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# Building a sustainable peace: How peace processes shape and are shaped by the international legal framework for the governance of natural resources

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Natural resources are strongly connected to the onset, duration and recurrence of armed conflicts. However, even after an armed conflict has formally ended, natural resources can be an important trigger for a relapse into armed conflict. For these reasons, it is of the utmost importance, both from a security and a development perspective, to address natural resources as an integral part of the peace process. This article aims to assess how provisions in peace agreements addressing natural resource governance are embedded in the international legal framework. It inquires into the particularities and legal nature of peace agreements and examines the various functions of natural resource arrangements as part of peace agreements. Finally, as each category of natural resources comes with distinct legal questions and peacebuilding challenges, the article zooms in on water governance as a case study to explore the different ways in which natural resource arrangements in peace agreements and international law interact. The analysis is based on a study of 40 intra-State agreements, including the 2015 South Sudan agreement, the 2015 Mali agreement and the 2016 Colombian agreement.

## 1 | INTRODUCTION

Natural resources are strongly connected to the onset, duration and recurrence of armed conflicts.<sup>1</sup> The contribution of the illicit trade in natural resources to the financing of armed conflicts, including the ongoing conflicts in the Democratic Republic (DR) of the Congo and the Central African Republic, has been well documented.<sup>2</sup> Likewise, con-

flicts over land use and ownership have played an important role in the armed conflicts in Guatemala, Colombia and Sudan, amongst others.<sup>3</sup> Recent reports furthermore point to water shortages, exacerbated by climate change and population growth, as one of the most acute risks for the outbreak of future armed conflicts.<sup>4</sup> However, even after an armed conflict has formally ended, natural resources can be an important trigger for a relapse into armed conflict. Sometimes this is because access to natural resources for armed groups as a source of conflict funding has not been properly cut off. In other situations, disputes between local communities and the government or between such communities over the allocation of natural resources or the distribution of their benefits are the trigger.<sup>5</sup> This is especially so when access to

<sup>1</sup>See, e.g., K Ballentine and H Nitzschke (eds), *Profiting from Peace: Managing the Resource Dimensions of Civil War* (Lynne Rienner 2005); and C Bruch, C Muffett and SS Nichols, 'Natural Resources and Post-conflict Governance: Building a Sustainable Peace' in C Bruch, C Muffett and SS Nichols (eds), *Governance, Natural Resources, and Post-conflict Peacebuilding* (Earthscan 2016) 1.

<sup>2</sup>The armed conflict in the DR Congo has been financed notably through the illicit exploitation and smuggling of tin, tantalum, tungsten and gold, while diamonds and gold are among the primary sources of revenue for armed groups operating in the Central African Republic. For recent overviews, see United Nations Security Council (UNSC) 'Midterm Report of the UN Group of Experts on the Democratic Republic of the Congo' UN Doc S/2017/1091 (22 December 2017) 11–16; and UNSC 'Final Report of the Panel of Experts on the Central African Republic extended pursuant to Security Council Resolution 2339 (2017)' UN Doc S/2017/1023 (6 December 2017).

<sup>3</sup>See, e.g., United Nations Department of Political Affairs (UN DPA) and United Nations Environment Programme (UNEP), 'Natural Resources and Conflict: A Guide for Mediation Practitioners' (2015) 35–36.

<sup>4</sup>See, e.g., Global High-level Panel on Water and Peace, 'A Matter of Survival' (2017); World Bank, 'High and Dry: Climate Change, Water and the Economy' (2016) 19–20.

<sup>5</sup>See C Webersik and M Levy, 'Reducing the Risk of Conflict Recurrence: The Relevance of Natural Resource Management' in Bruch et al (n 1) 39.

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water is jeopardized, as this commodity is essential for satisfying the most basic needs of human beings, including drinking water, sanitation and food production. For these reasons, it is of the utmost importance, both from a security and a development perspective, to address natural resources as an integral part of the peace process. This need to address natural resource governance is reflected in recent peace agreements, which increasingly include natural resource provisions. In their 2015 joint report, the United Nations (UN) Department of Political Affairs and the United Nations Environment Programme signalled that 'all major agreements from 2005 to 2014 contained such provisions', compared to only half of the agreements concluded between 1989 and 2004.<sup>6</sup>

This article aims to assess how natural resource provisions in peace agreements are embedded in the international legal framework, with a specific emphasis on water resources. Of course, the management of natural resources situated within a State's territory is subject to that State's sovereignty. However, this sovereignty is increasingly qualified by international legal obligations entered into by States, either through their participation in treaty regimes or by way of customary international law.<sup>7</sup> Natural resource arrangements in peace agreements are therefore increasingly governed by international law. This is all the more true for water resources, as these often fall within the jurisdiction of more than one State, requiring cooperation or, as a minimum, taking into account the interests of these other States. As a consequence, international law plays an important role in their management. Conversely, natural resource arrangements have the potential to contribute to shaping the international legal framework for the governance of natural resources as part of post-conflict peacebuilding, for example by reinterpreting existing international legal norms for the purpose of addressing the specific needs and challenges of post-conflict societies.

