
[207] John Young, *Fate of Sudan* (Zed Books 2012) 57.
[208] ibid.
[209] ibid.
[210] International Crisis Group (n 142) 135.
[211] Cirino Hiteng Ofuho describes the Sudan Peace Agreement as "a hollow document signed by splinter groups but not by *the main force in the south*" [emphasis added]. See Cirino Hiteng Ofuho, 'Negotiating peace - Restarting a moribund process' in Simmons and Dixon (n 18) 21.

Council as the principal organ of southern self-government, the central government retained competence in key areas including economic development, mining, and education policy. While this is not an unusual feature of power-sharing agreements (as one can see from the Philippine example), Khartoum's control over the internal workings of the Coordinating Council appeared to compromise southern self-government entirely. The central government retained ultimate control over the appointment and removal of any member of the southern administration, and misused this power to appoint individuals that would further northern interests. This is evidenced by the central government's support for Paulino Mantieb as Governor of Unity State. The appointment of Mantieb directly contravened Riek Machar's nomination, and stirred the tensions that would ultimately lead to Riek's resignation as President of the Coordinating Council.

As such, the Coordinating Council's ability to pursue its greater political and economic aspirations was inhibited by the Agreement's text from the outset. Despite its appearances as a legislative act devolving power to an autonomous southern government, the Agreement had actually bound the Coordinating Council to Khartoum, much in the same way that the Addis Ababa Agreement had done with its High Executive Council. Indeed, the Sudan Agreement's approach to resolving the North-South conflict largely mirrors that of the Addis Ababa Agreement, despite the 25 years that separated the two. Both agreements adopted similar provisions on regional self-government, finance, development, and freedom of belief. Given that both agreements also relied on good faith and little else, it is unsurprising that the Sudan Agreement failed to produce a better outcome than its predecessor. The Sudan Agreement did provide for a referendum on southern self-determination, but by omitting to delegate unilateral control of the Agreement from Khartoum, the referendum became one of many features that never materialized. Indeed, Riek Machar himself noted that in securing a referendum for the South, the Sudan Agreement conceded an Islamic centre in Khartoum: "That model clearly failed. If we don't change the Centre, and end the dominance of a minority clique, then there is little hope for a sustainable peace in the South."[212] The lessons Machar learned in this regard would significantly influence his outlook upon his return to the SPLM/A, and the ensuing negotiations that would culminate with the CPA.

[212] Quoted in International Crisis Group, 'Capturing the Moment: Sudan's Peace Process in the Balance,' Africa Report N°42 (Khartoum/Nairobi/Brussels, 3 April 2002).

As an agreement that was bound to the domestic legal system, the Sudan Peace Agreement—like its predecessor—exemplifies hard legalization. The Agreement itself recognized its origins as an organic law, endorsed by the National Assembly with the effect of a constitutional decree.[213] Similarly, the 1998 Constitution of the Republic of Sudan incorporated the key terms of the Agreement, namely a referendum on self-determination, preceded by an interim regional government for the southern States.[214] The Sudan Agreement exhibited high precision with regard to a number of key provisions, including the duties, functions and composition of the Coordinating Council, its competences, the interim arrangements on ceasefire and security, and the fundamental rights and freedoms that comprised a new Sudanese polity. In the absence of a more precisely defined timeframe, however, the Agreement remained low on obligation, and was vulnerable to political influence like the Addis Ababa Agreement before it. The Agreement provided for a politically weak Coordinating Council that could not further the peace process, and was bound to Khartoum on any issue that could potentially further southern aspirations. The entire Agreement was dependent on Khartoum implementing it unilaterally, in its own good time and in good faith. Given that the Sudan Peace Agreement was much more effective as a means of dividing the southern movement than it was as a means of resolving the North-South conflict, it is doubtful whether that good faith ever existed in the first place.

With regard to the delegation limb of the legalization matrix, the Sudan Peace Agreement did delegate interpretive and enforcement authority to the judicial, military and police organs of state. The Agreement could be interpreted by the Supreme Court and amended by the National Assembly in consultation with the Coordinating Council.[215] However, this grant of delegation only contributed to Khartoum's unilateral control over the Agreement's implementation. Furthermore, Khartoum insistence on brokering 'peace from within' did little to attract international support for the Agreement, and this was critical to its failure.[216] The lack of support was mainly due to the efforts of Garang's SPLM/A, which actively pressured the international community to denounce and reject the Sudan

[213] The Sudan Peace Agreement (n 158), Chapter Two, s1(b)(2).
[214] The Constitution of the Republic of Sudan (n 163) Part IX, Article 139(3)(g).
[215] The Sudan Peace Agreement (n 158), Chapter Eight, s11(2).
[216] Young (n 207) 57.

Agreement.[217] Garang's vision of a secular Sudan in which religion was a personal preference resonated with successive US administrations,[218] and established the SPLM/A internationally as the legitimate representative of southern aspirations.[219] The SSDF was duly left to ponder "why their deal with the government was perceived as a sell-out for the South… while the various agreements the SPLM signed with northern political parties [were] justified as advancing southern interests."[220]

SSDF dissatisfaction is understandable, given that the Sudan Peace Agreement served in many ways as a model for the CPA concluded by Khartoum and the SPLM/A some 8 years later.[221] Indeed, many of the key provisions agreed upon in 1997 went on to occupy a central and celebrated role in the CPA, including the provisions on a secular Sudan, an interim period governed by a regional southern government, and a referendum on self-determination. However, as the SSDF itself later conceded, the single and telling difference between the two agreements was that the CPA enjoyed international support while its predecessor did not.[222] Realizing that this would be crucial to any lasting and functioning settlement, the Bashir regime agreed to a peace process mediated by the Intergovernmental Authority on Development (IGAD) in 1998. That process would eventually culminate with the CPA, which finally brought an end to almost 50 years of war in Sudan.

7. III. C. COMPREHENSIVE PEACE AGREEMENT (2005)

The IGAD peace process grew out of the organization's annual summit in 1993. Peace negotiations were officially launched in Nairobi in March 1994 and in May of that year, the IGAD delegation had issued a Declaration of Principles (DoP) "that would constitute the basis for resolving the conflict in the Sudan."[223] The DoP stipulated that the people of south Sudan had a right to exercise their self-determination if the central government did not embrace secularism and democracy, and recognized the need for extensive rights of self-government throughout the

[217] ibid.
[218] Cirino Hiteng Ofuho (n 211) 20.
[219] Young (n 207) 88.
[220] International Crisis Group (n 156) 7-8.
[221] Young (n 207) 107.
[222] International Crisis Group (n 156) 7.
[223] The IGAD Declaration of Principles, 20 May 1994 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_940520_The%20IGAD%20Declaration%20of%20principles.pdf> accessed 19 August 2017.

nation; the separation of State and religion; and an equitable distribution of wealth among the multi-racial, multi-ethnic and multi-cultural peoples of Sudan. The SPLM/A readily accepted the DoP as a basis for negotiations, but Bashir's regime was not prepared to accept self-determination nor secularization as preconditions to further talks in 1994.[224]

Increasing oil revenues in the years immediately thereafter convinced the central Sudanese government to reconsider its position on these issues. Though substantial oil deposits had been discovered in Sudan in the 1970s, the essential infrastructure needed to extract and export oil was not operational until the late 1990s.[225] The central government's new found wealth inspired a policy U-turn with regard to the south. Southern self-determination within a unified Sudan suddenly became a more attractive option than secession and loss of several profitable oilfields.[226] As oil replaced religious expansion as a reason for war, and the war itself inhibited further oil exploration, peace became the logical policy for Khartoum.[227] With international pressure mounting—and the government's 'peace from within' strategy failing to alleviate it—Khartoum returned to the IGAD table in October 1997, and finally agreed to negotiate on the basis of the DoP in May 1998.

Initially, the IGAD initiative struggled to achieve anything of importance. During negotiations in June 2002, it became clear that any meaningful progress would be subject to the resolution of two major issues: the relationship between religion and the State, and the right of South Sudan to self-determination. The breakthrough came in July 2002 when the parties concluded the Machakos Protocol, "without which it would have been impossible to deal with the remaining outstanding issues."[228] The Protocol recognized the southern right to self-determination,[229] while striving to "redress the grievances of the people of South Sudan" within a framework that upheld the unity of the nation.[230] Accordingly, the parties agreed to work together to make the unity of the Sudan an attractive option to

[224] Mohamed el-Mukhtar Hussein, 'Negotiating peace - The road to Naivasha' in Simmons and Dixon (n 22) 18.
[225] Natsios (n 7) 107-108.
[226] International Crisis Group (n 142) 111.
[227] Natsios (n 7) 111.
[228] The Machakos Protocol, Talking Notes, Paragraph 7, 20th July 2002 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020710_MachakosProtocol.pdf> accessed 19 August 2017.
[229] ibid at Part A, Article 1.3.
[230] ibid at Part A, Article 1.1.

the people of South Sudan.[231] The Machakos Protocol sought to achieve this by recognizing Sudan as "a multi-cultural, multi-racial, multi-ethnic, multi-religious and multi-lingual country,"[232] in which religion would not be used as a divisive factor. The National Government vowed to take into account the religious and cultural diversity of the Sudanese people in all its laws,[233] and the application of Sharia law "only in respect of the states outside Southern Sudan" was affirmed.[234] For their part, the people of South Sudan would exercise their right to self-determination through an internationally-monitored referendum that would be held after Pre-Interim and Interim Periods.[235] The Pre-Interim Period would last six months, and would allow for the establishment of the bodies and mechanisms necessary to implement and monitor a comprehensive settlement.[236] An Interim Period of six years would follow, during which time the people of South Sudan would enjoy the advantages of a unified and secular Sudan, before exercising their right to secede from or remain in it.

Chapter I of the CPA incorporates the Machakos Protocol into the agreement, and recognizes "all the obligations and commitments specified" therein as binding.[237] The Agreement's chapeau also notes the parties' commitment to implementing the text "fully and jointly,"[238] and is the first agreement to explicitly acknowledge a peacebuilding role for the people of South Sudan in over 50 years of conflict. Aptly following the parties' commitment to a bilateral implementation is the Protocol on Power-Sharing set out under Chapter II. Under the Agreement, Sudan would be governed by a National Government that would protect and promote the national sovereignty of Sudan;[239] and possess exclusive Legislative and Executive Power over National Defence, Citizenship, Foreign Affairs, the Constitutional Court, the Central Bank, and others.[240] A Government of South Sudan (GoSS) would exercise authority

[231] ibid at Part A, Article 1.5.5.
[232] ibid at State and Religion, Preamble.
[233] ibid at Part B, Article 3.2.1.
[234] ibid at Part B, Article 3.2.2.
[235] ibid at Part B, Article 2.5.
[236] ibid at Part B, Article 2.1.(c).
[237] The Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (Comprehensive Peace Agreement), Chapeau, Article 1, 9 January 2005 <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf> accessed 19 August 2017.
[238] ibid at Chapeau.
[239] ibid at Chapter II, Part I, Article 1.3.1.
[240] ibid at Chapter II, Part V, Schedule A.

over the territory of South Sudan as it existed on 1 January 1956;[241] and have unprecedented and exclusive powers over the adoption of its own Constitution; legislation pertaining to its structures of governance; planning for regional services including health, education and welfare; and developing financial resources for the region.[242] States would exercise power at state level and in areas including social welfare, health care, education, and others.[243] The parties formally agreed to respect the autonomy of each organ of governance, and to abstain from encroaching on each organ's respective powers or functions.[244]

The CPA's power-sharing formulae equitably represented the main political parties of the North and South and reflected the political realities of the conflict.[245] The GoSS enjoyed a significant role in the National Executive, with the President of the GoSS serving as the Republic's First Vice-President.[246] The Agreement called for a "collegial decision-making process within the Institution of the Presidency,"[247] particularly in relation to declarations of war and states of emergency, Presidential appointments under the Peace Agreement;[248] and the establishment of a National Government.[249] Appointments to the National Executive were to be shared equitably by the two parties to reflect "the need for inclusiveness, the promotion of national unity… and the respect and implementation of Peace Agreement [sic]."[250] Crucially, the GoSS's executive organ—the Executive Council of Ministers—remained independent of Khartoum's influence. Though the Executive Council was obligated to assign 15% of its seats to Bashir's National Congress Party,[251] the CPA explicitly states that the President of the GoSS appoints his/her ministers to the Executive, and the Executive is ultimately accountable to him/her alone.[252] Given the extent to which successive regimes in Khartoum had previously interfered with government appointments in the South, this agreement on power-sharing reflected a much more participatory and sustainable approach to making peace in the Sudan.

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[241] ibid at Chapter II, Part III, Article 3.1.
[242] ibid at Chapter II, Part V, Schedule B.
[243] ibid at Chapter II, Part V, Schedule C.
[244] ibid at Chapter II, Part I, Article 1.5.1.4.
[245] ibid at Chapter II, Part II, Articles 2.2.5 and 2.5.5; Chapter II, Part III, Articles 3.5.1 and 3.6.4; and Chapter II, Part IV, Articles 4.4.2, and 4.5.1.
[246] ibid at Chapter II, Part II, Articles 2.3.5.
[247] ibid at Chapter II, Part II, Articles 2.3.4.
[248] ibid at Chapter II, Part II, Articles 2.3.6.
[249] ibid at Chapter II, Part II, Articles 2.3.12.
[250] ibid at Chapter II, Part II, Article 2.5.1.
[251] ibid at Chapter II, Part III, Article 3.6.4.2.
[252] ibid at Chapter II, Part III, Article 3.6.1.

The agreement on power-sharing also displayed remarkable precision with regard to the functions of government at all levels. For example, the CPA established a 30-day deadline for the formation of a Government of National unity;[253] and outlined the composition of the various executive and legislative organs during the interim period.[254] Moreover, the CPA provided for several contingencies, should any untimely events threaten the implementation of the painstakingly crafted Agreement. For example, the Agreement clarifies how the Institution of the Presidency shall function should a southerner win the national Presidential election,[255] and provides detailed instructions and exact timeframes in the event that the posts of the President of the Republic of Sudan, the First Vice-President of the Republic, or the President of the GoSS should fall vacant.[256] Obligation and precision duly combine here to make the implementation of the Agreement a priority in the minds of the parties—to keep the peace process on track in the event of a contingency, and to shelter it from any political fallout that might result. These provisions proved crucial just months after the CPA was concluded, when John Garang—the first President of the GoSS and inaugural First Vice-President of the Republic of Sudan—was killed in a helicopter crash.

In addition to executive and legislative organs, the CPA provides for judicial organs at every level of governance. At the National and GoSS levels, Supreme Courts and Courts of Appeal shall be established.[257] A Constitutional Court would have ultimate authority over the various levels and organs of government, and will uphold the human rights and fundamental freedoms guaranteed under the Agreement.[258] This included the right to life, to personal liberty, to vote, to a fair trial, the equal rights of men and women, freedom of thought, expression, and assembly, and freedom from discrimination.[259] The CPA further obligated the Republic of Sudan to comply with the international legal framework on political, economic, social, cultural and human rights.[260]

The Constitutional Court was also tasked with upholding the Interim National

[253] ibid at Chapter II, Part II, Article 2.3.12.
[254] ibid at Chapter II, Part I, Article 1.8.3.
[255] ibid at Chapter II, Part II, Article 2.3.7.
[256] ibid at Chapter II, Part II, Articles 2.3.8-2.3.10, and Chapter II, Part III, Article 3.6.6.
[257] ibid at Chapter II, Part II, Article 2.11.2, and Chapter II, Part III, Article 3.7.1.
[258] ibid at Chapter II, Part II, Article 2.11.3.2.
[259] ibid at Chapter II, Part I, Article 1.6.2.1-16.2.16.
[260] ibid at Chapter II, Part I, Article 1.6.1.

