

“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

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I. INTRODUCTION

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

The Court’s main concern was not Uganda’s vague allegation that the Lusaka Agreement could be interpreted as constituting consent to the presence of Ugandan forces on the territory of the Democratic Republic of the Congo (DRC).<sup>2</sup>

1. Olivier Corten, one of the lawyers of the DRC in the *Armed Activities* case, rightly pointed out in the oral proceedings that this issue is very limited in scope because it is only invoked to justify “the peaceful stationing of Ugandan troops in the Congo which . . . [would be] covered by the Congolese Government’s consent.” In contrast, it “covers neither the human rights violations, nor the illegal exploitation of natural resources, nor even the armed actions allegedly conducted on Congolese territory [by Ugandan troops].” *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Doc. No. CR 2005/04, at 3 (Apr. 13, 2005), available at <http://www.icj-cij.org/docket/files/116/4293.pdf> [hereinafter Oral Proceedings].

2. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 92 (Dec. 19) [hereinafter *Armed Activities*].

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

I argue in this Article that the Court deliberately used the term *modus operandi* to downgrade the legal status of peace agreements. This downgrading allowed the Court to resolve its concerns about the use of peace agreements as a means for states to avoid international responsibility. In *Armed Activities*, Uganda argued that the Lusaka Agreement precluded its violations of the principle of non-intervention. The downgrading also enabled the Court to accommodate the special character of peace agreements outside the traditional categories of international law while avoiding controversial issues of international law such as the status of non-state actors. However, the Court disregarded the likely repercussions that depriving peace agreements of their legal force would have on “whether peace lasts or war resumes.”<sup>7</sup> Virginia Fortna has recently argued that ceasefire agreements play a critical role in determining whether the provisional end of hostilities becomes permanent.<sup>8</sup> I argue that the legal force of peace and ceasefire agreements is crucial to this role.<sup>9</sup>

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

4. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 9 (Dec. 19) (separate opinion of Judge Parra-Aranguren) [hereinafter *Armed Activities*, Judge Parra-Aranguren].

5. *Armed Activities*, *supra* note 2, ¶ 99.

6. *Id.*

7. Virginia Page Fortna, *Scraps of Paper?: Agreements and the Durability of Peace*, 57 INT'L ORG 337, 365 (2003) [hereinafter Fortna, *Scraps*].

8. VIRGINIA PAGE FORTNA, *PEACE TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE* (2004) [hereinafter FORTNA, *PEACE TIME*].

9. Fortna also raises this point and argues that the breach of formal ceasefire agreements causes audience costs that make compliance with them more likely. *See id.* at 28-29, 199-205.

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

In this Article, I argue that the legal status of peace agreements is crucial to their success. Legal status not only reduces breaches of peace agreements by significantly increasing audience costs, but also triggers the application of the rules on countermeasures. This set of rules, by channelling and structuring state conduct in situations of deep mistrust in the aftermath of a conflict, provides a very effective mechanism to prevent breaches of peace agreements or minor accidents and provocations from sparking a renewal of violence.

I will start to defend my claim by closely examining the passages of the *Armed Activities* judgment in which the ICJ deals with the Lusaka Agreement: the issue of consent and the dismissal of Uganda's third counterclaim alleging various violations of the Lusaka Agreement by the DRC. I conclude that the Court downgraded the legal status of the Lusaka Agreement (Part II). Against this background, I will analyze the reasons that may have motivated the Court to downgrade the legal status of peace agreements (Part III). Subsequently, I will make the case for the crucial role of the legal status of peace agreements in the resolution of modern conflicts (Part IV). In order to determine which legal regime the Court should have established for peace agreements, I discuss the literature on the legal nature and effects of ceasefire, armistice, and peace agreements. I first analyze the literature on armistices (the

predecessors of modern peace agreements), which essentially does not apply any legal rules to armistice agreements. Subsequently, I deal with the only author so far to have engaged in a comprehensive analysis of the legal nature and effects of modern peace agreements: Christine Bell, who places peace agreements within a new category of *lex pacificatoria*.<sup>10</sup> Because I disagree with Bell's approach, as it fails to integrate peace agreements within the existing set of rules, practices, and institutions of the international legal system, I argue that peace agreements ought to be understood as legally binding international agreements to which the rules on countermeasures should apply (Part V).

## II. WHAT THE COURT SAID: DOWNGRADING THE LEGAL STATUS OF THE LUSAKA AGREEMENT BY QUALIFYING IT AS A MODUS OPERANDI

In its judgment in the *Armed Activities* case, the Court attributed very limited significance to the Lusaka Agreement, notwithstanding the facts that Uganda relied heavily on its provisions<sup>11</sup> and that the agreement marked an important step in the Congo war.<sup>12</sup> The Lusaka Agreement was signed on July 10, 1999 by all major parties to the conflict, namely the heads of state of the DRC, Uganda, Angola, Namibia, Rwanda, and

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

11. See Counter-Memorial Submitted by the Republic of Uganda, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, ¶¶ 65-101, 409-12 (Apr. 21, 2001), available at <http://www.icj-cij.org/docket/files/116/8320.pdf> [hereinafter Counter-Memorial]; Rejoinder Submitted by the Republic of Uganda, *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, ¶¶ 129-35, 299-320 (Dec. 6, 2002), available at <http://www.icj-cij.org/docket/files/116/8314.pdf> [hereinafter Rejoinder].

12. At the time of its conclusion, the Lusaka Agreement was regarded as the best chance for bringing peace to the Congo. The Secretary-General stressed that "it cannot be too often repeated that the Lusaka Ceasefire Agreement remains the best hope for the resolution of the conflict in the Democratic Republic of Congo and, for the time being, the only prospect of achieving it." U.N. Secretary-General, *Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of Congo*, ¶ 86, U.N. Doc. S/2000/30 (Jan. 17, 2000). The Security Council described it as "the most viable basis for the resolution of the conflict in the Democratic Republic of Congo. . . ." S.C. Res. 1279, U.N. Doc. S/RES/1279 (Nov. 30, 1999).

Zimbabwe, and later joined by the rebel groups Movement for the Liberation of Congo (MLC) and Congolese Rally for Democracy (RCD).<sup>13</sup> It provided for a variety of measures to end the Congo war, including arms control,<sup>14</sup> the redeployment of forces,<sup>15</sup> the installment of a United Nations/Organization of African Unity monitoring group,<sup>16</sup> and a national dialogue.<sup>17</sup>

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

13. The Lusaka Agreement was one of four distinct agreements that were signed in the course of the Congo conflict and that were at issue in the DRC v. Uganda case before the International Court of Justice. The others were the Kampala Disengagement Plan of April 8, 2000, the Harare Disengagement Plan of December 6, 2000, and the Luanda Agreement of September 6, 2002. While the Kampala and the Harare agreements essentially adjusted the timeframe prescribed by the Lusaka Agreement for the withdrawal of troops from the DRC as the original timeframe had not been observed, the Luanda Agreement had little relevance to the case before the ICJ because the claims brought by the DRC only referred to the time before the conclusion of the agreement on September 6, 2002. See U.N. Sec. Council, Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/815 (July 23, 1999) [hereinafter Lusaka Agreement] (reproducing Lusaka Ceasefire Agreement); Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures Order, 2001 I.C.J. 660 (Nov. 29) [hereinafter Provisional Measures Order].

14. Lusaka Agreement, *supra* note 13, at annex A, ch. 9.

15. *Id.* at annex A, ch. 11.

16. *Id.* at annex A, ch. 8.

17. *Id.* at annex A, ch. 5.

18. Armed Activities, *supra* note 2, ¶ 97.

19. Rejoinder, *supra* note 11, ¶¶ 299-320.

20. Counter-Memorial, *supra* note 11, ¶¶ 409-12.

21. Armed Activities, *supra* note 2, ¶¶ 93, 99.

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time that the ICJ dismissed a counterclaim because of a lack of direct connection.<sup>22</sup>

A. *The Appraisal of the Lusaka Agreement in the Context of the Question of Consent*

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

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

*Modus operandi* appears to be a new term of art that has not previously been used in the field of international law. Tra-

22. In *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 45 (June 15), and in *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)* 1991 I.C.J. 82 (Nov. 12), the counterclaim was dismissed because it did not involve any extension or widening of the case. See Shabtai Rosenne, *Counterclaims in the International Court of Justice Revisited*, in *LIBER AMICORUM IN MEMORIAM OF JUDGE JOSE MARIA RUDA* 457, 473 (Calixto Armas Bareo ed., 2000).

23. *Armed Activities*, *supra* note 2, ¶ 98 (emphasis added). Uganda also argued before the Court that the Lusaka Agreement constituted retroactively “an acceptance by all parties of Uganda’s justification for sending additional troops into the DRC between mid-September 1998 and mid-July 1999.” *Id.* ¶ 97 (emphasis added). The Court, however, rejected the alleged retroactive consenting effect of the Lusaka Agreement for the time from mid-September 1998 to mid-July 1999 by simply observing that no provision of the agreement could be interpreted in this sense. *Id.* ¶¶ 96-97.

24. Rejoinder, *supra* note 11, ¶ 315.

25. *Armed Activities*, *supra* note 2, ¶ 99.

26. *Id.*

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ditionally, three different legal terms have been associated with agreements concluded in the context of an armed conflict: the “ceasefire agreement,” the “armistice agreement,” and the “peace treaty.”<sup>27</sup> While these categories increasingly lose relevance in contemporary state practice,<sup>28</sup> they seem to merge to some extent into the modern type of “peace agreement.” The modern peace agreement includes a ceasefire to halt the fighting and has largely replaced the categories of “armistice” and “peace treaty” by providing the means for resolving the underlying dispute between the parties and putting a final end to the conflict.<sup>29</sup>

27. Traditionally, the peace treaty is considered to put a final end to the conflict, while the ceasefire or the armistice agreement only provide for an end to the hostilities but do not end the conflict permanently. The terms armistice and ceasefire were historically interchangeable in substance. While the term “armistice” was widely used at the turn of the century and consequently applied in the Hague Convention on the Law and Customs of War on Land, “ceasefire” was introduced after the end of World War II and has become the common notion since. David Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT’L L. 801, 811 (1996). The term “ceasefire” has not completely replaced the concept of “armistice,” however, because the latter has developed a distinct meaning in the past decades. An armistice in today’s meaning aims to terminate hostilities permanently. See Christopher Greenwood, *Scope of Application of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICTS 39, 58 (Dieter Fleck ed., 1995); Yoram Dinstein, *Armistice*, in I ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 256-57 (Rudolf Bernhardt ed., 1992) [hereinafter Dinstein, *Armistice*]. In fact, ceasefires have increasingly displaced peace treaties after World War II since the conclusion of the latter has often been omitted even though peace has in fact been achieved. In contrast to a ceasefire, “[t]he armistice, though primarily a military agreement, may touch upon broader political issues within the framework of the cease-fire resolutions.” Morriss, *supra*, at 814.

28. Greenwood points out that “the dividing line between ceasefires, armistices and other forms of suspensions of hostilities has become increasingly blurred.” Greenwood, *supra* note 27, at 59. Bailey assents: “There is no question that there has been confusion about the precise meaning of the terms cease-fire, truce, and armistice.” Sydney Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 AM. J. INT’L L. 461, 461 (1977).

29. Since the end of the Cold War, there has been a proliferation of peace agreements in the international arena that link ceasefires with political and legal arrangements for the durable hold and exercise of power. See Bell, *supra* note 10, at 373. In contrast, the terms “armistice” or “peace treaty” are rarely used anymore. In the case that a peace agreement succeeds and hostilities end, the parties generally do not sign an additional peace treaty to officially declare that they are in a state of peace. The con-

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I argue that the Lusaka Agreement is best qualified as a peace agreement, notwithstanding the fact that the parties named it a ceasefire.<sup>30</sup> Ceasefire agreements are designed to provide a “breathing space for the negotiation of more lasting agreements.”<sup>31</sup> Peace agreements, in contrast, “touch upon broader political issues within the framework of the cease-fire resolutions.”<sup>32</sup> They aim at “resolving the underlying disputes between the parties and may extend to the political, cultural,

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tent of armistice agreements is very similar to that of peace agreements. However, there seems to be a terminological preference towards “peace agreements.”

30. Bell also qualifies the Lusaka Agreement as a peace agreement. See Bell, *supra* note 10, at 381. In contrast, the parties to the Lusaka Agreement officially called the agreement a ceasefire (“Lusaka Ceasefire Agreement”). The Security Council also referred to the Lusaka Agreement as the “Lusaka Ceasefire Agreement.” S.C. Res. 1304, at pbml., recital 9, U.N. Doc. S/RES/1304 (June 16, 2000). DRC counsel Corten argued in the oral proceedings that this “terminology is particularly appropriate.” Oral Proceedings, *supra* note 1, at 11-12. It could be argued that the parties consciously used the term “ceasefire” in order to avoid the legal obligations arising from the conclusion of a peace agreement. In contrast, I argue that the legal character has to be assessed primarily on the basis of the substance of the provisions of the agreement, so long as the parties did not explicitly lay down such an understanding of the legal obligations arising from the agreement. Article 31 (1) of the Vienna Convention on the Law of Treaties provides that the provisions of a treaty shall be interpreted “in accordance with the ordinary meaning . . . in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. It follows in my view that the official term “ceasefire” is not sufficient to legally qualify the agreement as a ceasefire if the provisions of the agreement represent those of a peace agreement. The Court also seems to focus more on the substance than on the official name of the agreement when it states that the Lusaka Agreement is “more than a mere ceasefire agreement.” Armed Activities, *supra* note 2, ¶ 97.

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31. See Bailey, *supra* note 28, at 469. Greenwood characterizes a ceasefire agreement as “temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders.” Greenwood, *supra* note 27, at 58.

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32. This is Morriss’s description of an armistice that may also be applied to peace agreements. Morriss, *supra* note 27, at 814. Bell characterizes “peace agreements” as agreements that are concluded in the context of “a violent internal conflict to establish a cease-fire together with new political and legal structure.” She also acknowledges, however, that “the term ‘peace agreement’ remains largely undefined and unexplored.” Bell, *supra* note 10, at 374.

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economic, and ethnic differences at the heart of the conflict in a way that is intended to produce a lasting peace.”<sup>33</sup>

The Lusaka Agreement goes far beyond merely ordering the parties to cease hostilities.<sup>34</sup> The Court agreed with Uganda that the Lusaka Agreement is “more than a mere ceasefire agreement.”<sup>35</sup> It not only provides a framework to facilitate the orderly withdrawal of all foreign forces to build a stable and secure environment, but also tackles problems that are at the heart of the Congo conflict by providing for a political solution to the conflict.<sup>36</sup> Nevertheless, the Court did not qualify the Lusaka Agreement as a peace agreement but instead introduced the new category of *modus operandi*.

