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Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post-Conflict Societies

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Abstract

This article compares and contrasts the interpretation of the Lusaka Ceasefire Agreement 1999 by the International Court of Justice, the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone by the Special Court for Sierra Leone, and the General Framework Agreement for Peace in Bosnia and Herzegovina by the European Court of Human Rights. In doing so, it critically analyses the approach of the three different tribunals and attempts to explain the differences identified on the basis of the jurisdictional scope of each tribunal and the substantive law each has been tasked to apply. This comparison is both substantive and procedural. The article then examines the impact of these three tribunals on two specific aspects of the rule of law: legal accountability and legal certainty, both internationally and in the countries under examination. It is argued that, while these tribunals have enhanced legal certainty and accountability on the international level, any contribution they have made to the domestic rule of law has been questionable.

Key words

international courts and tribunals; law of treaties; peace agreements; rule of law; transitional justice

1. Introduction

This article will compare and contrast the interpretation of the Lusaka Ceasefire Agreement 1999[1] by the International Court of Justice ('ICJ'), the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ('the Lomé Agreement')[2] by the Special Court for Sierra Leone ('SCSL') and the General Framework Agreement for Peace in Bosnia and Herzegovina ('Dayton

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1 *Ceasefire Agreement* (Lusaka Agreement), <http://peacemaker.un.org/drc-lusaka-agreement99>, accessed 10 January 2014.

2 *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (RUF/SL) (also known as the 'Lomé Agreement'), 7 July 1999, <http://peacemaker.un.org/sierraleone-lome-agreement99>, accessed 10 January 2014. The Lomé Accord was ratified by the Parliament of Sierra Leone on 15 July 1999 with the Lomé Peace Agreement (Ratification) Act 1999.

Peace Agreement 1995')[3] by the European Court of Human Rights ('ECtHR'). In doing so, it will critically analyse the approach of these three different tribunals and attempt to explain the differences identified on the basis of the jurisdictional scope of each tribunal as well as the substantive law it has been tasked to apply.

This article will compare and contrast these three judgments both substantively and procedurally. Substantive comparison will be centred on two common themes: the legal status of peace agreements, falling short of the definition of a treaty, and the legal status of non-state actors, who do not have treaty-making capacity. The institutional comparison of each tribunal reveals a common thread running between them: each tribunal in all three cases closely followed its respective statute and applied the substantive international legal provisions it is mandated to interpret in each respective case.

This article will then examine the impact of these three tribunals on two specific aspects of the rule of law: legal accountability and legal certainty. It will examine their impact on these two aspects internationally and then domestically, namely in the Democratic Republic of the Congo ('DRC'), Sierra Leone, and Bosnia and Herzegovina. It will argue that the judgments of these three tribunals have assisted in enhancing legal certainty and accountability internationally as they have applied what is understood to be the applicable international legal principles in each case, upon which states can organize their international affairs and their future conduct *vis-à-vis* other states or towards their own citizens, be it victims of human rights violations or perpetrators of crimes against humanity.

However, the contribution of these three tribunals to legal accountability and certainty domestically is questionable, particularly with regards to the two non-inter-state cases, where individual criminal accountability and individual violations of human rights were at issue. The Lomé Amnesty Decision might be perceived domestically to open the doors to domestic prosecutions, notwithstanding the fact that an amnesty was put in place by the Lomé Agreement within Sierra Leone. Furthermore, the *Sedjic and Finci* case might be perceived as destabilizing the constitutional structure of post-conflict Bosnia and Herzegovina by finding an incompatibility with the European Convention on Human Rights. Ultimately, the impact of these tribunals domestically depends on the willingness of each state concerned to implement their judgments.

2. Peace agreements

Peace agreements are agreements between parties to a violent conflict, which are designed to formally end a conflict.[4] They are different from an armistice,[5] which is

3 *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995, (1996) 35 *International Legal Materials* 75.

4 C. Bell, *Peace Agreements and Human Rights* (2000), 19–35; C. Bell, *On the Law of Peace: Peace Agreements and Lex Pacificatoria* (2008), 127–61; C. Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100 AJIL 373, 373–412.

5 H. S. Levie, 'The Nature and Scope of the Armistice Agreement', (1956) 50 AJIL 880–905; N. Elaraby, 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Agreements', (1968) 33 *Law and Contemporary Problems*, 97–109.

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an agreement to stop hostilities, or a ceasefire, in which parties agree to temporarily stop fighting.[6] Contemporary peace agreements frequently go beyond the purpose of bringing a conflict to an end, encompassing provisions of increasing complexity covering a multiplicity of areas.[7] For example, some peace agreements include governance provisions, aiming to set up a government of national unity.[8] Other peace agreements are extensive and comprehensive to the point of providing the framework for the (re-)building of a state.[9]

The distinctive features of peace agreements render them challenging to categorize by international tribunals. First, they are increasingly concluded between state and non-state actors, rather than between states.[10] Those agreements signed by non-state actors therefore fall outside the definition of a treaty, which is 'is an international agreement concluded *between States* in written form and governed by international law'.[11] As such they fall outside the scope of the Vienna Convention on the Law of Treaties 1969 ('VCLT').[12] Nevertheless, the fact that the VCLT does not apply to international agreements concluded between states and other subjects of international law does not affect 'the legal force of such agreements' and 'the application to them of any of the rules' set forth in the VCLT 'to which they would be subject under international law independently of the Convention'.[13] Article 3 indicates that agreements signed between state and non-state actors can have binding legal effect between their signatories.

Second, peace agreements frequently simultaneously address both internal and external dimensions of intra-state conflict, as well as both long- and short-term goals.[14] They are often incomplete because they provide for further agreements in an attempt to develop a peace process.[15] Peace agreements are often of a transitional

6 V. P. Fortna, *Peace Time: Cease-Fire Agreements and the Durability of Peace* (2004); C. Gray, 'After the Ceasefire: Iraq, the Security Council, and the Use of Force', (1994) 65 *British Yearbook of International Law* 135–74.

7 For example the Dayton Agreement runs to approximately 150 pages, including 11 Annexes, covering areas including: the military aspects of the peace settlement, regional stability, elections, an inter-entity boundary line, elections, the Constitution, arbitration, human rights, refugees and displaced persons, a Commission to preserve national monuments, civilian implementation, and an international police task force.

8 See Part II on 'Governance', Lomé Agreement, *supra*, note 2, including provisions, for example, on the transformation of the RUF/SL into a political party (Art. III), enabling members of the RUF/SL to hold public office (Art. IV), and enabling the RUF/SL to join a broad-based government of national unity through cabinet appointment (Art. V).

9 See, e.g., the Dayton Agreement, *supra*, note 3. For an analysis of this agreement see F. Ni Aolain, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis', (1997–98) 19 *Michigan Journal of International Law* 957.

10 For a comparison between Appendix 4 and Appendix 2, see Bell, 'On the Law of Peace', *supra*, note 4, at 341–4 and at 310–37 shows that inter-state agreements are far fewer in number than intra-state peace agreements in current practice.

11 Art. 2(1)(a), VCLT. See Bell, 'Peace Agreements: Their Nature and Legal Status', *supra*, note 4, at 379, Bell argues that this definition 'places emphasis on a positivist notion of the treaty as a "formal instrument" defined by formalist criteria, rather than as a substantive "source of obligation", although these two concepts are both present to some degree' and to that effect she cites S. Rosenne, *Developments in the Law of Treaties, 1945–86* (1988), 14–15 (emphasis added).

12 Art. 1, VCLT.

13 Art. 3(a) and 3(b), VCLT. See also Y. Bouthillier and J. F. Bonin, 'Article 3' in O. Korten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary: Volume I* (2011), 66–76.

14 See Bell, 'Peace Agreements', *supra*, note 4, at 393.

15 Ibid., 391.

nature. They often include provisions of revision, extension, or even their demise.[16] Peace agreements constitute a crucial turning point: the transition from war to peace, the shift from *jus in bello* to the *jus post bellum*.[17] Nevertheless, that distinction is often blurred or breaks down because of the recommencement of hostilities, as was the case in Sierra Leone and as remains the case in the DRC.