The article assesses these forms of interaction between international law and peace agreements for the purpose of clarifying the overall international legal framework that applies to natural resource governance in post-conflict situations. The term 'governance' is understood to denote the broader framework for the exercise of political authority – either on the global, regional, domestic or local level – with respect to the management of natural resources within States.<sup>8</sup> The focus of the analysis is on peace agreements that have been concluded to end internal armed conflicts. The reasons for confining the analysis to this type of agreement are twofold. First, internal armed conflicts are the most prevalent type of armed conflict today. Resolving these armed conflicts does not only pose specific challenges to the domestic order of States, but also raises distinct questions about the role of the

international community, in light of the principles of non-intervention and sovereign equality enshrined in the UN Charter. Second, the legal nature of peace agreements that end internal armed conflicts is subject to a long-standing doctrinal debate.<sup>9</sup> This makes it all the more relevant to assess how this type of agreement interacts with international law.

For this purpose, the article first inquires into the particularities and legal nature of peace agreements to determine the framework for interaction with the international legal order (Section 2). Subsequently, it examines the various functions of natural resource arrangements as part of peace agreements for the purpose of identifying relevant international legal norms (Section 3). Lastly, the article zooms in on water governance and explores the different ways in which water arrangements in selected peace agreements, including the 2015 agreements on Mali and South Sudan and the 2016 agreement on Colombia, interact with international law (Section 4).

## 2 | CONCEPTUALIZING INTRA-STATE PEACE AGREEMENTS

This section discusses the particularities of peace agreements, explores their legal status and examines their relationship with international law. The purpose of this section is to clarify the phenomenon of peace agreements as well as the framework for their interaction with the international legal order. In line with the general objectives of this article, the focus of the discussion is on intra-State peace agreements.

### 2.1 | The particularities of intra-State peace agreements

Peace agreements can be defined as agreements concluded between parties to an armed conflict for the purpose of ending the armed conflict. Of course, this basic definition does not do justice to the great variety of peace agreements, both in terms of form and substance. From a substantive perspective, the scope of the agreement may range from merely establishing the conditions for a ceasefire between the parties to the conflict to creating the framework for a new State order. In their most developed form, peace agreements do not only regulate the conditions for ending the armed violence; they recreate the very fabric of the political, social and economic structures of the State.<sup>10</sup> These framework agreements can best be described as interim constitutions.<sup>11</sup> In some instances, these agreements even temporarily displace the State's constitution pending legislative proposals for permanent constitutional amendments. However, it should be kept in mind that, in many instances, peace agreements are developed over time as part of a broader peace process. Many peace agreements are 'partial', in the

<sup>6</sup>UN DPA and UNEP (n 3) 46.

<sup>7</sup>See NJ Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997); and DA Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-conflict Situations* (Cambridge University Press 2015).

<sup>8</sup>On the concept of governance and related concepts, see T Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges' (2000) 2 *Third World Quarterly* 795; WA Knight, 'Democracy and Good Governance' in TG Weiss and S Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2008) 620; E Brown-Weiss and A Sornarajah, 'Good Governance' in R Wolfrum (ed), *Encyclopedia of Public International Law, Vol. IV* (Oxford University Press 2012) 516; and KH Ladeur, 'Governance, Theory Of' in R. Wolfrum, *ibid* 541.

<sup>9</sup>See, e.g., C Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008); see also Section 2.2.

<sup>10</sup>For a more detailed assessment of the purposes of peace agreements, see P Wallensteen, *Understanding Conflict Resolution* (3rd edn, Sage 2012).

<sup>11</sup>See J Sapiano, 'Courting Peace: Judicial Review and Peace Jurisprudence' (2017) 6 *Global Constitutionalism* 131, 135–136.

sense that they address distinct issues that are negotiated separately between the parties as part of a series of sequenced negotiations.<sup>12</sup> Ideally, these agreements build towards a final agreement, but this is not necessarily so. The broader setting of the peace process in which the particular agreement has been negotiated should therefore always be taken into account when analysing its arrangements.

Furthermore, to fully appreciate the arrangements set out in the agreements for the post-conflict governance of natural resources, it is important to keep in mind two other particularities of peace agreements. First, the issues that are addressed within a peace agreement are very context-specific and also depend to a great extent on the parties negotiating the agreement. It is not necessarily so that all the parties to the conflict are represented at the negotiation table. A persistent problem is, for example, the underrepresentation of women in the negotiation of peace agreements.<sup>13</sup> In other instances there may be good reasons to exclude parties from the peace process, for example because the beliefs or methods of these parties are incompatible with core values shared by the international community.<sup>14</sup> However, it is clear that these decisions impact upon the terms and modalities of the negotiated settlement. For this reason, it is essential to appraise for each single agreement which of the parties to the armed conflict were represented and, more importantly, what were their stakes at the negotiation table and their political sensitivities. Second, to understand the framework in which a peace agreement operates, it should be noted that, once an agreement has been reached, it is not always implemented. Peace agreements are often fragile, especially when it concerns internal armed conflicts. More precisely, more than a third of these agreements break down within five years.<sup>15</sup> Implementation of the arrangements in peace agreements therefore is often faulty. This

however does not necessarily undermine their normative value, since the arrangements do represent the solution that has been agreed upon by the parties to the agreement. As such, they represent benchmarks for the parties to fall back on.<sup>16</sup> This is why this article focuses primarily on the arrangements themselves, notwithstanding their implementation record.