It could be argued that the Court did not reject established legal categories by introducing this new term of art but rather simply explained why the agreement did not constitute consent to the presence of Ugandan troops on Congolese territory. According to such an interpretation, the term “*modus operandi*” does not affect the legal status of the Lusaka Agreement, but merely represents a description of the agreement that illustrates that the provisions of the Agreement did not purport to constitute consent.<sup>37</sup> A “*modus operandi*” is gener-

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33. This is Morriss’s definition of a peace treaty. Morriss, *supra* note 27, at 814. R

34. See *Armed Activities*, *supra* note 2, ¶ 97. Judge Kooijmans points out that “[t]he Lusaka Agreement laid the foundation for the re-establishment of an integrated Congolese State structure.” *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 16 (Dec. 19), ¶ 51 (separate opinion of Judge Kooijmans) [hereinafter *Armed Activities*, Judge Kooijmans]. R

35. *Armed Activities*, *supra* note 2, ¶ 97; *Armed Activities*, Judge Kooijmans, *supra* note 34, ¶ 51. R

36. Moreover, a peace agreement is like an armistice “usually concluded in a formal inter-governmental agreement (namely a treaty) following lengthy and elaborate negotiations.” Dinstein, *Armistice*, *supra* note 27, at 258; Howard Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT’L L. 883 (1956). The Lusaka Agreement was signed after three weeks of intensive negotiations by the Heads of State of each signatory State. R

37. In one phrase, the ICJ remarks that, in fact, the Lusaka Agreement “did not purport to qualify the Ugandan military presence in legal terms.” *Armed Activities*, *supra* note 2, ¶ 99. However, it appears that the ICJ only used this phrase to back up its qualification of the Lusaka Agreement as a *modus operandi*. Otherwise, it is not clear why the Court employed the term “*modus operandi*” in the first place. It would have been sufficient to state that the agreement did not purport to constitute consent. R

ally defined as a “way in which a thing . . . operates”<sup>38</sup> or “in which a person performs a task or action.”<sup>39</sup> There is no obscurity in the language of the Court at all if we assume that the Lusaka Agreement simply lays out a procedure by which the parties shall take a significant step to solve the Congolese conflict.

I suggest, however, that this is not how the Court uses the term *modus operandi*. The Court does not say that the Lusaka Agreement *sets out* a *modus operandi*, it states that it “*represent[s] a . . . modus operandi*.”<sup>40</sup> In addition, it refers to the agreement *as a whole* as “*modus operandi* provisions.”<sup>41</sup> It seems therefore that the Court equates the Lusaka Agreement with a *modus operandi*. The Lusaka Agreement does not prescribe a *modus operandi*. It is a *modus operandi* itself.

This distinction is crucial because the qualification of the Lusaka Agreement as a *modus operandi* affects its legal nature, while a simple description of the legal regime set out by the agreement would only relate to its content. This distinction affects how we understand the Court’s rejection of Uganda’s consent argument. The qualification of the agreement as a *modus operandi* makes the legal nature of the agreement unsuitable to constitute consent. In contrast, if *modus operandi* only describes the content of the Lusaka Agreement, the Court would have had to analyze whether the individual provisions of the agreement could be interpreted to constitute consent to the presence of Ugandan troops on Congolese territory—something the Court did not do.<sup>42</sup>

An initial objection to my reading may be that it is an overly literal interpretation; perhaps the Court did not actually draft this passage in such a precise and conscientious manner. However, if we read the Court as treating the Lusaka Agreement as merely laying out a *modus operandi*, it is not clear why the Court employed the term *modus operandi* in the first

38. IX OXFORD ENGLISH DICTIONARY 957 (2d ed. 1991).

39. OXFORD AMERICAN DICTIONARY AND THESAURUS 962 (2003).

40. Armed Activities, *supra* note 2, ¶ 99 (emphasis added).

41. *Id.* ¶ 100.

42. In contrast, DRC counsel Cortes engaged in the oral proceedings in a detailed analysis of the provisions of the Lusaka Agreement to rebut Uganda’s argument that the provisions of the Lusaka Agreement purported to consent to the presence of Ugandan troops on Congolese territory. Oral Proceedings, *supra* note 1, at 10-11.

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place. It would have been sufficient to state that the provisions of the agreement did not purport to constitute consent. In addition, given the fact that various international agreements set out a *modus operandi* between the parties, it is difficult to see how this particular feature renders the Lusaka Agreement incapable of constituting consent to the Ugandan intervention.<sup>43</sup> It would also remain unclear why the Court introduced this term in its judgment and is therefore far more likely that by alluding to the Lusaka Agreement as “*modus operandi* provisions” the Court ascribes a certain status to the agreement which prevents it from consenting to the presence of Ugandan troops on Congolese territory. The term *modus operandi* seems to refer to the process-oriented character of peace agreements and denies these agreements the capacity to constitute consent on the basis of their peculiar features such as their process-orientation.

My interpretation is substantiated when it is read in light of Judge Parra-Aranguren’s dissenting opinion. The analysis of dissenting opinions often gives an idea of the legal issues discussed by the judges on the basis of which the Court made its decision.<sup>44</sup> Judge Parra-Aranguren, who believes that the Lusaka Agreement did constitute consent, accuses the Court of creating a legally impossible situation for Uganda:

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43. The Editorial Comment of the *American Journal of International Law* describes the Treaty of November 27, 1912 between France and Spain concerning Morocco as defining the spheres of influence of these two countries with regard to Morocco as a *modus operandi*. They state that the treaty was concluded because “a *modus operandi* had to be reached.” Board of Editors, *President Wilson and Latin America*, 7 AM. J. INT’L L. 329, 358 (1913) (italics in the original). Furthermore, Cottier describes the legal structure and operation of the GATT and the WTO concerning the negotiations in the trade rounds as a *modus operandi*. Cottier’s use of the term indicates that the provisions of the treaty lay down a *modus operandi*—in contrast to an agreement constituting a *modus operandi* itself. In addition, Cottier’s use of the term *modus operandi* suggests that *modus operandi* describes process-oriented legal frameworks. Thomas Cottier, *Preparing for Structure Reform in the WTO*, 10 J. INT’L ECON. L. 497, 499 (2007). The court’s passage in the Armed Activities case introducing the term *modus operandi* also stresses the process-oriented character of the Lusaka Agreement. *Armed Activities*, *supra* note 2, ¶ 99.

44. Justice Scalia describes dissenting opinions as a vehicle for informing “the public . . . about the state of the Court’s collective mind.” Antonin Scalia, *The Dissenting Opinion*, 19 J. SUP. CT. HIST. 37, 38 (1994).

On the one hand, if Uganda complied with its treaty obligations and remained in the territory of the DRC until the expiration of the timetables agreed upon, Uganda would be in violation of international law because the legal status of its presence had not been changed, the status of its military forces in the DRC being a violation of international law. On the other hand, if Uganda chose not to violate international law as a consequence of its military presence in the DRC, and therefore withdrew its troops from the territory of the DRC otherwise than in accordance with the timetables agreed upon, Uganda would have violated its treaty obligations, thereby also being in violation of international law.<sup>45</sup>

It is likely that the Court's characterization of the Lusaka Agreement as a *modus operandi* was intended not only to reject Uganda's consent argument, but also to circumvent Judge Parra-Aranguren's criticism by ascribing to the Lusaka Agreement a status that precludes it from creating a legally impossible situation. The existence of a legally impossible situation requires that two conflicting legal obligations of the *same legal order* are imposed but cannot both be fulfilled. If the agreement is a mere *modus operandi*, it lacks the necessary formal legal status to create the conflict that Parra-Aranguren assumes.<sup>46</sup>

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45. See Armed Activities, Judge Parra-Aranguren, *supra* note 4, ¶ 8.

46. In my view, it would have been more appropriate for the Court to counter Judge Parra-Aranguren's assumption of the existence of a legally impossible situation for Uganda with a different consideration. I have pointed out that the existence of a legally impossible situation requires two competing legal obligations that cannot both be fulfilled. Parra-Aranguren presupposes that the Lusaka Agreement imposes a legal obligation on Uganda not to withdraw its troops from Congolese territory before the dates set by the Agreement's timetables. I argue, in contrast, that timetables in peace agreements generally do not prescribe such an obligation. Rather, they are based on the consideration that the process of troop withdrawal might take a considerable amount of time and that nations occupying foreign territory might have interests in staying for awhile that need to be taken into account in order to achieve peace. In the context of the Congo war, the timetables were not perceived as legal obligations by either the parties or the international community. Between June and August 2000, Uganda withdrew "five battalions from the Democratic Republic of the Congo, which it characterized as a unilateral gesture in support of the Kampala Disengagement plan." *Fourth Report of the Secretary-General on the United Nations Organization*

Moreover, if the ICJ merely wanted to express the transitory character of the Lusaka Ceasefire Agreement, it could have used the existing term of art *modus vivendi*. A *modus vivendi* is “an arrangement of a temporary and provisional nature concluded between subjects of international law which gives rise to binding obligations on the parties.”<sup>47</sup> It is plausible to assume *a contrario* that the Court invented a new category of agreement rather than resorting to this established term of art because it did not want the Lusaka Agreement to create legally binding obligations. Instead, the Court effectively treated the agreement as “a political settlement, with no discernible legal consequences,” as Okawa argues.<sup>48</sup>

B. *The Appraisal of the Lusaka Agreement in the Context of the Dismissal of Uganda’s Third Counterclaim*

The argument that the ICJ qualified the Lusaka Agreement as a *modus operandi* to downgrade its legal status is further supported by the way in which the Court dismissed Uganda’s third counterclaim. The Court held that the counterclaim alleging breaches by the DRC of the Lusaka Agreement lacked a direct connection to the DRC’s original claim, in fact and in law, because of the inherently different nature of the Lusaka Agreement as compared to the violations of princi-

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*Mission in the Democratic Republic of Congo*, S/2000/888, ¶ 30 (Sept. 21, 2000). This suggests that Uganda did not feel constrained by the timetable set out in the Lusaka Agreement. Rather, the timetables granted Uganda a privilege to remain on Congolese territory for the time specified, recognizing the security interests of Uganda due to repeated raids by anti-Ugandan insurgents along the Congolese/Ugandan border. The Sixth Report on MONUC acknowledges this link by stating that “[t]he Lusaka Ceasefire agreement acknowledged the concerns of Rwanda, Uganda and Burundi over the presence of the armed groups which threaten the security of their borders, and recognized that the withdrawal of Rwandan and Ugandan troops would be linked directly to progress made in the disarmament and demobilization of the militias.” *Sixth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of Congo*, S/2001/128, ¶ 88 (Feb. 12, 2001) [hereinafter Sixth Report on MONUC]. It follows that no impossible legal situation was created for Uganda because the timetables of the Lusaka Agreement do not require that its troops remain on Congolese territory.

47. Walter Rudolf, *Modus Vivendi*, in 3 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 442-43 (Rudolf Bernhardt ed., 1997).

48. See Phoebe N. Okawa, *Case Concerning Armed Activities on the Territory of the Congo*, 55 INT’L & COMP. L. Q. 747 (2006).

ples of public international law that the DRC's complaint alleged.

In its third counterclaim, Uganda argued that the DRC did not disarm and demobilize the armed groups on its territory, including the anti-Uganda insurgents; that it impeded the deployment of the UN Observer Mission to the Congo (MONUC) in government-controlled territory; and, in particular, that it prevented the Congolese national dialogue.<sup>49</sup>

The Court dismissed Uganda's third counterclaim under article 80, paragraph 1, of the Rules of Court as "not directly connected with the subject-matter of the Congo's claims,"<sup>50</sup> finding an insufficient factual and legal connection between Uganda's counterclaim and the DRC's original claim that Uganda had perpetrated acts of armed aggression on Congolese territory.<sup>51</sup> The Court found that there was no factual connection between the two claims because Uganda's counterclaim "relate[s] to *methods for solving the conflict* in the region agreed at multilateral level in a ceasefire accord . . . [while] Congo's claims . . . relate to acts for which Uganda was allegedly responsible *during that conflict*."<sup>52</sup> There was also no legal

49. Counter-Memorial, *supra* note 11, ¶¶ 409-12. The provisions of the Lusaka Agreement regarding the national dialogue provide for open political negotiations of all internal parties to the conflict that shall be held under the authority of a neutral facilitator, and that should result in a new political dispensation in the DRC. Parties to the national dialogue include the DRC government, the rebel groups (Movement for the Liberation of Congo (MLC) and Congolese Rally for Democracy (RCD)), unarmed opposition groups, and the Congolese civil society. "All parties will have equal status in the debate. . . . Topics to be tackled in the debate are democratic elections, the formation of the national army and the re-establishment of state administration throughout the DRC." INTERNATIONAL CRISIS GROUP (ICG), DEM. REP. CONGO REP. NO. 5, THE AGREEMENT ON A CEASE-FIRE IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ANALYSIS OF THE AGREEMENT AND PROSPECTS FOR PEACE 2 (1999), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400209\\_20081999.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400209_20081999.pdf) [hereinafter REPORT ON LUSAKA AGREEMENT].

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50. Armed Activities, *supra* note 2, ¶ 93.

51. Provisional Measures Order, *supra* note 13, at 680. According to the Court, a counterclaim has a "dual character": On the one hand, it is an "autonomous legal act" in the sense that it "constitutes a separate 'claim.'" On the other hand, it is "linked to the principal claim" in the sense that it "widen[s] the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings." *Id.* ¶ 29.

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52. *Id.* ¶ 42 (emphasis in original).

connection because “whereas the Congo seeks to establish Uganda’s responsibility based on the violation of the [principles of the non-use of force and of non-intervention] . . . Uganda seeks to establish the Congo’s responsibility based on the violation of specific provisions of the Lusaka Agreement.”<sup>53</sup>

This holding illustrates that Uganda’s third counterclaim was dismissed because of the inherently different legal nature of the Lusaka Agreement for the following reasons. The absence of a direct legal connection seems to be based on the assumption that it is not possible to establish legal responsibility on the basis of violations of the Lusaka Agreement.<sup>54</sup> The Court’s rejection of Uganda’s third counterclaim thus appears to be premised on the particular legal status of the Lusaka Agreement, lending support to my argument that the qualification of the Lusaka Agreement as a *modus operandi* downgraded the legal status of the agreement.<sup>55</sup> The factual distinction between “methods for solving the conflict” and acts committed “during the conflict” suggests that the breaches of the Lusaka Agreement alleged by Uganda were of a different nature than the violations of the principles of non-use of force and of non-intervention claimed by the DRC.