Constitution which "shall be the Supreme Law of the land."[261] A National Constitutional Review Commission (NCRC) would prepare an interim Constitution based on the terms of the CPA within six weeks of receipt of the agreement.[262] The NCRC would also be responsible for preparing any other legal instruments necessary to give effect to provisions and institutions of the CPA.[263] The CPA further obligated the parties "to implement the Agreement and to give legal and constitutional effect to the arrangements agreed therein."[264] Disputes among the various institutions emanating from the peace process could also be referred back to the Constitutional Court.[265] By tying the provisions of the CPA to the Sudanese Constitutional framework in this manner, the Agreement displayed the compelling language and precise instruction of a truly substantive legal document. Non-compliance was discouraged because such hard legalization made abrogation "tantamount to constitutional disorder with dire repercussions for the unity of the Sudan."[266]

Chapter III of the CPA sets out the Protocol on Wealth-Sharing. The parties pledge to share the wealth of the nation equitably, "so as to enable each level of government to discharge its legal and constitutional responsibilities and duties."[267] The agreement also recognizes "[t]hat revenue should reflect a commitment to devolution of power and decentralisation of decision-making in regard to development, service delivery and governance."[268] This statement is crucial as it distinguishes the CPA's provisions on wealth-sharing from those of its 1997 predecessor, and is symbolic of the extent to which the CPA devolved genuine political power to the GoSS. While the Agreement recognized that South Sudan, and the Southern Kordofan, Blue Nile and Abyei state had a pressing need to perform basic government functions and fund post-conflict reconstruction,[269] the CPA also recognized that there was a practical limit on how much national resources could be mobilized for these tasks.[270] The GoSS revenue stream is largely dependent on regional and state taxes, including income tax, excise tax, licences, and levies on

[261] ibid at Chapter II, Part I, Article 1.5.1.2(iii)-(vii).
[262] ibid at Chapter II, Part II, Articles 2.12.5 and 2.12.4.2.
[263] ibid at Chapter II, Part II, Articles 2.10.1 and 2.12.9.
[264] ibid at Chapter II, Part II, Article 2.12.2.
[265] ibid at Chapter II, Part II, Article 2.11.3.2.(vi).
[266] Deng (n 11) 244.
[267] Comprehensive Peace Agreement (n 237) Chapter III, Part I, Article 1.2.
[268] ibid at Chapter III, Part 1, Article 1.8.
[269] ibid at Chapter III, Part 1, Articles 1.5 and 1.6.
[270] ibid at Chapter III, Part 1, Article 1.13.

tourism and border trade.[271] Accordingly, the Agreement issues a formal plea for the international community "to play a strong and constructive role in providing post-conflict construction/reconstruction assistance to Sudan…."[272] A Southern Sudan Reconstruction and Development Fund shall be established to solicit and utilize funds from domestic and international donors for this purpose.[273] A similar fund—the National Reconstruction and Development Fund—shall be established by the National Treasury to develop war affected areas outside South Sudan.[274]

In contrast to its predecessors, the CPA provides a detailed formula for the redistribution of oil revenues—one of the financial cornerstones of South Sudan's transition to a functioning polity under the Agreement. Indeed, the text acknowledges that sharing wealth from the nation's oil resources "should balance the needs for national development and reconstruction of Southern Sudan."[275] Accordingly, net oil revenues derived from Southern oil wells will be split 50-50 between the GoSS and the National Government as of the beginning of the pre-interim period.[276] The National Government further pledges to allocate 50% of the national revenue collected in Southern States to the GoSS "to partially meet the development costs and other activities during the interim period [sic]."[277] In order to guarantee the appropriate sharing of financial resources and the transfer of funds in accordance with the agreed formulae, the CPA mandates the formation of a Fiscal and Financial Allocation and Monitoring Commission.[278]

National oil resources were to be managed with due regard to the national interest, the public good, the affected regions, the local populations and the relevant environmental policies.[279] A National Petroleum Commission was mandated to manage oil exploration and development in the Sudan in accordance with these principles.[280] The CPA provides binding arbitration where disagreement arises between members of the Commission itself,[281] or where individuals holding rights in

[271] ibid at Chapter III, Part 6, Article 6.3.
[272] ibid at Chapter III, Part 1, Article 1.15.
[273] ibid at Chapter III, Part 15, Article 15.1.
[274] ibid at Chapter III, Part 15, Article 15.4.
[275] ibid at Chapter III, Part 5, Article 5.1.1.
[276] ibid at Chapter III, Part 5, Article 5.6.
[277] ibid at Chapter III, Part 7, Article 7.3.
[278] ibid at Chapter III, Part 8, Article 8.2.
[279] ibid at Chapter III, Part 3, Article 3.1.1.
[280] ibid at Chapter III, Part 3, Articles 3.3 and 3.4.
[281] ibid at Chapter III, Part 3, Article 3.5.4.

land wish to contest the award of an exploration contract.[282] The CPA precisely provides for separate National and South Sudan Land Commissions, with authority to arbitrate between contending claims over land.[283]

Chapters IV and V of the CPA were aimed at resolving the unique peculiarities of the conflicts in Southern Kordofan and Blue Nile states. Both states occupied territory that fell within the Republic of Sudan border under the CPA, but both identified readily with the southern states that had been neglected and marginalized by the central government. Accordingly, the CPA attempted to accommodate the concerns of both states within a National framework based upon human rights and cultural freedoms.[284] Both states would have executive, legislative and judicial organs, and possess exclusive powers in religious and cultural matters, traditional and customary law, education administration up to third level, and the drafting and adoption of a State Constitution.[285] Both states would have their own respective State Land Commissions,[286] and both were to receive 75% of the total National Reconstruction and Development Fund.[287] Furthermore, both states were permitted to recruit personnel for the public service and security sectors locally, subject to National standards and training.[288] The CPA was to be made subject to the will of the people of South Kordofan and Blue Nile, and Chapter V explicitly recognized a process of popular consultation as "a democratic right and mechanism to ascertain the views of the people" of both states in that regard.[289]

Abyei—an oil-rich region within the state of South Kordofan that straddles the border between Sudan and South Sudan—also received its own particular arrangement under the CPA. For the duration of the interim period, Abyei was to remain a part of both Kordofan in the Republic of Sudan and Bahr el Ghazal in South Sudan.[290] The region would be administered by an Executive Council which would have responsibility for administering necessary services, maintaining security in the region, and making proposals to the National Government regarding development

[282] ibid at Chapter III, Part 3, Article 3.5.3.
[283] ibid at Chapter III, Part 2, Articles 2.6.1 and 2.6.4, and Articles 2.7.1 and 2.7.4.
[284] ibid at Chapter V, Part 1, Articles 1.1 and 1.2.
[285] ibid at Chapter V, Schedule A.
[286] ibid at Chapter V, Part 9, Article 9.5.
[287] ibid at Chapter V, Part 8, Article 8.6.
[288] ibid at Chapter V, Part 5, Article 5.9.
[289] ibid at Chapter V, Part 3, Article 3.1.
[290] ibid at Chapter IV, Part 1, Article 1.2.1.

and urbanization projects for the area.[291] Abyei was not empowered with legislative, executive and judicial organs under Chapter IV, but this was to be determined at a later date by the Presidency of the Republic.[292] As an oil-rich region, Abyei's wealth-sharing provisions were explicitly specified. The region was entitled to its respective share of the national revenue (as specified in the CPA), its own tax revenue, and equitable shares of both the South Sudan and National Reconstruction and Development Funds.[293] Furthermore, revenue from oil produced in the region was to be specifically shared, with 50% going to the National Government, 42% to the GoSS, and the remaining 8% being divvied up among the states of Kordofan and Bahr el Ghazal, and the Ngok Dinka and Misseriya nomadic people that inhabited the region.[294]

Within the first two years of the interim period, an Abyei Boundaries Commission was to define and demarcate the precise boundaries of the area.[295] At the end of the interim period—and in tandem with the South Sudanese referendum on self-determination—Abyei was to have its own referendum on either retaining its special administrative status in the north or becoming part of Bahr el Ghazal in the South.[296] However, the particulars of the protocols on the conflicts in Abyei, Southern Kordofan and Blue Nile never came to be. The CPA was not subjected to the process of popular consultation promised under Chapter V, yet the peace process moved forward regardless. When South Sudan ultimately voted to secede from the Republic of Sudan, tensions flared in Southern Kordofan, and fighting broke out in the state one month before South Sudan's independence. The conflict spread to Blue Nile several months later, and remains deadlocked in March 2018. Similar tensions in Abyei prompted the National Government to forcibly seize control of the area immediately prior to South Sudan's declaration of independence. To date, the people of Abyei have not had the opportunity to exercise their ballot on the future status of the region. The lack of progress on these key aspects of the CPA is indicative of the fact that the bilateral mechanisms that facilitated SPLM/A participation in implementing the peace process throughout South Sudan did not extend north of the

[291] ibid at Chapter IV, Part 2, Article 2.5.
[292] ibid at Chapter IV, Part 2, Articles 2.6 and 2.7.
[293] ibid at Chapter IV, Part 3, Articles 3.2.1-3.2.4.
[294] ibid at Chapter IV, Part 3, Article 3.1.
[295] ibid at Chapter IV, Part 5, Article 5.1.
[296] ibid at Chapter IV, Part 1, Article 1.3.

border.[297] Indeed, even a cursory glance at the implementing modalities of those Protocols reveals that local actors possessed very little power to force key issues, e.g., the referendum on Abyei. The CPA's failure to deliver on these key provisions highlights one of its most debilitating flaws: that it engineered a North-South oriented solution to what it perceived to be a North-South conflict exclusively. In doing so, it fomented the narrative that each of Sudan's bloody conflicts were isolated and unrelated.[298] That narrative has persisted to this day, with disastrous consequences for peace-making efforts in the Republic of Sudan.

The security arrangements that would govern Sudan during the interim period and beyond were detailed exhaustively in Chapter VI and Annexure I, which provided for a phased withdrawal of combatants from their positions north and south of the border.[299] The army of Sudan would be comprised of both SAF and SPLM/A units, but the two forces would remain separate during the interim period.[300] Chapter VI envisioned the creation of Joint Integrated Units, comprised of both SAF and SPLM/A officers, which would serve as a symbol of national unity during the interim period and provide the "nucleus of a post-Interim Period future army of the Sudan should the vote of referendum confirm unity."[301] The Agreement envisioned a permanent cessation of hostilities within 72 hours of the conclusion of the agreement,[302] which prohibited any act that contravenes the Agreement, any unauthorized movement of troops, any unauthorized recruitment or mobilization, unauthorized replenishment of supplies, violations of human rights and humanitarian law, and the recruitment of child soldiers.[303] In the event of a violation, a Ceasefire Joint Military Committee is empowered to determine appropriate disciplinary measures, such as shaming the guilty parties, "severe punishment in event of [sic] grave violations," or referral to civil, criminal, or court-martial procedures.[304] The explicit prohibition of these acts and the provision of punitive measures in the event

[297] See Edward Thomas, *Against the Gathering Storm - Securing Sudan's Comprehensive Peace Agreement* (Chatham House 2009) 30 <https://www.ciaonet.org/attachments/13800/uploads> accessed 19 August 2017. Thomas argues that the CPA's explicit provision for the withdrawal of the SPLM/A from Southern Kordofan and Blue Nile was evidence that CPA implementation in the area did not have the same organic guarantees that it had in the South.
[298] Matus (n 36) 34.
[299] Comprehensive Peace Agreement (n 237), Annexure I – Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices, Part II, Articles 18.2 and 18.4.
[300] ibid at Chapter VI, Article 1(a) and (b).
[301] ibid at Chapter VI, Article 4.1.(b).I and IV.
[302] ibid at Annexure I, Part I, Article 5.2.1.
[303] ibid at Annexure I, Part I, Article 10.1.
[304] ibid at Annexure I, Part I, Articles 10.2.1, 10.2.2 and 10.2.3, respectively.

of a breach ranks the Agreement's security arrangements high on precision and obligation. In addition, the parties are required to furnish the ceasefire mechanisms with maps, sketches, and detailed lists revealing the particulars of their troops and detailed data on their inventories and stocks.[305] As a result, the CPA's security measures evidence hard legalization in a manner that its predecessors did not.

Annexure I also details the institutional infrastructure necessary to oversee and verify the implementation of the highly legalized CPA. The Ceasefire Political Commission—a senior political decision-making body—was to be responsible for monitoring the implementation of the Agreement, negotiating any operational details as they arise, settling deadlocks arising out of implementation of the ceasefire, and determining disciplinary measures in the event of a violation.[306] Joint Ceasefire Joint Military Committees were envisioned at national, regional and local levels.[307] These bodies would have responsibility for overseeing the parties' compliance to their obligations, ruling on unresolved ceasefire violations, and crucially, serving as a channel of communication between the parties in the tense post-conflict security environment.[308] Each body is specifically comprised under the Annex, and includes representation from UN, SAF and SPLM/A staff from the appropriate political/military background and rank.[309] Notably, both the Ceasefire Political Commission and the Ceasefire Joint Military Committee—the most senior political and military bodies tasked with implementing the Agreement—are required to reach their decisions by consensus.[310] Both of the belligerent parties are thus granted an active role in implementing the CPA through the bipartisan implementation mechanisms espoused under the Agreement. This level of precision and inclusion is unprecedented in Sudan's turbulent history of conflict resolution documents.

Under the Agreement, the parties request the deployment of a United Nations Peace Support Mission in accordance with Chapter VI of the UN Charter (on the pacific settlement of disputes). Upon the ceasefire taking effect, the UN mission was to assist with coordinating the de-mining effort throughout the Sudan,[311] and monitoring the withdrawal of all weapons from within range of the respective

[305] ibid at Annexure I, Part I, Articles 8.5, 8.6.2, 8.8, and 8.10, respectively.
[306] ibid at Annexure I, Part I, Articles 14.5.1, 14.5.2, 14.5.6, and 14.5.7, respectively.
[307] ibid at Annexure I, Part I, Article 13.1.
[308] ibid at Annexure I, Part I, Articles 14.6.5.1, 14.6.5.2, 14.6.5.4 and 14.6.5.10, respectively.
[309] ibid at Annexure I, Part I, Articles 14.2, 14.6.3, 14.7.1, and 14.8.3, respectively.
[310] ibid at Annexure I, Part I, Articles 14.4 and 14.6.4, respectively.
[311] ibid at Annexure I, Part I, Articles 8.6.4-8.6.6.

parties' assembly areas.[312] Annexure I further obligates the parties to furnish the UN mission with "detailed lists of size and location of their forces in each area,"[313] and grants the Special Representative of the Secretary General and the Force Commander of the UN Mission positions on the senior political and military implementation mechanisms.[314] Article 15.4 of Annexure I prompted a Status of Forces Agreement that represented an act of delegation hitherto unprecedented in Sudan's peace-making efforts. The provisions of the Status of Forces Agreement were standard fare, granting the UN mission freedom of movement, and several immunities and privileges within the country.[315] However, the fact that the Sudanese state was willing to cede some of its authority to a third-party actor is indicative of a significant shift in its negotiation strategy up to that point, and reflects the CPA's trend towards delegation, and thus, legalization.

That said, the extent to which the act of delegation to the UN Mission can be attributed to the terms of the CPA must be qualified. UN Security Resolution 1590 followed just two months after the conclusion of the CPA, giving the UN mission authority to use force to protect civilians and UN personnel in the face of imminent danger,[316] and granting legally binding effect to the Agreement's requests for UN assistance with monitoring ceasefire, redeployment and de-mining.[317] In addition, the Security Council, acting under Chapter VII of the UN Charter, *requested* the Sudanese government and the UN Secretary General to conclude the Status of Forces Agreement within 30 days of the resolution's adoption.[318] As a legally binding instrument, one may reason that the obligation to conclude a Status of Forces Agreement weighed more heavily on the Sudanese government because of Resolution 1590, rather than the terms of the CPA itself. While such an obligation may have arisen independently of the peace agreement, the resolution's complementary provisions still contributed to the perception of the CPA—which formed the resolution's "raison d'être"[319]—as a legal document.