## 2.2 | The legal nature of intra-State peace agreements

In legal terms, a primary distinction can be made between peace agreements concluded between States and peace agreements concluded between States and armed groups. The former could be classified as 'treaties' within the meaning of Article 2 of the 1969 Vienna Convention on the Law of Treaties, which defines a 'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.<sup>17</sup> Therefore, as long as the agreement satisfies these conditions, it is governed by the rules on *inter alia* the conclusion, interpretation, suspension and termination of treaties as set out in the Vienna Convention, no matter its form or whether it is a single agreement or rather a package of agreements. However, it rarely happens that an internal armed conflict is terminated by a peace agreement between States. One of the exceptions is the 1991 Paris Agreement to settle the armed conflict in Cambodia, which was signed by 19 States, with the Cambodian factions represented by the Supreme National Council signing the agreement on behalf of the State of Cambodia.<sup>18</sup>

Whereas agreements between States qualify as treaties, the situation is different for agreements concluded between States and armed groups. Article 3 of the 1969 Vienna Convention on the Law of Treaties indicates that '[t]he fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law ... shall not affect the legal force of such agreements'.<sup>19</sup> However, this provision does not clarify who can be considered as 'subjects of international law'. The commentary to the Draft Articles adopted by the International Law Commission (ILC) on the topic clearly indicates that the restrictive interpretation of the term 'treaty' was not 'in any way intended to deny that other subjects of international law, such as international organizations and *insurgent communities*, may conclude treaties'.<sup>20</sup> However, it can be derived

<sup>12</sup>See C Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373.

<sup>13</sup>The UNSC, for example, adopted Resolution 1325 (2000) on women and peace and security. This resolution is the first in a series addressing *inter alia* women's participation in conflict resolution and peacebuilding. See UNSC 'Women and Peace and Security' UN Doc S/RES/1325 (31 October 2000). See also C Bell and C O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements' (2010) 59 *International and Comparative Law Quarterly* 941. Notwithstanding some minor improvements, women's participation in peace processes is still marginal. For current data, see <<http://www.unwomen.org/en/what-we-do/peace-and-security/facts-and-figures>> and <<https://www.cfr.org/interactive/womens-participation-in-peace-processes/explore-the-data>>. Important work is carried out *inter alia* by UNEP, UN Women, the UN Development Programme and the Peacebuilding Support Office's (PBSO) Joint Programme on Women, Natural Resources and Peace, which recently established a Knowledge Platform on Gender, Natural Resources, Climate and Peace (<<https://www.gender-nr-peace.org/>>).

<sup>14</sup>In its Resolution 2254 (2015) on Syria, the UNSC noted, for example, that the ceasefire that was to be concluded between the Syrian government and the opposition would not apply to offensive or defensive actions against 'Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al-Nusra Front (ANF), and all other individuals, groups, undertakings, and entities associated with Al Qaeda or ISIL, and other terrorist groups, as designated by the Security Council'. See UNSC 'Middle East (Syria)' UN Doc S/Res/2254 (18 December 2015) para 8.

<sup>15</sup>An empirical study based on the Uppsala Conflict Data Program Peace Agreement Dataset showed that 77 of the 216 agreements concluded between 1975 and 2011 were never implemented. Interestingly, this does not necessarily imply that violence recurs. The study concludes that 'in 19 of these cases violence with the same parties did not restart even though the agreement was not implemented'. See S Höglbladh, 'Peace Agreements 1975-2011 - Updating the UCDP Peace Agreement Dataset' in T Pettersson and L Themnér (eds), *States in Armed Conflict 2011* (Uppsala University, Department of Peace and Conflict Research 2012) 53.

<sup>16</sup>See *ibid*, in which the author notes that '[i]mplementation of an agreement is often protracted. However in many cases where the implementation breaks down the parties continue to say they are bound by the agreement.'

<sup>17</sup>Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 2.

<sup>18</sup>See UNGA and UNSC 'Framework for a Comprehensive Political Settlement of the Cambodia Conflict' UN Docs A/46/608 and S/23177 (30 October 1991). For more information on the 1991 Paris Agreement, see, e.g., S Ratner, 'The Cambodia Settlement Agreements' (1993) 87 *American Journal of International Law* 1.

<sup>19</sup>VCLT (n 17) art 3.

<sup>20</sup>ILC 'Yearbook of the International Law Commission, Vol. II' (1966) UN Doc A/CN.4/SER.A/1966/Add.1 (18 January 1966) 189 (emphasis added).

from the ILC reports that the term 'insurgent communities' refers only to opposition groups 'to which a measure of recognition has been accorded'.<sup>21</sup> These would include recognized self-determination movements within the meaning of Article 1(3) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, such as Polisario in the Western Sahara. However, whether other opposition groups would qualify as subjects of international law having a treaty-making capacity is a more difficult matter.<sup>22</sup> The 2005 Comprehensive Peace Agreement (CPA) concluded between the government of Sudan and the Sudan People's Liberation Movement (SPLM) illustrates this difficulty well. This agreement recognized a right for the South Sudanese people, represented by the SPLM, to external self-determination. As such, it would be valid to conclude that the SPLM enjoyed a large measure of recognition, including by the government of Sudan, and that for this reason the CPA would qualify as a treaty. Nevertheless, the arbitral tribunal which was called upon by the parties to the agreement to settle a dispute regarding its implementation concluded that the CPA was not a treaty. It qualified the CPA instead as an 'agreement ... between the government of a sovereign state, on the one hand, and, on the other, a political party/movement, albeit one which th[is] agreement ... recognize[s] may – or may not – govern over a sovereign state in the near future'.<sup>23</sup> Given the controversies regarding the circumstances in which armed opposition groups are considered to enjoy a sufficient measure of recognition to be deemed capable to conclude treaties, it may be argued that the implementation of the majority of peace agreements concluded between States and armed groups is primarily governed by domestic law.