It is therefore inopportune to categorize peace agreements signed by non-state actors as treaties, even though they clearly contain legally binding obligations.[18] This begs the question of whether their classification matters at all. First, the characterization of peace agreements as treaties would make them fall within the applicable substantive international law before international tribunals, should they come within their jurisdiction.[19] Second, parties could take other action to enforce the treaty in the case of non-compliance.[20] Third, the creation of obligations in international law is necessary for the application of the state responsibility regime,[21] including being limited by peremptory norms.[22] Fourth, non-compliance with obligations under international law entails reputation costs.[23] Nevertheless, the violation of a peace agreement by the outbreak of conflict would also entail negative reputation costs as between the credibility of the two parties to enter future peace agreements, but not for violation of international law.[24] Given that peace agreements clearly create legally binding obligations, they fall somewhere in the middle of the spectrum, with treaties on one end and domestic law on another end.

This article will focus on the Lusaka Ceasefire Agreement 1999, the Lomé Agreement 1999, and the Dayton Peace Agreement 1995. Focus is placed on these three agreements because they are the only three peace agreements whose provisions have been challenged in one way or another before international courts and tribunals in contentious proceedings, rather than before domestic courts or advisory or arbitral proceedings before international tribunals. Light will be shed on these three

16 R. Teitel, *Transitional Justice* (2000), 197–201.

17 'The Law After War' or 'Postwar Justice'; see G. Bass, 'Jus Post Bellum', (2004) 32 *Philosophy and Public Affairs*, 385–412; C. Stahn and J. Kleffner (eds.), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (2008); C. Stahn, 'Jus in bello, jus ad bellum – jus post bellum? - Rethinking the Conception of the Law of Armed Force',(2006) 17 EJIL 921; C. Stahn, 'Jus post bellum: Mapping the discipline(s)',(2008) 23 *American University International Law Review* 311; see also *The Jus Post Bellum Project* of Leiden University <http://juspostbellum.com/>, accessed 10 January 2014.

18 See Art. 2 of the VCLT.

19 Unless an international tribunal is specifically mandated by its Statute to apply principles other than those of public international law, such as for example contracts between host states and foreign investors applied by the International Centre for the Settlement of Investment Disputes (ICSID), or even domestic law of the relevant country concerned by international criminal hybrid tribunals, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers of the Court of Cambodia (ECCC), or the Special Tribunal for Lebanon (STL) etc.

20 See Part V, VCLT.

21 *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>, accessed 10 January 2014.

22 Art. 53 and 72 of the VCLT and Art. 26 and Chapter III of the *Articles on State Responsibility*.

23 T. Franck, *Power of Legitimacy Among Nations* (1990), 35–7; O. Schachter, *International Law in Theory and Practice* (1991), 7.

24 See, e.g., the pulling out by the rebel group 'Forces Nouvelles' from the Linas-Marcoussis Peace Accords of 24 January 2003 (S/2003/99) on the basis that the president of Ivory Coast, Laurent Gbagbo had failed to honour the provisions of the peace agreement in 2004. This led to the establishment of the United Nations Operation in Cote d'Ivoire (UNOCI) under UN Security Council Resolution 1528 (S/RES/1528 of 2004).

agreements because some of their provisions have been subject to interpretation by international courts and tribunals: the ICJ, the SCSL, and the ECtHR respectively. These three peace agreements will briefly be outlined in this section, while their status and legal nature will be discussed in the next section in the course of commenting on their interpretation by the ICJ, SCSL, and the ECtHR.

2.1. Lusaka Ceasefire Agreement 1999

The Lusaka Ceasefire Agreement was signed on 10 July 1999 by the heads of state of the DRC, Uganda, Angola, Namibia, Rwanda, and Zimbabwe.[25] It was later signed by the rebel groups Movement for the Liberation of Congo ('MLC') and the Congolese Rally for Democracy ('RCD'). The Lusaka Agreement sought to bring an end to the hostilities within the territory of the DRC. Specifically the Lusaka Agreement provided that

> the final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex B of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC.[26]

Under the terms of Annex B, the Calendar for the Implementation of the Ceasefire Agreement was dependent upon a series of designated 'Major Events' which were to follow upon the official signature of the Agreement ('D-Day'). This 'Orderly Withdrawal of all Foreign Forces' was to occur on 'D-Day plus 180 days'. It was provided that, pending that withdrawal, 'all forces shall remain in the declared and recorded locations' in which they were present at the date of the signature of the Agreement.[27]

2.2. Lomé Agreement 1999

On 23 March 1991 forces of the Revolutionary United Front ('RUF') entered Sierra Leone from Liberia and commenced an armed conflict to overthrow the one-party rule of the All Peoples' Congress ('APC'). An attempt was made to put an end to this conflict with the signing of the Adibjdan Peace Agreement, which was signed on 30 November 1996.[28] Nevertheless, this agreement collapsed shortly thereafter. The armed conflict in Sierra Leone continued up to 7 July 1999, when the Lomé Agreement was signed.[29] The parties to the conflict negotiated from 25 May 1999 until the day of the signing of the agreement in Lomé, Togo. The object and purpose of this agreement was the 'definitive settlement of the fratricidal war' in Sierra Leone

25 See Lusaka Agreement, *supra* note 1; H. Solomon and G. Swart, *Conflict in the DRC: A Critical Assessment of the Lusaka Ceasefire Agreement* (2010); H. Boshoff and M. Rupiya, 'Delegates, Dialogue, and Desperadoes: The ICD and DRC Peace Process', (2003) 12(3) *African Security Review* 29–37; K. Masire, 'Commentary on the Lusaka Agreement: Prospects for Peace in the Democratic Republic of Congo', (2010) 10(1) *African Security Review*.

26 See Lusaka Agreement, *supra* note 1, at Art. III(12).

27 Ibid., Annex A, Art. 11(4).

28 *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* (also known as the 'Adidjan Peace Agreement'), 30 November 1996, <http://peacemaker.un.org/sierraleone-peace-agreement-RUF96>, accessed 10 January 2014.

29 Lomé Agreement, *supra* note 2; A. Alao and C. Ero, 'Cut Short for Taking Short Cuts: The Lomé Peace Agreement on Sierra Leone', (2001) 4(3) *Civil Wars* 117; H. M. Binningsbo and K. Dupuy, 'Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone', (2009) 44(3) *Power Sharing in Africa* 87.

and 'genuine national unity and reconciliation'.[30] The Lomé Agreement contained pardon and amnesty provisions. Article 9(2) of this Agreement provides that 'the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the signing of the present agreement'. Furthermore, Article 9(3) of the Lomé Agreement provided that

> [T]o consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF, in respect of anything done by them in pursuit of their objectives as members of those organisations since March 1991 up to the signing of the present Agreement.

It is notable that at the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in Article IX of the Agreement ('absolute and free pardon') would not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of Resolution 1315 (2000).

2.3. Dayton Peace Agreement 1995

The Dayton Peace Agreement was initialled at the Wright-Patterson Air Force Base near Dayton on 21 November 1995 and it was signed and entered into force in Paris on 14 December 1995.[31] It was the result of 44 months of intermittent negotiations under the auspices of the International Conference on the former Yugoslavia and the Contact Group. The Dayton Agreement 1995 put an end to the Bosnian War, which was one of the conflicts in the former Socialist Federative Republic of Yugoslavia. It was signed by Slobodan Milošević, president of the Federal Republic of Yugoslavia in the absence of Karadžić, by Franjo Tuđman, president of Croatia, and by Alija Izetbegović and Muhamed Sacirbey, President and Foreign Minister of Bosnia and Herzegovina respectively. It was also witnessed by French president Jacques Chirac, US president Bill Clinton, UK Prime Minister John Major, German Chancellor Helmut Kohl and Russian Prime Minister Viktor Chernomyrdin. The Constitution of Bosnia and Herzegovina is the fourth annex to the Dayton Peace Agreement.