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[312] ibid at Annexure I, Part I, Article 8.9.
[313] ibid at Annexure I, Part I, Article 8.7.
[314] ibid at Annexure I, Part I, Articles 14.2.3 and 14.6.3.1, respectively.
[315] Agreement between the Government of Sudan and the United Nations Concerning the Status of the United Nations Mission in Sudan (28 December 2005) <http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf> accessed 19 August 2017.
[316] UN Security Council Resolution 1590 (2005) S/RES/1590, Article 16(i).
[317] ibid at Article 4(a)(i) and (iii) and Article 4(c).
[318] ibid at Article 16(ii).
[319] Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100(2) The American

The CPA also displays a greater degree of detail with regard to processes of Demobilization, Disarmament and Re-Integration (DDR)—features that had been notably absent from previous agreements on the North-South conflict. The CPA displays a political and practical awareness of this omission, acknowledging that DDR processes "are crucial components for a secure and peaceful Sudan…."[320] The CPA also recognizes the importance of national ownership of DDR processes, and calls for the establishment of a DDR institutional infrastructure to coordinate DDR activities at national, regional, and state level.[321] The CPA exhibits significantly less detail as to what the DDR process might actually entail, however. Ex-combatants are to be "empowered by provision of training and information to voluntarily choose their path to reintegration,"[322] and the GoSS undertakes to absorb demobilized southerners from the SAF and the SPLM/A into various institutions of the Southern State service.[323] However, these provisions remain a significant improvement on the DDR details that were seriously lacking in the Addis Ababa and Sudan Agreements. When considered with the expansive peace-building bureaucracy and international support envisioned under the Agreement,[324] the CPA's DDR provisions provide a roadmap more conducive to sustainable peace than any of its predecessors.

Despite the exhaustive detail and exacting timeframe put in place by the CPA, implementation of the Agreement did not proceed to the letter. The precision evident in the Agreement's implementing modalities provided an initial burst of momentum that secured a functioning GoSS polity and an appropriate security environment in the early days of the peace process.[325] Immediately thereafter, progress began to stall, and the parties missed a number of deadlines "on what was admittedly a very challenging time schedule."[326] The SAF withdrawal from South Sudan—which was supposed to occur in 2007—did not occur until 2009.[327] The nationwide general elections—scheduled for the end of the third year of the interim period—did not occur until 2010, as the parties sought political dominance in the oil-

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Journal of International Law 373, 394.
[320] Comprehensive Peace Agreement (n 237) Annexure I, Preamble.
[321] ibid at Annexure I, Part III, Article 25.1.1-25.1.3.
[322] ibid at Annexure I, Part III, Article 24.6.
[323] ibid at Chapter VI, Article 3(d).
[324] ibid at Annexure I, Part III, Article 24.12., which calls on the international community to mobilize financial support for the DDR process.
[325] Thomas (n 297) 16.
[326] Natsios (n 7) 179.
[327] Lovise Allen, 'Making Unity Unattractive: The Conflicting Aims of Sudan's Comprehensive Peace Agreement' (2013) 15(2) Civil Wars 173, 184. .

rich regions along the North-South border.[328] In the absence of any substantive progress on these issues, the South Sudanese referendum on self-determination came to be seen as the CPA's "centre-piece,"[329] and secession became a much more attractive option than continued engagement with a highly centralized government seemingly acting in bad faith. The people of South Sudan duly voted for secession in January 2011, and on 9 July, South Sudan became an independent state.

However, secession—much like the CPA itself—was only a means "of reframing the problems of uneven development in Sudan, not a solution for them."[330] While the CPA correctly identified the North-South conflict as the natural consequence of an exploitative centre-periphery relationship, it actually served to recreate those inequities by premising the agreement around bipartisan political forces and interests.[331] By granting Bashir's National Congress Party and the SPLM/A a majority share in their respective assemblies, the CPA allowed them to retain "a grip on power,"[332] much to the detriment of the myriad of constituents that comprised Sudanese society, including women.[333] The CPA thus reflected a southern incarnation of the toxic centre-periphery relationship that Sudan had suffered since independence, with Juba as its new centre.[334] Voices of opposition within the GoSS claimed that the Agreement had "inadvertently sowed the seeds for one-party rule... and undermined the development of multi-party democracy."[335] Tribal and ethnic inequality also continued to play a significant role in the politics of South Sudan's transition. In fact, anxieties about economic issues such as land ownership often led to conflict, and tribal violence actually increased post-agreement.[336] Given the extent to which the CPA had re-created the inequalities that had characterised Sudan since independence, it is not surprising that South Sudan descended into its own civil war in December 2013.

Though these criticisms impart valuable lessons about the negative effects of

[328] Thomas (n 297) at 23.
[329] ibid at 6.
[330] ibid at 22.
[331] Anne Itto, 'Guests at the table? The role of women in peace processes' in Simmons and Dixon (n 18) 58.
[332] Thomas (n 297) 14.
[333] Itto (n 331) 58.
[334] International Crisis Group, 'Politics and Transition in the New South Sudan,' Africa Report N°172 (Juba/Nairobi/Brussels, 4 April 2011) 18: "The legacy of centralised authority is strong. Inconsistent commitment to local government among state and national actors... has inhibited decentralisation thus far and will continue to present challenges."
[335] ibid at 2.
[336] Thomas (n 297) 28.

certain legal mechanisms, their alternatives surmise the elusiveness of a perfect peace. Had the CPA embraced a broader process of inclusion rather than the bilateral negotiations it entailed, it ran the risk of not producing any agreement at all.[337] Allen notes that attempts to include northern opposition parties in the initial IGAD negotiations in 1994 were a non-starter, while the attempt to consolidate several southern splinter groups into a viable political party under the Sudan Agreement in 1997 arguably did more harm than good to the prospects of lasting peace.[338] The CPA—on the other hand—succeeded where its predecessors had failed, affecting a cessation of hostilities between North and South, and crucially, bringing respite to the untold suffering of the civilian population.[339] But a perfect peace should be more than just the absence of war.[340] The CPA itself recognized this; pledging to replace war in Sudan "not just with peace, but also with social, political and economic justice which respects the fundamental human and political rights of all the Sudanese people."[341] The parties' failure to deliver on this promise produced a negative peace, marked by the periodic absence of war rather than the creation of transformative political and social practices. This has allowed cycles of violence to regenerate in South Sudan.

All things considered, the CPA remains the most highly legalized agreement in Sudan's history of conflict, and its legal character is closest to that of 'hard law.' The Agreement was incredibly precise, setting out a transformative political framework for addressing the key issues that underpinned the conflict, and providing for the institutional infrastructure and resources necessary to resolve these issues in exhaustive detail. The explicit provision of exact formulae for sharing power and redistributing wealth within the Agreement's text is a feature unique to the CPA—its predecessors opted to postpone agreement on this issue to the post-agreement phase, thereby jeopardizing the momentum of implementation and risking further dispute and conflict. Indeed, the CPA's exacting detail seizes upon the momentum generated by the Agreement's conclusion, and provides for several contingencies should any unforeseen circumstances threaten its timely implementation. Such specific terms were notably absent from previous agreements aimed at resolving the Sudanese

[337] Allen (n 327) 176.
[338] ibid.
[339] Natsios (n 7) 185.
[340] Aldehaib (n 12) 2.
[341] Comprehensive Peace Agreement (n 237) Chapter I, Part A, Article 1.5.2.

conflict.

The CPA also exhibited a higher degree of obligation than its predecessors. The Agreement's text was tied intrinsically to the Sudanese constitutional framework, an act of incorporation that ensured the parties' compliance with key aspects of the CPA in order to ensure legal continuity during the post-conflict transition. The Agreement's annexes explicitly prescribed the parties' obligations, the means by which they should fulfil them, and the timeframe in which they should comply,[342] refining the obligatory language used throughout the body of the main text. What is perhaps most notable of the CPA is that it is the first truly bilateral agreement to emanate from the North-South conflict. The CPA legally obligates both parties to implement the Agreement fully and jointly, and delegates significant power to the Southern institutions in order to achieve this. The delegation of such political power to the southern institutions was central to forcing the issue of southern self-determination by the end of the interim period, given Khartoum's reluctance to address the more contentious aspects of the CPA. Had the Agreement not enshrined bilateral obligations, nor granted the southern institutions the power to implement them, the CPA might have gone the way of the Addis Ababa and Sudan Agreements.

Finally, the CPA delegated the authority to enforce and interpret the terms of the Agreement to multilateral and international organs that had been absent on previous occasions. Many of the peacebuilding institutions with monitoring and enforcement duties were multilaterally composed with representatives from the belligerent parties, and some provided for UN and IGAD membership. By explicit provision, decisions were to be made by consensus, and several bodies—including the Ceasefire Political Commission and the Ceasefire Joint Military Committee—were to serve as dispute resolution mechanisms and channels of communication. Failing resolution at this level, disputes among the various peacebuilding organs could be referred up to the Constitutional Court of Sudan, which had ultimate interpretive authority over the CPA. The Agreement also provided for the most significant grant of delegation in the Sudan's history of conflict-resolution by authorising the UN to undertake a key role in stabilizing post-conflict Sudanese society. That the CPA ranks high on every matrix of the legalization framework sets it apart from its predecessors, and grants the Agreement an international dimension that challenged the central government's once absolute authority over the peace

[342] Deng (n 11) 250.

process.

It remains uncertain what effect the CPA's hard legal character had on the peace process. Highly precise and obligatory provisions that shared power among the belligerent parties and instructed them on the issues they had to address—and when, and how—did not seem to bridge the trust divide that separated North and South. Though the CPA ultimately delivered on the promise of southern self-determination in January 2011, it failed to deliver on other key aspects of the Agreement, including the status of the Abyei region, and the resolution of the conflict in Southern Kordofan and Blue Nile. To date, the highly legalised nature of the CPA has not served as a basis for challenging the Republic of Sudan's *de facto* control of Abyei. Its provisions have not served as a model for resolving the conflict in Southern Kordofan and Blue Nile, as was once predicted.[343] Nor has the democratic and highly devolved GoSS envisioned under the terms of the CPA materialized in the wake of independence. South Sudan—like its northern neighbour—remained highly centralized politically. Power was concentrated in the hands of a southern elite that did not reflect the South's ethnic diversity, and the resulting tensions lead the fledgling nation into civil war in December 2013. The failure to implement some of the core principles of the CPA in both of the Sudanese states thus suggests that peace agreement implementation remains rooted in the realm of politics, where political expediency outweighs legal certainty. The fault lies not with the provisions of the CPA itself, which was "not really an overambitious peace agreement, but the fact that sustainable peace for Sudan is an enormously ambitious political project that demands more commitment than it has so far been given."[344] Accordingly, if peace agreements are to sustain peace, maintain security, and prohibit the use of force in the international arena, then international lawyers have much to do to ensure that peace is an obligation, rather than an option.

7. IV. CONCLUSIONS

A case study of the Sudan provides a unique cross-section of the relationship between certain legal mechanisms—and the manner in which they are detailed and composed—and the ensuing peace process they produce. A retroactive perspective

[343] See International Crisis Group (n 34) 3.
[344] Thomas (n 297) 18.

such as this may offer an appropriate lens through which to view the interconnected conflicts that continue to ravage the geographic span of the Sudan. Despite an ongoing process of national dialogue, violence remains the principle means of communication in the contested political space that divides centre and periphery in the Republic of Sudan. Similarly, the tentative peace established by an August 2015 'Compromise Peace Agreement' on South Sudan serves only as "an imperfect solution" to the other fault-lines that permeate the new nation,[345] much as the CPA itself had done for the whole of Sudan. All of the Sudan can thus benefit from the North-South experience of the CPA, and the lessons inherent in South Sudan's fall from newly liberated grace into resurgent internal conflict.

A notable feature of North-South peace-making is the trend towards harder legalization as the conflicts wore on. From the Addis Ababa Agreement in 1972 to the culmination of the second civil war in 2005, each of the North-South peace agreements were drafted with a formal legal aesthetic, and tied to Constitutional processes and methods of domestic ratification. Despite these legal processes, however, the 1972 and 1997 peace agreements did not give rise to legal remedies upon breach, nor recourse to judicial procedure when they went unimplemented. Their abandonment can be attributed to the fact that key provisions required further legislative action or legal clarification, which weakened their strands of precision and their overall legalization in turn. Both Agreements were also lacking in delegation: the 1972 Agreement made no reference to a neutral or interpretive power that could clarify ambiguous terms or enforce their implementation, and the central government retained control over appointments to the only Court in the land that could interpret the 1997 Agreement.

It was only when the parties reinforced the 2005 CPA along all of its dimensions that the peace process produced legally compelling obligations. The CPA explicitly stated the formulae for sharing power and resources—contentious issues that had not been definitively settled upon the conclusion of the previous agreements. The CPA also ranked much higher in terms of delegation, subjecting its ceasefire to UN monitoring and verification. The CPA was intricately tied to the Sudanese Constitution in ways that its predecessors was not. Moreover, the terms of the Agreement could be interpreted by a Constitutional Court with authority to

[345] International Crisis Group, 'South Sudan's South: Conflict in the Equatorias,' Africa Report N°236, (Juba/Nairobi/Brussels, 25 May 2016), (i).

adjudicate on disputes between the various levels and organs of government. All of these legal mechanisms combined to produce a much more sustainable process that provided for recourse to dispute resolution and further negotiations, if necessary. These channels of communication and legal adjudication were lacking from previous agreements, providing no viable alternative to violence and inviting their collapse.

Increasingly legal mechanisms also played a pivotal role in securing the short-term objectives of successive peace agreements in Sudan, and often generated the momentum that sustained the process beyond the agreement itself. For example, the bilateral ceasefire brought about by the Addis Ababa Agreement ensured the rapid implementation of some of its key aspects, including the installation of a regional government in southern Sudan within 6 months of the Agreement's conclusion. Similarly, the high precision and exacting timeframe that characterised the CPA's transitional provisions ensured the installation of a functioning GoSS in the immediate aftermath of the CPA's conclusion, which proved crucial to forcing progress on other aspects of the agreement in the latter years of the process. In this respect, the Sudanese experience epitomises the value of highly legalized instruments in regulating post-conflict environments governed by trust and security concerns, at least in the short-term. Though the processes emanating from the Addis Ababa Agreement and the CPA experienced setbacks as they wore on, the short-term objectives achieved through their technically specific and legally compelling provisions arguably sustained those processes beyond the texts that bore them.

The 1997 Sudan Peace Agreement also established a thorough and technically proficient ceasefire mechanism that ensured that the South Sudan Coordinating Council was established as per the terms of the Agreement. However, the Agreement's other key provisions inhibited the growth of good faith and the development of a long-term peace process from the outset. The Coordinating Council remained bound to Khartoum in areas of key competence, and this prevented the SSDF from developing into a cohesive entity capable of forcing the implementation of other aspects of the Agreement. The central government's ultimate control over the mediation, negotiation and implementation of the Sudan Peace Agreement thus served as a major impediment to its long-term viability, and a reminder of the need to delegate and devolve power in order to sustain a bilateral commitment to peacebuilding.