It is important to note that the Court’s rejection of this counterclaim deviated from its previous case law regarding the admissibility of counterclaims. In fact, it marks the first time

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53. *Id.* ¶ 42.

54. The absence of a direct legal connection cannot be based simply on the fact that the provisions of the agreement rely on different norms than the principle of non-intervention. The provisions included in Uganda’s first admissible counterclaim alleging that assaults on diplomats constituted a violation of the Vienna Convention on Diplomatic Relations also differ from the principle of non-intervention. However, the principle of non-intervention and the provisions of the Vienna Convention could fall into a common category of international norms to which the Lusaka Agreement does not belong.

55. The link between the legal status assigned to the Lusaka Agreement by the Court and the refusal of the Court to admit Uganda’s third counterclaim alleging breaches of the Lusaka Agreement by the DRC was also noted by the DRC in the oral proceedings. The DRC argued that the Court meant, by stating that the “[a]greement concerns matters relating to ‘*methods of solving the conflict*’ and not . . . issues concerning acts for which the parties were allegedly responsible ‘*during that conflict*,’” that “the Lusaka Ceasefire Agreement in no way prejudices the rights, claims or position of the parties.” Oral Proceedings, *supra* note 1, at 12.

ever that the ICJ dismissed a counterclaim because of a lack of a direct connection.<sup>56</sup> Prior to this case, the Court had employed a rather flexible and generous approach towards counterclaims.<sup>57</sup> The primary purpose of the direct connection requirement was to prevent “the risk of infringing the Applicant’s rights and of compromising the proper administration of justice”:<sup>58</sup> in other words, an abuse of process. The Court had deemed it sufficient that counterclaims “form part of the same factual complex” and that the parties are “pursuing the same legal aims.”<sup>59</sup> The Court interpreted the “same legal aims” as the “attempt to establish State responsibility and to seek reparations on that account, over and above the dismissal of the original claims.”<sup>60</sup> The Court applied this standard in the cases *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>61</sup> *Oil Platforms*,<sup>62</sup> and *Land and Maritime Boundary Between Cameroon and Nigeria*.<sup>63</sup> In the last case, for example, the ICJ held that there was a direct factual connection because the alleged facts all “occurred along the frontier between the two States” and a direct legal connection

56. See *supra* note 22. This occurs at a time when the Court has changed its practice on counterclaims from making a decision about them in the judgment on the merits to dealing with their admissibility at a preliminary stage in the form of presidential orders, as well as when the Court is increasingly confronted with peremptory challenges to the admissibility of counterclaims. The cases of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1997 I.C.J. 243 (Dec. 17) [hereinafter *Application of the Genocide Convention 1997*] and *Oil Platforms (Iran v. U.S.)*, Order on Counter-Claims, 1998 I.C.J. 190 (Mar. 10) [hereinafter *Oil Platforms Order*] at the end of 1997 and early in 1998 marked the first time the ICJ was faced with peremptory challenges to the admissibility of counterclaims. Before, questions relating to counterclaims were decided in the judgment on the merits. See Rosenne, *supra* note 22, at 459.

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57. Sienho Yee, *Article 40*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 849, 912-17 (Andreas Zimmerman et al. eds., 2006).

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58. *Application of the Genocide Convention 1997*, *supra* note 56, ¶ 31.

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59. *Id.* ¶¶ 33-35.

60. Yee, *supra* note 57, at 911.

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61. *Application of the Genocide Convention 1997*, *supra* note 56, ¶¶ 34-35.

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62. *Oil Platforms Order*, *supra* note 56, at 205.

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63. *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig., Eq. Guinea intervening)*, Order, 1999 I.C.J. 983, at 985 (June 30).

because “the parties pursue the same legal aim, namely the establishment of legal responsibility and the determination of the reparation due on this account.”<sup>64</sup>

In the *Armed Activities* case, the Court implicitly established new conditions for the existence of a direct connection in fact and in law. Had the Court applied the standard from its previous case law to *Armed Activities*, Uganda’s third counterclaim could not have been dismissed. In the previous cases, it was sufficient to establish the existence of a factual connection by demonstrating that the alleged conduct formed part of the same factual complex.<sup>65</sup> In *Armed Activities*, however, the Court held that violations of “methods for solving the conflict” are insufficient notwithstanding the fact that they took place within the same territorial confines and within the same conflict. Only acts committed “during the conflict” would form part of the same factual complex in the *Armed Activities* case. Similarly, in previous cases, a direct connection in law existed when both parties sought to establish legal responsibility for the violation of any norm of international law and claimed reparations. In *Armed Activities*, however, Uganda’s attempt to establish Congo’s responsibility on the basis of breaches of the Lusaka Agreement was insufficient to establish a direct legal connection.

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

In order to understand why the Court downgraded the legal status of the agreement, and thus refrained from decid-

64. *Id.* at 985.

65. *See id.*; Application of the Genocide Convention 1997, *supra* note 56, ¶¶ 34-35; Oil Platforms Order, *supra* note 56, at 205.

ing the issues presented on their merits, and also to understand the underlying issues concerning the legal nature of peace agreements, it is crucial to inquire into the Court's reasons for the qualification of the Lusaka Agreement as a *modus operandi*.

### III. WHY THE COURT DOWNGRADED THE LEGAL STATUS OF THE LUSAKA AGREEMENT

In *Armed Activities*, preventing the Lusaka Agreement from constituting consent to the presence of Ugandan troops on Congolese territory was not the main reason for the Court to qualify the Lusaka Agreement as a *modus operandi*. If this had been the Court's only concern, it could simply have interpreted the content of the Agreement as not constituting consent without ascribing it a specific legal status. As such, the Court's motivation for downgrading the legal status of the Lusaka Agreement requires closer examination.

It seems that the Court wanted to prevent a scenario where states could avoid international responsibility for their actions by including *legally binding* liability-excluding provisions in peace agreements. Further, it is my view that the Court was aware of the peculiar features of peace agreements: namely, the inclusion of non-state actors as signatories, their process-oriented character, and the armed conflict context. I argue that the Court qualified the Lusaka Agreement as a *modus operandi* both to accommodate these features and to signify that the agreement lies outside the realm of public international law. This allowed the Court to avoid addressing the alleged breaches by the DRC and considering other related issues—primarily the legal status of non-state actors in international law.

#### A. *Preventing States from Explicitly Excluding their Legal Responsibility in Peace Agreements*

I argue that the Court feared that any recognition of the consenting effect of peace agreements, and thus a liability-excluding effect, would give states an incentive to avoid their international responsibility through the conclusion of peace agreements that include explicit liability-excluding provisions. For example, in the *Armed Activities* case, recognizing such an effect would have excluded Uganda's responsibility for violat-

ing the principle of non-intervention. The Court may have been concerned that if it interpreted the Lusaka Agreement in this sense, then:

[a] state in a position analogous to that of Uganda in this case might well seek to include a provision to the effect that the presence of its troops during the agreed withdrawal period had been consented to by all parties or a provision that the presence of its troops during the agreed withdrawal period shall not engage its international legal responsibility . . . [and thereby] void international responsibility for the presence of its soldiers during the relevant period.<sup>66</sup>

Indeed, as Stephen Mathias argues, “the issues of consent and possibly even the waiver of one state’s legal rights against another . . . may, in the future, become matters of express treatment in such agreements.”<sup>67</sup> In this event, a peace agreement could even exclude international responsibility for wrongful acts committed before the agreement was actually concluded, as Uganda claimed in *Armed Activities*.<sup>68</sup>

The Court may have been particularly concerned with such provisions in light of the fact that peace agreements are different from other agreements between states. In general, belligerents do not reach a ceasefire on equal footing: “There are usually winners and losers in a war and at least one side’s acceptance of a cease-fire may have been ‘coerced.’”<sup>69</sup> In the *Armed Activities* case the DRC was “coerced” into signing the Lusaka Agreement and, in particular, to agreeing to provisions such as the integration of rebel groups into the political process<sup>70</sup> and the troop withdrawal timetables.<sup>71</sup> In fact, at the

66. Mathias, *supra* note 3, at 638.

67. *Id.* at 638-39.

68. Uganda had argued before the Court that the Lusaka Agreement constituted “an acceptance by all parties of Uganda’s justification for sending additional troops into the DRC *between mid-September 1998 and mid-July 1999*.” *Armed Activities*, *supra* note 2, ¶¶ 96-97 (emphasis added).

69. See Fortna, *Scraps*, *supra* note 7, at 340.

70. The rebel groups Movement for the Liberation of Congo and Congolese Rally for Democracy were closely affiliated with Uganda. Including them into the peace process insured the preservation of Ugandan influence in the DRC. See RENÉ LEMARCHAND, *THE DEMOCRATIC REPUBLIC OF CONGO: FROM COLLAPSE TO POTENTIAL RECONSTRUCTION* 49 (2001), available at [www.teol.ku.dk/CAS/nyhomepage/mapper/Occasional%20Papers/Occ\\_papers](http://www.teol.ku.dk/CAS/nyhomepage/mapper/Occasional%20Papers/Occ_papers)

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time of the negotiations of the Lusaka Agreement, President Kabila faced a threat of imminent military defeat that he could only prevent by signing the agreement.<sup>72</sup>

With this background in mind, the Court's decision to downgrade the legal status of the Lusaka Agreement may have been meant to rebut any suggestion that a peace agreement can be used to exclude international responsibility. Had the Court only stated that the provisions of the Lusaka Agreement did not purport to exclude Uganda's liability for the violation of the principle of non-intervention, parties to future conflicts might have been tempted to more explicitly exclude their international responsibility in peace agreements.<sup>73</sup> In order to

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\_rene.doc. This would have placed "Museveni in a position of unrivalled power in East and Central Africa." REPORT ON LUSAKA AGREEMENT, *supra* note 49, at 4. Moreover, a national dialogue on an equal footing would have "significantly weakened [Kabila] militarily, politically and in terms of regional alliances." *Id.* at 10. The International Crisis Group (ICG) assumed that the "format for the talks outlined in the Lusaka ceasefire was expressly designed to unseat the regime of then President Laurent Kabila by forcing him to negotiate on an equal status with his many opponents." ICG, AFRICA REP. NO. 27, FROM KABILA TO KABILA: PROSPECTS FOR PEACE IN THE CONGO 18 (2001), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400257\\_16032001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400257_16032001.pdf) [hereinafter ICG, REPORT ON REGIME CHANGE]. In the Lusaka Agreement, the rebel groups were considered as partners with equal status to Kabila in the national dialogue negotiations. See REPORT ON LUSAKA AGREEMENT, *supra* note 49, at 2.

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71. See ICG, REPORT ON REGIME CHANGE, *supra* note 70, at 1, 3.

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72. "In the midst of the Lusaka talks, the situation turned critical for Kabila and his government. On 15 June 1999, Rwanda Patriotic Army (RPA) forces crossed the Sankuru River and captured the Kasai Oriental town of Lusambo. The river formed the last natural obstacle in front of province's diamond-rich capital of Mbuji Mayi . . . . The strategic importance of Mbuji Mayi cannot be overstated . . . . If Mbuji Mayi were to fall, the government would be deprived of these funds and lose its land links to Katanga, also rich in minerals. In the words of RPA Deputy Chief of Staff James Kabarebe: 'If Kananga, Mbuji Mayi and Kabinda are taken, then Kinshasa will fall.' Under immense international pressure the Rwandans eventually agreed to stop their military advance and sign a ceasefire." ICG, AFRICA REP. NO. 26, SCRAMBLE FOR THE CONGO: ANATOMY OF AN UGLY WAR 3 (2000), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400130\\_20122000.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400130_20122000.pdf) [hereinafter ICG, REPORT ON CONGO WAR]. "Since then this advantage has slipped away from the Rwandans. . . . Since the ceasefire therefore the strategic balance has continued to change." *Id.* at 6.

73. In the context of the Armed Activities case, there existed, in fact, an agreement that explicitly legalized the presence of Ugandan troops on Congolese territory. Article 1(4) of the Luanda Agreement, which was con-

achieve this aim, it was necessary for the Court to downgrade the legal status of peace agreements so that they could never have a liability-excluding effect—no matter what the parties agreed.<sup>74</sup>

B. *Accommodating the Distinct Features of Peace Agreements*

Another core consideration of the Court in qualifying the Lusaka Agreement was the difficulty of fitting the distinct features of peace agreements into traditional categories of international law. As a consequence, the Court arguably decided not to integrate peace agreements into the realm of international law, but to assign them to the new category of *modus operandi*.

Peace agreements are concluded during a state of conflict in which respect for the law is weakened because the foundations of the state itself are often at risk.<sup>75</sup> Bell asserts that peace agreements are “existential compromises by states with regard to how it conceives of its own sovereignty, power, mo-

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cluded on September 6, 2002 and hence did not form part of the facts before the Court, provided that “[t]he parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the parties put in place security mechanisms guaranteeing Uganda’s security, including training and coordinated patrol of the common border.” Agreement on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Cooperation and Normalisation of Relations Between the Two Countries (Luanda Agreement), Dem. Rep. Congo–Uganda, art. 1(4), Sept. 6, 2002, available at <http://www.state.gov/t/ac/csbm/rd/22627.htm>.

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

75. There is indeed the “argument . . . that legal rules do not really ‘matter’ in areas relating to the use of force.” For a critique of this argument, see ANTHONY AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 124 (1999).

nopoly over the use of force, and capacity to resist nonstate violence.”<sup>76</sup> As a result of this coercive context, it is sometimes argued that parties comply with and respect the provisions of peace agreements less than other agreements in international law.<sup>77</sup> The Court may therefore have downgraded the legal status of the Lusaka Agreement in an attempt to limit the effects of this disregard for the law.