The Constitution confirmed that 'The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law as a state'.[32] It, however, modified its internal structure into two entities: the Federation of Bosnia and Herzegovina and

30 Preamble, Lomé Agreement.

31 Dayton Agreement; Symposium: The Dayton Agreements: a Breakthrough for Peace and Justice? in the *European Journal of International Law*: P. Gaeta, 'The Dayton Agreements and International Law', (1996) 7 EJIL 147; N. Figa-Talamanca, 'The Role of NATO in the Peace Agreement for Bosnia and Herzegovina', (1996) 7 EJIL 164; S. Yee, 'The New Constitution of Bosnia and Herzegovina', (1996) 7 EJIL 176; J. Sloan, 'The Dayton Peace Agreement: Human Rights Guarantees and their Implementation', (1996) 7 EJIL 207.

32 Art. I(1) of the Constitution, which can be found at Annex 4 of the Dayton Agreement.

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the Republika Srpska.[33] Furthermore, the Constitution of Bosnia and Herzegovina describes Bosniacs, Croats, and Serbs as its 'constituent peoples'.[34] Article 2(2) of the Constitution makes the rights and freedoms set forth in the European Convention on Human Rights directly applicable in Bosnia and Herzegovina. The Constitution makes it impossible to adopt any decision against the will of the representatives of any 'constituent people' by the introduction of power-sharing arrangements, including, inter alia, a bicameral system – comprising the House of Peoples and the House of Representatives[35] – and a collective Presidency.[36] Only persons declaring an affiliation with one of the three 'constituent people' are entitled to run for the House of Peoples and the collective Presidency.[37] These two provisions were the result of strong demands from some parties to the conflict.[38]

3. Decisions by international courts and tribunals

The aforementioned peace agreements have been the subject of interpretation by the ICJ, the SCSL, and the ECtHR respectively, each arising from different sets of facts. The first was at the merits and counter-claims stage of an intra-state case (*DRC* v. *Uganda*), the second at the appeal stage of the admissibility of the prosecution of two indictees (Kallon and Kamara) and the third at the merits stage of two individual petitions against a state (*Sedjić and Finci* v. *Bosnia and Herzegovina*). The following section of this article will provide a brief introduction to each of these three tribunals, with a particular focus on their mandate and the substantive law they are tasked to apply. After this, the relevant cases will be outlined in turn.

3.1. International Court of Justice and the *Armed Activities* case

The ICJ is the principal judicial organ of the UN,[39] and it functions in accordance with its Statute.[40] It is a permanent court and only states may be parties to contentious cases before it.[41] It may receive any legal dispute[42] referred to it by any state for

33 Art. I(3) of the Constitution, Annex 4 of the Dayton Agreement.
34 Preamble to the Constitution of Bosnia and Herzegovina, Annex 4 of the Dayton Agreement.
35 Art. IV of the Constitution of Bosnia and Herzegovina, 1995.
36 Art. V of the Constitution of Bosnia and Herzegovina, 1995.
37 Art. VI(1): 'The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).' Art. IV(2): 'The House of Representatives shall comprise 42 Members, two- thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.' Art. V (preambular provision): The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.'
38 Nyustuen, *Achieving Peace or Protecting Human Rights: Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (2005), 192; O'Brien, 'The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation', in W. I. Zartman and V. Kremenyuk (eds.) *Peace Versus Justice: Negotiating Forward- and Backward-Looking Outcomes* (2005), 105.
39 See, generally, Chapter XIV of the Charter of the United Nations, 26 June 1945, XV UNCIO 335 (hereinafter 'UN Charter') and, specifically Art. 92 of the UN Charter, <http://www.un.org/en/documents/charter/>, accessed 10 January 2014.
40 Statute of the International Court of Justice, 26 June 1945, XV UNCIO 355 (hereinafter 'ICJ Statute'), <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>, accessed 10 January 2014.
41 Art. 34(1) of the ICJ Statute.
42 According to the ICJ a legal dispute arises when the claim of one party is positively opposed by the other: South West Africa (*Ethiopia v. South Africa; Liberia v. South Africa*) [1962] ICJ Rep. 319, at 32; Applicability of

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settlement in accordance with international law.[43] States parties to the ICJ Statute may at any time declare that they recognize as compulsory, and in relation to any other state accepting the same obligation, the jurisdiction of the ICJ in all legal disputes concerning the interpretation of a treaty, or any question of international law.[44] The function of the ICJ is to decide in accordance with international law disputes submitted to it, and it does so by applying international conventions, international custom, and general principles of law recognized by civilized nations.[45] The ICJ also uses judicial decisions and the writings of prominent international jurists as subsidiary means of interpretation.[46]

In the *Armed Activities in the Territory of the Congo* case, the DRC filed an application instituting proceedings in the ICJ against the Republic of Uganda in respect of a dispute concerning acts of armed aggression perpetrated by Uganda on the territory of the DRC, in violation of the UN Charter and the Charter of the Organization of African Unity. 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'.[47] The ICJ, at the merits stage, rejected Uganda's argument by holding that 'the provisions of the Lusaka Agreement … represented an agreed *modus operandi* for the parties' and that 'in accepting this *modus operandi* the DRC did not "consent" to the presence of Ugandan troops'.[48] The DRC simply agreed that there should be 'a process to end that reality in an orderly fashion', but 'it did not thereby recognise the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms'.[49] Furthermore, at the counter-claims stage, the ICJ rejected Uganda's counter-claim alleging violations by the DRC of the Lusaka Agreement by holding that it was not directly connected with the subject matter of DRC's claim.[50]

3.2. Special Court for Sierra Leone and the *Lomé Amnesty* case

On 12 June 2000, the President of Sierra Leone requested the President of the Security Council to initiate a process whereby the UN would resolve on setting up a special court in Sierra Leone, with a view to bringing to justice those members of the RUF

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the Obligation to Arbitrate under s.21 of the United Nations Headquarters Agreement of 26 June 1947 [1988] ICJ Rep. 12, at 27.

43 Arts. 34(1) and 36(1) of the ICJ Statute. The bases of jurisdiction of the ICJ are: (i) Special Agreement, see Art. 36(1) of the Statute, (ii) Compromissory Clauses in treaties and Conventions, see Art. 36(1) of the Statute, (iii) Compulsory Jurisdiction in Legal Disputes, Art. 36(2)–(5) of the Statute, (iv) General Dispute Settlement Treaties, Art. 37 of the Statute.

44 Art. 36(2) of the ICJ Statute.

45 Art. 38(1)(a)–(c) of the ICJ Statute.

46 Art. 38 (1)(d) of the ICJ Statute.

47 Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, [2005] ICJ Rep. 168, at para. 98; J. T. Gathii, 'Armed Activities in the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*)', (2007) 101(1) AJIL 142; P. N. Okowa, 'Case Concerning Armed Activities on the Territory of the Congo', (2006) 55 *International and Comparative Law Quarterly* 742.

48 *Armed Activities, supra* note 47, para. 99.

49 Ibid.

50 Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Order of 29 November 2001, paras. 42 and 43.