Autonomy was the principal vehicle for supporting this commitment over the

course of the Sudanese civil wars. Throughout the conflicts, peace agreements devolved increasingly generous grants of autonomy to southern polities in order to assuage southern grievances. The manner in which these arrangements were legally framed, however, had a significant impact on how southern self-determination played out in practice. The Addis Ababa Agreement, for example, espoused a regional southern government with executive and legislative power, but these powers were limited by the degree of control that the central government retained over education, economic and social development, and regional planning. Furthermore, the Addis Ababa Agreement made the appointment or removal of any member of the southern executive dependent on the President's approval. This further limited the southern government's ability to challenge the North-South divide and pursue its own aspirations. The 1997 Sudan Peace Agreement bound the southern Coordinating Council to the central government in much the same way. Though the Agreement did grant the south a means of exercising its right to self-determination, the Coordinating Council was not granted the political power to force a referendum on the issue, nor affect a radical change in the centre's relationship to its peripheries. While southern political institutions were established under these autonomous arrangements, the way in which they were legally framed ensured they were hollow as organs of governance.

The CPA, in contrast, created a truly autonomous GoSS, capable of exercising southern self-determination and forcing the issue when the implementation of the agreement began to falter. Though the central government exercised authority over issues of Sudanese sovereignty, the GoSS had unprecedented authority over the territory of South Sudan, competence to adopt its own Constitution and to legislate on matters pertaining South Sudan's political, cultural and economic future. In contrast to previous agreements, the President of the GoSS has independent authority over appointments to the Executive Council. Given how Khartoum's interference in southern political appointments had marred previous peace processes, the grant of autonomy bestowed under the CPA marked an unprecedented step towards southern self-determination. The CPA's protocol on wealth sharing also demonstrated a commitment to southern autonomy through the provision of practical revenue sources. The North and South's equal share of the country's oil reserves during the interim period reflected this commitment, with oil

revenues furnishing 98% of the GoSS's operating budget in 2011.[346] Under the more highly legalized terms of the CPA, South Sudan was thus empowered with the political and financial means to pursue its self-determination to an extent that had not been possible previously.

Though autonomy has been the harbinger of a newly independent South Sudan, the devolution of political power along a North-South divide has not brought about the cessation of violent conflict in the Sudan. The CPA failed to resolve the overarching centre-periphery relationship that has haunted the Sudan for half a century, and merely created a new centre in South Sudan at the expense of other peripheral regions.[347] The concentration of power in the SPLM/A has bred intra-factional fighting along ethnic and tribal lines, as various actors vie for political control of the new centre. This, in turn, has prevented the growth of a pacified political environment and the emergence of viable opposition parties in South Sudan. Furthermore, the Agreement on the Resolution of the Conflict in the Republic of South Sudan—which continues to tentatively govern post-conflict South Sudan—has repeated the mistakes of the CPA, concentrating political power among the actors that dominated the centre before the South Sudanese civil war, and leaving very little space for civil society groups and other parties to contest this power.[348] If South Sudan is to escape its own history of conflict, it should consider the political and legal structures it has erected in the past, and avoid recreating the inequitable relationships that have made violence a more effective form of politics than dialogue has up until this point.

Despite the hard legal character of the CPA and the substantial political power it ceded to the southern movement, the negative aspects of the Agreement's legacy are readily observable in the increasing fragmentation of the region and the erosion of state authority in both Sudan and South Sudan. The Republic of Sudan must confront "the core questions of its identity, system of rule, wealth and power

[346] International Crisis Group (n 334) 20.
[347] International Crisis Group, 'Sudan: Major Reform or More War,' Africa Report N°194 (Nairobi/Brussels, 29 November 2012) 20.
[348] James Copnall, 'South Sudan: Obstacles to a lasting peace,' *BBC News* (26 August 2015) <http://www.bbc.com/news/world-africa-33912156> accessed 19 August 2017: "South Sudanese civil society groups have also criticised the agreement for putting too much emphasis on power-sharing among the elite, rather than insisting on accountability and justice, or resolving the underlying issues that caused the conflict. The government and the rebels have signed a power-sharing agreement, essentially fine-tuning a return to the status quo ante."

sharing, and its relationship with South Sudan,"[349] complex issues that the nation has not been able to resolve through Khartoum's process of 'national dialogue.'[350] South Sudan, too, suffers violence fuelled by local grievances and competition for "land, grazing rights, water, and even oil."[351] Only a political process of broad-based participation can address these issues, which lie beyond the elitist competition for control at the centre, and have greater implications for the future of the South Sudanese state. South Sudan's saving grace may yet be "its newness."[352] The blueprint laid out by the 2015 Agreement may yet provide a watershed moment for South Sudan "to try new approaches to statecraft,"[353] approaches that avoid the errors visited upon the region by colonial nation-building and unilateral peacebuilding. Elsewhere, Khartoum's piecemeal approach to peace-making appears likely to continue, at the expense of the lessons learned over 50 years of conflict, and the lessons yet to come.

[349] International Crisis Group (n 347) 1-2.
[350] See generally, International Crisis Group, 'Sudan: The Prospects for "National Dialogue",' Africa Report N° 108 (Nairobi/Brussels, 26 November 2013).
[351] Marina Ottaway and Mai El-Sadany, 'Sudan: From Conflict to Conflict' (The Carnegie Papers, 2012) 7.
[352] Peter Biar Ajak, 'A Second Chance for South Sudan,' Foreign Policy (20 February 2015) <http://foreignpolicy.com/2015/02/20/a-second-chance-for-south-sudan> accessed 19 August 2017.
[353] ibid.

8.

CONCLUSIONS

A bad peace is even worse than war.

– Tacitus

8. I. OVERVIEW

This thesis set out to identify legal features and mechanisms that are central to sustainable peace. Abbott et al's theory of legalization provided an appropriate method for the examination of peace agreements with ambiguous legal status, and allowed agreements to be broken down into their respective parts so as to isolate the peacebuilding mechanisms that worked (and those that did not). Deep engagement with the socio-political, cultural, and historical factors that informed the conflicts in the Philippines, Sierra Leone, and Sudan allowed me to suggest qualitative, tentative, causative links between certain provisions and the sustainability of peace agreements in those countries. However, if this thesis is to advance a broad theoretical framework for sustainable agreement design, it must provide evidence of mechanisms that are resilient to conflict in a wider sense. This is not easily nor lightly done: ceasefire mechanisms in Sierra Leone (1999) and Sudan (2005) were worded similarly, but effected varying degrees of success – can these differing outcomes provide lessons that might apply to a difficult contemporary context such as Ukraine? Autonomy has been used as a potential vehicle for conflict resolution in both Sudan (2005) and the Philippines (2014), but do these examples provide a useful model for managing the fragmentation of Syria? In attempting to extract general lessons from previous efforts, one risks losing sight of the complex political factors that inform conflict elsewhere, when it is well settled that "no one pattern suits all."[1]

While it may not be possible to apply whole provisions to emerging conflicts without due regard to their particular contexts, this does not preclude us from

[1] Julian Thomas Hottinger, 'The Darfur Peace Agreement – Expectations unfulfilled,' in Mark Simmons and Peter Dixon (eds) *Peace by piece – Addressing Sudan's Conflicts* (Accord Conciliation Resources 2006) 49.

identifying patterns as to how these provisions are drafted and the outcomes they produce. Indeed, by focusing on how these provisions are designed, as opposed to whether they are 'successful' or not, we can better understand the purpose and effects of particular provisions so that they may be tailored to specific contexts. Hundreds of reports by the International Crisis Group provide general advice in this regard: agreements are more likely to succeed if they provide mechanisms for the redress of key issues, including processes for equitable political participation and the redistribution of wealth.[2] Similarly, a review of the UN's conflict prevention and resolution activities has produced guidelines that stress the importance of precision in peace agreements, including specific modalities for implementation and timeframes.[3] This thesis elaborates on these guidelines in a more technically specific manner, detailing the manner in which legal provisions shape these guidelines in practice, thus impacting on their utility as principles of conflict resolution. Aside from the political considerations recommended by policy documents, this thesis reaffirms previous research by Bell and Gopalan[4] and makes important advancements in building on their work, particularly in the context of agreement design where the parties are non-state actors or states with little central authority. Furthermore, the parallels between this thesis and Fortna's work triangulates the importance of highly legalized instruments in a conflict resolution context,[5] and points to the role of both law and politics in achieving mutually beneficial goals. Thus, while the findings detailed herein do not purport to establish the foundations of a prototypical peace agreement, they do provide lessons as to agreement design generally and the mistakes that negotiators and policymakers continue to make in that regard. It is to those lessons that we now turn.

8. II. THE ROLE OF LEGALIZATION IN THE SHORT-TERM

What is perhaps most striking about this study is the manner in which highly

[2] Mark L Schneider, 'Strategies for Implementing and Enforcing Peace Agreements: Lessons Learned,' (2006) 7 Cardozo Journal of Conflict Resolution 317, 319, 321.
[3] *United Nations Guidance for Effective Mediation* (United Nations 2012) <http://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf> 21.
[4] Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (OUP 2008), and Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55(2) Buffalo Law Review 403.
[5] Virigina Page Fortna, *Peace Time – Cease-Fire Agreements and the Durability of Peace* (Princeton University Press 2004).

legalized provisions produce stable institutions that can contain conflict and sustain agreement. Precision becomes one of the more prominent limbs of the legalization framework in this context, often equating itself with the very language of law by prescribing authorized and prohibited behavior,[6] particularly in relation to short-term commitments. This is best exemplified by the highly legalized ceasefire arrangements set out under the North-South peace process in Sudan, and the Abidjan and Lomé Accords in Sierra Leone. All of these agreements explicitly prohibited the commission of activities that might jeopardize a burgeoning peace process, thus narrowing the scope for military mis-encounters between the parties and easing the security dilemma that occurs in the immediate aftermath of open conflict. Yet despite the fact that each agreement had highly legal ceasefire arrangements in common, they did not affect similar outcomes. Ceasefires in Sudan in 1972 and 2005 generally held, but the ceasefire envisioned under the Sudan Peace Agreement failed to assert itself. Likewise, ceasefires in Sierra Leone in 1996 and 1997 struggled from the outset, and the collapse of a tentative ceasefire arrangement under the Lomé Accord in 1999 necessitated military intervention before it was forcibly restored in late 2000.

Though the instability of ceasefire arrangements in Sierra Leone can be somewhat attributed to the RUF's disregard for the political process,[7] the case studies examined herein suggest a more general causative relationship between ceasefire arrangements and the oversight bodies prescribed to manage them. The more successful oversight mechanisms were accompanied by highly legalized provisions that established and mandated them. Sustainable ceasefires prescribed under the Addis Ababa (1972) and Comprehensive Peace (2005) Agreements in Sudan were accompanied by bipartisan oversight bodies that had their investigative powers and membership precisely set out under those agreements. Though these bodies were not independent of the parties, and were thus low on delegation, they were empowered with obligatory language that enabled them to dictate punitive measures and authorize troop movements during the ceasefire. These bodies could thus serve as important dispute resolution forums when ceasefire violations presented themselves, thereby preventing skirmishes from descending into open conflict and contributing to a stable security environment in which those agreements could be implemented. The

[6] Christine Bell, 'Peace Agreements: Their Nature and Legal Status,' (2006) 100(2) The American Journal of International Law 373, 395.
[7] International Crisis Group, 'Sierra Leone: Managing Uncertainty,' Africa Report N°35 (Freetown/Brussels 24 October 2001), 2.

Abidjan Accord (1996) and the Conakry Peace Plan (1997) in Sierra Leone, in contrast, failed to provide the monitoring infrastructure necessary to support a ceasefire. As a highly functional document that was only supposed to govern a six month period, the Conakry Peace Plan did not elaborate upon the exact parameters of a ceasefire, nor what the technical aspects of a verification and monitoring mechanism might entail. Similarly, many of the bodies tasked with monitoring and verification under the Abidjan Accord were not explicitly mandated or comprised, and the principle body for implementing the agreement lacked the obligatory power to compel compliance and contain violent incidents. Imprecision with regard to the demobilization and disarmament of combatants, and delegation to neutral third-party monitors, further exacerbated the existing security dilemma and inhibited the establishment of bipartisan bodies that could contain conflict in the post-agreement period.

The role of legalization in providing for these bodies and securing a stable environment for implementation is thus evident from the peacebuilding experiences in Sudan and Sierra Leone: when agreements lacked more legally compelling provisions, implementation became difficult, and the agreement would ultimately come apart. The Sudan Peace Agreement (1997) and the Lomé Accord (1999) provide further insight in this regard. Both agreements prescribed highly legalized ceasefire arrangements, with the Lomé Accord even providing for UN monitoring, supported by a Security Council resolution. Yet the ceasefire enshrined under the Lomé Accord was frequently violated within the agreement's first year, despite its highly detailed provisions and delegated mechanisms for verification. While this is attributable to the RUF's resumption of full-scale hostilities by mid-2000, defects in the UN's mandate and the composition of the ceasefire monitoring bodies reveal structural flaws that prevented the Lomé Accord from reacting to violations of the agreement. Furthermore, valuable forums for dispute resolution, such as the Council of Elders and Religious Leaders, were not established during the implementation phase, despite their explicit provision under the Accord. Similarly, the Sudan Peace Agreement's elaborate ceasefire mechanisms failed to contain conflict following the conclusion of the agreement. This is partly due to the fact that the SSDF lacked the political standing to unite the various southern factions under its remit, but also because the Sudan Peace Agreement delegated very little power to the group to influence the agreement's implementation. The Sudan Peace Agreement, like the

Lomé Accord, envisioned the state as the primary vehicle for implementation and viewed its non-state signatory as a passenger in that process. Ceasefire mechanisms responsible for conflict management remained subject to the overbearing influence of SAF headquarters, which prevented the SSDF from developing any significant political power to influence the agreement's implementation, and kept the southern movement divided.

All of this serves to underscore the importance of delegatory provisions through which weaker parties can exert their influence on the peace process. Hard legalization plays a key role in guaranteeing these bodies by explicitly providing for their establishment, their membership, and their mandate. We see a particularly clear example of this in the context of the 2014 Comprehensive Agreement on the Bangsamoro (CAB), which envisioned an expansive peacebuilding infrastructure and enshrined a key role for the MILF in both short-term (ceasefire monitoring and demobilization) and long-term processes (formulation of fiscal policy, intergovernmental relations). What remains notable here is not just the provision of these bodies, but the degree of precision adopted by the CAB in contrast to other agreements. Precision has cemented the role of these bodies in the politics of transition: in the aftermath of a military confrontation between rogue MILF elements and the AFP in January 2015, the parties restored peace through the bilateral bodies charged with maintaining the ceasefire under the agreement. The CAB's unprecedented delegatory provisions manifested themselves in the actions of the Third Party Monitoring Team (comprised of two representatives of Philippine NGOs, two representatives of international NGOs, chaired by Alistair MacDonald, former EU Ambassador to the Philippines), which was also active on the ground to restore the parties' mutual ceasefire. Despite the generally static condition of the peace process since March 2016, several of the bilateral bodies envisioned under the CAB have continued to carry out their mandates, thereby maintaining the military ceasefire and the political process. We can thus observe the key role that hard legalization plays in overcoming the security dilemma and fostering the parties' commitment to the political process post-agreement, across the case studies examined here.

Other studies affirm the importance of these bodies and the degree of legalization with which they are drafted. Fortna has found that the most effective mechanisms for maintaining peace in the aftermath of interstate conflict include

specifying the ceasefire terms and providing for joint commissions for the resolution of disputes.[8] Fortna argues that efforts to 'strengthen' ceasefire arrangements between India and Pakistan in 1949 and 1965 decreased the likelihood of conflict in the region,[9] thus reaffirming Gopalan's finding that more highly legalized agreements bore more sustainable periods of peace in that same conflict zone.[10] Conversely, weak ceasefire agreements between Israel and Syria fell apart quicker than their 'stronger,' or more elaborate counterparts.[11] Indeed, Fortna's research highlights how, in the context of ceasefire agreements, specificity has positive implications for agreement stability.[12] In her 2003 study of ceasefire agreements, detailed agreements were followed by periods of lasting peace; moderately detailed agreements had mixed success; and less-detailed agreements tended to fail quickly.[13] This reiterates the need for more precise agreements, particularly in the context of short-term commitments and pressing security concerns. Fortna has also found that the likelihood of conflict decreases dramatically where the parties establish joint commissions to work out disputes as they arise,[14] which the supports the argument advanced above vis-à-vis delegation to bodies that can channel dispute resolution and contain conflict, and the degree of specificity with which they are drafted.