In addition, the peculiar features of modern peace agreements make them much more difficult to adjudicate than ordinary treaties.<sup>78</sup> For example, peace agreements frequently address “simultaneously both [the] ‘internal’ and ‘external’ dimensions of intrastate conflict.”<sup>79</sup> They are process-oriented because they frequently contain obligations for the parties to negotiate a political settlement of the conflict, but do not dictate the outcomes.<sup>80</sup> The Lusaka Agreement provides for a national dialogue and determines the participants of the dialogue,<sup>81</sup> their status in the negotiations,<sup>82</sup> and the binding

76. See Bell, *supra* note 10, at 391. Laurent Kabila, for example, repeatedly claimed that he would not participate in the national dialogue under occupation and on an equal footing with the rebel groups. See ICG, REPORT ON CONGO WAR, *supra* note 72, at 81.

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77. Support for this point of view can also be derived from the Lusaka Agreement. The International Crisis Group states that the parties did “not [adhere] to the provision to cease hostilities and disengage military units from battle.” They argue that “many have taken this opportunity to engage further in their military and other ambitions.” “For example, even though Uganda and Bemba have signed the agreement, Uganda continues to provide military assistance and training to the MLC, and Bemba has continued to pursue territorial gains in north western DRC.” REPORT ON LUSAKA AGREEMENT, *supra* note 49, at 18. For the various breaches of the Lusaka Agreement by the Kabila government, see Counter-Memorial, *supra* note 11, at 87-94.

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78. See Bell, *supra* note 10, at 395.

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79. *Id.* at 393.

80. The Lusaka Agreement provides for a national dialogue that shall result in a new political order for the DRC but does not specify how this order should be designed. See Lusaka Agreement, *supra* note 13, at annex A, ch. 5.

81. Lusaka Agreement, *supra* note 13, at annex A, ch. 5.2(a) (naming the Congolese parties to the dialogue as “the Government of the Democratic Republic of Congo, the Congolese Rally for Democracy and the Movement for the Liberation of Congo, the political opposition as well as representatives of the *forces vives*”).

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82. *Id.* at annex A, ch. 5.2(b) (stating that “all the participants in the inter-Congolese political negotiations shall enjoy equal status”).

character of the resolution adopted by them,<sup>83</sup> but it does not address the outcome of the negotiations. The non-binary nature of these types of provisions makes it difficult to adjudicate when there has been compliance with a specific provision, as well as when a party has breached a duty to negotiate in “good faith.”<sup>84</sup> As a consequence, the ICJ refused to rule on the substance of Uganda’s allegations that the DRC breached the national dialogue provisions of the Lusaka Agreement and dismissed Uganda’s third counterclaim.

C. *Avoiding Controversial Issues of International Law*

Finally, the Court found that downgrading the legal status of peace agreements was convenient because it enabled the Court to avoid deciding controversial issues of international law such as the legal status of non-state actors. The peace process often requires the inclusion of opposition and rebel groups. As a result, peace agreements are often signed by state and non-state actors, even though non-state actors have not been fully accepted as subjects of international law.<sup>85</sup> The Lusaka Agreement was signed by the rebel groups MLC and RCD, but whether and to what degree such armed opposition groups are subjects of international law is greatly disputed.<sup>86</sup>

83. *See id.* at annex A, ch. 5.2(c).

84. *See Bell, supra* note 10, at 411.

85. *Id.* at 407.

86. For a thorough analysis of the legal status of non-state actors in international law, see LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW (2002). This debate is important for the issue of whether agreements that are also signed by non-state actors are legally binding. Article 3 of the Vienna Convention on the Law of Treaties states that “[t]he fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law . . . shall not affect . . . the legal force of such agreements.” Vienna Convention, *supra* note 30, art. 3. The tautological problem behind this conflict is that, on the one hand, the existence of treaty-making capacity requires international subjectivity. On the other hand, the existence of international subjectivity depends on the rights and duties of the actors in the international arena, including whether they have the capacity to sign legally binding agreements. *See id.* at 51; Bell, *supra* note 10, at 384. Bell infers that “[r]ecognizing peace agreements as international agreements therefore seems to require the nonstate group and the agreement to ‘bootstrap’ each other into the international legal realm.” Bell, *supra* note 10, at 384. The issue is therefore not one of legal doctrine but rather of legal politics.

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This lack of certainty affects the legal nature of the agreement as a whole.<sup>87</sup>

By downgrading the legal status of peace agreements, the Court avoided dealing with the increasingly pressing issue of the legal status of non-state actors in international law. Judge Kooijmans pointed out in his dissenting opinion in *Armed Activities* that an ordinary ceasefire agreement would not have the capacity to change the legal situation, but that the Lusaka Agreement was more than a mere ceasefire agreement.<sup>88</sup> Kooijmans argued that the Lusaka Agreement possibly created a new legal state of affairs by upgrading the status of the Movement for the Liberation of Congo and the Congolese Rally for Democracy.<sup>89</sup> Given this, had the Court not downgraded the legal status of the Lusaka Agreement, it would have been required to deepen its examination of the status of rebel groups in international law.

Therefore, there were good reasons for the Court not to apply traditional categories of international law to peace agreements. The distinctive character of peace agreements, as well as the fact that they are increasingly signed by state and by non-state actors, makes it difficult to fit them into current international law categories. Moreover, it would be undesirable if the exclusion by states of international responsibility for wrongful acts was given effect in peace agreements.

Nevertheless, downgrading the legal status of peace agreements and hence declining to make them justiciable is the wrong response to these problems. It overlooks the other edge of the sword in qualifying peace agreements as a *modus operandi*. The ICJ underrated the importance of the legal nature of peace agreements in the resolution of modern conflicts, and in particular how the legally binding nature of such agreements can influence the behavior of parties to a conflict.

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87. Bell, *supra* note 10, at 379-84.

88. See *Armed Activities*, Judge Kooijmans, *supra* note 34, ¶ 50.

89. *Id.* ¶¶ 50-53.

#### IV. WHAT'S AT STAKE: THE FORCE OF LEGALLY BINDING PEACE AGREEMENTS IN INTERNATIONAL CONFLICT RESOLUTION

By downgrading the legal status of peace agreements, the Court ignored the behavior-regulating effect that international law has on states during a conflict and prior to any adjudication.<sup>90</sup> In these circumstances, the role of peace agreements can be crucial. Legally binding peace agreements serve as a pledge by the parties for compliance because the breach of peace agreements causes high audience costs. The normative power of the law increases the credibility of the parties' commitments. The ICJ plays an important role in upholding the normative effect of international law. Downgrading the legal status of peace agreements threatens to undermine their capacity to increase audience costs, potentially resulting in parties feeling less bound by the obligations they took on in such agreements.

On the basis of Fortna's work on the effects of ceasefire agreements on the durability of peace in the aftermath of a conflict,<sup>91</sup> I argue in this Part that peace agreements increase the chances for durable peace, and that one crucial factor of this effect is the legal nature of peace agreements. While there has been considerable research in the fields of social science and conflict resolution on the question of why and under what conditions peace agreements succeed or fail,<sup>92</sup> the legal

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

91. See FORTNA, *PEACE TIME*, *supra* note 8.

92. See, e.g., *id.*; ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS (Stephen Stedman, Donald Rothchild & Elizabeth Cousens eds., 2002); FEN OSLER HAMPSON, *NURTURING PEACE: WHY PEACE SETTLEMENTS SUCCEED OR FAIL* (1996); Kristian Skrede Gleditsch & Kyle Beardsley, *Nosy Neighbours: Third-Party Actors in Central American Conflicts*, 48 J. CONFLICT RES. 379 (2004); Stephen John Stedman & Donald Rothchild, *Peace Operations: From Short-Term to Long-Term Commitment*, 3 INT'L PEACEKEEPING 17, 25-26 (1996) (giving some limited attention to the clarity of a peace agreement); Barbara Walter, *The Critical Barrier to Civil War Settlement*, 51 INT'L ORG. 335 (1997); LOUIS KRIESBERG, *CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION* 283-84 (1998); Dorina A. Bekoe, *Toward a Theory of*

character of peace agreements and the role of the law in peace processes have received little attention.<sup>93</sup> To address this gap, I characterize the situation of parties to a conflict that have signed a peace agreement and show how the legal status of peace agreements affects the parties' conduct. Finally, I outline the reasons why the legal status of peace agreements induces the parties to comply.

In situations where peace agreements are concluded, cooperation is required to maintain a "possible, but precarious peace."<sup>94</sup> The conclusion of a peace agreement shows the parties' willingness to end fighting, but that there was fighting to begin with suggests substantial conflicting interests. The main contribution of peace agreements to maintaining peace is that they facilitate cooperation. Parties anticipate obstacles to cooperation and draft peace agreements accordingly to diminish the effect of these obstacles. Hence, peace agreements make it more costly to attack, reduce uncertainty about the other side's actions and intentions, and prevent misunderstandings and accidents from causing the resumption of war.<sup>95</sup> For example, the Lusaka Agreement installed a United Nations/Organization of African Unity monitoring group to monitor non-compliance with the agreement.<sup>96</sup> It ordered the re-deployment of forces in declared and recorded locations to prevent confrontations between opposing troops<sup>97</sup> and it employed measures for arms control.<sup>98</sup> These provisions demonstrate that, notwithstanding the conclusion of a peace agreement, parties to a conflict still have many reasons to resume fighting.<sup>99</sup>

Fortna identifies two dilemmas confronting states that have signed a peace agreement. First, they encounter the pris-

*Peace Agreement Implementation: The Case of Liberia*, 38 J. ASIAN & AFR. STUD. 256 (2003); Ulrich Schneckener, *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, 39 J. PEACE RES. 203 (2002); Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SECURITY 5 (1997).

93. See Bell, *supra* note 10, at 374. R  
94. See FORTNA, PEACE TIME, *supra* note 8, at 12. R  
95. *Id.* at 10.  
96. Lusaka Agreement, *supra* note 13, at annex A, ch. 8.  
97. *Id.* at annex A, ch. 11.  
98. *Id.* at annex A, ch. 9.  
99. FORTNA, PEACE TIME, *supra* note 8, at 19-20. R

oner’s game dilemma: They prefer peace to war, but they do not prefer peace to settling the dispute on their own terms. It follows from this dilemma that “[c]onflicting interests give belligerents an incentive to break the cease-fire in a bid to make unilateral gains on the battlefield.”<sup>100</sup> Second, states have to deal with security dilemma dynamics: Although in certain situation states might actually prefer not to attack each other, “[i]n an atmosphere of deep mistrust in the aftermath of war, each side has good reason to fear attack from its opponent.”<sup>101</sup> This dilemma might result in a resumption of hostilities even though each party would actually prefer peace.

While peace agreements adopt various measures to address these dilemmas, the very signing of a formal, legally binding peace agreement is crucial to ensuring the success of these measures.<sup>102</sup> The success of each of the measures adopted depends on the authoritative power of the agreement. The outlined prisoner’s game and security dilemma dynamics stress the need for reciprocity and clarity. Parties to a conflict will only be willing to sacrifice their interests “if they feel that the commitments they obtained from the other side are going to be implemented.”<sup>103</sup> They pay close attention to the exact wording of peace agreements; the drafting process is generally surveyed by lawyers.<sup>104</sup> The importance that the parties attribute to the conclusion of a formal peace agreement and the scrutiny with which they draft its provisions indicate that they sign such agreements in order to exchange pledges of compliance.

The case of Laurent Kabila provides a good example of the “pledge dimension” of peace agreements. While Kabila

100. Fortna, *Scraps*, supra note 7, at 341. Ceasefire agreements can change the domestic military and political power balance, as the history of the Lusaka Agreement documents. Shortly before the conclusion of the agreement, Rwanda was close to gaining control over the strategically important city of Mbuji Mayi. The signing of the Lusaka Agreement, however, took the momentum away from Rwanda and enabled Kabila to strengthen the position of Congolese troops in Mbuji Mayi. See supra note 72.

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101. Fortna, *Scraps*, supra note 7, at 341. In the context of the Lusaka Agreement, “[e]ach [party] suspected the others of a double game, and used its suspicions to justify its own duplicity.” ICG, REPORT ON CONGO WAR, supra note 72, at iii.

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102. Fortna, *Scraps*, supra note 7, at 340.

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103. Bell, supra note 10, at 378.

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104. See id.

seemingly only signed the Lusaka Agreement in order to stop the advance of Rwandan troops, without ever intending to keep his commitments to the UN and for a national dialogue on an equal footing, he had to take into account that his breach of the Lusaka Agreement came at a high price. The international community considered Laurent Kabila primarily responsible for the failure of the Lusaka Agreement, which significantly reduced his diplomatic leeway.<sup>105</sup> The pledge is not valuable because the parties trust each other's promises, but because the conclusion of a peace agreement increases the costs for breaking the agreement. Fortna has pointed out that

[t]he very act of agreeing formally and publicly to peace can alter incentives. By committing publicly to a formal cease-fire agreement, actors stake their international reputations on compliance. By signing a formal agreement, states bind themselves under international law.<sup>106</sup>

While international law lacks a central enforcement authority like national governments have in their domestic spheres, a breach of international law still comes at a price. It "brings international opprobrium and legitimizes retaliation by the other side."<sup>107</sup> Fortna remarks that "[d]iplomacy becomes more difficult for the defector."<sup>108</sup> In addition, "transgression may cause aid to be withheld and increase international support for the other side."<sup>109</sup> In the case of the Congo war, it was only after Joseph Kabila succeeded his father and expressed his willingness to cooperate and to implement the provisions of the Lusaka Agreement that the international community changed its attitude towards the Congolese gov-

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105. See ICG, REPORT ON CONGO WAR, *supra* note 72, at 83. Yasuaki generalizes this mechanism, remarking that "[n]ations which violate a rule of international law are often denied or have restrictions imposed on the enjoyment of . . . [their] interests." Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 EUR. J. INT'L L. 105, 118 (2003).

106. FORTNA, PEACE TIME, *supra* note 8, at 21.

107. *Id.*

108. *Id.*

109. *Id.*

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ernment and gave wide international support to the new president.<sup>110</sup>

Fortna observes that as a consequence of the cost of the international reaction to breaches of peace agreements, “[w]hen states do break formal cease-fires, they often go to great lengths to make it look as if they were provoked so as to minimize the international costs.”<sup>111</sup> She refers to the example of Israel’s waiting for an Arab provocation to end the 1948 ceasefire in the first Arab-Israeli war: Despite learning of the impending Arab attack hours beforehand, it took the first blow so that it would be clear that it was not the aggressor.<sup>112</sup> Similarly, in the Congo war, the parties to the conflict were careful to construct breaches of the Lusaka Agreement only as reactions to earlier breaches by other parties.<sup>113</sup> These examples demonstrate that the breach of a peace agreement causes audience costs: “By declaring to an audience (the international community, especially aid donors and military sponsors) their commitment to peace, states invoke costs to breaking this commitment.”<sup>114</sup> The legal nature of the peace agreement thus increases the pressure on parties to comply with the different provisions of the peace agreement as “[l]egalization is (therefore) one of the principal methods by which states can increase the credibility of their commitments.”<sup>115</sup>

These examples point to a crucial factor that is empirically difficult to observe.<sup>116</sup> It is the answer to a deep-lying

110. For details on this change, see generally ICG, REPORT ON REGIME CHANGE, *supra* note 70.

111. FORTNA, PEACE TIME, *supra* note 8, at 21.

112. *Id.*

113. See, for example, the statement of Justice Minister Mwenze Kongolo that “the Lusaka protocol is dead” and indicating that the first obstructions of the national dialogue following shortly after hostilities between Uganda and Rwanda on Congolese territory occurred after the Lusaka Agreement was signed. REPORT ON LUSAKA AGREEMENT, *supra* note 49, at ii.