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responsible for committing crimes against the people of Sierra Leone.[51] This request was taken up by the Security Council,[52] and in 2002 an agreement was entered into by the UN and the government of Sierra Leone, whereby the SCSL was established.[53]

The SCSL functions in accordance with its Statute.[54] It is an ad hoc criminal tribunal, which is considered to be of hybrid nature,[55] as it incorporates both substantive international criminal law and Sierra Leonean law in its Statute. In summary, the SCSL has the power to prosecute persons who committed, or ordered the commission of, crimes against humanity,[56] serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of the Additional Protocol II thereto of 8 June 1977, [57] and other serious violations of international humanitarian law.[58] Regarding the domestic law of Sierra Leone, the SCSL can prosecute persons who have committed offences relating to the abuse of girls under the Prevention of Cruelty to Children Act 1926 (Cap 31),[59] or offences relating to the wanton destruction of property under the Malicious Damage Act 1861.[60]

The UN Secretary-General has characterized the SCSL as a 'treaty-based *sui generis* court of mixed jurisdiction'.[61] The personal and territorial jurisdiction of the SCSL includes those 'who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean Law committed in the territory of Sierra Leone' and includes also those 'who, in committing such crimes, have threatened the establishment and implementation of the peace process in Sierra Leone' while not being in Sierra Leone, such as the case of Liberia's former President Charles Taylor.[62]

In the *Lomé Amnesty* case, brought before the Appeals Chamber of the SCSL, on the one hand the government of Sierra Leone argued that the Court was bound to observe the amnesty granted under Article 9 of the Lomé Agreement,[63] and that the Court should not accept jurisdiction over crimes committed prior to 7 July 1999,

51 Annex to Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786 (2000).
52 UNSC Resolution 1315, UN Doc. S/RES/1315 (2000).
53 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), 2178 UNTS 137, <http://www.sc-sl.org/LinkClick.aspx?fileticket = CLk1rMQtCHg%3d&tabid = 176>, accessed 10 January 2014.
54 Statute of the Special Court for Sierra Leone, enclosure to the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000).
55 SCSL Statute; see further L. A. Dickinson, 'The Promise of Hybrid courts', (2003) 97 AJIL 295.
56 Art. 2, SCSL Statute.
57 Art. 3, SCSL Statute.
58 Art. 4, SCSL Statute.
59 Art. 5(a), SCSL Statute.
60 Art. 5(b), SCSL Statute.
61 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), para. 9.
62 Art. 1, SCSL Statute.
63 *Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Amnesties* (2009), 11: The United Nations position is that 'amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law'.

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when the amnesty was in force.[64] As such, the government argued that it would be an abuse of process to allow the prosecution of crimes predating the Lomé Agreement.[65] On the other hand, the prosecution argued that the SCSL is bound by Article 10 of its Statute[66] and that the Lomé Agreement is limited in effect to domestic law and was not intended to cover crimes mentioned in Articles 2 and 4 of the Statute of the Court.[67]

Considering that the Lomé Agreement did not constitute a treaty as it created neither rights nor obligations capable of being regulated by international law,[68] and that the RUF did not have treaty making capacity,[69] the Court held that the Lomé Agreement nevertheless created 'binding obligations and rights between the parties to the agreement in municipal law'.[70] The Court held that the 'consequences of its not being a treaty or an agreement in the nature of a treaty is that it does not create an obligation in international law'.[71] Finding 'no ground on which the validity of Article 10 of the Statute could be impugned',[72] the Court held that it could not consider the grant of an amnesty as universally effective in regard to grave international crimes and crimes against humanity, such as those contained in Articles 2–4 of its Statute.[73] It therefore concluded that the amnesty granted under Article 9 of the Lomé Agreement could not constitute a bar to the prosecution of the defendants in this case.[74] The Court held that 'the grant of an amnesty in respect of such crimes … is in breach of an obligation towards the international community as a whole'.[75]

3.3. The European Court of Human Rights and the *Sedjić and Finci* case

The ECtHR is a permanent court monitoring the compliance of member states of the Council of Europe[76] with their obligations under the European Convention on

64 *The Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, Decisions – Preliminary Motion based on Lack of Jurisdiction, Abuse of Process, Amnesty and Lomé Accord, and Application in Respect of Jurisdiction and Defects in Indictment, Case Nos. SCSL-2004–15-PT and SCSL-2004–16-PT, 13 March 2004, at para. 1; S. Meisenberg, 'Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone', *International Review of the Red Cross* 8 (2004) 837–51; D. Macaluso, 'Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Special Court for Sierra Leone on the Jurisdiction of the Special Court for Sierra Leone' 27 *Brooklyn Journal of International Law* (2001-02) 347, 347–80.

65 Ibid., para. 1 and 22, see further, the Kallon Preliminary Motion.

66 Art. 10 of the Statute of the SCSL provides: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of crimes referred to in Articles 2 to 4 of the present Statute shall not be a bar to prosecution'.

67 Ibid., para. 2, 22, and 54.

68 Ibid., paras. 37–44, citing and disagreeing with P. H. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts', in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998), 333–46.

69 Ibid., paras. 45–8.

70 Ibid., para. 49.

71 Ibid., para. 49.

72 Ibid., para. 64.

73 Ibid., paras. 71.

74 Ibid., para. 72.

75 Ibid., para. 73.

76 1949 Statute of the Council of Europe, ETS 001 (1949).

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Human Rights.[77] All the 47 member states of the Council of Europe, as well as the European Union, are members of the Convention.[78] The substantive law applied by the ECtHR consists of the rights and freedoms listed in section I of the Convention, as well as Protocols 1, 4, 6, 7, 12, and 13.[79] In so far as jurisdiction is concerned, any state party to the Convention may bring to the ECtHR a case against any other state party, which is alleged to have breached the provisions of the Convention or the Protocols.[80] Individuals, NGOs, and groups of individuals who claim to have been victims of human rights violation may also bring a case against the state party which has committed the alleged violation.[81] In both inter-state cases and individual applications, the ECtHR may only address complaints alleging a breach of the provisions of the Convention or Protocols by a state party.[82]

In the *Sejdić and Finci* v. *Bosnia Herzegovina* case, brought before the Grand Chamber of the ECtHR, the applicants complained of their ineligibility to stand for election in the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin respectively.[83] They argued that this amounted to racial discrimination, by invoking Article 14 of the Convention,[84] in conjunction with Article 3 of Protocol No. 1.[85] Given that Article 14, prohibiting discrimination on all grounds, is not a free-standing right, it is always examined with another right established under the Convention – in this case, the right to free elections. The applicant also invoked the free-standing right to non-discrimination as enshrined in Article 1 of Protocol No. 12 to the Convention.[86]

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77 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950), as amended by Protocol No. 11, ETS 155 (1994).

78 For a list of the member states and observer states of the Council of Europe, see: http://hub.coe.int/web/coe-portal/navigation/47-countries.

79 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 9 (1952); Protocol No. 4 to the Convention, ETS 46 (1963); Protocol No. 6 to the Convention, ETS 114 (1983); Protocol No. 7 to the Convention, ETS 155 (1984); Protocol No. 12 to the Convention, ETS 177 (2000); Protocol No 13 to the Convention, ETS 187 (2002).

80 Art. 33, European Convention of Human Rights.

81 Ibid., Art. 34.

82 Ibid., Arts. 33 and 34.

83 *Sejdić and Finci v. Bosnia and Herzegovina* (Applications Nos. 27996/06 and 34836/06), Judgment of the Grand Chamber of the European Court of Human Rights of 22 December 2009, at para. 2; M. Milanovic, 'Introductory Note on *Sejdić and Finci v. Bosnia and Herzegovina*', (2010) 49 *International Legal Materials* 281; S. Bardutzky, 'The Strasbourg Court on the Dayton Constitution: Judgment in the case of *Sedjić and Finci v. Bosnia and Herzegovina*, 22 December 2009', (2010) 6 *European Constitutional Law Review* 309; Minority Rights Group International, 'Discrimination and Political Participation in Bosnia and Herzegovina: *Sejdić and Finci v. Bosnia and Herzegovina*', 12 March 2010, <http://www.refworld.org/docid/4b9e17b92.html>, accessed 10 January 2014.