Precision can make a particularly positive contribution in the post-agreement phase by clearly stating what is immediately required of the parties. This can provide a surge of momentum that drives the implementation of the agreement's short-term goals, such as establishing a ceasefire, or passing implementing legislation. If these initial objectives are successful, implementation of the agreement can proceed on the force of its own momentum; as we can see in Sudan in 1972 and 2005, and the Philippines in 1996 and (perhaps) 2014. Despite the difficulties these agreements encountered, their precise terms demanded immediate legislative action and the devolution of political power to previously marginalized constituencies. The empowerment of these actors in the immediate post-agreement phase generated a positive sense of anticipation that subsequently drove the political process forward. Werner has highlighted how this initial burst of momentum normalizes compliance

[8] Fortna (n 6) 210.
[9] ibid at 162.
[10] Gopalan (n 5) 454.
[11] Fortna (n 6) 162.
[12] Virginia Page Fortna 'Scraps of Paper? Agreements and the Durability of Peace' (2003) 57(2) International Organization 337, 362.
[13] ibid.
[14] Fortna (n 6) 195.

with the terms of the agreement, to the point that honoring the agreement merely requires maintenance of the status quo.[15] As the peace agreement becomes accepted as a course of dealing between the parties, it serves as both a fulcrum for implementation, and a barrier to violent conflict.[16] Thus, precision can play a crucial role in transforming the black letter text of an agreement into a self-sustaining political process. This has been more recently observable in the context of the Colombian peace process. As the longest peace agreement to any intrastate conflict to date, and the most detailed in the context of the Colombian conflict,[17] the revised Final agreement of November 2016 has made it possible for the parties to proceed with implementation, despite the political challenges they face. By July 2017, the FARC had successfully disarmed its personnel under UN supervision, and 3,600 ex-FARC combatants had been granted amnesty, paving the way for their transition to civilian life under the terms of the agreement.

That being said, some critics would suggest that rigid, highly legalized features—such as precise ceasefires and delegated dispute resolution procedures—are only effective where the parties display the political will to make them work.[18] Indeed, Bell argues that dispute resolution procedures can be ineffective, as they require levels of inter-communal co-operation that the very need for dispute resolution demonstrates to be missing.[19] This largely explains why a highly legalized agreement like the Lomé Accord failed to ensure peace on the basis of its terms alone. Fortna concedes that certain agreements may be somewhat epiphenomenal: only those who intend to be bound will consent to highly legalized agreements.[20] Agreements between more adversarial actors will thus be in greater need of mechanisms that ensure and encourage cooperation.[21] Unfortunately, the security risk involved in agreeing to restrictive ceasefire agreements or binding arbitration often outweighs any functionalist logic, leading to the conclusion of weak agreements between parties most in need of highly legalized mechanisms.[22] Yet even where trust

[15] Suzanne Werner, 'The Precarious Nature of Peace: Resolving the Issues, Enforcing the Settlement, and Renegotiating the Terms,' (1999) 43(3) American Journal of Political Science 912, 916.
[16] ibid.
[17] Christine Bell, "Getting to 'not yet': Colombia's Peace Agreement Referendum," (4 October 2016) <http://www.politicalsettlements.org/2016/10/04/getting-to-not-yet-colombias-peace-agreement-referendum> accessed 13 October 2016.
[18] Fortna (n 6) 197.
[19] Bell (n 5) 184.
[20] Fortna (n 13) 344.
[21] Fortna (n 6) 115.
[22] ibid.

is lacking, highly legalized mechanisms have a confidence-building effect in and of themselves. By credibly signalling the parties' intentions, highly legalized agreements allow parties to anticipate certain behaviour from their adversary, thus helping the parties to overcome the security dilemma.[23] A willingness to work within legitimate dispute resolution forums and bilateral implementation bodies signals a good-faith effort to avoid conflict as a means of achieving political outcomes, which in turn, builds confidence between former belligerents.[24] Conversely, the collapse of these bilateral mechanisms tends to reflect increasing tensions and a possible return to hostilities.[25] The former can be readily observed in contemporary Mindanao, where the MILF has continued to work within the political process, despite some significant setbacks; while the latter underscores the critical omission of the Council of Elders and Religious Leader during the implementation of the Lomé Accord.

While precision plays a central role in securing and sustaining a peaceful environment within which the implementation of an agreement can take place, the text of an agreement can only go so far.[26] Short-term successes such as a cessation of hostilities must be accompanied by tangible benefits and political processes that addresses the parties' grievances if a peace agreement is to sustain itself. The case studies provide ample evidence in this regard. The Abidjan Accord's lack of a cohesive reintegration strategy provided little incentive for the RUF to abide by the terms of its ceasefire, and dissatisfaction with the advantages of the political process eventually drained support for the agreement. Similar problems beset the Final Agreement in the Philippines, which immediately delivered on its promise of an autonomous region for the Moro people, but failed to counter the protracted effects of chronic underdevelopment in Mindanao. While the precise mechanisms enshrined under the 2014 CAB continue to maintain the peace in Mindanao, non-progress of the agreement threatens further disillusionment with the political process, and an increasing shift towards Islamic extremism. Thus, despite their advantages in the short term, highly technical peacebuilding mechanisms—such as ceasefires and demobilization processes—cannot lead a political process by themselves. As UN special envoy for Syria, Staffan de Mistura, has reiterated, any reduction in violence

[23] Fortna (n 13) 344.
[24] Fortna (n 6) 197.
[25] Fortna (n 13) 362.
[26] 'Reflecting on the IGAD peace process - An interview with Nicholas (Fink) Haysom' in Mark Simmons and Peter Dixon (eds) *Peace by piece – Addressing Sudan's Conflicts* (Accord Conciliation Resources 2006) 31.

cannot be sustained unless there is a political horizon in sight.[27] Negotiating this transition from conflict management to post-conflict transformation and reconstruction is something that peace agreements must accommodate, but words cannot definitively prescribe.

8. III. TRANSITIONING TO LONG-TERM COMMITMENTS

One of the more difficult aspects of agreement design is being able to strike a balance between the need for technical precision in the short-term, and consultative peacebuilding in the long-term. Indeed, the difficulty of this task largely explains the disparity between agreement quantity and quality identified from the outset of this thesis. Peace agreements can precisely provide for short-term commitments, giving parties a reasonable expectation of what they can initially expect from the agreement on paper, and allowing them to tentatively commit to a peace process, so long as it proceeds as planned. There is thus no shortage of peace agreements being concluded. However, as implementation proceeds, the agreement provides less and less detailed instructions for the parties, sometimes necessitating deviation from the agreement's terms and duly accounting for the frequency with which agreements break down during implementation. If the parties are to achieve a sustainable, non-violent process, then the agreement must eventually transition from overly prescribed instructions, to reactive processes of dialogue and consensus-building.

Precision is not always conducive in this regard: where agreements provide exact deadlines for the completion of certain tasks, they frequently fail to provide contingencies where those deadlines are not met. Precision can thus exacerbate existing tensions around implementation if certain aspects of the agreement do not proceed to plan. This is exemplified by the Lomé Accord in Sierra Leone and the Comprehensive Peace Agreement in Sudan, both of which were criticised for their overly rigid timeframes. Furthermore, precision can inhibit the growth of long-term processes of peacebuilding by establishing the agreement as a permanent point of reference for the parties and the principle vehicle for change, when in practice, a political process is more appropriately sustained through the reformed political and legal structures that the agreement provides for. Bell refers to this as the

[27] 'Syria war: Peace talks restart in Geneva,' BBC News (16 May 2017) <http://www.bbc.com/news/world-middle-east-39934868> accessed 21 August 2017.

'constitutionalization' of the peace agreement, which is better achieved by constructively ambiguous language involving symbolism, shared values, and appeals to nationhood.[28] We see this 'constitutionalization' of peace agreement commitments used to great effect in Sudan in 1972 and 2005, and to less successful extents in the Philippines in 1996 and Sierra Leone in 1999. In these instances, we can observe how autonomy/power-sharing arrangements guaranteed by domestic constitutions and guided by normative principles such as human rights and socio-economic equality gave rise to political processes that developed beyond the literal boundaries of their peace agreements. Thus, the long-term goals of peacebuilding may be better served by strong normative guarantees that indicate a general direction for the peace process to follow, rather than precisely prescribed instructions that cannot predict the environment in which they will be brought to bear.[29]

However, it should be noted that processes of legalization retain a key role in shaping this normative 'direction.' Throughout this analysis, hard legalization is shown to have played a key role in guaranteeing equality of participation and inclusion (through delegation), and the redistribution of political power (through precision and obligation); all of which influence the domestic political landscape beyond the limits of the peace process itself, and allow long-term goals to be addressed through reformed political institutions. As shown in Section II of this Chapter, precision and delegation also play key roles in mandating and comprising bilateral bodies, which facilitate political transition by promoting consensus-building and sustained dialogue. These features complement each other in such a way as to maintain an appropriate security environment in the short-term, while leaving enough texture for the "coherent holistic development" of "a more lasting constitutional discourse."[30]

The Sierra Leonean experience reveals much about the limits of precision in this regard. The Abidjan Accord envisioned an expansive peacebuilding bureaucracy that was supposed to deliver on a number of ambitious socio-economic goals. The socio-economic aspects of the agreement were to be informed by 'guiding principles' set out under the agreement, indicating the general direction that the agreement should take in the long run. However, the agreement's imprecision with regard to a

[28] Bell (n 5) 169.
[29] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 2009) 11.
[30] Bell (n 5) 173, 174.

ceasefire, the provision of third-party monitors, and the composition of many of the bodies tasked with implementing the agreement failed to secure a stable political environment from which the more broadly defined socio-economic goals could follow. Conversely, the Conakry Peace Plan was focused on the technical aspects of ceasefire and demilitarization, with a view to restoring President Kabbah's government within a six month timeframe. The agreement's focus on short-term precision came at the expense of any sustainable resolution of the conflict, and failed to pave the way for long-term processes or confidence building measures that would entrench political dialogue between the parties. In any case, the Conakry Peace Plan's overly functional and technical manner neglected the contextual nuances of the conflict in Sierra Leone, causing the agreement to fail irrespective of its short-term precision or long-term potential.

While these agreements teach us the obvious lesson that the failure to appropriately provide for short-term procedures and mechanisms will be to the detriment of long-term goals, the Lomé Accord is evidence that precisely prescribing both short-term and long-term objectives is not the solution. Indeed, while this thesis concludes that agreements that are highly legalized are more sustainable than those that are not, legalization alone does not guarantee sustainable peace. The Lomé Accord was the most highly legalized agreement of the Sierra Leonean conflict, and boasted a detailed annex with implementing modalities and timetables. On paper, it provided for the mechanisms that should have facilitated a transition to post-conflict governance. However, the agreement's precision rendered the agreement too rigid to respond to real-time events as they occurred, and the elaborate peacekeeping infrastructure envisioned under the terms of the agreement was perhaps too technical for the Sierra Leonean state apparatus to support. The Sierra Leonean experience is thus particularly illustrative of how difficult it is to marry the immediate cessation of conflict to the development of a self-sustaining political process within the confines of a single text.

In particularly difficult contexts, it may be more conducive to view the peace agreement not as a single static document, but as a basis for recurring legal processes—a Constitution of sorts. In his key work, Fen Olser Hampson concludes that peace agreements are imperfect roadmaps to peace.[31] Hampson's study reveals

[31] Fen Osler Hampson *Nurturing Peace: Why Peace Settlements Succeed or Fail* (1996 Institute of Peace Press) 218-219.

how frequently agreements are revised to reflect difficult or impossible deadlines, or amended to accommodate new challenges to the existing agreement.[32] Wagner too views the myriad goals of a peace agreement as a series of contracts, "that are subject to continued negotiation and renegotiation."[33] Likewise, a study by Hoffman and Bercovitch emphasised the process element of peacebuilding, and concluded that if a peace process is to endure, it must be renegotiated on an ongoing basis, using the initial peace agreement as a framework.[34]

The Lomé Accord is evidence of this approach. After renewed hostilities during the agreement's troubled implementation, the parties to the Lomé Accord met in Abuja in November 2000 to reaffirm their commitment to the Lomé process, clarify elements of the ceasefire, and revise the timeline for implementation. The Abuja Agreement thus supplemented the original Lomé Accord, allowing the process envisioned under the original agreement's terms to take hold. We have more recently seen the pragmatic renegotiation of a 'final' settlement in the context of the civil conflict in Colombia. Following the rejection of the government-FARC peace deal in a national referendum in October 2016, the parties chose to revise and expand the terms of their existing agreement, rather than abandon the process and start anew. Despite the fact that the government chief negotiator, Humberto de la Calle, insisted that the original agreement was "the best deal possible," he later conceded that the revised agreement was better.[35] Lead FARC negotiator, Iván Márquez, also acknowledged the importance of revising the agreement to include key stakeholders that had been absent from the original negotiations.[36] These examples suggest that it is not always conducive to peace to view an agreement as a final settlement of the conflict, or a static legal document that must be enforced to the letter. While the agreement should of course prescribe the basic terms of the parties' peacetime relationship, an agreement is best viewed as a "living document" that the parties must renegotiate continuously when implementation proves difficult or impossible.[37]

The phased negotiation of peace agreements may also prove a more

[32] ibid.
[33] R Harrison Wagner, *War and the State: The Theory of International Politics* (University of Michigan Press 2007) 121-122, 237, in Michael G Findley, 'Bargaining and the Interdependent Stages of Civil War Resolution' (2012) 57(5) Journal of Conflict Resolution 905, 909.
[34] Evan Hoffman and Jacob Bercovitch, 'Examining Structural Components of Peace Agreements and Their Durability,' (2011) 28(4) Conflict Resolution Quarterly 399, 420.
[35] Sibylla Brodzinsky, 'Colombian government and FARC reach new peace deal,' *The Guardian* (13 November 2016).
[36] ibid.
[37] Hoffman and Bercovitch (n 35) 421-422.

sustainable method of managing the transition from short-term to long-term peacebuilding. The agreements in Sudan in 2005 and the Philippines in 2014 were preceded by framework agreements that sketched out the basis of more comprehensive settlements, without being immediately actionable in and off themselves. Following these landmark agreements; detailed annexes, formulae, timeframes, and transitionary mechanisms were agreed by the parties, and added to the original framework agreement as implementing protocols. It is possible that negotiating the agreement in this manner fostered mutual trust between the parties, normalizing sustained dialogue as a basis for prospective peacebuilding. Indeed, though the 'success' of the 2014 CAB will need to be evaluated more fully with time, the process appears to have at least normalized non-violent engagement on the issue of Moro self-determination as between the parties—though whether it will deliver on that issue in the long term remains to be seen. In Sudan, the negotiation of separate protocols on power and wealth-sharing allowed the Comprehensive Peace Agreement to deliver on its promise of southern self-determination, even when progress on the unique status of the Abyei region stalled. Though the status of Abyei remains contested as of August 2017, the delivery of a politically viable South Sudan under the terms of the Comprehensive Peace Agreement may yet offer a diplomatic opportunity to resolve the now-interstate dispute independent of the agreement. Comprehensive agreements that are built upon the skeleton of an initial framework agreement may thus provide another means of managing the transition from short-term to long-term peacebuilding, but further research is necessary in this regard.