The principal difference between the two types of peace agreements is therefore that peace agreements concluded between States are an integral part of the international legal order, while peace agreements concluded between States and armed groups are primarily part of the domestic legal order. This difference has implications for the way in which these agreements interact with international law: this interaction is primarily horizontal for inter-State peace agreements and primarily vertical for intra-State peace agreements.

### 2.3 | Relationship with the international legal order

Considering intra-State peace agreements as *part of* domestic law does not imply that they are necessarily *subjected* to international law. To the contrary, in recent years, international courts and tribunals have accepted that peace agreements – because of their specific nature and the interests at stake – may sometimes even temporarily override relevant norms of international law. A specific

example concerns the 1995 Dayton Agreement for Bosnia and Herzegovina. This Agreement determined that only citizens who affiliated with the 'constituent peoples', namely Bosniacs, Croats and Serbs, could be elected for the House of Peoples and the Presidency of Bosnia and Herzegovina.<sup>24</sup> This power-sharing agreement was challenged before the European Court of Human Rights by citizens of Jewish and Roma origin. While the Court questioned both the continued rationale for and proportionality of the discriminatory treatment in light of the changed circumstances, it did recognize as a matter of principle that the exclusion rule was 'broadly compatible with the general objectives of the [European] Convention [on Human Rights], ... namely the restoration of peace'.<sup>25</sup>

In addition, intra-State peace agreements contain and build upon international norms, for example with respect to human rights protection and good governance. It is exactly this interplay between peace agreements and international law that is central to this article and which is further explored in Section 4 with respect to natural resource governance. More generally, references to international legal norms in a peace agreement may serve several interrelated objectives. First, such references may be specifically intended to internationalize the agreement, in the sense that its implementation becomes subject to an international institutional machinery. References to specific human rights in an agreement, for example, may trigger the engagement of human rights treaty monitoring bodies with respect to the interpretation and implementation of the agreement's provisions.<sup>26</sup> Second and related to this, references to international legal norms may provide a universal framework for interpreting the commitments set out in the peace agreement. In this sense, international law functions both as a normative framework and as a shared discourse for the parties to the agreement, providing 'impartial definitions of acceptable behavior that are universally endorsed'.<sup>27</sup>

<sup>24</sup>See UNGA and UNSC 'General Framework Agreement for Peace in Bosnia and Herzegovina' UN Docs A/50/790 and S/1995/999 (30 November 1995) Annex 4 (containing the constitution of Bosnia and Herzegovina), preamble and arts IV and V.

<sup>25</sup>*Sejdić and Finci v Bosnia and Herzegovina* App Nos 27996/06 and 34836/06 (ECtHR, Grand Chamber Judgment, 22 December 2009) para 45. For a more elaborate analysis of this judgment and other relevant judgments, see Sapiano (n 11).

<sup>26</sup>These bodies would then be able to assess a State's performance, both pursuant to periodic reporting procedures and through an individual complaint mechanism. An example includes the 2003 Concluding observations of the Committee on Economic, Social and Cultural Rights (CESCR) with respect to Guatemala, in which the Committee indicated its concern regarding adverse impacts 'on the full realization of economic, social and cultural rights enshrined in the Covenant, particularly with regard to indigenous peoples' as a result of serious problems caused by insufficient progress made by the State party towards the effective implementation of the Peace Agreements of 1996 (including the Global Agreement on Human Rights, the Agreement on Social and Economic Aspects and the Agrarian Situation). See CESCR 'Concluding Observations on Guatemala' UN Doc E/C.12/1/Add.93 (12 December 2003) para 10. See also K Hulme, 'Using a Framework of Human Rights and Transitional Justice for Post-conflict Environmental Protection and Remediation' in C Stahn, J Iverson and J Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford University Press 2017) 119, 129; and, more generally, C Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000).

<sup>27</sup>See S Akram et al, *International Law and the Israeli-Palestinian Conflict: A Rights-based Approach to Peace in the Middle-East* (Routledge 2011) 4; and P Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge University Press 2015) 33–36.

<sup>21</sup>See ILC 'Report of the International Law Commission Covering the Work of its Fourteenth Session, 24 April–29 June 1962' UN Doc A/5209 (1962) 164.

<sup>22</sup>See, e.g., Bell (n 12) 380–381; C Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalization of Peace Agreements between State and Non-State Parties* (Cambridge University Press 2018).

<sup>23</sup>*The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)* (Award) (22 July 2009) PCA Case No 2008-07 para 427. For an analysis, see SP Sheeran, 'International Law, Peace Agreements and Self-determination: The Case of the Sudan' (2011) 60 *International and Comparative Law Quarterly* 423.

Logically, the use of international legal notions in a peace agreement may also have a catalysing effect on norm creation related to peace processes. This is the type of interaction Christine Bell refers to when she employs the notion of *lex pacificatoria*, that is, 'the law of the peacemakers'.<sup>28</sup> In her work, she has convincingly demonstrated how peace settlement practice has developed innovative concepts which have had an impact on the interpretation of, *inter alia*, the right to self-determination and international refugee law.<sup>29</sup> Section 4 below addresses this type of normative interaction with respect to natural resource governance.