84 Art. 14 of the Convention provides: 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

85 Art. 3 of Protocol 1 provides: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

86 Art. 1 of Protocol No. 12 to the Convention provides:
1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

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After finding that Article 14 in conjunction with Article 3 of Protocol No. 1 was applicable in this case,[87] the ECtHR observed that in order to be eligible to stand for election to the House of Peoples of Bosnia and Herzegovina, one has to declare affiliation with 'a constituent people' and that the applicants were excluded as they did not wish to declare any affiliation as they were of Roma and Jewish origin respectively.[88] The Court noted that this exclusion rule pursued one aim broadly compatible with the general objectives of the Convention: 'the restoration of peace'.[89] It recognized that the Dayton Peace Agreement was designed to put to end to 'a brutal conflict marked by genocide and ethnic cleansing' and that a 'very fragile ceasefire was in effect' when it entered into force.[90] The Court recognized that the overriding concern of the participants to the peace negotiations was equality between the 'constituent peoples' and that the approval of such an exclusionary rule was necessary to ensure peace.[91]

Nevertheless, the Court concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and that it breached Article 14 taken in conjunction with Article 3 of Protocol No. 1,[92] as well as Article 1 of Protocol 12 because it racially discriminated against the applicants in becoming elected.[93] The ECtHR justified this by observing that important positive developments have taken place in Bosnia and Herzegovina since the entering into force of the Dayton Peace Agreement, including its progress as a potential candidate for EU membership,[94] its election as a member of the United Nations Security Council between 2010 and 2012, and the preparations for closure of the international administration created on the ground enforcement measure under Chapter VII of the UN Charter.[95] When reaching this conclusion the ECtHR also observed that mechanisms of power-sharing exist that do not automatically lead to the total exclusion of representatives of the other communities.[96] The ECtHR underlined Bosnia and Herzegovina's undertaking to revise its electoral legislation in light of Council of Europe and European Union standards.[97]

87 *Sejdic and Finci v. Bosnia and Herzegovina*, para. 41.
88 Ibid., para. 45.
89 Ibid.
90 Ibid.
91 *Sejdic and Finci v. Bosnia and Herzegovina*, para. 45.
92 Ibid., para. 50. In relation to this finding, the Court considered that it is not necessary to examine separately whether there has also been a violation of Art. 3 of Protocol No. 1 taken alone or under Art. 1 of Protocol No. 12 as regards the House of Peoples, at para. 51.
93 Ibid., para. 56.
94 Ibid., para. 47, citing: Progress Report to the European Commission of Bosnia and Herzegovina, 14 October 2009, SEC/2009/1338.
95 *Sejdic and Finci v. Bosnia and Herzegovina*, para. 47, citing Report by Mr Javier Solana, EU High Representative for the Community and Common Foreign and Security Policy and Mr Olli Rehn, EU Commissioner for Enlargement, on EU's Policy in Bosnia and Herzegovina: The Way Ahead of 10 November 2008; Report by the International Crisis Group on Bosnia's Incomplete Transition: Between Dayton and Europe, 9 March 2009.
96 See the Opinions of the Venice Commission, at para. 22 of ECtHR's judgment.
97 *Sejdic and Finci v. Bosnia and Herzegovina*, para. 49 citing European Commission for Democracy through Law (Venice Commission), para. 21 of judgment, and Stabilisation and Association Agreement ratified by the European Union, 2008.

4. EXPLAINING THE APPROACH OF EACH TRIBUNAL *VIS-À-VIS* PEACE AGREEMENTS

The present article will now turn to the comparison of the three cases outlined above, both substantively (section 4.1) and procedurally (section 4.2).

4.1. Substantive comparison

In the *Armed Activities* case, the ICJ treated the Lusaka Ceasefire Agreement as a '*modus operandi*', which did not amount to consent to the presence of Ugandan groups on Congolese territory. The provisions stipulated 'how the parties should move forward', providing a process to put an end to the conflict in 'an orderly fashion'.[98] The ICJ stressed that the Lusaka Agreement did not validate the presence of the Ugandan troops on the territory of the DRC in law, which was in violation of international law.[99] The ICJ avoided making any pronouncement regarding whether the Lusaka Agreement constituted a treaty, while at the same time it considered that it created binding obligations between the two states.

In his separate opinion Judge Parra-Arranguren argued that this interpretation created 'an impossible situation'.[100] On the one hand, he argued that

> 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.[101]

On the other hand, he argued that

> if Uganda complied, 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 on, Uganda would have violated its *treaty obligations*, thereby also being in violation of international law.[102]

What is noteworthy about Judge Parra-Arranguren's separate opinion is that he does not hesitate to recognize the legal nature of the Lusaka Agreement: it is a treaty.[103] Nevertheless, he does not explain why he considers it a treaty, especially in light of the fact that, apart from by a series of states, it was also signed by a non-state actor, the Congolese Rally for Democracy and the Movement for the Liberation of the Congo. For Judge Parra-Arranguren, a conflict of obligations under international law therefore seems to arise.

Treating the Lusaka Agreement as not creating binding obligations *in international law* – but as creating obligations as between the parties – means that secondary rules of international law, including the law on responsibility of states for wrongful acts,

98 *Armed Activities* case, *supra*, at para. 99.
99 Ibid., at para. 104.
100 *Armed Activities* case, *supra*, Separate Opinion of Parra-Aranguren, para. 8.
101 Ibid., para. 8 (emphasis added).
102 Ibid., para. 8 (emphasis added).
103 Ibid., para. 8.

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would therefore not apply to this agreement.[104] Furthermore, Andrej Lang argues that the ICJ assigned the Lusaka Agreement such a status that it rendered it 'largely irrelevant in the realm of international law'.[105] This begs the question why the ICJ did not recognize the legal status of the Lusaka Agreement. Lang answers that question by arguing that the ICJ wanted to avoid 'a scenario where states could avoid international responsibility for their actions by including legally binding liability-excluding provisions in peace agreements'.[106] Stephen Mathias further argues that

> [A] state in a position analogous to that of Uganda in this case might well seek to include in such an agreement either 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.[107]

Turning to the *Sedjić and Finci* judgment, it seems at first glance as if the ECtHR did what the other tribunals refused to do: it checked the compatibility of a peace agreement with an international treaty, namely the European Convention on Human Rights. Taking a closer look, the ECtHR made an important distinction: it considered that this case fell within its jurisdiction, as it was asked to check the compatibility between the Constitution of Bosnia and Herzegovina and the Convention, and not the compatibility of the Dayton Accord with the said Convention.[108] The ECtHR noted that the power to amend the Constitution of Bosnia and Herzegovina was vested in the Parliamentary Assembly, which is 'clearly a domestic body'.[109] Even though the ECtHR could not hold the respondent state responsible for putting in place the contested constitutional provisions, it considered that the respondent state could nevertheless be held responsible for maintaining them.[110] The ECtHR conceived its mandate as a narrow one: it was concerned with removing the incompatibility of a constitutional provision with the Convention and not the very same provision, as included in Annex IV of the Dayton Accord, with the said Convention and its Protocols.

What is particularly notable about the judgment of the ECtHR is its discussion as to why Bosnia and Herzegovina was no longer a country in transition. Fourteen years had passed between the time of the signing of the Dayton Accord in 1995 and the handing down of this judgment in 2009. The Court particularly noted that '[W]hen the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground', making the approval of 'constituent peoples' necessary to ensure peace.[111] The Court put a lot of emphasis on the positive developments

104 J. Combacau and D. Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility Categorizing International Obligations', (1985) 16 (December) *Netherlands Yearbook of International Law* 81.
105 A. Lang, '"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution', (2008) 40 *International Law and Politics*107, at 124.
106 Ibid., at 125.
107 S. Mathias, 'The 2005 Judicial Activity of the International Court of Justice', (2006) 100 AJIL 629, at 638.
108 *Sedjic and Finci v. Bosnia and Herzegovina*, *supra*, para. 30, citing *Jeličić v. Bosnia and Herzegovina* (decision), no. 41183/02, ECHR 2005–XII.
109 Ibid., paras. 30 and 15.
110 Ibid., paras. 30 and 13.
111 Ibid., para. 45.

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that had occurred since the signing of the Dayton Peace Agreement, including its membership of the Council of Europe since 2002, which signalled that the ground was indeed ready for receiving its judgment, without destabilizing the governmental framework put in place in 1995. In a sense, the present judgment would further enhance the promotion of human rights, strengthening Bosnia and Herzegovina's constitutional arrangements.