114. FORTNA, PEACE TIME, *supra* note 8, at 22.

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

116. For empirical approaches on whether international law impacts state conduct, see Ryan Goodman & Derek Jinks, *How To Influence States: Socialization And International Human Rights Law*, 54 DUKE L.J. 621 (2004); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 337-66 (1997);

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question that Fortna does not examine: Why do formal peace agreements cause an increase in audience costs?<sup>117</sup> In my view, it is due to the normative power of the law.<sup>118</sup> Even though the decisionmaking heads of states, such as Laurent and later Joseph Kabila in the DRC or Museveni in Uganda, generally engage in rational calculations to realize the basic goals of their respective states,<sup>119</sup> their actions will be constrained, and even partly defined, by the regime established by international legal rules in general and by the Lusaka Agreement in particular.<sup>120</sup>

Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). For an excellent critique of Hathaway and an account of empirical international legal studies, see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).

117. On the general discussion on why states comply with international law, see Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review); LOUIS HENKIN, *HOW NATIONS BEHAVE* 49-68 (2d ed. 1979); THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995); Helfer & Slaughter, *supra* note 116, at 337-66.

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118. In my view, the impact of international legal rules on states is best captured by the constructivist theory. It is based on the premise that the international system is a "social structure" that is "defined, in part, by shared understandings, expectations or knowledge." Alexander Wendt, *Constructing International Politics*, 20 INT'L SEC. 71, 73 (1995). That forms "a mutually constitutive relationship" with the actors of the system. AREND, *supra* note 75, at 128. International legal rules form part of this structure as state practice evinces. *Id.* at 129. They partly constitute the structure of the international system. *Id.* at 138. For an excellent overview of the different theories of international law with respect to the concept of compliance, see Benedict Kingsbury, *The Concept of Compliances as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998).

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119. Uganda, for example, did not primarily insist on the initiation of the national dialogue to bring peace to the DRC. Rather, it aimed at strategically improving its position in the Congo conflict. Clark presumes that "Museveni may have seen the Lusaka Agreement as a way of displacing Kabila by political means: if the letter of the Accords were [sic] followed, then a national conference of all political forces in the country would eventually be held. If Kabila failed to live up to the political side of the Agreement, on the other hand, then Museveni would have a legitimate excuse to prosecute the war in Congo with renewed vigour." John F. Clark, *Explaining Ugandan Intervention in Congo: Evidence and Interpretations*, 39 J. MOD. AFR. STUD. 261, 283 (2001).

120. Fortna provides some examples of case studies where the existence of formal ceasefire agreements seemingly constrained the behavior of the parties to the conflict. In the Kargil conflict between India and Pakistan, India scrupulously avoided crossing the formal ceasefire line after it was "blamed

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

Psychologically, the domestic socialization of the actors generally induces them to obey the commands of peace agreements (although not at any price). Compliance with the law is a norm that is deeply rooted in society, generating a psychological effect of the law known as “compliance-pull.”<sup>121</sup> The law has a legitimacy-generating character, and in reverse, it denies legitimacy to those that disregard it. International law benefits from the psychological effect of the law in the domestic arena because actors in the international sphere are socialized domestically.<sup>122</sup> They are acclimated to obeying the commands of the law and seek to avoid being blamed for breaches of the law.

While it is true that international law does not have the same means to secure compliance that are available in the domestic sphere, namely the “infrastructure of government, constitution, courts, and police,”<sup>123</sup> it generates compliance in a more subtle way. Thomas Franck argues that the “rules of the

for the 1965 war because it was provoked into crossing the formal cease-fire line.” FORTNA, PEACE TIME, *supra* note 8, at 203. In the Middle East conflict, the “existence of a cease-fire agreement reached in June 1982 between Israel and Syria also constrained (though it did not stop) Israeli military moves in Lebanon,” as reports from contemporary witnesses indicate. *Id.* at 205. Yasuaki points out that “government officials of a state usually take actions even in the critical case of resorting to armed force by paying attention to the regulatory function and legitimating power of international law.” Yasuaki, *supra* note 105, at 125. While the notion of decisionmaking elites is usually more complex and diverse and is not limited to the leader of the country, there is evidence that, in particular, Laurent Kabila and Museveni took most decisions with regard to the Congo war on their own. See Clark, *supra* note 119, at 262.

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121. For a description of the term “compliance-pull,” see FRANCK, *supra* note 117, at 65. For a description of the phenomenon, see *id.* at 37.

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122. Yasuaki points out that “[t]he fact that law has been internalized contributes to the tendency of government officers to conduct their state affairs in accordance with law in international society.” Yasuaki, *supra* note 105, at 122.

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123. FRANCK, *supra* note 117, at 38.

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international system obligate primarily because they are like the house rules of a club":<sup>124</sup>

Membership in the club confers a desirable status, with socially recognized privileges and duties and it is the desire to be a member of the club, to benefit by the status of membership, that is the ultimate motivator of conformist behaviour.<sup>125</sup>

When states sign peace agreements, therefore, they attach their reputation to the agreement and their membership status in the "club" is affected by their compliance with that agreement.<sup>126</sup> Instrumentally, the stigma that is associated with a breach of the law causes audience costs and decreases the legitimacy of actions taken because the "[v]iolation of a legal commitment entails reputational costs—again generalizable to all legal commitments—that reflect distaste for breaking the law. International law reinforces this effect through its strong emphasis on compliance."<sup>127</sup>

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

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124. *Id.*

125. *Id.* Franck's approach is primarily based upon the legitimacy of international norms as the central reason for compliance, thereby neglecting the institutional dimension of compliance. His approach identifies four factors which constitute the legitimacy of a norm: the norm's historical pedigree, its determinacy, its coherence, and its adherence understood as its consistency with higher, constitutive norms of the international legal order. *See id.* at 50-194.

126. Throughout the Congo war, it has always been a major consideration for Museveni not to lose "his reputation as a regional broker, and the donor support that this credibility has assured him." REPORT ON LUSAKA AGREEMENT, *supra* note 49, at 14.

127. Abbott & Snidal, *supra* note 115, at 428.

as a consequence, likely impact domestic decisionmaking processes.<sup>128</sup>

The institutional dimension of compliance with international law is also the main reason why the compliance-pull of hard law is stronger than that of soft law,<sup>129</sup> though the normative dimension of the compliance-pull is diminished to some

128. Yasuaki rightly remarks that “[e]ven when the US and a limited number of major powers ignore some rules of international law under certain circumstances, their negative reputation as violators of international law will remain and often jeopardize their leadership in their future relations with other nations. The negative reputation as a violator of international law also counts in domestic politics as well, particularly in liberal democratic societies.” Yasuaki, *supra* note 105, at 119. A good example of how ICJ judgments and the image of the law-breaker impact the decisionmaking process of governments is the ICJ’s decision in the *Military and Paramilitary Activities in and Against Nicaragua* case. In fact, Nicaragua used this decision as a substantial part of its strategy to fight U.S. involvement in Nicaragua. Paul S. Reichler, a U.S. lawyer who played a leading role in representing Nicaragua in the ICJ, provides the following account of Nicaragua’s aims in suing the United States:

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It was clear that to win the debate in Congress we had to change the question. That was the reason for proposing that Nicaragua sue the United States in the World Court: to change the focus of the debate in Congress in order to win forthcoming votes on Contra aid. The question would no longer be the simplistic one asked (and answered) by the Reagan administration: whether the Sandinistas were Communists whose very existence threatened U.S. interests. With the United States in the defendant’s dock in The Hague, members in Congress would have to ask themselves whether U.S. national interests were truly served when America wantonly disregarded and thereby undermined, the most fundamental principles of international law.

Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT’L L.J. 15, 22-23 (2001).

129. Hard law “refers to legally binding obligations that are precise . . . and that delegate authority for interpreting and implementing the law;” “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.” Abbott & Snidal, *supra* note 115, at 422. For different conceptions on soft law, see generally Harmut Hilgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499 (1999); Francesco Francioni, *International “Soft Law”: A Contemporary Assessment*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOR OF SIR ROBERT JENNINGS 167 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850 (1989); Prosper Weil, *Towards Relative Normativity in International Law?*, AM. J. INT’L L. 413 (1983).

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extent as well. While it has been argued that actors in conflicts often do not pay much attention to differences in hardness among the norms,<sup>130</sup> I argue, in contrast, that the distinction makes a substantial difference in most cases.<sup>131</sup> Assuming that “policy makers do not know and do not care about the legal status of these rules” puts into question whether “‘legalness’ matters at all in compliance with norms.”<sup>132</sup> The international legal system has established a normative order of rules, institutions, and practices that is perceived as highly legitimate by its relevant actors: mainly governments. And this normative order exerts considerable compliance-pull upon those actors. It is a central element of this system that it places high burdens on the genesis of “hard” international norms, which constitutes an important reason for its legitimacy and compliance-pull.<sup>133</sup> Soft law does not form part of this system, and as a consequence typically does not have the same effects on compliance as hard law. The adjudication of the ICJ assumes a central role in this system, fostering the legitimacy of a norm, and stressing the obligation to comply with it.

By downgrading the legal status of peace agreements, however, the ICJ effectively refused to adjudicate these agreements.<sup>134</sup> Not only will this prevent the Court in the future from condemning breaches of a peace agreement, but it gives

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130. See Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591 (2000). Ratner argues, based on his research on the role of the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) in promoting norm-based solutions to ethnic conflicts, that the role of soft law in the prevention of ethnic conflict is widely underestimated by theories of international law while the superiority of hard law over soft law is overestimated.

131. See *infra* Part V.2 (fleshing out this argument in more detail).

132. Martha Finnemore, *Are Legal Norms Distinctive?*, 32 N.Y.U. J. INT'L L. & POL. 699, 701 (2000).

133. Generally recognized international norms are either treaties signed by states and/or international organizations, custom, or general principles of law. Both custom and general principles of law require proof that a great majority of states follow this rule and recognizes it as law. These conditions are hard to fulfill.

134. The fact that the ICJ dealt with the Lusaka Agreement in the context of the issue of consent is, in my view, not an indication that the ICJ regards peace agreements as adjudicable because the Court downgraded the legal status of the Lusaka Agreement to rebut Uganda's consent argument. See *supra* Part II.

rise to the even more pressing concern that the qualification of peace agreements as a *modus operandi* threatens to insulate them entirely from the existing set of rules, principles, and enforcement mechanisms of international law. This could initiate a process in which respect for the legal character of peace agreements increasingly diminishes.

Such a development would significantly impact the capacity of peace agreements to induce compliance because the legal status of peace agreements is a crucial element to their success. I have argued in this Part that the parties consciously employ legal instruments as a pledge for compliance *vis-à-vis* their reciprocal commitments. The normative and institutional dimension of the law makes states more likely to comply with peace agreements. Downgrading the legal status of peace agreements thus weakens the coercive effect of both dimensions. Given the deleterious effect that this downgrading may have on future conflict resolution, the Court should have integrated peace agreements within the common set of rules, practices, and institutions of the international legal system.<sup>135</sup>

#### V. WHAT THE COURT SHOULD HAVE DONE: A PROPER LEGAL REGIME FOR PEACE AGREEMENTS

A proper legal regime should assign peace agreements a legal status that embeds them into an existing set of rules, practices, and institutions used by the international legal system to induce compliance. The benefits that come with legal status are not merely achieved with the label of “law.” Rather, the legal status of peace agreements will only have its full effect if it is backed by principles such as *pacta sunt servanda* and decentralized enforcement mechanisms such as the rules on countermeasures.

International law can play a central role in guiding and channeling state conduct in unstable, precarious situations where peace agreements have been signed. Notwithstanding the psychological compliance-pull of international law, an examination of modern conflicts teaches us that peace agreements are frequently violated. In fact, peace agreements employ instruments such as monitoring groups, observer mis-

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135. Keohane also emphasizes “the effect of international institutions and practices on state behavior.” ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 26 (1984).

sions, and arms control regimes because it is assumed that their provisions will be violated at some point. The function of peace agreements is not primarily to prevent minor breaches of the agreement from occurring, but rather to ensure that these minor breaches do not lead to war. In order to maximize the efficacy of peace agreements, they must be given their full legal effect by integrating them into the existing set of rules, practices, and institutions of international law.

I will focus principally on the rules on countermeasures, as their application to peace agreements may effectively regulate the conduct of states in the aftermath of a conflict.<sup>136</sup> In particular, I argue that the rules on countermeasures provide adequate means to channel and restrain state conduct in the aftermath of a conflict. While they incorporate the logic of retaliation to accommodate post-conflict situations, they give states clear guidance on how they may react if the other party breaches the peace agreement. They require states to take a set of successive steps before resorting to countermeasures, thereby controlling their reactions and reducing the risk of minor incidents provoking a return to war.

My approach differs from other current accounts of the legal effects of armistice agreements (the predecessors of modern peace agreements<sup>137</sup>) which evade the difficult task of fitting peace agreements into the established categories of international law. These accounts merely provide that a renewed armed attack constitutes a new violation of the principle of non-use of force. They do not address which rules of international law, below the threshold of armed force, should be used to address such breaches, even though guidance and structure are needed most in this regard if the ultimate goal is to avoid a resumption of hostilities.<sup>138</sup>

A more promising and nuanced account of how the legal character and effects of peace agreements might be preserved is offered by Bell, who introduces the new category of *lex pacifi-*

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

137. See *infra* Part V.1.

138. Cf. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 51-54 (3d ed. 2005) [hereinafter Dinstein, WAR]; Dinstein, *Armistice*, *supra* note 27; Morriss, *supra* note 27; Greenwood, *supra* note 27; Bailey, *supra* note 28, at 461, 469; Levie, *supra* note 36.