Furthermore, intra-State peace agreements result on a regular basis of international efforts of mediation and consultation, while often international monitoring and review are part and parcel of these agreements. These forms of international involvement in the negotiation and implementation of intra-State peace agreements have two notable effects. First, the agreement itself becomes internationalized due to the involvement of international organizations and third States. The role of these actors can be confined to political support for the peace agreement, through notions such as 'witnesses' or 'guarantors' to the agreement, but it can also take the form of direct international involvement in the monitoring of the agreement. Examples of the latter include the deployment of a verification or peacekeeping mission to actively support implementation of the agreement.<sup>30</sup> In many instances, arrangements for the deployment of these missions are part and parcel of the peace agreement and only need subsequent authorization by the respective international organization.<sup>31</sup> Another effect of the involvement of international actors can be seen in the substance of the agreement. International actors bring with them their own sets of norms, which are based on international legal norms and principles.<sup>32</sup> For example, the official policy of the UN precludes it from co-signing an agreement which includes full amnesties for the commission of international crimes.<sup>33</sup> UN involvement in the negotiation of a peace

agreement may therefore, *inter alia*, impact upon the transitional justice arrangements of the agreement.

In sum, this article posits that the interaction between peace agreements and international law goes two ways. First, international law provides a normative and interpretative framework for the design and implementation of the arrangements set out in peace agreements. Second, peace agreements can also shape and further develop international law, most notably by providing novel interpretations to existing norms and principles in international law. This interplay is further explored in Section 4, focusing specifically on water governance.

### 3 | POSITIONING NATURAL RESOURCE ARRANGEMENTS WITHIN PEACE AGREEMENTS

While the previous section addressed intra-State peace agreements in a more general fashion, the current section focuses on the position of natural resource arrangements within these agreements. As indicated in the introduction, all major peace agreements concluded in recent years include provisions on natural resources. More specifically, one can discern three categories of natural resources addressed in these agreements, namely renewable natural resources, such as water, fisheries, wildlife and forests; non-renewable or extractive natural resources, such as oil, gas and minerals; and land.<sup>34</sup> The purpose of this section is to clarify the underlying factors which explain how natural resources are addressed in peace agreements. For this purpose, Section 3.1 addresses these underlying factors, while Section 3.2 delves into the various categorizations used in peace agreements with respect to natural resource arrangements.

#### 3.1 | The relationship between natural resources and the conflict dynamics

The way in which natural resources are addressed in peace agreements depends on several factors, which are closely related to the dynamics of the armed conflict for which a settlement is negotiated. These factors are related to the nature of the underlying armed conflict, the role that natural resources played within this conflict and the type of natural resources involved. These factors are discussed in turn.

Every armed conflict has its own dynamics, which frames the resulting peace process. Nevertheless, on a more abstract level, one can distinguish between various categories of armed conflict, which partly determine how questions relating to natural resource governance could be addressed. Addressing intra-State armed conflicts exclusively, a distinction should be made between armed conflicts in which opposition movements contest the authority of the

<sup>28</sup>See Bell (n 9); and C Bell, 'Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus post Bellum*' in N White and C Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar 2013) 499.

<sup>29</sup>See Bell (n 9).

<sup>30</sup>Examples of these types of missions include the United Nations Verification Mission in Guatemala, deployed by the UN between 1994 and 2004 to monitor the peace process in Guatemala; and the United Nations Mission in Sierra Leone, deployed by the UN between 1999 and 2005 to cooperate with the government and the other parties in implementing the Lomé Peace Agreement and to assist in the implementation of the disarmament, demobilization and reintegration plan.

<sup>31</sup>See, e.g., Section 6.3.3 of the Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace in Colombia (24 November 2016), English translation in Annex II to UNSC 'SG Letter of 29 March 2017 Addressed to the PSC (Colombia)' UN Doc S/2017/272 (21 April 2017), which specifically requests for the deployment of a UN verification mission mandated to 'verify the reintegration of FARC-EP personnel and the implementation of personal and collective security and protection measures'. This request was endorsed by the UNSC, which established the mission pursuant to Resolution 2366 (2017). See UNSC 'Identical Letters Dated 19 January 2016 from the Permanent Representative of Colombia to the United Nations Addressed to the Secretary-General and the President of the Security Council (S/2016/53)' UN Doc S/RES/2366 (10 July 2017).

<sup>32</sup>See Kastner (n 27) 88.

<sup>33</sup>See UN Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies' UN Doc S/2004/616 (23 August 2004) para 10.

<sup>34</sup>UNEP, 'Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations' (2012) 11.

government, secessionist armed conflicts and conflicts involving indigenous peoples. To the extent that natural resources play a role in the underlying dynamics of these armed conflicts, each type of armed conflict requires different solutions.

The resolution of classical power struggles involving natural resources calls for the inclusion of arrangements that restore governance of natural resources to the central government and focus on incorporating safeguards to promote equitable access to natural resources and their benefits. The 2016 Colombian Peace Agreement, for example, contains detailed arrangements for 'democratizing land access', including the creation of a permanent land bank 'as a vehicle for free distribution'.<sup>35</sup> This land bank is created 'for the benefit of *campesino* communities and especially rural women with insufficient or no land and the rural communities most affected by poverty, neglect and the conflict; legalizing property ownership rights; and, as a result, reversing concentration and promoting a fair distribution of land'.<sup>36</sup>

The resolution of secessionist armed conflicts on the other hand calls for arrangements which redistribute power among the former belligerents. The 2005 Agreement between Sudan and South Sudan provides a relevant example. This agreement provided for a transitional period in which South Sudan obtained substantial autonomy within the existing boundaries of the State of Sudan until a referendum was held. This referendum would allow the people of South Sudan to choose between remaining an autonomous region within the State of Sudan or the creation of a new State of South Sudan. As part of this transitional arrangement, the agreement provided for a concurrent competence for the government of Sudan and the newly established (local) government of South Sudan as regards land tenure and the sharing of the proceeds of oil production between them.<sup>37</sup> This kind of power-sharing mechanism is fairly common in peace agreements that end secessionist armed conflicts.