8. IV. How the Law Shapes Devolution

Throughout this analysis, we have seen how various forms of devolution are utilized as a means of conflict resolution. Devolution is particularly useful in the context of conflicts involving marginalized political constituencies, ethnic, or religious groups, as it enables these constituents to address key issues and local grievances that the central state has failed to resolve hitherto.[38] However, as both current practice and this analysis show, the majority of devolution arrangements are either implemented poorly, or not at all.[39] Even where devolution takes place, these

[38] Betty Bigombe, Paul Collier and Nicholas Sambanis, 'Policies for Building Post-conflict Peace' (2000) 9(3) Journal of African Economies 323, 345.
[39] Michael Van Walt Van Praag, 'The Missing Peace: International Law of Intrastate Relations'

arrangements are often undone when the central state asserts its power beyond the delicate balance enshrined in autonomous or power-sharing arrangements.[40] The case studies presented herein provide several examples of these shortcomings. While the 1976 Tripoli Accord envisioned an autonomous region in the southern Philippines, considerable ambiguities in the agreement's text fostered disagreement when the parties tried to clarify the finer elements of implementation, and hastened the collapse of the agreement. The legislation charged with establishing the 1996 Final Agreement's ARMM omitted crucial details pertaining to the independent funding of the autonomous institutions, thereby limiting the ARMM's ability to challenge the factors that brought about Mindanao's chronic underdevelopment.

If Mindanao highlights how autonomous arrangements are often unimplemented, or implemented poorly, then Sudan serves to highlight how they can be undone by the central state encroaching on a region's new found autonomy. The highly legalized Addis Ababa Agreement of 1972 enabled the establishment of an autonomous regional government in southern Sudan within 6 months of the conclusion of the agreement. While the autonomous region embedded itself in the Sudanese political system for the 11 years that it existed, it remained dependent on the central state's approval with regard to funding and political appointments. When the southern regional assembly blocked President Nimiery's proposal to redraw the north-south border in contravention of the 1972 Agreement, Nimiery simply abrogated the autonomous arrangement entirely, triggering the outbreak of the Second Sudanese Civil War. The autonomous Coordinating Council envisioned under the 1997 Sudan Peace Agreement was hampered by similar tethers to the central government. The government's control over political appointments to the Coordinating Council allowed the regime in Khartoum to keep the southern movement divided, thereby preventing it from developing any political clout to force the implementation of the other aspects of the agreement.

It is only when autonomous arrangements bestow genuine political power upon the devolved polity that such arrangements become sustainable. We see this in the context of the 2005 Comprehensive Peace Agreement in Sudan. The agreement bestowed unprecedented independence on the Government of South Sudan by preserving southern control over political appointments, and granting legislative and

(2014) 20(1) Annual Survey of International & Comparative Law 1, 11.
[40] ibid.

executive power over economic and cultural matters. The agreement specifically detailed a southern government with significant power, which enabled the fledgling South Sudan to surge ahead with the implementation of the agreement when progress stalled. That South Sudan used its new-found autonomy to secede from Sudan rather than remain within the unitary state may dissuade state actors from conceding such generous grants of autonomy in their own respective conflicts, however. Yet the Sudanese experience underscores the importance of striking a balance between competing interests with regard to self-determination and territorial integrity: southerners may have been more amenable to remaining within the Sudanese state had the Addis Ababa Agreement and the Sudan Peace Agreement not provided such a negative impression of autonomy in action. Indeed, autonomy need not devolve power equal to that of the central state in order to be workable, but it must enable the devolved entity to address the key issues that have fuelled its grievances up unto that point. The Final Agreement in the Philippines is evidence of this: the MNLF were willing to accept an autonomous arrangement within the territory of the Philippines and the limits of the Constitution, but if they could not challenge the socio-economic factors that had fuelled the conflict hitherto, the agreement could not serve as a sustainable solution. This remains a pertinent lesson to contemporary Mindanao, where the 2014 CAB has yet to deliver on the promise of autonomy enshrined under its terms. Any subsequent arrangement that facilitates Moro autonomy must match the degree of self-determination espoused in the CAB, or it risks suffering the same fate as its predecessors.

While there appears to be a link between significant devolution and sustainable conflict resolution, sophisticated autonomous arrangements can also cut off a host of legal options for accommodating non-state actors in complex, multilateral internal conflicts. We see this most strikingly in Sudan, where the North-South conflict was just one in a series of conflicts pertaining to the central government's relationship to its peripheral regions. Though the 2005 Comprehensive Peace Agreement set a benchmark for autonomy to which constituents in eastern Sudan, Blue Nile, South Kordofan, and Darfur have aspired, it remains unlikely that the central government will consent to further power-sharing arrangements, given their perceived "negative returns" on the 2005 agreement.[41] Attempts to cede power

[41] International Crisis Group, 'Sudan: The Prospects for "National Dialogue",' Africa Report N°108 (Nairobi/Brussels, 11 March 2015) 12.

to the peripheral regions in recent years have been symptomatic of Sudan's previous peace-making efforts, with core provisions going unimplemented and the constituent parties possessing little power to compel Khartoum to comply.[42] Any future agreement on Sudan's internal conflicts must duly reflect the achievements and limitations of the CPA, and accommodate the central government's interests within a highly legalized framework that cedes power away from the centre while upholding the territorial and political integrity of Sudan. The Philippine government may also have to grapple with the enormous compromise embedded in the 2014 CAB as it attempts to placate a communist insurgency that has been ongoing for 50 years. Likewise, the complex compromise reached between Colombia and FARC may limit the extent to which the Colombian state can accommodate the demands of other insurgent groups. Negotiators should thus consider how the creation of asymmetric political structures might affect other parties in multilateral conflicts, and thus impact upon the resolution of broader cycles of conflict in those regions.

Just as precision can be used to shape autonomous structures that are conducive to sustainable processes of conflict resolution, so too can it shape structures of inequality and exclusion that exacerbate than rather ameliorate conflict. Unanticipated deviations from an agreement's terms are not always the product of political manipulations: they often have their roots in legal concepts and terms that the agreement clearly specifies, but the parties interpret to reflect their intentions and aspirations. Indeed, Bell notes that the peace process is little more than a non-violent extension of the political conflict between the belligerents, played out in the reconstruction of political and legal institutions of the state.[43] As such, anyone involved in drafting, implementing, or interpreting an agreement is caught up in that conflict in some way.[44]

We can observe how former belligerents use legal language to assert control over the ensuing political process in several of the case studies examined in this thesis. Southern autonomy under the Sudan Peace Agreement was largely ineffective due to the ties that bound the Coordinating Council to the central government. As an unmediated agreement, it represented a political effort to appease the southern movement within existing state structures, and the agreement's text largely reflects

[42] See generally International Crisis Group, 'Sudan: Preserving Peace in the East,' Africa Report N°209 (Nairobi/Brussels, 26 November 2013).
[43] Bell (n 5) 23.
[44] ibid.

this. The SSDF had very little power to influence the implementation of the agreement due to a lack of bilateral structures that might have supported the political process. Of the few joint commissions envisioned under the agreement, the bilateral Joint Military Committee was headquartered at the SAF HQ, where Sudanese military intelligence could exert undue influence over the SSDF and prevent it from developing into a capable military and political force. Taken together, these provisions reveal the means by which the central state retained control over the Coordinating Council, which were hidden in plain sight in the agreement's text. It is often difficult to distinguish between measures implemented in bad faith and reasonable limitations on asymmetric devolution, however. For example, the 1996 Final Agreement in the Philippines promised Moro autonomy on paper while trying to preserve a balance between the competences of the central Philippine state and the ARMM. Because the legislation charged with implementing the agreement had to be passed through existing political structures, it was subject to significant 'watering down' that the MNLF was powerless to influence or control. The legislation appears to have been an attempt to implement the Final Agreement in good faith, but the political compromise it entailed effectively deprived the MNLF of any significant power to challenge the status quo, and pacified the group as a military threat. The Philippine government was thus able to defeat their enemy through legal processes, though the structural biases of these processes did not ensure a sustainable resolution of the conflict. It is possible that this process is repeating itself in the Philippines today, given the current challenges to the legislation charged with implementing the CAB.

The Lomé Accord is perhaps a more obvious example of how negotiating in bad faith can allow for the unilateral implementation of a peace agreement. By maintaining rather than reforming existing Constitutional structures, the Lomé Accord allowed President Kabbah's incumbent government "to keep both hands on the steering wheel when the agreement's provisions were to be implemented."[45] The government duly controlled the legislative process and pace at which the RUF were assimilated into the body politic. Furthermore, in granting the RUF a senior cabinet appointment and three further cabinet positions, the agreement strategically used the words "such as" to *suggest* rather than guarantee certain portfolios that might be

[45] Helga Malmin Binningsbø and Kendra Dupuy, 'Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone' (2009) 44(3) Africa Spectrum 87, 99.

regarded as senior. The exacting precision and careful wording of the agreement duly allowed the central government to contain the RUF "by allocating weak ministries… and diluting cabinet power through expanding the number of ministers."[46] It may be argued that such legal manoeuvring was necessary in order to contain a group such as the RUF, who had no legitimate political mandate and who had given reason not to be trusted. However, it is submitted that this could have been more effectively achieved through the explicit provision of penalties for breach, such as sanction, prosecution, or military action. Structural isolation of the RUF was counter-productive to sustainable peacebuilding, as it disincentivised participation in the political process from the outset, immediately undermining confidence-building measures and hastening the resumption of hostilities. A more equitable or effective power-sharing arrangement, supported by the credible threat of costs in the event of breach, might have brought affected a better outcome, either by sustaining the process for a longer period, or hastening the adoption of punitive measures against the RUF.[47]

In any event, the case studies presented herein reveal how the law can be manipulated to produce paper polities instead of genuinely autonomous constructs. Autonomous half-measures do not contribute to sustainable peace processes: at best, they can manage the effects of conflict; at worst, they lead the parties back to war. Agreements must thus be scrutinised to prevent these outcomes ex ante, and should be supported by interpretative bodies and multilateral bodies capable of shaping and challenging the unilateral interpretation of certain terms and concepts. The findings of this thesis would suggest that a legalization framework is useful for scrutinizing agreements in this manner, as it reveals how the agreement's constituent provisions and institutions relate to each other, how these relationship produce particular legal structures, and how these structures relate to sustainable systems for resolving conflict.

[46] ibid at 101.

[47] It is important to note the difficulty that the agreement's guarantors encountered in trying to provide for possible sanctions against the RUF prior to the agreement. See Georges Nzongola-Ntalaja, 'Unpacking the Lomé Peace Accord' in Sierra Leone One Year After Lomé, CDD Planning Strategy Series 5 (Centre for Democracy and Development – 2000) 54 in Abiodun Alao and Comfort Ero, 'Cut short for taking short cuts: the Lomé peace agreement on Sierra Leone' (2001) 4(3) Civil Wars 117, 127.

8. V. INCLUSION AND THE KEY COMPLIANCE COMMUNITY

Negotiators can further limit the scope for unilateralism by pursuing broad based consultative processes during negotiation, and providing for inclusive participative structures that support the implementation of the agreement. The research presented here suggests that peace agreements that guarantee the rights and input of marginalized groups and civil society actors are more sustainable than those that do not. The Philippine example is particularly illustrative of this point. The 2014 CAB recognized the political participation of women and other marginalized constituencies as a necessity, and their representation in the regional assembly and a multilateral Council of Elders was enshrined under its text. The agreement recognized the need to focus development programmes on women as victims, as well as participants in conflict, with due regard to the female auxiliary forces of the MILF. Furthermore, the CAB was negotiated on the government's behalf by a woman, Teresita Quintos Deles. Women have thus been at the vanguard of a broader movement towards inclusivity and civil society engagement in the Philippines.[48] We can see this in the CAB's unprecedented recognition of the rights of indigenous peoples, provision for their political participation, and the provision that their needs be considered when formulating development programmes and the Bangsamoro justice system. This is in stark contrast to previous agreements, which repeatedly neglected the input of Christian and non-Moro communities and failed to address their relationship with the Moro people. While concerns remain about the politics of inclusivity will play out in practice,[49] the stability of the peace process thus far suggests that the move towards inclusivity has had positive implications for peace in Mindanao.

The link between inclusion and sustainable peace is not so clear in the Sierra Leonean example. Civil society groups such as the Women's Movement for Peace and the Inter-Religious Committee influenced the negotiation of the Abidjan and Lomé agreements,[50] and led the calls for amnesty and power-sharing provisions prior

[48] Yasmin Bursan-Lao, 'Philippines: women and inclusivity in the Mindanao peace process,' in Alexander Ramsbotham and Achim Wennmann (eds), *Legitimacy and peace processes – From coercion to consent* (Accord Conciliation Resources 2014) 28.

[49] Oona Paredes, 'Indigenous vs. native: negotiating the place of Lumads in the Bangsamoro homeland,' (2015) 16(2) Asian Ethnicity 166, 175.

[50] Lansana Gberie, 'Bringing peace to West Africa: Liberia and Sierra Leone' (2007) <http://www.hdcentre.org/uploads/tx_news/107BringingpeacetoWestAfrica_LiberiaandSierraLeone.pdf> accessed 20 February 2015, 66.

to the Lomé Accord.[51] Though the Lomé Accord's implementation was difficult, it eventually produced a lasting peace process marked by civil society participation in a Human Rights Commission and a Truth and Reconciliation Commission. Both of these bodies identified and abated many of the structural factors that initially had led to civil war. With regard to gender inclusivity, the Lomé Accord was the only agreement in Sierra Leone to recognize the specific needs of women and children in post-conflict development programmes. However, the needs of female combatants were neglected in favour of males during the disarmament and reintegration processes envisioned under the agreement.[52] Furthermore, the Lomé Accord failed to guarantee women's participation in its power-sharing provisions, despite the prominent role that women played in advocating for peace in the country. Despite this, the Lomé Accord has produced a lasting political process which has moved towards a more gender inclusive model (due in no small part to the recommendations of civil society groups, in which women play a key part).[53]

The link between gender inclusivity and agreement sustainability may thus appear indeterminate to some commentators. However, the case studies analysed in this thesis suggest that the importance of women is often exemplified by their absence rather than their presence. Indeed, Valerie M Hudson has argued that agreements that exclude women collapse faster than those that include them.[54] Thus, while agreements that provide for inclusivity may still suffer structural setbacks, agreements that fail to acknowledge major stakeholders rarely succeed. Sudan provides interesting examples in this regard. While the 1972 Addis Ababa Agreement did not provide any specific gender inclusive provisions, the strong human rights guarantees enshrined under the agreement and the secular environment in which it was implemented affected a significant change in Sudanese socio-political culture. Equal citizenship rights led to the emergence of strong female leadership in the post-agreement period, and 25 women were democratically elected to the southern regional assembly.[55]

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[51] Michael O'Flaherty, 'Sierra Leone's Peace Process: The Role of the Human Rights Community' (2004) 26 Human Rights Quarterly 29, 33 [original citations omitted].
[52] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Final Report of the TRC* (2004) 105.
[53] See (n 52) at 171-172.
[54] Valerie M Hudson, 'What Sex Means for World Peace,' Foreign Policy (24 April 2012) <https://foreignpolicy.com/2012/04/24/what-sex-means-for-world-peace/> accessed 21 July 2017.
[55] Amel Aldehaib, 'Sudan's Comprehensive Peace Agreement viewed through the eyes of the Women of South Sudan' (2010) Institute for Justice and Reconciliation Fellows Programme Occasional Paper

However, this inclusive political culture did not last. Despite Constitutional rights to equality, the 1997 Sudan Peace Agreement did not contain any gender inclusive provisions, nor did it prescribe gender quotas. Despite playing a major role in the SPLM/A military campaign, women were largely excluded from the negotiations that informed the 2005 Comprehensive Peace Agreement, with only two women serving nominally as negotiators for the movement.[56] The 2005 agreement did provide a quota of 25% in regard to women's representation in structures of governance, but the agreement largely treated women as victims of war, rather than participants; and even at that, the agreement failed to meet the particular needs of women.[57] Despite the prescription of a gender quota under the Comprehensive Peace Agreement, it has not been practically implemented, and South Sudan remains a male-dominated polity like its northern neighbour. The region's recurring cycles of conflict are thus indicative of Hudson et al's claim that the best indicator of a state's peacefulness is not its wealth, democracy, or tolerance of ethnoreligious identity, but its treatment of women.[58] These examples duly illustrate the need to encourage gender inclusivity as a normative standard by prescribing stronger human rights guarantees in peace agreements. Furthermore, agreements should institutionalise women's participation not only in national and regional assemblies, but in multilateral implementing mechanisms and dispute resolution procedures, which might affect cultural change at community levels.