Turning to the Lomé Agreement, it provides an example of what Lang and Mathias indicated that negotiating parties would do, even before the *Armed Activities* case was handed down by the ICJ: negotiating parties excluded the liability of all persons responsible for violations of international humanitarian law and Sierra Leonean law during the armed conflict in that country, even those who had committed war crimes.[112] Even if the negotiating parties were not prevented from including an amnesty provision in the Lomé Agreement, even for war crimes,[113] the SCSL held that the amnesty granted by Article 9 of the Lomé Agreement did not constitute a bar to prosecution before it.[114] The SCSL justified this position by arguing that the Lomé Agreement lacked sufficient legal status because it was signed between the government of Sierra Leone and the RUF rebel group, the latter of which 'international law does not seem to have vested with such [treaty-making] capacity'.[115] This dictum demonstrates the extent of the reach of positive public international law.

In so far as non-state actors are concerned, while the SCSL was unable to recognize that they had any treaty-making capacity, the ICJ avoided tackling the controversial issue at the heart of the *Armed Activities* case, namely the legal status of the Lusaka Peace Agreement, and that inextricably linked with it: the status of the rebel groups MLC and RCD.[116] These two groups became formal participants in the open national dialogue and they were given the power to sign the Lusaka Agreement.[117] Judge Koojimans, in his separate opinion in the *Armed Activities* case,

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112 This should be compared and contrasted with Rule 159 of the ICRC Customary International Humanitarian Law Rules which provides that, 'At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in armed conflict, or those deprived of their liberty for reasons related to the armed conflict, *with the exception of persons suspected of, accused or sentenced of war crimes*' (emphasis added): J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. 1, 611.

113 Absolute amnesties potentially violate Rule 158 of the ICRC Customary International Humanitarian Law Rules, which provides that: 'States must investigate war crimes allegedly committed by their national or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes, over which they have jurisdiction and, if appropriate, prosecute the suspects' See Henckaerts and Doswald-Beck, ibid., at 607. Nevertheless, a caveat has been formulated by the former prosecutor of the International Criminal Court, Luis Moreno-Ocampo, whereby the prosecutor should exercise their discretion when it comes to the prosecution of such crimes, especially when it comes to promoting 'the interests of peace' See Policy Paper on the Interests of Justice, ICC-OTP-2007, September 2007, <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09–73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>, accessed 10 January 2014.

114 The *Prosecutor v. Kallon and Kamara*, *supra*, at para. 72.

115 Ibid., at para. 48.

116 For the status of non-state actors in international law, see generally: J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011); M. Noortman and C. Rygaert (eds.), *Non-State Actor Dynamics in International Law* (2010); C. Bailliet (ed.), *Non-State Actors, Soft Law, and Protective Regimes: From the Margins* (2012). See also the reports by the Committee on Non-State Actors (Math Noortmann, Cedric Ryngaert and Jean d'Aspremont) of the International Law Association, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/1023.

117 Art. III (19), Lusaka Agreement 1999, *supra*.

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considered that the rebel groups were given an 'upgraded' status by the Lusaka Agreement and that these two groups had become the two parties, who together with the central government had primary responsibility for the re-establishment of an integrated state administration.[118] He further argued that after the Lusaka Agreement, territorial authority could no longer be seen as vested exclusively in the central government, but as being shared with 'armed opposition' movements, which had been recognized as part of the national authority.[119] This indicates that the full implications of the relationship between the contemporary *jus in bello* and *jus post bellum* have yet to be determined, and that the issue of whether agreements that are signed by such groups – even though it is unclear when they cease to be 'armed' – have the same legal effect as a treaty remains unresolved by positive international law.[120]

Insofar as the Dayton Peace Agreement is concerned, Christine Bell argues that it has a 'contrived treaty form'.[121] She argues that the drafters of this peace agreement attempted to contrive treaty status for it by framing it as if it were between states at the point that it was concluded between state and non-state actors.[122] Clear treaty status was preserved by the signing of the agreement by three republics and the witnessing of this by their respective heads of state – the president of the Federal Republic of Yugoslavia, the president of Croatia, and the president and foreign minister of Bosnia and Herzegovina – and the EU, rather than by it being signed directly by the representatives of the three ethnic groups making up the population of Bosnia and Herzegovina. This issue became more complex as a result of the indictment of the Serbian representatives as war criminals by the International Tribunal for the Former Yugoslavia, and by the fact that the Federation of Bosnia and Herzegovina and Republika Srpska only acquired a status as constituent parts of the new state, so it would have been impossible for the constituent populations to have treaty-making capacity before the coming into force of the Dayton Peace Agreement.

Given that the Dayton Peace Accord was signed by representatives of states, including the Federal Republic of Yugoslavia, Bosnia and Herzegovina, Croatia, France, the United Kingdom, Germany, and Russia, as well as a *sui generis* international organization, the EU, this agreement squarely falls within the definition of a treaty as set out in Article 2(1)(a) of the Vienna Convention on the Law of Treaties. The Dayton Peace Accord is prima facie 'an international agreement concluded between States in written form and governed by international law'. Contrived, meaning deliberately created rather than arising naturally or spontaneously, might be an appropriate term to use for all treaties, rather than just this one, insofar as the conclusion of all treaties requires the will and deliberation of states concluding them. If the term 'contrived'

118 Judge Koojimans, Separate Opinion in *Armed Activities* case, *supra*, para. 52.
119 Ibid., para. 53.
120 Nevertheless, it is now well accepted that groups known as national liberation movements have the capacity to conclude treaties. See J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 123; Le Y. Bouthillier and J.-F. Bonin, Commentary to the Vienna Convention, *supra*, at 73; A. Cassesse, *International Law* (2001), at 77.
121 See Bell, *On the Law of Peace*, 145.
122 Ibid.

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is taken to mean 'artificial' – it might be objected that the formal requirements of the Vienna Convention were not met. Had this issue come before the ICJ in a hypothetical case, the Court would have reached the same conclusion, namely that the Dayton Accord is a treaty, by applying positive law. International law on treaties does not require the Court to pierce the veil of states and examine whether they are states properly so-called, neither is it required to look at the intention for or reasons why states entered into certain treaties, unless a ground for their invalidity can be made out on the facts of each case.[123]

4.2. Comparison of the institutional role of each tribunal

The differences in approach between the ICJ, the SCSL, and the ECtHR can be explained on the basis of the jurisdictional scope of each tribunal and the substantive law each one has been tasked to apply. Each of the aforementioned tribunals has a different task to perform: first, the ICJ hears inter-state disputes on the basis of general public international law; second, the SCSL deals with prosecutions of those most responsible for specific violations of international criminal law and Sierra Leonean domestic law, and, finally, the ECtHR usually hears individual applications against Council of Europe state parties for violations of the European Convention on Human Rights. Each of these tribunals is limited by the ICJ Statute, the SCSL Statute, and the European Convention respectively to resolve disputes that come before them on the basis of the substantive law it has been tasked to apply, as outlined above.

The approach of the ICJ in the *Armed Activities* case *vis-à-vis* the Lusaka Agreement can therefore be explained on the basis of the law it has been tasked to apply. Given that the ICJ can only apply treaties, international customary law, and general principles of law, the Lusaka Agreement could not amount to DRC's consent to the presence of Ugandan troops on DRC's territory.[124] The ICJ made 'no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement'.[125] The ICJ could only resolve the issues that it was tasked to tackle with, nothing more. The approach of the SCSL can be explained by reference to Article 10 of its Statute, which provides that an amnesty granted to persons falling within the jurisdiction of the SCSL should not be a bar to prosecution.[126] The SCSL had no other option but to consider Article 9 of the Lomé Agreement as not constituting a bar to the prosecution of the individuals before it. Otherwise, it would have had to disapply its own statute. The approach of the ECtHR can be explained by reference to the task that it has been mandated to perform by the Convention: it hears applications

123 See section 2 of Part V of the Vienna Convention on the Law of Treaties, Arts. 46–53 covering the grounds of invalidity of treaties including, error, fraud, corruption of a representative of a state, coercion, and conflicts with a peremptory norm of general international law.

124 *Armed Activities* case, *supra*, at para. 99.

125 *Armed Activities* case, *supra*, at para. 91.