*catoria*.<sup>139</sup> I nevertheless disagree with Bell’s approach because it relegates peace agreements to a distinct, somewhat self-contained category of transnational law. Assigning peace agreements to the field of *lex pacificatoria* excludes peace agreements from the international legal system that is crucial to compliance. Peace agreements need to be integrated into the existing categories of international law.

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

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

While the legal literature is mostly silent on the issue of the legal nature and effects of modern peace agreements,<sup>140</sup> some authors have written on the effects of traditional ceasefire and armistice agreements.<sup>141</sup> Their contributions are useful for appraising the legal status of modern peace agreements because armistices and peace agreements are today nearly identical concepts.<sup>142</sup> However, I suggest that these

139. Bell, *supra* note 10, at 407-412.

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140. Bell is the first author that has engaged in a comprehensive analysis of the legal nature and effects of modern peace agreements. *Id.* at 374-75.

141. See Dinstein, *WAR*, *supra* note 138, at 51-54; Dinstein, *Armistice*, *supra* note 27; Morriss, *supra* note 27; Greenwood, *supra* note 27; Bailey, *supra* note 28, at 461, 469; Levie, *supra* note 36.

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142. The only difference between the two concepts is that while the term “armistice” emphasizes that the agreement only represents a cessation of violence, the term “peace agreement” stresses that the war is terminated. However, it appears that peace agreements have, in fact, mostly replaced armistice agreements in contemporary state practice. See *supra* note 29 (discussing the relationship between peace and armistice agreements). While the distinction between a peace agreement and an armistice would provide for an additional category, modern international scholars seem to prefer the single category of peace agreements that encompasses armistices and peace treaties in the traditional sense.

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authors attach very little legal significance to these agreements. They disregard the critical importance of legal guidance in post-conflict situations and insufficiently explain why they do not apply existing rules of international law, such as countermeasures.

These authors are ambiguous about the legal effects of these agreements because they are concluded in a state of war where the law of war (*jus in bello*) applies.<sup>143</sup> In this paradigm, the breach of a ceasefire agreement effectively does not have any relevant legal consequences because the ceasefire agreement only suspends hostilities without ending the state of war.<sup>144</sup> In contrast, the breach of an armistice agreement constitutes the unleashing of a new use of force, violating article 2(4) of the UN Charter and giving rise to the right of self-defense<sup>145</sup> because the armistice agreement terminated the state of war.<sup>146</sup> It remains unclear what results from the breach

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

144. It is emphasized in the legal literature on ceasefire agreements that they only interrupt hostilities. Dinstein, *WAR*, *supra* note 138, at 52. As a consequence, "a cease-fire violation is irrelevant to the determination of armed attack and self-defence." *Id.* The only rules on ceasefire agreements are articles 36 to 41 of the Hague Convention on the Law and Customs of War on Land, which are widely perceived to form part of customary international law. *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land arts. 36-41, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention IV]. Even though they employ the term "armistice" that was common at the time when the Convention was drafted, they effectively deal with ceasefire agreements. *Id.*; Dinstein, *Armistice*, *supra* note 27, at 257. The main provision, article 40 of the Convention, provides that a ceasefire may be denounced in the event of a material breach of the ceasefire by the other party. *See* Hague Convention IV, *supra*, art. 40. However, if the breach of a ceasefire is irrelevant to the determination of armed attack and self-defense, the questions are what legal relevance a breach of the ceasefire actually has and why parties should only denounce a ceasefire in the event of material breaches.

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145. Dinstein, *Armistice*, *supra* note 27, at 258.

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146. Dinstein points out that "[a]t the present time, armistices tend to terminate hostilities on all fronts . . . and to deny totally the right of any party to resume military operations under any circumstances whatsoever." He adds that "where the text of the armistice agreement or the intention of the parties lends itself to such interpretation, an armistice can nowadays put an end to the state of war." *Id.* at 257. Greenwood also states that an armistice can "terminate the state of war, if the parties intend that it should have that effect." Greenwood, *supra* note 27, at 58.

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of an armistice beyond a violation of the prohibition of the use of force under article 2(4). In particular, it is unclear what legal significance a breach has if the parties violate the provisions of an armistice without resorting to force.

If the state of war is terminated, the logical consequence would be that the general provisions of international law apply once again.<sup>147</sup> Accordingly, it would be natural to assume that the rules on countermeasures apply as well. However, the legal literature does not draw this conclusion. While there seems to be consensus that the parties are bound by the provisions of an armistice agreement,<sup>148</sup> the question of the legal consequences of a breach of an armistice is generally avoided.<sup>149</sup> Thus, it remains unresolved whether the obligations of an armistice agreement are legal or political in nature; what, if any, are the legal consequences of a breach of an armistice provision; and whether the ICJ should adjudicate such issues and provide for remedies or reparation, at least in the form of satisfaction in recognizing the breach as a violation of international law.

147. However, it is not clear that armistice agreements have the capacity to terminate the war. Traditionally, only peace treaties or implied mutual consent terminated the state of war. As a consequence, most legal scholars do not even consider whether general norms of international law could apply to armistice agreements. See, e.g., Greenwood, *supra* note 27; Bailey, *supra* note 28; Morriss, *supra* note 27. However, these authors overlook that the role of armistice agreements has substantially changed in the past decade. The fact that they, and peace treaties, have to a large extent been replaced by peace agreements supports the recognition of the capacity of peace agreements to terminate war. Dinstein rightly points out that “[t]here is entrenched resistance in the legal literature to any reappraisal of the role assigned to armistice in the vocabulary of war.” He demands that “the terminology has to be adjusted to fit the modern practice of States” and that “[s]cholars must open their eyes to the metamorphosis that has occurred over the years in the legal status of armistice.” Dinstein, *WAR*, *supra* note 138, at 44.

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148. “The terms of an armistice treaty shall be strictly observed by the parties to a conflict.” Greenwood, *supra* note 27, at 60.

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149. It is only stated in the negative that a breach does not give rise to the right to resume hostilities outside the right to self-defense. See Morriss, *supra* note 27, at 822-23. “Although terms of the armistice agreements dealing with important but collateral issues such as verification regimes or implementation mechanisms may fail, the overriding obligation not to resort to force as a means of dispute settlement is deemed severable and continues to be binding.” *Id.* at 931.

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This situation is unsatisfactory because the history of the Lusaka Agreement and other peace agreements has taught us that parties to a conflict generally do not immediately decide to unleash a new war immediately after signing a peace agreement. Rather, minor provocations, misunderstandings, and accidents draw the belligerents back into war. International law in this context has a crucial role to play in channelling state conduct after a peace agreement has been signed to prevent regression to war. As this Section has shown, the current state of the literature does not clarify the legal consequences of a breach of an armistice or ceasefire agreement. In the next Section, I examine the most promising attempt to define the legal status of modern peace agreements.

B. *The Promotion of a New Field of Lex pacificatoria that Effectively Downgrades the Legal Status of Peace Agreements*

Bell engages in a comprehensive legal analysis of modern peace agreements as the emerging legal instrument for modern conflict resolution.<sup>150</sup> While she stresses the importance of the legal status of peace agreements, she effectively assigns peace agreements to a distinct, self-contained category of transnational law that she calls "*lex pacificatoria*."<sup>151</sup> I argue in this Section that *lex pacificatoria* does not ensure the full legal effect of peace agreements because it does not integrate them into the existing set of rules, practices, and institutions of international law. As a result, *lex pacificatoria* does not represent a sufficient legal category to channel state conduct in conflict situations.

Bell makes the case for the recognition of an emerging field of *lex pacificatoria* as an alternative mode of legalization to accommodate the particular features of peace agreements, such as the inclusion of non-state actors as signatories, their process-oriented character, their war background, and the conflicting nature of their short-term and long-term goals.<sup>152</sup>

150. See generally Bell, *supra* note 10.

151. *Id.* at 374-75.

152. In Bell's view, the defining features of *lex pacificatoria* are the "distinctive self-determination role" of peace agreements expressed by their external and internal dimension, the "distinctive mix of state and nonstate signatories," distinctive types of "treatylike contractual and value-driven constitu-

Bell argues for “the usefulness of considering peace agreement practice on its own terms, as a distinctive use of law that cuts across international and domestic, public and private spheres.”<sup>153</sup> She draws a parallel to *lex mercatoria* by stating that “just as the term *lex mercatoria* seeks to provide a label conducive to understanding the ways that commercial practices assert their own legalization across international and domestic spheres, so the term *lex pacificatoria* usefully captures similar dynamics with regard to the legalization of peace agreement commitments.”<sup>154</sup> In essence, Bell proposes to conceptualize peace agreements as contracts that “incorporate internationalized treaty-like commitments with a high degree of third-party enforcement, while enabling a transition to domestic constitutional commitments.”<sup>155</sup> The crux of Bell’s approach is that she does not attempt to integrate peace agreements into existing categories of international law, but instead relegates them to a distinct, somewhat self-contained category of international law. She explicitly states that “the contract itself may not constitute a binding international agreement.”<sup>156</sup> As a consequence, Bell effectively denies peace agreements full legal effect at the international level.

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

I have argued above for the crucial role of the legal character of peace agreements in the resolution of international conflicts—a role that Bell also acknowledges. In fact, the need for a justification of the legal nature of peace agreements ap-

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tional provisions,” and “distinctive types of third-party delegation” such as observers or facilitators. Bell, *supra* note 10, at 407-12.

153. *Id.* at 410.

154. *Id.* at 409.

155. *Id.* at 399.

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

pears to be a driving normative force behind Bell's model of *lex pacificatoria*.<sup>157</sup> However, the beneficial effects of peace agreements are not achieved by merely labelling them as law. The benefits of the legal nature of peace agreements is substantially diminished for the purpose of inducing compliance in the context of peace processes if they are not accompanied by credible legal effects. By assigning peace agreements to a distinct legal category of *lex pacificatoria*, Bell deprives peace agreements of their full legal significance in the international legal order. As a result, she effectively eliminates the beneficial legal effects of peace agreements that I identified in Part IV.

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

A crucial element of being incorporated in this way into the doctrine of international law is that the principle *pacta sunt servanda* comes into effect. *Pacta sunt servanda* states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>158</sup> Yasuaki rightly points out that "[i]t is a powerful idea in all human societies including international society [that States do not] dare to violate easily because they know that they have to pay high political costs if they do so."<sup>159</sup> He argues that "[o]nce the treaties are concluded, it is difficult to denounce them unilaterally because of the legal and political power of the principle '*pacta sunt servanda*.'"<sup>160</sup> However, the legal principle of *pacta sunt servanda* only applies to agreements that form part of the common set of rules, principles, and practices of the international legal system. Thus, its effect on compliance is dependant on legal status. By drawing a parallel to *lex mercatoria*, Bell effectively suggests that peace agreements are a category of law

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157. *Id.* at 374-75.

158. See Vienna Convention, *supra* note 30, art. 26.

159. See Yasuaki, *supra* note 105, at 116 n.39.

160. *Id.*

widely insulated from the international legal system and the compliance-pull of the *pacta sunt servanda* principle.

In contrast to my view, Ratner tends to support Bell's *lex pacificatoria* approach, arguing that the distinction between hard law and soft law is only of "marginal relevance."<sup>161</sup> Based on his research on the role of High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) in promoting norm-based solutions to ethnic conflicts, Ratner blames existing theories of international law for focusing exclusively on the impact of "hard" rules and neglecting the important role of "soft" rules.<sup>162</sup> He rejects the "implicit assumption that hard law will affect behavior more than will soft law."<sup>163</sup> According to his research, "the High Commissioner has avoided giving any particular attention . . . to positivism's legal/non-legal distinction,"<sup>164</sup> instead relying "upon the notion of 'international standards' as a sort of umbrella."<sup>165</sup> Many of the actors in ethnic conflicts are either unaware of or indifferent with regard to the legal nature and the hardness of international norms.<sup>166</sup>

While I do recognize that soft law may play a significant role in particular circumstances, I insist that peace agreements rely on the application of "hard" international law for several reasons. First, Ratner draws rather broad generalizations from the particular European context of his case study. The European context suggests that the important role of "hard" international rules was replaced to some extent by the high institutionalized third-party involvement of the OSCE, and by the compliance-pull exerted by the generally strong desire of many domestic players in ethnic conflicts in Europe to form part of the European community of values. These conditions are generally not present in the context of peace agreements.

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161. See Ratner, *supra* note 130, at 611.

162. *Id.* at 652. Ratner also criticizes that "institutionalist and normative views are built around grand structures . . ." These views "adopt an explicitly impersonal, procedurally oriented emphasis to the issue of causation," fail "to sufficiently view law as ultimately a process of communication among relevant decision-makers," and neglect the role of "individuals who act as messengers or transmitters of norms." *Id.* at 656-57.

163. *Id.* at 653.

164. *Id.* at 659.

165. *Id.*

166. See *id.* at 661-62.

In particular, there exists a vacuum due to the lack of strong mediating institutions that needs to be filled by the established rules and the enforcement regime of international law.<sup>167</sup> Second, while unawareness of and indifference to legal distinctions may represent a relevant factor concerning local bureaucrats or non-state actors, peace agreements are mostly signed by governments whose representatives are well aware of the hardness of international rules.<sup>168</sup> Ratner himself admits that there is a group of addressees that he characterizes as “predominantly bureaucrats in the foreign ministry” as well as “senior politicians or NGO leaders” for which “the distinction between soft and hard law retains significance.”<sup>169</sup> Finally, “hard” norms induce compliance through factors to which soft law generally cannot live up. Hard norms have a particularly high degree of legitimacy and are embedded in a quite effective system of decentralized enforcement mechanisms. As a consequence, it is crucial to the success of peace agreements that they are integrated into the set of rules, institutions and practices of “hard” international law.

Applying the *lex pacificatoria* model to the Lusaka Agreement illustrates the limited potential of Bell’s theory. Had the Court adopted Bell’s approach, it would have arrived at the same result as it did in *Armed Activities*.