Lastly, armed conflicts involving indigenous peoples call for special arrangements which protect indigenous peoples' rights over land and natural resources, as recognized by international law. Several human rights bodies have recognized the special relationship of indigenous peoples with their traditional lands and natural resources as part of their rights to self-determination and to enjoy their culture.<sup>38</sup> The inclusion of arrangements regulating ownership and/or access for indigenous peoples to their lands and natural resources are therefore

essential. This may also implicate respecting practices that may otherwise be illegal. Here again, the 2016 Colombian peace agreement provides a conspicuous example, where an exception to a domestic policy to ban illicit coca production is made for indigenous peoples. The agreement provides in the relevant part that '[t]he policy must continue to recognize the ancestral and traditional uses of the coca leaf, as part of the indigenous community's cultural identity'.<sup>39</sup>

Not only the categorization of the armed conflict is determinative of how natural resources are addressed in peace agreements, also the role that natural resources have played in the conflict assumes an important role. Natural resources are rarely among the root causes of armed conflicts, but they have been associated to their outbreak.<sup>40</sup> The *grievances* theory focuses on perceived injustices relating to the use of natural resources as a cause for the outbreak of armed conflict. These perceived injustices may relate to the effects of the exploitation of natural resources on the living environment of particular ethnic or social groups or they may relate to the (unequal) distribution of the benefits obtained from the exploitation of natural resources.<sup>41</sup> The *greed* theory on the other hand focuses on the prospects for armed groups to gain access to large deposits of natural resources as an incentive to start an armed conflict.<sup>42</sup> Related to greed as a factor in the onset of armed conflicts is the role that natural resources rents can play in perpetuating the armed conflict. Natural resources give parties to an armed conflict access to weapons and to political support. In addition, the profits obtained from resource exploitation can prove to be a disincentive for armed groups to sit down at the negotiating table.<sup>43</sup>

Obviously, addressing grievances over natural resources requires a radically different approach than addressing their contribution to conflict financing. To address grievances, peace agreements would have to include arrangements that regulate the allocation of natural resources among marginalized communities and enhance their participation in decision making. Where natural resources played a role in financing armed groups, peace agreements would more likely include arrangements aimed at incentivizing armed groups to participate in the peace process (e.g. through disarmament, demobilization and reintegration (DDR) programmes or power-sharing arrangements),<sup>44</sup> while at the same time including measures to curb conflict

<sup>35</sup>Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (n 31) Section 1.1.1.

<sup>36</sup>*ibid.*

<sup>37</sup>See The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (9 January 2005) <<https://peacemaker.un.org/node/1369>> Chapter III (on wealth-sharing).

<sup>38</sup>See, e.g., CESCR 'Guidelines for the Treaty-specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/C.12/2008/2 (24 March 2009); and HRC 'Guidelines for the Treaty-specific Document to be Submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights' UN Doc CCPR/C/2009/1 (22 November 2010) under art 1. There is also a rich body of case law in regional human rights systems, most notably within the Inter-American system. See UNGA 'Report of the International Law Commission Seventieth Session (30 April–1 June and 2 July–10 August 2018)' UN Doc A/73/10 (2018) 253–256 for references to relevant case law and legal provisions.

<sup>39</sup>Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (n 31) Section 4.

<sup>40</sup>See, e.g., P Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources* (Oxford University Press 2013) 14.

<sup>41</sup>See, e.g., MT Klare, *Resource Wars: The New Landscape of Global Conflict* (Metropolitan Books 2001) 208; and M Ross, 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases' (2004) 58 *International Organization* 41.

<sup>42</sup>P Collier and A Hoeffler, 'Greed and Grievance in Civil War' (2004) 56 *Oxford Economic Papers* 563.

<sup>43</sup>See, e.g., I Bannon and P Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (World Bank 2003) 217–218.

<sup>44</sup>Power-sharing refers to 'the reconstitution of "normal" politics in a postconflict society through new institutional arrangements including different degrees of autonomy and federalism, or governance arrangements. Power-sharing shapes incentives of belligerents so that the benefits from participating in a government of national unity or autonomy arrangements are greater than challenging or overthrowing the government.' See A Wennmann, 'Breaking the Conflict Trap: Addressing the Resource Curse in Peace Processes' (2011) 17 *Global Governance* 265, 267.

financing for armed groups undermining the peace process (through institution building).

Of course, even if natural resources did not play a role in the conflict, it may still be important to include specific provisions in the agreement. This is especially so when natural resources are damaged as a result of the hostilities. Collateral damage to the environment is a common feature of armed conflicts. Arrangements with respect to restoring the degraded environment are regularly included in peace agreements.<sup>45</sup>

A last factor impacting the way natural resources are addressed in peace agreements stems from the type of natural resource involved. As Jensen and Kron indicate:

*Different types of natural resources such as minerals, oil and gas, timber, land and water can generate unique kinds of conflict between stakeholders, often at different spatial and political scales.... Typically, the potential for a natural resource to generate risks and vulnerabilities that drive conflict depends on the magnitude and distribution of revenues and benefits they generate, the number of livelihoods they directly support or the scale of negative impacts they cause.*<sup>46</sup>

Indeed, scarce natural resources such as water have a very different role in the conflict dynamics than valuable export commodities such as diamonds.<sup>47</sup> In addition, these natural resources also have different functions in peacebuilding. Diamonds for example, can perform an important function in kick-starting the economy and ensuring peace-dividends. Water on the other hand, is essential to support livelihoods.