126 Art. 10 was found not to be in violation of Arts. 55 and 64 of the VCLT (providing that a treaty is void if it conflicts with a peremptory norm), at paras. 62–4 of the *Kallon and Kamara* decision.

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by individuals or states that another contracting state has breached one or more of the provisions of the Convention and its Protocols. In the *Sedjić and Finci* case, the ECtHR did just that: it checked whether Bosnia and Herzegovina was compliant with the Convention. It simply fell outside its mandate to check the compatibility of the Dayton Accord with the Convention.

5. The (non-)establishment of legal accountability and legal certainty in post-conflict societies by the ICJ, the SCSL and the ECtHR

The preceding discussion demonstrates that each of the tribunals under examination followed closely its own respective rules and procedures and executed the narrow mandate with which it had been bestowed. This begs the question: what is the impact of the ICJ, the SCSL, and the ECtHR's interpretation of peace agreements in the post-conflict societies in question? This article will now turn to the impact of the three judgments discussed in the post-conflict societies that each one was related to: the DRC, Sierra Leone, and Bosnia and Herzegovina. The article will specifically focus on the impact of these three tribunals on two fundamental tenets of the rule of law: legal accountability and legal certainty.

5.1. Peace agreements falling outside the competence of the ICJ, the SCSL, and the ECtHR

By considering the Lusaka Agreement as a *modus operandi*, the ICJ effectively considered it as falling outside its competence,[127] because it is not part of international law, which it is mandated to apply by its own Statute. By considering the Lomé Agreement not to be an international treaty with only an effect in domestic law, the SCSL did not consider that it had the power to make any pronouncements regarding its compatibility with international law. Given that Annex 4 of the Dayton Accord is the Constitution of Bosnia and Herzegovina, the ECtHR adopted a similar stance, which it incidentally recognized as an 'international treaty'.[128] A convergence in the end result of these judgments can therefore be discerned: none of these tribunals considered the peace agreements as falling within their competence, and none of them checked their compatibility with international law. This could be qualified by reference to Article 10 of the Statute of the SCSL, which was underpinned by the underlying determination that amnesties in respect of international crimes, such as genocide, crimes against humanity, or other serious violations of international humanitarian law are illegal.[129]

127 *Armed Activities* case, *supra*, para. 91 and Counter-Claims Order, *supra*, paras. 42 and 43.

128 *Sedjic and Finci v. Bosnia and Herzegovina*, *supra*, para. 30.

129 This Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), states at para. 24 that 'With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.' This amounts to an indirect examination of Art. 9 of the Lomé Agreement by the Secretary-General.

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5.2. The promotion of international legal accountability and legal certainty by the ICJ, the SCSL, and the ECtHR

The following question, however, lingers on: have the ICJ, the SCSL, and the ECtHR promoted legal accountability and legal certainty, two fundamental tenets of the rule of law,[130] in the three cases under examination?[131] For the purposes of this article, the rule of law is understood to be 'the principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated'.[132] The main element of this definition of the rule of law is that public authority is conferred by and should be exercised in accordance with the law – what is otherwise known as 'supremacy of the law'. When not exercised in accordance with the law, then public authority bodies are accountable on the basis of the law – what is otherwise known as 'accountability to the law'. Legal accountability is the aspect of the rule of law most closely linked to the functioning of international courts and tribunals.[133] This article will focus on legal accountability, as well as another procedural aspect of the rule of law: legal certainty. For the purposes of this article, legal certainty is understood to be the principle which holds that the law must provide those subject to it with the ability to regulate their conduct. Legal certainty is associated with the public promulgation of laws, their precise and clear content, and their non-retroactivity, as well as with the protection of legitimate expectations.

Legal accountability is the connecting knot between international courts and tribunals and the rule of law in post-conflict states, which constitute the two building blocks of this article. International courts put in action a fundamental tenet of the rule of law: they ensure that the exercise of power by states is within the confines of public international law. International courts and tribunals put in action the

130 For definitions of the rule of law in jurisprudence see: A. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885); L. Fuller, *The Morality of Law* (1964); J. Raz, 'The Rule of Law and Its Virtue', (1977) 93 *The Law Quarterly Review* 195. The main proponents of the substantive rule of law are: R. Dworkin, *A Matter of Principle* (1985) (the rights-based conception); J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) *Public Law* 59; J. Laws, 'Law and Democracy', (1995) *Public Law* 72, J. Laws, 'The Constitution: Morals and Rights', (1996) *Public Law* 622 (the role of courts in protecting fundamental rights and the rule of law conceived as encompassing freedom, certainty, and fairness). See further: D. Jielong, 'Statement on the Rule of Law at the National and International Levels', (2007) 6 *Chinese Journal of International Law* 185; Report of the United Nations Secretary General, 'The Rule of Law at the National and International Levels: Comments and Information Received from Governments', (2007) UN Doc. A/62/121 (2007) 19; Some talk of a hybrid category, the 'internationalised rule of law', see Introduction by the Editors, M. Zurn, A. Nollkaemper, and R. Peerenboom (eds.), *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012), 1–17; A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at 302.

131 Sarah Nouwen examines this question with regards the International Criminal Court in Uganda: see S. Nouwen, 'The ICC's Intervention in Uganda: Which Rule of Law Does It Promote?' in M. Zurn, A. Nollkaemper, and R. Peerenboom, *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012), 278–304.

132 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (2004), para. 6; see also the UNGA resolution A/RES/67/1 (2012), 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the International and National Levels' and A/RES/67 (2013), on 'The Rule of Law at the National and International Levels'.

133 P. Jessup, 'The International Court of Justice and the Rule of Law', (1945) 108(4) *World Affairs* 234; R. Higgins, 'The International Court of Justice, the United Nations System, and the Rule of Law', Speech at the London School of Economics, 13 November 2006, <http://www.lse.ac.uk/publicEvents/pdf/20061113_Higgins.pdf>, accessed 10 January 2014.

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principle of legality or supremacy of law. Had peace agreements fallen within the competence of the ICJ or the SCSL, the principle of legal accountability of states *vis-à-vis* their legal obligations under those agreements would have been promoted. This would potentially send a strong message to the parties of peace agreements that they would be held accountable for the obligations they signed up to in peace agreements, which would in turn contribute to their effective enforcement. This would in turn result in the effective upholding of accountability under international law, unless certain provisions of peace agreements were not in accordance with international law, such as the illegality of amnesties for crimes against humanity and the discriminatory nature of exclusion of minorities from electoral processes.

The ICJ, the SCSL, and the ECtHR seem to uphold legal accountability at the international level. First, all three tribunals applied the international law applicable in each case. They all applied what they considered to be the applicable international law to the facts of the cases before them. The ICJ applied the fundamental principles applicable to the *Armed Activities* case, namely the principle of non-use of force in international law and the principle of non-intervention, relevant international human rights principles, and international humanitarian law, especially with regards to torture and other forms of inhumane treatment.[134] The SCSL rejected the inadmissibility arguments by applying Article 10 of its Statute, holding that an amnesty falling within its jurisdiction in respect of crimes referred to in Articles 2 to 4 of its statute did not constitute a bar in proceeding to the merits of the *Kallon and Kamara* prosecutions.[135] The ECtHR applied the European Convention on Human Rights and, specifically, Article 14 protecting individuals from discrimination.[136] The conclusion can therefore be drawn that all three tribunals upheld the supremacy of international law in each case, in juxtaposition to domestic law or peace agreements falling outside the classical definition of treaty law, applied by international tribunals.

Furthermore, the three tribunals under examination promoted legal accountability under international law. The ICJ not only found that Uganda had violated a series of international law principles by engaging in military activities in the territory of the DRC and by committing acts of torture, but also that Uganda was under obligation to make reparation to the DRC for the injury caused.[137] The SCSL strongly promoted the principle of international individual criminal accountability by rejecting the preliminary motions regarding the validity of amnesty brought by Kallon and Kamara. The ECtHR found that certain constitutional provisions of Bosnia and Herzegovina were discriminatory and urged that state to reform its constitution to bring it in line with the Convention. All three tribunals, therefore, left no legal vacuum in the international sphere, by holding either states or individuals accountable for violations of international law. Addressing past violations of international

134 *Armed Activities* case, *supra*, operative paragraph 345.
135 The *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, paras. 71–3.
136 *Sedjic and Finci v. Bosnia and Herzegovina*, *supra*, paras. 50 and 56.
137 *Armed Activities*, *supra*, p. 281, operative para. 345, operative para. 5.