First, if the Court treated the Lusaka Agreement as *lex pacificatoria*, the Agreement would still lack the capacity to constitute consent to the presence of Ugandan troops on Congolese territory. The Lusaka Agreement is only capable of

167. The Lusaka Agreement contemplated a facilitator, and Ketumile Masire, former president of Botswana, was eventually appointed. However, he could neither build an institutional structure comparable to that of the OSCE, nor did he have similar standing. In fact, the efforts of Masire as the official facilitator were systematically obstructed by the Kabila government. See ICG, REPORT ON CONGO WAR, *supra* note 72, at 80. The demand of a Francophone co-facilitator, “made by Laurent Kabila after he had already agreed to the former Botswana president’s appointment,” served as a means “to bedevil the English-speaking Masire’s office” and “to delay or undermine the equal status format envisaged in the Lusaka Agreement.” ICG, REPORT ON REGIME CHANGE, *supra* note 70, at 23.

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168. The Lusaka Agreement was signed by six states and two rebel groups. See Press Release, Security Council, Democratic Republic of Congo President Assures Council of his Commitment to Lusaka Agreement, U.N. Doc. SC/7006 (Feb. 2, 2001).

169. Ratner, *supra* note 130, at 664.

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consenting to the presence of Ugandan troops on Congolese territory if it forms part of the same system of conflict of norms as the principle of non-intervention. Only under this condition may the conflict of norms be solved, because the agreement has the capacity to justify a violation of the principle of non-intervention. The agreement does not have this effect, however, if it forms part of a distinct, self-contained category of transnational norms that is not part of the international legal system.

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

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

The agreement depended entirely upon the cooperation of the parties to succeed. Tragically, none of the signatories fulfilled what they had pledged. Each suspected the others of a double game, and used its suspicions to justify its own duplicity. Since the belligerents themselves were the ones responsible for policing the agreement, and since there was no external guarantor to compel their compliance, the agreement quickly became empty.<sup>170</sup>

It follows that parties to a conflict rely on the involvement of the international community to solve their conflict. They sign peace agreements in order to employ the compliance-pull generated by international law. Thus, the normative order of international law incorporating principles, such as the prohibition of the use of force, has a fundamental interest in the success of the peace process. While Bell also incorporates certain principles of international law in peace agreements as normative guidelines for interpretation,<sup>171</sup> she refuses to integrate peace agreements into the system of rules, practices, and institutions provided by international law.

However, this integration is crucial to the capacity of peace agreements to induce compliance. The parties to a conflict will only regard the provisions of peace agreements as binding and constraining if they are accompanied by credible legal effects. Warring parties need to be socialized by principles, institutions, and the rules of enforcement of the international legal system to respect the provisions of peace agreements. Arend rightly points out that “[i]f the decision-making elites in states perceive legal rules to be fundamentally different from other rules, the effect legal rules produce in international relations may be different from the effect of other ‘norms,’ ‘rules,’ and ‘institutions.’”<sup>172</sup> Therefore, the capacity of peace agreements to increase audience costs and to constrain state conduct in the aftermath of a conflict relies on the possibility of adjudication by the ICJ, on the applicability of the principle *pacta sunt servanda*, and on the compliance-inducing effect of the rules on countermeasures. *Lex pacificatoria* lacks the normative and institutional quality of the interna-

170. ICG, REPORT ON CONGO WAR, *supra* note 72, at iii.

171. See Bell, *supra* note 10, at 405-08.

172. AREND, *supra* note 75, at 118.

tional legal system. As a consequence, assigning peace agreements to the category of *lex pacificatoria* threatens to substantially reduce the compliance-pull of peace agreements.

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

In this Section, I outline my view that the legal status of peace agreements should trigger the application of the rules on countermeasures. In the absence of a “world policeman to command or coerce obedience to international law rules,”<sup>173</sup> the international legal system relies on decentralized enforcement mechanisms “such as countermeasures to win respect and compliance with these duties.”<sup>174</sup> Countermeasures form part of the Articles on State Responsibility: They are well-established rules that have the capacity to channel and restrain state conduct in the aftermath of a conflict. The various steps required by the rules on countermeasures that a party would have to take to lawfully retaliate for breaches of a peace agreement will often prevent minor provocations and incidents from spiralling back into war.

While there are few compelling reasons not to apply countermeasures to peace agreements, it is true that other norms of international law cannot reasonably be applied because of the special features of peace agreements. However, this is not a sufficient reason to entirely exempt peace agreements from the realm of traditional categories of international law. Only to the extent that “hard” international law does not fit should categories of soft law such as Bell’s *lex pacificatoria* be applied to peace agreements.

I will begin this Section by outlining my approach in more detail and then move on to apply it to the facts and arguments presented to the Court in *Armed Activities*. I conclude that had the Court applied this approach in the *Armed Activities* case, it could still have rejected Uganda’s consent argument, but it would have had to hold Uganda’s third counterclaim admissible and uphold it on the merits.

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173. David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 818 (2002).

174. *Id.*

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

Countermeasures are secondary norms of international law that apply only in the event of the breach of a primary norm of international law, such as the provisions of an international agreement.<sup>175</sup> They are a central feature of a decentralized system of enforcement that authorizes the state affected by the wrong to lawfully breach a norm of international law vis-à-vis the wrongdoer. They determine which acts an injured state may lawfully take and which acts would constitute wrongful acts themselves.<sup>176</sup> Because of its ability to discriminate between lawful and unlawful acts, the legal regime of countermeasures should guide and channel the conduct of states in post-conflict. It provides the very clarity and reciprocity that I suggested above were crucial to preventing a return to war.

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

The Court disregards the possibility of using the rules on countermeasures to provide a legal regime that is particularly well-suited to channel and structure state conduct in post-conflict situations. While countermeasures provide states with the unique opportunity to lawfully retaliate against the wrongful acts of other states, they confer this entitlement only under the condition that the state observes a set of rules that is designed

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

176. ANTONIO CASSESE, INTERNATIONAL LAW 302 (2d ed. 2005).

to minimize unauthorized coercions and to restrain the discretion of states in conflict situations.

Applying the legal regime of countermeasures would require a state to take clearly defined steps before it could retaliate for the breach of a peace agreement. First, a countermeasure may “only” be taken for the purpose “to induce [a] State to comply with its obligations.”<sup>177</sup> Second, countermeasures must be preceded by steps designed as procedural safeguards against impulsive reactions. They must be preceded by a request that the responsible state cease the wrongful act<sup>178</sup> and they must be accompanied by an offer to negotiate.<sup>179</sup> In addition, the responsible state must be notified of any decision to take countermeasures.<sup>180</sup> Third, countermeasures are intended as instrumental measures. They must be terminated if the wrongful act has ceased (“for the time being”)<sup>181</sup> and must be reversible “as far as possible.”<sup>182</sup> Fourth, a countermeasure must be proportional.<sup>183</sup> Proportionality “secures a certain predictability of the responses and predetermines, albeit roughly, the social sanction against the wrongdoer.”<sup>184</sup> Finally, a state may only resort to non-forcible countermeasures. Forcible measures are excluded from the ambit of permissible countermeasures because the rules on countermeasures are subordinated to the prohibition of the use of force under article 2(4) of the UN Charter.<sup>185</sup> As a consequence, the provi-

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177. As a consequence of this purpose, a countermeasure may not be taken against a state that is not responsible for the wrongful act. U.N. GAOR, 56th Sess., Supp. No. 10, art. 49(2), U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on the Responsibility of States]. Paragraph 76 of this report reproduces all of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries in one paragraph. For clarity subsequent citations are by article number.

178. *Id.* art. 52 (1)(a).

179. *Id.* art. 52(3).

180. *Id.* art. 52(1)(b).

181. *Id.* art. 49(2).

182. *Id.* art. 49(3).

183. *Id.* art. 51.

184. Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUR. J. INT'L L. 889, 890 (2001).

185. Article 50(1)(a) of the Draft Articles on the Responsibility of States makes reference to article 2(4) of the UN Charter and provides that countermeasures shall not affect the obligation to refrain from the threat or use of force. Draft Articles on the Responsibility of States, *supra* note 177, art. 50(1).

sions of the peace agreement that establish a ceasefire may never be suspended as a reaction to the breach of the peace agreement by the other party unless the right to self-defense under article 51 of the UN Charter applies.<sup>186</sup>

States can be expected to follow the rules on countermeasures because they give states the opportunity to retaliate in a lawful way.<sup>187</sup> While the logic of conflict induces states to retaliate for breaches by the other party, states also strive for recognition from the international community. As discussed earlier in this Article, states are careful not to be identified as the party that violated the peace agreement. Countermeasures accommodate the two-fold desire of states to retaliate and to remain part of the club by retaliating within the bounds of the law.

The downside of applying the rules on countermeasures to peace agreements is that the practice may legitimize breaches of a peace agreement so long as they are in reaction to a violation of the agreement by the other party. It could be argued that it would be preferable not to legitimize any breaches of peace agreements. The application of countermeasures to peace agreements might itself threaten to trigger a series of countermeasures that plunge the parties back into war.

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

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186. This view is disputed as it depends on whether hostilities are terminated or only suspended. *See supra* note 142 (discussing this distinction).

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

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

A consistent application of the rules on countermeasures would limit state discretion and eliminate the current ability of states to manipulate the lack of rules to liberate themselves from the provisions of the peace agreements to the greatest extent possible. For example, after Ugandan and Rwandan troops clashed in Kisangani, Justice Minister Mwenze Kongolo claimed that “as far as we are concerned the Lusaka protocol is dead.”<sup>188</sup> While the clash of troops is clearly a wrongful act, there would be no doubt that if the rules on countermeasures were applied that the DRC could not respond to such a breach by completely nullifying the entire Lusaka Agreement. The government of the DRC would first have to request that Uganda and Rwanda cease the breach of the peace agreement. Then it would be obligated to try to settle the conflict by peaceful means. Even if these attempts failed, the DRC would have been restricted to taking a countermeasure that was proportional and aimed at inducing compliance with the peace agreement. Denouncing a peace agreement is never an adequate countermeasure to induce compliance with the agreement.

The legal regime of countermeasures is also flexible enough to accommodate some of the peculiar features of peace agreements, such as their process-oriented character. It requires that any countermeasures adopted would have to respect the time-frame set out in the peace agreement. In the case of the Lusaka Agreement the national dialogue “was supposed to start immediately after the cessation of hostilities, the establishment of the JMC and the disengagement of forces, and be completed before the deployment of the UN Peace-Keeping mission, the disarmament of armed groups and the withdrawal of foreign forces.”<sup>189</sup> As a result of this time-frame, Uganda’s decision to suspend the withdrawal of its troops until progress was made within the framework of the national dialogue was a lawful countermeasure. In contrast, Laurent

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188. REPORT ON LUSAKA AGREEMENT, *supra* note 49, at ii.

189. See ICG, REPORT ON CONGO WAR, *supra* note 72, at 79.

Kabila's unwillingness to initiate the national dialogue unless all foreign troops were withdrawn was a wrongful act because, under the terms of the Agreement, Uganda and Rwanda were not obliged to withdraw their troops until the national dialogue was initiated.

Another example of a lawful countermeasure was Uganda's and Rwanda's refusal to withdraw their troops unless the DRC cooperated with UN-appointed facilitator Masire. Their use of this countermeasure was proportionate because Kagame and Museveni began pulling back their troops as soon as the newly appointed President Joseph Kabila called back Masire, lifted the ban on political parties, and prepared a renewed national dialogue.<sup>190</sup>

In order for the legal regime of countermeasures to apply at all, however, peace agreements must be considered binding international agreements. Both the Court's opinion in *Armed Activities* and Bell's *lex pacificatoria* theory fail to understand peace agreements as legally binding international agreements, even though state practice seems to suggest the opposite.<sup>191</sup>

As discussed above, peace agreements are drafted so as to trigger the normative pull of the law. Parties to a conflict sign a peace agreement because they want their opponents to be legally bound by its provisions. Peace agreements are, as a result, generally drafted in a legalized manner:

[They] share a legal-looking structure, with preambles, sections, articles and annexes. They also share legal-type language, speaking of parties, signatories and, binding obligations. The structure and language of peace agreements suggests that the parties mutually view them as legal documents.<sup>192</sup>

Therefore, Bell concludes that "peace agreements are drafted in an attempt to use a legal form and appear to evidence intent to be legally bound."<sup>193</sup>

International law attributes legal significance to the joint will of the parties when it recognizes international conventions

190. See LEMARCHAND, *supra* note 70, at 40.

191. With regard to ceasefire agreements, see FORTNA, PEACE TIME, *supra* note 8, at 199-205.

192. Bell, *supra* note 10, at 378.

193. *Id.* at 395.

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as a source of international law.<sup>194</sup> International law indicates that the joint will of the parties to sign an agreement is a source of binding law.<sup>195</sup> I argue that we ought to respect the joint will of the parties to a peace agreement and conceive of it as a legally binding agreement. As Levie points out, a peace agreement “is an agreement; it is a contract; it is consensual.”<sup>196</sup>

The problem is that “these aims are somewhat frustrated at present by [the] limits of traditional legal categories.”<sup>197</sup> I have pointed out that the process-oriented character of peace agreements, the political background of war, and the inclusion of non-state actors as parties to the agreements make it difficult to fit peace agreements into traditional categories of international law. In the case of the Lusaka Agreement more particularly, the fact that it was also signed by non-state actors limits the applicability of the Articles on State Responsibility and puts into question whether the Agreement complies with the Vienna Convention’s definition of a treaty as an agreement between states.<sup>198</sup>

International law is generally not a very flexible and modifiable category of law, as it relies to a high degree on legal certainty and formalism to be successful as a legal system.<sup>199</sup> In contrast, peace agreements rely on flexibility to enable the

194. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

195. *Id.* art. 38(1).

196. Levie, *supra* note 36, at 881. He refers to the traditional notion of the armistice.

197. Bell, *supra* note 10, at 395. She argues that “[t]he compliance pull gained by achieving obligations with a clear claim to be binding as treaties or constitutions is undermined by the lack of correlation between the parties to the obligation and the formal parties to the agreement, and the peculiar nature of the peace agreement as a process document.” *Id.* Watson describes this dilemma with regard to the Oslo Accords where, according to him, Israel and the Palestinians wanted both to be legally bound by the agreement, but traditional international law only provided the legal categories for Israel to be bound. GEOFFREY WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 92 (2000).

198. The Vienna Convention on the Law of Treaties only applies if the agreement is signed by states (article 2) and provides that the legal force of agreements not only requires signing by states but depends on whether the signatories are subjects of international law (article 3). See Vienna Convention, *supra* note 30, arts. 2, 3.