### 3.2 | Categorization of natural resource arrangements in peace agreements

As a result of the factors examined in the previous section, natural resource arrangements in peace agreements can be categorized in the following ways. First, natural resources are often addressed from a developmental or humanitarian perspective. Relevant provisions relate to the task of the government to provide basic services to the population or concern arrangements regarding access for communities to natural resources. A human rights-based approach is particularly apt for the implementation of this type of provisions. Second, natural resource arrangements often call for environmental protection measures. These arrangements relate to the restoration and/or conservation of (degraded) natural resources. International environmental law as well as human rights law are relevant for the implementation of these arrangements. Third, natural resources can be addressed from a security perspective. Relevant arrangements

approach natural resources as tools to build confidence between former belligerents. These arrangements are often connected to DDR programmes and include projects aimed at restoring vital infrastructure, such as water systems, as a means to reintegrate former combatants. As such, international law on peace and security and, more specifically, peacekeeping operations may play an important role in their implementation. Finally, also relating to security, one can discern arrangements that establish structures for the governance of natural resources and their revenues. These include power-sharing, wealth-sharing and/or autonomy arrangements. These types of arrangements are primarily addressed through the constitutional order of the respective State. However, international law does play a role in their implementation. Where it concerns autonomy arrangements, international legal norms relating to the right to self-determination, such as the requirement that any choice for a particular political and economic system has to be based on 'a free and genuine expression of the will of the peoples concerned',<sup>48</sup> provide the parameters for the design and implementation of these arrangements. Likewise, power-sharing arrangements need to respect obligations arising from the right to self-determination, including most importantly that natural resources exploitation must benefit the people of the State.<sup>49</sup>

From this categorization<sup>50</sup> it is clear that natural resource arrangements in peace agreements interact with several branches of international law, including international human rights law, international environmental law and international law relating to the maintenance of international peace and security. These connections are further explored in the following section, which aims to situate peace agreements within the international regulatory environment for the management of natural resources within States.

## 4 | INTERPLAY BETWEEN PEACE AGREEMENTS AND INTERNATIONAL LAW

The natural resource arrangements in peace agreements do not operate in a legal vacuum. On the contrary, these arrangements are part of a broader international regulatory framework which delineates the governance of natural resources at the domestic level. In addition, as set out in Section 2, peace agreements themselves often contain and build upon international norms. This section explores these forms of interplay in more detail. Section 4.1 sets out the general framework for interplay between natural resource arrangements in peace agreements and the international legal framework for the governance of natural resources within States. Section

<sup>48</sup>See *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 para 55.

<sup>49</sup>For a more in-depth analysis of how peace agreements have developed international law in this respect, see DA Dam-de Jong, 'Balancing National Ownership with International Intervention: Combating Illegal Exploitation of Natural Resources through Peace Processes' in M Weller et al (eds), *International Law and Peace Settlements* (2020, Cambridge University Press fc).

<sup>50</sup>See for a slightly different categorization, SJA Mason, DA Sguaitamatti and MPR Gröbli, 'Stepping Stones to Peace? Natural Resource Provisions in Peace Agreements' in Bruch et al (n 1) 71, 100.

<sup>45</sup>See ILC 'Third Report on the Protection of the Environment in Relation to Armed Conflict' UN Doc A/CN.4/700 (3 June 2016) 45.

<sup>46</sup>D Jensen and A Kron, 'Environmental Peacebuilding and the United Nations' in A Swain and J Öjendal (eds), *Routledge Handbook of Environmental Conflict and Peacebuilding* (Routledge 2018) 121, 131.

<sup>47</sup>See M Renner, 'The Anatomy of Resource Wars' (WorldWatch 2002) 8–9.

4.2 subsequently explores how these forms of interplay take shape in selected peace agreements. The focus of this section is on water governance, in line with the general theme of this special issue.

#### 4.1 | The international legal framework for the governance of natural resources within States

The governance of natural resources is primarily regulated by the principle of permanent sovereignty over natural resources. This principle has been set out in several UN General Assembly resolutions and treaties and is considered to be part of customary international law.<sup>51</sup> It provides States considerable freedom to freely dispose of their natural resources, as long as they respect the limitations that international law has set for the purpose of *inter alia* protecting human rights, the environment and foreign investors.<sup>52</sup> Some of these limitations ensue directly from the principle itself. The 1962 Declaration on Permanent Sovereignty over Natural Resources, which is the key document formulating the principle, includes an obligation for States to exploit natural resources for national development and the well-being of the people.<sup>53</sup>

Other limitations can be derived from the broader international legal framework. Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), incorporating the right of peoples to economic self-determination, for example, provides that 'in no case may a people be deprived of its own means of subsistence'.<sup>54</sup> Arguably, this right contains both a horizontal (inter-State) as well as a vertical (people versus government) dimension.<sup>55</sup> The rights of foreign investors also impose clear limitations on the right of States to freely dispose of their natural resources by way of standards such as 'fair and equitable treatment' as well as the conditions attached to expropriation of property.<sup>56</sup> Furthermore, multilateral environmental agreements formulate obligations for States with respect to conservation of

natural resources, including their sustainable use. Some of these environmental conventions formulate general constraints for States regarding the sustainable use of their natural resources, based either on the precautionary principle or on the customary law obligation to prevent significant transboundary environmental harm.<sup>57</sup> Other conventions promote nature conservation, *inter alia*, through the establishment and protection of designated sites. These conventions, notably the 1971 Ramsar Convention on Wetlands of International Importance, the 1972 World Heritage Convention and the 1992 Convention on Biological Diversity,<sup>58</sup> are particularly relevant for peacebuilding, since their institutional machinery may offer valuable assistance to post-conflict States to restore their environment.<sup>59</sup>