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law enables the restructuring of post-conflict societies, as it gives due respect to the principle of legal accountability.[138]

Moreover, all three tribunals seem to promote the principle of legal certainty. By applying the international legal principles at stake in each case, without reversing the traditional understanding of the law of treaties; reiterating the international prohibition of the use of force and the impossibility of a peace agreement constituting consent by a state to having the troops of another state on its territory; upholding the duty to prosecute war crimes, irrespective whether amnesty provisions are in place; or robustly protecting the right to non-discrimination under the European Convention, they all reached predictable outcomes under international law. The DRC, Uganda, Sierra Leone, and Bosnia and Herzegovina, upon receiving the judgments of each respective tribunal, had a clear picture of how to proceed with their international affairs *vis-à-vis* other states, or towards their own citizens, be they perpetrators of international crimes or victims of human rights violations. Uganda had to withdraw its troops from the DRC, Sierra Leone had Kallon and Kamara imprisoned, and Bosnia and Herzegovina had to amend its constitution to bring it in line with the right to non-discrimination in elections.

5.3. (De-)stabilization of domestic legal certainty and legal accountability by international tribunals

Have the ICJ, the SCSL, and the ECtHR promoted legal certainty and legal accountability, in the post-conflict societies of the DRC, Sierra Leone, and Bosnia and Herzegovina? If one considers the Lusaka Agreement as part of the domestic law of the DRC, the Lomé Agreement as part of the domestic law of Sierra Leone, and Annex 4 of the Dayton Accord as the Constitution of Bosnia and Herzegovina, the impact of the ICJ, the SCSL, and the ECtHR on promoting two of the fundamental tenets of the rule of law, namely legal certainty and legal accountability, in countries in transition comes into question.

The first criticism that can be levelled against these tribunals is that of the destabilization of legal certainty domestically. On the one hand, in the case of Sierra Leone, where numerous amnesties were granted under Article 9 of the Lomé Agreement, the legal certainty aspect of the rule of law in Sierra Leone was perceived to be undermined, because proceeding with the prosecution of Kallon and Kamara called into question the numerous amnesties granted in accordance with the Lomé Agreement, thereby undermining legal certainty in Sierra Leone.[139] For example, there have been increasing calls for the prosecution of Ibrahim Bah, who allegedly supplied arms during the civil war.[140] On the other hand, the indirect finding via the Statute of the SCSL that amnesties are incompatible with crimes against humanity

138 Solomon and Tolbert's argument *a contrario*: D. Tolbert and A. Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies', (2006) 19 *Harvard Human Rights Journal* 29, at 35 (who particularly focus on international crimes, rather than violations of international law in general).

139 Compare and contrast this approach with that of the Truth Commission for Sierra Leone, 3B Witness to Truth, Report of the Sierra Leone Truth and Reconciliation Commission, Chapter 6, p. 4 ('The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement').

140 J. Decapua, 'Sierra Leone: Rights Group – Prosecute Alleged Arms Dealer', *All Africa*, 19 June 2013, <http://allafrica.com/stories/201306240115.html>, accessed 10 January 2014.

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might actually pave the way for other provisions of the Lomé Agreement to be challenged before the Sierra Leone Constitutional Court and might be a step towards entrenching the rule of law domestically. On the one hand, in the case of Bosnia and Herzegovina, if a purely procedural vision of legal certainty is adopted, then the ECtHR had done disservice to the promotion of the stability of the Constitution of Bosnia and Herzegovina by finding certain of its provisions in violation of the right to non-discrimination. On the other hand, given that the Constitution of Bosnia and Herzegovina makes the European Convention applicable domestically and gives it priority over all other domestic law,[141] a ruling of the ECtHR bringing one of the provisions of the Constitution into line with the Convention enhances legal certainty, making the eligibility criteria of the Constitution clearer and more definite in light of the non-discrimination provisions of the Convention.

Furthermore, in terms of the potential impact that each tribunal has domestically, it can be argued that the ICJ is the institution most removed from the ground, the SCSL, less so in light of its hybrid nature, and the ECtHR even less so, which has made itself an effective supranational court.[142] It can be argued that the ICJ's judgment has had little impact on the cessation of armed activities in the DRC, as the situation there remains unstable.[143] Insofar as the SCSL is concerned, both Kallon and Kamara were tried and convicted by the SCSL, while at the same time many of those who bear responsibility for committing crimes in Sierra Leone remain unaccountable. Finally, the ECtHR can be described as the court with the least disconnect with the domestic situation in Bosnia and Herzegovina. This can be explained by the active engagement of the ECtHR with the domestic constitutional provisions concerned, and by its encapsulation of the wider context in which Bosnia and Herzegovina operates, including its pending membership application to the European Union.[144]

6. Conclusion

In the course of its analysis, this article has identified an underlying tension: the adherence of international tribunals to their mandate and their possible undermining of the domestic rule of law in the post-conflict countries under examination. The

141 Art. II(2) of the Constitution of Bosnia and Herzegovina, Annex IV of the Dayton Accord.

142 L. Helfer and A. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273; L. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19(1) EJIL 125.

143 Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region, UN Doc. S/2013/119 (2013); Reports of the Secretary-General of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, UN Doc. S/2013/96 (2013); UN Doc. S/2021/838 (2012); UN Doc. S/2012/355 (2012); UN Doc. S/2012/65 (2012); UN Doc. S/2011/656 (2011); UN Doc. S/2011/298 (2011); UN Doc. S/2011/20 (2011); UN Doc. S/2010/512 (2010); Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, UN Doc. S/2010/164 (2010); UN Doc. S/2009/623 (2009); UN Doc. S/2009/335 (2009); UN Doc. S/2009/160 (2009); UN Doc. S/2008/728 (2008); UN Doc. S/2008/433 (2008); UN Doc. S/2008/218 (2008); UN Doc. S/2007/671 (2007); UN Doc. S/2007/156 (2007); UN Doc. S/2006/759 (2006); UN Doc. S/2006/390 (2006); Report of the Secretary-General pursuant to para. 8 of Resolution 1698 (2006) concerning the Democratic Republic of the Congo, UN Doc. S/2007/68 (2007).

144 See the Statement of the Commissioner for the Enlargement and European Neighbourhood Policy, Štefan Füle, EU-Bosnia and Herzegovina, Sejdić-Finci Positive Progress, 3 December 2013, to the effect of tentative agreement on the new composition and method of the selection of Delegations for the House of Peoples.

common denominator between the DRC, Sierra Leone, and Bosnia and Herzegovina is that all three have been through armed conflict, either internal or international. The exigencies for establishing legal accountability and legal certainty in transitioning states is at all times a difficult task, with concessions being made in the form of amnesties and general framework constitutional provisions, rather than provisions fully fleshing out the fundamental rights and freedoms of their citizens, and time frames for the withdrawal of troops from the territory of another state. Such provisions will be found nowhere in conflict-free, constitutionally stable democratic countries.

Bringing cases before these international tribunals that relate to legal issues arising from facts during the transition of such states signals their transition into peaceful and stable states, where international law, be it the prohibition of the use of force, international criminal law, and international human rights, are protected. International tribunals are called upon to uphold the international legal principles applicable to such countries, indicating the international standards each state is required to meet. Their task is inevitably limited by their respective mandates. Their undermining of legal certainty and predictability might not necessarily be undesirable for states in transition: this indicates that such states need to take steps positively to comply with international law. Legal certainty would only be of value if a state had already aligned its constitutional provisions and its conduct in international affairs with the exigencies of public international law.