From a sustainability perspective, all of the relevant stakeholders must be included if the political process is to support itself in the long-term. From a compliance perspective however, peacemakers must negotiate with the non-state actors that are able to implement their obligations within the territory they control, and maintain the political will of their supporters. The trade-off inherent in accommodating both of these perspectives means that certain armed groups and interests are excluded from the peace process, particularly in conflicts where a number of armed groups are competing for power and legitimacy. This can have a destabilizing effect on agreement sustainability which the agreement must contain or

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[56] ibid at 6.

[57] ibid.

[58] Jacqueline O'Neill, 'Are Women the Key to Peace in Colombia?' Foreign Policy (20 April 2015) <https://foreignpolicy.com/2015/04/20/are-women-the-key-to-peace-in-colombia-farc-talks> accessed 21 July 2017. See Valerie M Hudson, Bonnie Ballif-Spanvill, Mary Caprioli, and Chad F Emmett, *Sex and World Peace* (Columbia University Press 2012).

address in some way. The 1997 Sudan Peace Agreement failed to do this. Following the split between the SPLM/A and its Nasir faction, the Sudanese government moved to exploit the division by making peace exclusively with the Nasir faction. However, the movement failed to unify the various armed groups under its remit, and could not establish a coherent command structure capable of implementing the agreement throughout the south. Moreover, the Nasir faction and the subsequent SSDF did not enjoy the political support that the SPLM/A had garnered regionally and internationally. The agreement did not attempt to accommodate the SPLM/A in any way, nor did the SPLM/A wish to work within the framework of the agreement. It had thus failed to engage what Gopalan refers to as "the key compliance community,"[59] the party capable of delivering on the agreement's promise—in this case, the SPLM/A. As such, the Sudan Peace Agreement could not serve as a sustainable solution to the North-South conflict.

The challenge of identifying 'the key compliance community' is exacerbated in conflicts where a number of armed groups are privy to the conflict. In such a context, each group's power to implement their obligations is somewhat diluted, as indeed may be their legitimacy, or their interest in peace. The Sierra Leonean example is instructive in this regard. Despite the fact that "a plethora of actors" had contributed to the conflict in Sierra Leone over the course of a decade,[60] the Lomé Accord was a strictly bilateral agreement between the government and the RUF. The agreement duly underestimated the significant influence that key stakeholders—including the *kamajors* and the SLA units that had sided with the AFRC—could exert on how the peace process developed. This is highlighted by the assumption underpinning the agreement: that the government would be able to carry the *kamajors* along in the peace process and the RUF would do the same for the AFRC.[61] The Lomé Accord suggests that such arrangements are not sustainable: marginalized actors are not likely to be 'brought along' by other armed groups unless their participation in political processes is incentivised or ensured under the agreement.[62] This is an important lesson for conflict resolution efforts in Syria,

[59] Gopalan (n 4) 417.
[60] Abiodun Alao and Comfort Ero, 'Cut short for taking short cuts: the Lomé peace agreement on Sierra Leone' (2001) 4(3) Civil Wars 117, 119.
[61] ibid at 122-123.
[62] As Peter Harling of the International Crisis Group has argued, "[T]o endlessly search for a more credible and coherent political opposition is to mistake cause and consequence: only a political process viewed as credible and coherent by the opposition's base will produce viable representatives –

where peacemakers have been prone to grouping moderate non-state actors together in a bid to present a 'key compliance community' where none exists. Again, the Lomé Accord suggests this approach is not sustainable. Indeed, the RUF's commitment to the peace process was questionable from the outset, and Sankoh exerted little centralized authority over the group towards the end of the conflict. In such trying circumstances, it is difficult to account for the law's role in peacebuilding. Absent a broadly consultative political process or a decisive military victory, the normative power of the law may be of little use where there are is no 'key compliance community' to exert or respect it.

The Bangsamoro peace process offers a long view of the effects of exclusive negotiations, as evidenced by the wax and wane of the MILF and MNLF, respectively, as representatives of the Moro people. Indeed, one Filipino journalist likened the relationship of the MNLF and the MILF to that of two security guards with alternating schedules: "[w]hen one takes a nap, the other takes over."[63] The failure to include dissenting voices in the Tripoli Accord and the Final Agreement ruled them out as sustainable conflict resolution instruments, with the 1976 agreement fostering division in the Moro movement, and the 1996 agreement neglecting the differing political and cultural aspirations advanced by both groups. The 2014 CAB reflected the Philippine government's recognition of the MILF as the region's 'key compliance community,' to the detriment of the MNLF's influence over that agreement. Crucially, however, the CAB provides for a broadly inclusive political process that accommodates MNLF participation and recognizes their gains to date. For example, the MNLF is to be represented on the Bangsamoro Transition Authority, and its members are encouraged to run for election in the forthcoming Bangsamoro entity. Though extremist elements remain violently opposed to peace in the southern Philippines, the CAB limits the range of activities that these spoiler elements can claim to be legitimate by prescribing inclusive political structures within which competing interests can be accommodated. Such an approach remains unique to the characteristics of the conflict in Mindanao, and even at that, it has yet

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not the other way around." See Ian Black, 'Syrian opposition under pressure to attend Geneva peace conference,' The Guardian (17 October 2013).

[63] Julkipli M Wadi, "Radical Islamic movements complicate Moro struggle," *Philippine Daily Inquire*r (14 February 1999) 10 in Soliman M Santos Jr, 'Delays in the Peace Negotiations between the Philippine Government and the Moro Islamic Liberation Front: Causes and Prescriptions' (2005) 3 East-West Centre Washington Working Papers, 6.

to be seen how the politics of inclusivity will play out in practice.[64] Nevertheless, on paper, the CAB provides a more sustainable method of engaging 'the key compliance community' and other major stakeholders than can be observed in the other case studies.

8. VI. The Economics of Peace Agreements

Funding, resource management, and revenue generation are other crucial factors that significantly affect agreement sustainability. Post-conflict reconstruction and development efforts require complex economic arrangements, but these are often limited in peace agreements to wealth-sharing formulae or rhetorical appeals to international donors. Rather than define key priorities and provide adequate resources to meet them, some agreements espouse lofty socio-economic programmes that may be ill-conceived or unlikely to be implemented.[65] As a result, finite financial resources can be spread thin, reducing the agreement to a wish list rather than a post-conflict settlement.[66]

We can see this very clearly in Sierra Leone. Though the Abidjan Accord acknowledged that socio-economic rehabilitation would be limited by available resources, the agreement committed an ambitious post-conflict development programme to paper. In the absence of precise programmes for job creation, education, and reintegration, however, these goals were unlikely to be achieved. Moreover, the agreement was heavily dependent on funding from the international community, further limiting the viability of its strategy for economic rehabilitation. The Lomé Accord was similarly hampered by poor fiscal design. It stressed the need for international financial support as a matter of urgency, but guaranteed free health care and education in an environment where resources were remarkably scarce. The consequences of such poor financial planning manifested themselves in the disarmament, demobilisation and reintegration processes envisioned under the agreement. Though those processes received the majority of external funding, they remained woefully under-resourced. Given the extent to which institutional capacity in Sierra Leone had diminished over the course of the conflict, the Lomé Accord

[64] Paredes (n 49) 175.
[65] Tony Addison and Mark McGillivray, 'Aid to conflict-affected countries: lessons for donors' (2014) 4(3) Conflict, Security & Development 347, 355.
[66] ibid.

should have chartered a more instructive course towards economic (and agreement) stability.

Indeed, institutional capacity is something that peace agreements largely assume of the states within which they are implemented. New political structures are often established on the foundations of weak institutions imposed by previous central or colonial authorities, with the consequence that revenue generation and effective government spending may be inhibited in the early years of the peace process.[67] As such, the provision of revenue generating powers is not always enough to finance ambitious autonomous arrangements, as evidenced by the Addis Ababa Agreement and the Final Agreement in Sudan. Donor funding and the provision of aid can play an important role in sustaining an agreement during this initial period, but such funding measures are rarely prescribed by peace agreements and are not informed by good fiscal policy. A recipient country's capacity to put foreign assistance to good use generally increases after three years, at which point donor funding should ideally increase.[68] However, research has repeatedly shown that aid during the initial post-conflict phase is mistimed;[69] surging in when the government's capacity to spend it effectively is underdeveloped, and tapering out after three to four years when the process is most in need of it.[70] There is duly an argument to be made that peace agreements should elaborate on their economic aspects by regulating the provision of financial support by willing donors in a highly legalized manner. Theoretically, it would appear that this would be preferable to the rhetorical provisions in peace agreements at present, and the political processes that dictate the provision of ineffective aid.

In the absence of effective funding strategies, negotiators and parties tend to over-estimate the effects of natural resources as a cure-all for economic underdevelopment. Agreements can guarantee an equitable share of natural resource ownership, but this can inadvertently enshrine economic dependence on resource exploitation—an inherently risky strategy. Bigombe, Sambanis and Collier have found that of three policy-dependent risk factors that impact the frequency of

[67] ibid at 363.
[68] Jos van Gennip, 'Post-conflict Reconstruction and Development,' (2005) 48(3) Society for International Development 57, 60.
[69] See Paul Collier, V L Elliott, Håvard Hegre, Anke Hoeffler, Marta Reynal-Querol, Nicholas Sambanis, *Breaking the Conflict Trap – Civil War and Development Policy* (OUP 2003), Paul Collier, 'Post-conflict Recovery: How Should Strategies Be Distinctive?' (2009) 18(1) Journal of African Economies 99, van Gennip (n 68).
[70] Collier et al (n 69) 177.

recurring conflict, the most powerful factor is natural resource dependency.[71] They maintain that the peak danger level exists where natural resource exports constitute 25-30% GDP.[72] Six years after the wealth-sharing provisions agreed under the Comprehensive Peace Agreement, oil exports constituted 98% of the Government of South Sudan's operating budget.[73] The fledgling nation's subsequent descent into internal conflict thus affirms Bigombe et al's research, and demonstrates how an abundance of natural resources cannot ensure agreement stability. Agreements would be better served by the provision of a coherent management strategy. This is an important point to consider as the Bangsamoro peace process moves forward. During negotiations of the 2014 CAB, both parties considered the ownership of natural resources to be a very important issue, but they alone cannot alleviate Mindanao's economic woes. The parties will need to formulate a cohesive economic strategy for social reconstruction and redevelopment in Mindanao, something which has not been forthcoming under previous agreements in the region.

Disarmament, demobilisation and reintegration processes are also intrinsically linked to the short-term viability of peace, but the peace agreements analysed here did not precisely prescribe those processes, nor provide for their funding. The $20 million shortfall in funding for disarmament and demobilisation processes under the Lomé Accord is worth recalling here. So too are the vague provisions on reintegration that characterised the agreements in Sierra Leone, which identified training and education as vehicles for integration, but failed to elaborate on how these programmes would be funded or prioritised over the needs of non-combatants. Crucially, Bigombe et al have found that the second most important factor affecting the recurrence of civil conflict is a lack of alternative livelihoods, with education as one factor for measuring opportunity (as well as per capita income and per capita GDP growth).[74] We can observe the consequences of neglecting reintegration in the wake of the Addis Ababa Agreement in Sudan, where unemployed Anyanya soldiers posed one of the most significant threats to the post-agreement order. Disarmament and reintegration process had been similarly neglected or poorly designed in the Philippines prior to the 2014 CAB, with the

[71] Betty Bigombe, Paul Collier and Nicholas Sambanis, 'Policies for Building Post-conflict Peace' (2000) 9(3) Journal of African Economies 323, 325.
[72] ibid.
[73] International Crisis Group, 'Politics and Transition in the New South Sudan,' Africa Report N°172 (Juba/Nairobi/Brussels, 4 April 2011) 18, 20.
[74] Bigombe et al (n 71) 326.

consequence that violence remained a viable vehicle for expressing dissatisfaction with both the Tripoli Accord and the Final Agreement. The case studies analysed here and the leading economic literature thus suggest that disarmament, demobilisation, and reintegration processes should be designed not only as clearly instructive provisions, but as economically viable programmes that can sustain peace.

All of these points reiterate the suggestion that peace agreements should elaborate upon their economic components by adopting highly legalized measures, such as precise and obligatory budgetary constraints, regulatory institutions to which enforcement measures are delegated, and subsequent donor's conferences where financial arrangements may be renegotiated and supplemented. The highly legalized nature of these mechanisms would involve a balancing of short-term to long-term goals, and a negotiation of institutional flexibility versus rigidity—as most peace agreement mechanisms do. Such challenges would be preferable to existing efforts, which have rarely influenced the economic systems that spring up around peace processes. This has a particularly detrimental effect in conflicts where central authority and institutional capacity is very weak, as evidenced by Sudan and Sierra Leone. The literature recognizes it as essential that donors and interested economic supporters, as well as national and local leaders from the recipient country, forge some kind of broad agreement on reconstruction plans.[75] Why not incorporate that agreement into the peace agreement as an annexe or supplement? Indeed, Österdahl argues that the incorporation of national and international laws on economic reconstruction could be construed as a key component of a formative *jus pos bellum*.[76] It is similarly submitted here that the pursuit of sustainable peace would benefit from an agreement's economic aspects being subject to the same standard of prescription and analysis as its political and legal components. While there is a body of work that examines the economics of post-conflict economic policies, this analysis underscores the need for research that reveals how best fiscal practice can be accommodated within the terms of an agreement, and how it can complement its political and legal processes.

[75] van Gennip (n 68) 60.
[76] Inger Österdahl, 'Just War, Just Peace and the Jus post Bellum' (2012) 81(3) Nordic Journal of International Law 271, 282.

8. VII. The Lengths and Limits of Legalization

The research presented here would appear to extend Gopalan's finding of a positive correlation between highly legalized interstate agreements and lasting peace to peace agreements between states and non-state actors. Throughout the examples explored herein, we can observe a move towards more highly legalized agreements that have had positive implications for the pursuit of peace in each country. What is less clear from the protracted conflicts explored here is whether these positive effects are the result of a move towards legalization, or a result of the conflict's duration, i.e., has the conflict's enduring negative effects focused the political will and attention to craft necessary to produce more sustainable agreements? Assuming this to be an inherent aspect of conflict resolution efforts, it appears that highly legalized agreements help to foster the mutual confidence, the political will, and/or the momentum necessary to sustain peace processes or drive them forward. This is clearly exemplified in the troubled contexts where implementation has not proceeded to the letter. In Sierra Leone, the Lomé Accord was perceived as a well-crafted peaceful solution worthy of the international political and military commitment necessary to later sustain a peace process on its terms. In Sudan, the highly legalized terms of the Comprehensive Peace Agreement generated the momentum that drove southern autonomy forward when the parties' commitment to the process began to wane. Legalization theory thus plays a valuable role in highlighting the legal mechanisms that support, sustain, and contain the broader political dynamics that shape conflicts resolution efforts, and highly legalized agreements are more effective for this purpose.