199. Bederman, *supra* note 173, at 826.

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parties to quickly adjust to new factual circumstances.<sup>200</sup> This is why Bell prefers to place peace agreements within the new category of *lex pacificatoria* rather than attempting to integrate peace agreements into existing categories of international law. In contrast, as outlined above, the significant benefits that ac-

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200. An example of the need for flexibility and the potential problems associated with the legally binding character of peace agreements can be found in the regime change in the DRC during the Congo war. While the significance of the national dialogue provisions had been emphasized by the great majority of actors during the reign of Laurent Kabila, it was increasingly questioned after Joseph Kabila took over. See ICG, AFRICA REP. NO. 37, THE INTER-CONGOLESE DIALOGUE: POLITICAL NEGOTIATION OR GAME OF BLUFF?, at 22 (2001), available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400488\\_16112001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400488_16112001.pdf). Some have argued that “[s]ince the death of Laurent Désiré Kabila, the Inter-Congolese Dialogue, as it was developed in Lusaka, has lost one of its *raison d’être*.” *Id.* at 22. Accordingly, numerous bilateral consultations that took place between the warring parties after Laurent Kabila’s death implied “that the Lusaka agreement has not worked, and that calling for its implementation means in essence calling for the status quo.” See ICG, REPORT ON CONGO WAR, *supra* note 72, at 82. However, I argue that these valid objections do not require the entire exemption of the national dialogue provisions from the application of the rules on state responsibility. The problem of the increasing inadequacy of the Lusaka Agreement against the background of changed factual circumstances can be solved without a full exemption. First, the Lusaka Agreement could be re-negotiated. The Kampala, Harare, and Luanda Agreements all adjusted the timetables of the Lusaka Agreement with regard to the withdrawal of foreign troops. Second, if one party that is not interested in the peace process obstructs these efforts, it appears appropriate to pick up Richard Baxter’s proposal with regard to political treaties in general that “[a] change in a government’s orientation must . . . be regarded as ‘a fundamental change in circumstances.’” Richard Baxter, *International Law in “Her Infinite Variety,”* 29 INT’L & COMP. L. Q. 550 (1980). Peace agreements are highly politicized agreements. The replacement of Laurent Kabila by his son Joseph constituted a change in the orientation of the Congolese government. More importantly, if we explicitly exclude long-term provisions of peace agreements entirely from the regime of state responsibility, we might in the long term compromise their constraining effect on the behavior of the parties. The national dialogue provisions of the Lusaka Agreement, for example, crystallized the awareness of the international community and concentrated its efforts to induce compliance. It provided a road-map to peace that Laurent Kabila could not depart from. The international community’s denial of support to Laurent Kabila because he obstructed the national dialogue process contrasted with the international community’s support for his son because Joseph took steps to re-vitalize the national dialogue indicate the constraining effects of such a provision. They determine the necessary steps for the peace process and constrain the behavior of the parties accordingly.

crue by integrating peace agreements into established categories of international law suggest that this should be done whenever possible.

The problem with most current conceptions of international law is that the different forms of legalization in international law are mostly framed as a binary option between hard international law and pure politics.<sup>201</sup> Everything that does not fit into the current categories of hard international law is viewed as a purely political instrument.<sup>202</sup> For example, the legal literature on armistice agreements treats armistices as political instruments because it has difficulty qualifying their legal effects. I argue, in contrast, that there is an urgent need to apply hard law categories like *pacta sunt servanda* and countermeasures to peace agreements. Only to the extent that this is doctrinally impossible should a softening of legal arrangements occur.

Instead of conceiving of the relationship between hard law and soft law as a binary option, we should understand it as a continuum along which lies a variety of different forms and degrees of soft law.<sup>203</sup> While hard law “refers to legally binding obligations that are precise . . . and that delegate authority for interpreting and implementing the law,”<sup>204</sup> “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions.”<sup>205</sup> Adopting the continuum approach allows us to apply existing hard law norms to peace agreements whenever possible, while preserving the possibility of turning to soft law categories when the particular features of modern peace agreements conflict with the traditional categories of interna-

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201. See Abbott & Snidal, *supra* note 115, at 422 (acknowledging that “[s]oft law has been widely criticized and even dismissed as a factor in international affairs”). Ratner blames the “traditional positivist view of international law” of treating soft law as “simply ‘political’ documents.” Ratner, *supra* note 130, at 609.

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202. For this point of view, see Rachel Brett, *Human Rights and the OSCE*, 18 HUM. RTS. Q. 675 (1996) (“There is no way in which political commitments can have legal effect internationally or domestically.”).

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203. Abbott & Snidal, *supra* note 115, at 422.

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204. *Id.*

205. *Id.*

tional law, or when the employment of soft law is useful in a particular context. Ratner also acknowledges that it is the combination of hard law and soft law, each category applied in the appropriate circumstance, that plays a significant role in preventing ethnic conflict.<sup>206</sup>

Bell's conception of *lex pacificatoria* falls into the binary approach by completely relegating peace agreements to the soft law category. I argue, in contrast, that peace agreements should be integrated into existing categories of hard international law to the extent possible. Only where the goals of peace agreements would be frustrated, or where the existing categories of international law simply do not fit, should a softening such as Bell proposes occur. For example, it should not automatically follow from the lack of recognition of non-state actors as subjects of international law that state signatories of a peace agreement like the Lusaka Agreement are relieved from their obligations under categories of hard international law. Binding international norms should still be applied to state parties, while non-state actors could be regulated in domestic courts as Bell proposes, with international legal norms serving as soft normative guidelines.<sup>207</sup>

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

How would the Court have decided the *Armed Activities* case if it had adopted the approach of integrating peace agreements into current categories of international law? First, the ICJ should not have resolved the issue of consent by qualifying the Lusaka Agreement as a *modus operandi*. Under my approach, peace agreements are norms of international law that form part of the system of conflicts of international law. Thus, they are in principle capable of legalizing behavior that would otherwise be considered a violation of non-intervention. In my view, the Court should have based its rejection of Uganda's consent argument exclusively on the fact that the timetables of the Lusaka Agreement did not purport to legally consent to the presence of Ugandan troops on Congolese territory. Rather, the timetable was a privilege granted to Uganda in order to master the time-consuming task of troop withdrawal

206. See Ratner, *supra* note 130, at 594-95, 665.

207. See Bell, *supra* note 10, at 411-12 (indicating that implementation of peace agreements has critical effect on international norms).

and to protect its long-term interests in the DRC.<sup>208</sup> The timetable did not legitimize Uganda’s violation of the principle of non-intervention. It only postponed the requirement to cease the wrongful act immediately.

My approach, admittedly, does not prevent the scenario that particularly concerned the ICJ. It would in principle be possible under my theory for the aggressor in a conflict to evade its international responsibility by agreeing to a peace agreement only under the condition that its provisions explicitly exclude liability. However, it might be possible to at least partly counter this negative effect through the application of article 53 of the Vienna Convention on the Law of Treaties, which declares a treaty void when it conflicts with principles of *jus cogens*.<sup>209</sup> Interestingly, the Special Court for Sierra Leone in the *Kallon* case rejected the claim that the amnesty clause in the Lomé Agreement eliminated its jurisdiction partly by relying on *jus cogens*.<sup>210</sup> It held that “a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obliga-

208. See Sixth Report on MONUC, *supra* note 46, ¶ 88.

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209. Dinstein also points out with regard to armistice agreements that, while “[t]he contracting parties to an armistice agreement are free to insert any provisions which they deem appropriate,” “[t]he freedom of contractual engagements applies, as with all other treaties, subject only to the requirement that the stipulations of the armistice do not conflict with a peremptory norm of general international law.” Dinstein, *Armistice*, *supra* note 27, at 258. Article 53 defines *jus cogens* as a peremptory norm of general international law that is accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention, *supra* note 30, art. 53. However, the meaning and scope of *jus cogens* is disputed. For substantial literature on *jus cogens*, see THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006); LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW (1988); ROBERT KOLB, THÉORIE DU IUS COGENS INTERNATIONAL (2001); CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); Lee M. Caplan, *State Immunity, Human Rights and Jus cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003).

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210. The claim that the amnesty clause excluded the jurisdiction of the Court is similar to the qualification of the Lusaka Agreement as a *modus operandi* to rebut Uganda’s contention that the agreement constituted consent in the Armed Activities case. See *Armed Activities*, *supra* note 2, ¶ 99.

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tion to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.<sup>211</sup> In a similar fashion, the ICJ could have held that the concept of *jus cogens* prevents states from excluding after the fact<sup>212</sup> their international responsibility for violations of the principles of non-intervention and non-use of force.<sup>213</sup>

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

Third, I argue that the Court should have sustained Uganda's third counterclaim on the merits. In the present case, Uganda had claimed in particular that the DRC pre-

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211. Prosecutor v. Kallon & Kamara, Decision on Jurisdiction, Case Nos. SCSL-2004-15-AR72(E), SCLS-2004-16-AR72(E), ¶ 71 (Mar. 13, 2004).

212. The situation would be different if the DRC had invited Uganda to enter its territory. In this case, there would not be a violation of the principles of non-intervention and non-use of force in the first place. In fact, Uganda had made such an argument in the Armed Activities case. However, the Court rejected this argument. See Armed Activities, *supra* note 2, ¶¶ 51-52. R

213. There are two specific problems with the application of article 53 of the Vienna Convention to peace agreements. The first is that provisions of a peace agreement that exclude liability for violations of *jus cogens* do not conflict directly with *jus cogens*. Such provisions do not request the parties to commit acts violating *jus cogens* norms, but rather provide that in the case that such acts were committed, international responsibility for them is excluded. The other problem arising with the application of article 53 to peace agreements is that, according to the wording of article 53 and the principle of non-separability of the provisions of an illegal treaty expressed in article 44, the application of article 53 to peace agreements as a means to uphold the legal nature and relevance of these agreements—in contrast to the approach of the ICJ—depends on whether certain provisions could be held void while others remain valid. See Vienna Convention, *supra* note 30, arts. 44, 53. In this case, the invalidity of the entire ceasefire agreement would have practically the same outcome as the approach of the ICJ. R

vented the Congolese national dialogue.<sup>214</sup> I argue that the Court should have found this to be a wrongful act of the DRC. The problem with this proposition is that the provisions on the national dialogue in the Lusaka Agreement exemplify the process-oriented character of modern peace agreements that require an elevated degree of flexibility. They are therefore particularly difficult to adjudicate.

Nevertheless, legal responsibility may be established on the basis of the rules on state responsibility for *evident* breaches of such provisions. Such an evident breach of the national dialogue provisions could have been inferred to the DRC in the *Armed Activities* case. While all parties to the conflict failed to comply with the provisions of the Lusaka Agreement, it is fair to say that Laurent Kabila played a particularly obstructive role and evidently breached the national dialogue provisions of the Lusaka Agreement.<sup>215</sup> Lemarchand accused Kabila of “stubborn refusal to implement the Lusaka accords”<sup>216</sup> and stated that Kabila “made a mockery of the Lusaka accords, consistently resisted calls to negotiate with the rebels and their allies,

214. Other alleged violations of the Lusaka Agreement were that the DRC did not disarm and demobilize the armed groups on its territory, including the anti-Uganda insurgents, and that it impeded the deployment of the UN Observer Mission to the Congo in government-controlled territory. Counter-Memorial, *supra* note 11, ¶¶ 87-94, 409-12.

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215. The Kabila Government arbitrarily claimed a change of design of the Inter-Congolese Dialogue: It was now supposed to “be conducted through a 300-member Constituent Assembly unilaterally appointed by Kabila.” Moreover, “in contradiction with the Lusaka agreement, Kabila has on numerous occasions declared that the national dialogue would never be held under occupation. His representatives have argued for a separation of the military and political aspects of Lusaka—requiring the withdrawal of foreign troops before a national dialogue can take place”—a claim that was unacceptable to Uganda. ICG, REPORT ON CONGO WAR, *supra* note 72, at 80-81. In addition to the breach of the provisions of the Lusaka Agreement on the national dialogue, Kabila was arguably responsible for creating obstacles to the establishment of the MONUC mission in the DRC. “UN officials say that, in 95 per cent of the cases, the obstructions to MONUC activities have come from Kabila’s Government. The UN Secretary General’s fourth report on the UN mission in the DRC accuses Kabila of persistent harassment and intransigence in its attitude to MONUC including: refusal to authorize MONUC’s flights, media hate campaigns, state-organised street protests, an extortionist currency exchange rate, plus taxes and fuel charges that add millions to operational costs.” *Id.* at 76.

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216. See LEMARCHAND, *supra* note 70, at 5.

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and heaped scorn on the UN-appointed facilitator.”<sup>217</sup> The International Crisis Group stated that “[m]ost international players, including France, US, Britain and Belgium, among others, agree that Kabila is the main obstacle to the implementation of the Lusaka Agreement.”<sup>218</sup> As a consequence, it took his death and the appointment of his son Joseph as President of the DRC to bring fresh hope to the stalled Lusaka Peace process.<sup>219</sup>

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

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217. *Id.* at 40.

218. ICG, REPORT ON CONGO WAR, *supra* note 72, at 83.

219. ICG, REPORT ON REGIME CHANGE, *supra* note 70, at ii; LEMARCHAND, *supra* note 70, at 53.

## VI. CONCLUSION

I have argued that the qualification of the Lusaka Agreement as a *modus operandi* in the *Armed Activities* case downgrades the legal status of peace agreements. I have outlined what may have been the Court's reasons for this downgrading: First, the Court eliminated the capacity of peace agreements to exclude the international responsibility of states for wrongful acts; and second, it tried to accommodate the distinct features of peace agreements and to avoid addressing complex issues of international law raised by modern peace agreements. The problem with this approach is that it undermines the legal status of peace agreements. In situations of prisoner's game and security dilemmas, where peace is precarious and war likely to resume, a degradation of the legal nature and effects of peace agreements in the perception of the relevant actors might turn the scale towards war.

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

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

The judgment of the Court in *Armed Activities* sends the wrong message to the signatories of future peace agreements who consciously employ legally binding agreements as a pledge for compliance. The limited legal role that the ICJ attributes to the Lusaka Agreement might in the long-term have

a chilling effect on the parties to a peace agreement because “[t]he lingering ambiguity over the binding status of an agreement can undo the parties’ intention to be bound, by offering those who would later renege an opportunity to dismiss the agreement as not binding.”<sup>220</sup> In contrast, a regime based on the concept of peace agreements as legally binding international agreements and the application of the rules on countermeasures to peace agreements is likely to strengthen the guiding role of the law in the aftermath of a conflict. This proposed regime increases the capacity of peace agreements to make peace last.

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220. Bell, *supra* note 10, at 386.