However, the myriad mechanisms that comprise highly legalized agreements impose technical limitations on the parties thereto, making such arrangements difficult in certain contexts. While highly legalized agreements play a key role in overcoming the security dilemma by prescribing clear instructions on how certain processes will proceed, parties may be initially reluctant to commit to rigid arrangements, particularly if the relationship is characterised by animosity. Where uncertainty remains high, and the anticipated benefits under the agreement are perceived as low, high legalization may not be enough to overcome the trust-deficit that divides the parties.[77] The political process that informs negotiations and precedes

[77] Barbara Koremenos, Charles Lipson, and Duncan Snidal, 'The Rational Design of International

the agreement is thus central to generating the initial political will, trust, and commitment necessary to making such a project work:[78] highly legalized agreements alone cannot ensure this. The Lomé Accord provides an interesting example in this regard. Despite its highly legalized nature, the agreement initially failed to affect a better outcome than the less legalized agreements that preceded it. This can be attributed in part to the context that informed the agreement: of all the agreements analysed in this thesis, the Lomé Accord was born of the shortest negotiation period (just 6 weeks), and concluded in a political environment that favoured peace with the RUF at any cost. It can hardly be said that this was an appropriate incubation period for the trust and confidence that would be required of an agreement as ambitious as the Lomé Accord, particularly when it was negotiated with as volatile an actor as the RUF.

Hard legalization also imposes significant difficulties on states with limited institutional capacity, as demonstrated by the difficulties of funding peace processes in weaker states. Highly legalized agreements with expansive peacebuilding bureaucracies ask a lot of domestic political systems which are limited in their capacity to govern effectively. For example, drafting an agreement that is capable of transitioning from short-term certainty to long-term self-sufficiency requires a significant degree of institutional flexibility.[79] The peacebuilding infrastructure in place must be capable of reacting to adverse shocks to the implementation schedule, so that parties may gain from cooperation without tying themselves to an agreement that has since become unworkable.[80] However, as has been flagged in the context of the WTO—widely perceived as the optimal example of an international, highly legalized structure—such flexibility requires highly sophisticated political structures,[81] which are often lacking in the post-conflict environment. Capacity is not easily or readily developed either: it requires the dedication of significant resources, the application of expertise, and the formation of state relationships with private sector stakeholders,[82] who also remain weak in the post-conflict order.[83] Faced with

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Institutions,' (2001) 55(4) International Organization 761, 793.
[78] 'Reflecting on the IGAD peace process - An interview with Nicholas (Fink) Haysom' (n 26) 31.
[79] Koremenos et al (n 77) 793.
[80] ibid.
[81] Jeffrey Kucik and E Reinhardt, 'Does Flexibility Promote Cooperation? An Application to the Global Trade Regime,' (2008) 62(3) International Organization 477, 501.
[82] ibid.
[83] J Andrew Grant, 'Diamonds, foreign aid and the uncertain prospects for post-conflict reconstruction in Sierra Leone' (2005) 94(381) The Roundtable 443, 447.

weakened political structures and no guaranteed international support, parties may opt for agreements that are broad but substantively shallow instead of those that are narrow but deep.[84]

While this may work in the context of multilateral treaties between states, this thesis affirms previous studies that found that shallow agreements are not preferable as internal conflict resolution instruments. Unlike multilateral treaties, systems for reasonably limiting self-serving behaviour in pursuit of a mutually beneficial goal are not optimally functional prior to a peace agreement's implementation. Indeed, the very fact that there has been a violent conflict signals the collapse of these systems. They must duly be rehabilitated and reconstructed over time, and highly legalized instruments play a much more effective role in achieving this outcome. Sustained negotiations and mutual attention to detail foster a non-violent political culture of dialogue. Clear and instructive provisions guide the initial implementation of the agreement, allowing a ceasefire to take hold, and ideally become self-sustaining. Multilateral bodies for ceasefire monitoring and dispute resolution foster continued cooperation, and serve as valuable vehicles for transition to long-term objectives. In contrast, shallow agreements encourage uncertainty in the immediate term and broaden the scope for misunderstanding and unilateral interpretation further down the line. Where progress has been negligible, a lack of conflict management systems makes a return to violence less costly and more likely.

We have seen the role of legal mechanisms in affecting both of these outcomes under the 9 agreements explored within this thesis. We have also seen the cost of highly legalized agreements, and the technical difficulties than an elaborate agreement such as the Lomé Accord placed on a weakened, post-conflict, Sierra Leonean state. While such agreements require the dedication of significant resources (both human and economic), this study would suggest that it is more sustainable to commit those resources to a highly legalized agreement than it is to attempt to be cost-effective within a weakly legalized agreement. To attempt the latter is to neglect the opportunity cost involved in bringing the parties to the negotiating table and extracting the best compromise possible from them under the circumstances; and to risk the parties retreating from political process and hardening their positions if the

[84] Scott Barrett, 'Consensus treaties,' (2002) 158(4) Journal of Institutional and Theoretical Economics 529 in Jana von Stein, 'The International Law and Politics of Climate Change Ratification of the United Nations Framework Convention and the Kyoto Protocol,' (2008) 52(2) Journal of Conflict Resolution243, 248.

agreement is unsuccessful (which research suggests it most likely will be).[85] It is also to ignore the far greater human and economic cost involved should the agreement break down (again, as the data suggests a less detailed agreement is more likely to do): where conflict reignites after a negotiated settlement, it is 50% more deadly than a conflict terminated through decisive victory by one side.[86] From both a cost analysis and sustainability perspective, the data thus favours the parties' and the international communities' commitment to highly legalized agreements. War remains "ex post efficient"[87]: it is costly in terms of lives and money, and may persuade parties to accept a peaceful solution rather than incur the cost of victory, or defeat.[88] The challenge thus lies not in convincing the parties of the need for highly legalized agreements, but in designing the agreements in such a way that uncertainty remains low, anticipated benefits remain high, and the process sustains this perception.

8. VIII. THE CONSEQUENCES OF LEGALIZATION

As a final comment, it is worth addressing the consequences of adopting a legalization framework: how this may compromise purely legal or political perspectives, or suggest some degree of overlap between the two. This thesis has rejected a positivist legal analysis as it fails to account for the influence of legal language and its normative power on emerging process of peace. These are exactly the distinct processes of legal institutionalisation that Abbott et al try to capture with their theory of legalization.[89] Likewise, this thesis rebuts the narratives that frame conflict resolution and peace agreements as purely political and instrumental, as they fail to accurately account for the prescriptive, legislative, and interpretative process that comprise legal systems, and bear themselves out in peace agreements and peace processes. A legalization framework, in contrast, allows us to account for the practical role that law plays in prescribing short-term behaviour and shaping the transition to sustainable long-term political processes. The research presented in the thesis has also highlighted how political processes (such as negotiations) and concepts (political will, public sentiment) are crucial in laying the foundations for

[85] Fortna (n 12) 362.
[86] Monica Duffy Toft, 'Ending Civil Wars: A Case for Rebel Victory?' (2010) 34(4) International Security 7, 20.
[87] James D Fearon, 'Rationalist Explanations for War,' (1995) 49(3) International Organization 379, 383.
[88] Fortna (n 12) 340.
[89] Kenneth Abbott et al., 'The Concept of legalization,' (2000) 54(3) International Organization 401.

sustainable peace, but legal mechanisms are often central to managing and maintaining variations in political will over the long-term. Binary divisions of law and politics thus appear reductive and detrimental to our understanding of how peace processes unfold, and the myriad factors that affect their implementation.

Indeed, Abbott et al have previously argued that "law and politics are intertwined at all levels of legalization."[90] Both disciplines are arguably the driving forces behind the creation of the various forms of legalization,[91] and we can observe this in action in peace processes that produce new political and legal structures. It may thus be argued that law and politics are not alternating methods of viewing conflict, but are in fact mutually constitutive of efforts to resolve it. Each imposes checks and balances on the over-application of the other, and both characterize the battle for transition through political and legal processes rather than the use of violence.[92] The political and legal vocabularies are implicated in this struggle to such an extent that it is difficult to objectively identify which mechanisms best serve agreement sustainability with a professional neutrality that is independent of the conflict or political prescriptions on how best to resolve it.[93] Martti Koskenniemi has previously flagged this judgment bias, arguing that "we all participate in politics from some particular, local angle or position and that even 'international' is only a name for a number of conflicting, highly idiosyncratic positions."[94] The danger of advocating a legalization framework is thus that we may be caught up in the politicization of the agreement and the legal structures it produces in the same way that the drafters and the parties themselves are.

Yet, as Koskenniemi has flagged, international legal scholars already make certain value-judgments by virtue of the discipline. International law has often regarded itself as the avant-garde of liberal modernity, advocating reform of existing international structures and advancing the cause of universal human rights.[95] Normative perceptions of what values international law should promote and assure are supposed to provide an objective moral standard of behaviour that is universally considered 'right.' The idea that international law exists as a category independent of

[90] ibid at 419.
[91] Miles Kahler, 'The Causes and Consequences of Legalization,' (2000) 54(3) International Organization, 661.
[92] Bell (n 5) 23
[93] ibid at 19.
[94] Martti Koskenniemi, 'International Law in a Post-Realist Era,' (1995) 16(1) Australian Year Book of International Law 1.
[95] ibid.

international politics is only sustainable if it is understood as law in an extremely narrow formalist sense, and treated as such at the level of international relations.[96] Yet the more we attempt to prove the substantive effects of this body of law on state practice and subject behaviour, "the less we are able to demonstrate its independence from the power and policy of the strongest States."[97] This disparity between theory and practice was best exemplified at the 70th meeting of the UN General Assembly in September 2015, where the United States and Russia used the same legal concepts to criticise Russian intervention in the Crimea, and US support for Saudi intervention in Yemen, respectively.[98] The body of international law that these concepts comprise remains a source of criticism for those who violate it, but it appears almost "utopian in its lack of closeness to the world of facts."[99]

While adopting a legalization framework may imply a constitutive relationship between law and politics, purely technical legal frameworks neglect the observable effects that political relations and dynamics have on the application of legal principles. Positivist legal analyses may preserve the scholarly integrity of international law as a discipline, but they do not assist our understanding of why peace agreements bearing the character of hard law—and representing genuine consensus between belligerents—collapse. Indeed, Dajani has argued in the context of the Palestinian-Israeli conflict that law does not provide all of the answers: it is just one variable in a much larger dynamic.[100] The conclusions drawn in this chapter speak to this. The law alone cannot prescribe the transition from short-term commitments to long-term political processes: it may provide a roadmap and institutions that encourage continued engagement, but if an agreement does not reflect the political and contextual realities of the environment in which it is implemented, these provisions will fall by the wayside (as evidenced by the Lomé Accord). The processes and institutions precisely elaborated under an agreement are also subject to economic influences and practical matters of funding that are ill-suited to legal prescription (but they should be regulated under highly legalized

[96] Miro Cerar, 'The Relationship between Law and Politics,' (2009) 15(1) Annual Survey of International and Comparative Law 19, 36.
[97] Koskenniemi (n 94) 1.
[98] See Julia Ioffe, 'The Remarkable Similarity of Putin's and Obama's Speeches at the UN,' Foreign Policy (29 September 2015) <http://foreignpolicy.com/2015/09/29/the-remarkable-similarity-of-putins-and-obamas-speeches-at-the-u-n> accessed 28 July 2017.
[99] Koskenniemi (n 94) 4.
[100] Omar M Dajani, 'Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks' (2007) 32 The Yale Journal of International Law 61, 110.

agreements). These factors underscore the unsuitability of purely legalistic solutions to conflict, which is in and of itself multi-sectoral. It is thus submitted that the theory of legalization provides a more nuanced understanding of the many factors that influence the pursuit of peace, while preserving the legal character of the features prescribed by peace agreements.

In considering the disparity between the body of international law and the social change it affects, Bell urges us to embrace our ambivalence, "and in so doing, refuse to accept that we must choose between pragmatic managerialism and naïve idealism, regulation or emancipation, politics or law".[101] Bell's thoughtful stance is reflective of the current global political climate, in which the post-World War Two order is no longer guaranteed. And yet, highly legalized agreements continue to prosper: the 2016 Colombian peace deal is no less legitimate for its uncertain status under traditional concepts of international law. This would suggest that highly legalized agreements are particularly useful for combatting the challenges that face the current legal order. Indeed, it has been argued in the context of agreements on climate change and the environment that the provision of mechanisms that produce practical effects is far more important than formal legal status.[102] The research advanced by this thesis supports such a claim, highlighting the significant effects that highly legalized provisions can produce, despite their ambiguous status. As the case studies presented in this thesis demonstrate, provisions that are high on precision, obligation, and delegation can influence party behaviour in a manner that positivist categories of international law have failed to. Parties appear to perceive highly legalized agreements as legally binding—despite the provisions of the VCLT or the jurisprudence of the ICJ—and in agreeing to highly legalized agreements, they commit to interpreting and implementing these documents through distinctly legal processes. This analysis thus advocates legalization theory as a more accurate barometer of legal obligation, and reiterates Bell's claim that positivist law as it is presently perceived cannot hope to regulate the distinctly legal processes that are being adopted as common practices across peace processes the world over.[103]

The peace processes in Northern Ireland, Mindanao, and Colombia, and the

[101] Bell (n 4) 303.
[102] Joost Pauwelyn and Lilliana Andonova, 'A "Legally Binding Treaty" or Not? The Wrong Question for Paris Climate Summit,' European Journal of International Law: Talk! (4 December 2015) <http://www.ejiltalk.org/a-legally-binding-treaty-or-not-the-wrong-question-for-paris-climate-summit> accessed 28 July 2017.
[103] Bell (n 6) 412.

degree to which these processes influenced each other, attest to this formative *lex pacificatoria*. In Chapter 5, we observed how the parties to the Bangsamoro peace process adopted—almost word for word—the Good Friday Agreement's provisions on disarmament and security reform. The 2014 CAB utilized the Good Friday Agreement's highly precise and obligatory language, and delegated authority to neutral third parties who would oversee and implement these mechanisms. The similarity of these provisions suggests they are more than just a political vehicle for post-conflict transition, or a sociological phenomenon. In prescribing provisions that are similarly high on precision, obligation and delegation, the parties to the Bangsamoro conflict implied a distinctly legal mechanism which would be regulated by the terms of an agreement that the parties also perceived as legal. The adoption of common provisions in such different contexts reiterates the legal influence that processes of legalization have on party behaviour, and affirms the possibility of a distinct *lex pacificatoria*. This thesis has grappled with the foundational elements of Bell's *lex pacificatoria* throughout the case studies explored herein: the provisions on self-determination; the inclusion of both state and non-state actors; obligations that transition between precisely-worded short-term objectives and symbolic appeals to long-term 'constitutionalization' of the peace process; and various forms of delegation that comprise overlapping political forums and legal processes.[104] Moreover, this final chapter has provided a valuable socio-legal commentary on how variations in precision, obligation, and delegation can affect processes of legalization, both in terms of the legal structures they produce, and the sustainability of the agreements that mandate those structures. This is an important contribution – not just in terms of identifying an emerging body of law that can be labelled a *lex pacificatoria*, but in terms of improving best practice in the common adoption of successful peacebuilding mechanisms, and asserting quality control over the number of peace agreements that claim to be 'legal.'

These foundational aspects of a *lex pacificatoria* are immediately applicable to conflicts in Syria and Ukraine, where conflict resolution efforts have been repeatedly impaired by a lack of precision and delegation. Various agreements in both contexts have failed to elaborate on truce lines, monitoring mechanisms, and penalties for infractions. Elaborating on these mechanisms under more highly legalized agreements may not guarantee more sustainable outcomes in the absence of

[104] ibid at 407.

the political will to make them work. However, this thesis has forcibly demonstrated that attempts to sustain peace on the basis of weak agreements are at best a wasted opportunity, and at their worst, an aggravator of further conflict. If parties can be brought to the negotiating table to conclude weak instruments with little chance of success, then the challenge lies not in fostering their political will, but in convincing them of the benefits of more highly legalized agreements. The law's contribution in this regard lies in convincing the parties that the risk is negligible, the benefits are achievable, and thus, that the pen might prove mightier than the sword.

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