These regimes apply to natural resources that are found within a State's territory and under its national economic jurisdiction in maritime waters, but also to natural resources shared between two or more States. Moreover, specifically relevant for the protection of water resources, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Convention) contains rules relating to the protection of the aquatic environment, including the principles of prevention, precaution and the polluter-pays principle.<sup>60</sup> Some of these rules have also been included in the 1997 Convention on the Law of the Navigational Uses of International Watercourses (UN Watercourses Convention). This Convention moreover contains rules for the allocation of water resources, based on the principles of equitable use and participation. Many of its rules codify or build on customary international legal norms.<sup>61</sup> However, notwithstanding the entry into force of the UN Watercourses Convention in 2014 and the recent expansion of

<sup>57</sup>See, e.g., Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 3 August 1975) 1046 UNTS 120 preamble; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 194(2); CBD (n 51) art 3; the UNFCCC (n 51) preamble, para 8; and United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 715 art 7.

<sup>58</sup>Article 2 of the Ramsar Convention determines that '[e]ach Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance', while Article 3 prescribes that 'Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.' See Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention) arts 2–3. Likewise, Articles 3 and 4 of the World Heritage Convention (n 51) formulate an obligation for States to identify and delineate world heritage within their territory and to ensure their 'protection, conservation, presentation and transmission to future generations'. Lastly, Article 8 of the CBD (n 51) requires States to establish 'a system of protected areas or areas where special measures need to be taken to conserve biological diversity' and to 'promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings'.

<sup>59</sup>See, e.g., B Sjöstedt, 'The Ability of Environmental Treaties to Address Environmental Problems in Post-conflict' in Stahn et al (n 26) 73.

<sup>60</sup>The UNECE Convention was developed for the European region in the context of the UN Economic Commission for Europe (UNECE). However, the Convention has been amended to allow all UN member States to accede to it, a possibility that has become effective as of 1 March 2016. In 2018, two African States (Chad and Senegal) acceded.

<sup>61</sup>Owen McIntyre refers to the UN Watercourses Convention as 'a statement of current customary and general international law on watercourses'. See O McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources' (2006) 46 Natural Resources Journal 157, 160 fn 2.

<sup>51</sup>See, e.g., UNGA 'Declaration on Permanent Sovereignty over Natural Resources' UN Doc A/RES/1803(XVII) (14 December 1962). Relevant treaties incorporating the principle include the United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); the Convention for the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (World Heritage Convention); and the Convention on Biological Diversity (adopted 5 May 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD). Very importantly, the principle is also enshrined in identical Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), and the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The International Court of Justice confirmed the customary nature of the principle of permanent sovereignty over natural resources in its judgment of 19 December 2005 in the *Armed Activities on the Territory of the Congo* case. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 para 244.

<sup>52</sup>See Schrijver (n 7).

<sup>53</sup>The Declaration proclaims that '[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'. See Declaration on Permanent Sovereignty over Natural Resources (n 51) para 1.

<sup>54</sup>ICESCR (n 51) art 1(2); and ICCPR (n 51) art 1(2).

<sup>55</sup>For this argument, see Dam-de Jong (n 7) 77–80.

<sup>56</sup>See generally Schrijver (n 7).

the UNECE Convention, customary norms as well as regional agreements still form the backbone of international freshwater law. This is partially because relatively few States have thus far ratified the conventions, but also because the UN Watercourses Convention itself encourages the conclusion of regional agreements. Nevertheless, considering the body of international freshwater law as a whole, it may be argued that it contains principles and rules that are crucial for the interpretation and implementation of arrangements with respect to water management in intra-State peace agreements. Examples are discussed in the following section.

## 4.2 | A closer look at forms of interplay between natural resource arrangements and the international legal framework

Natural resource arrangements in peace agreements operate within the regulatory framework that was set out in the previous section. The international legal framework therefore directly impacts upon the implementation of these arrangements. More specifically, it is posited that international law provides a normative framework for the design and implementation of natural resource arrangements within the peace agreement. This relates to the first type of interplay between international law and peace agreements, as examined in Section 2. In addition, it is posited that natural resource arrangements in peace agreements can also shape and further develop international law, most notably by giving substance to open-ended norms and principles in international law. The current section examines these forms of interplay in more detail, focusing specifically on water arrangements. It analyses the arrangements on the level of the agreement itself, without entering into details on how the arrangements have actually been implemented. The reason for this restriction stems from the article's objective to conceptualize peace agreements and their interplay with international law rather than looking at how specific peace agreements are implemented. The current section is based on a study of approximately 40 intra-State peace agreements.<sup>62</sup>

Intra-State peace agreements often approach water from a developmental or humanitarian perspective. These water arrangements focus on satisfying primary needs in the post-conflict environment, notably restoring water installations and access to potable drinking water for the population. Examples include the 2007 agreement for Côte d'Ivoire, which contains a provision on the rehabilitation of public services, including with respect to water;<sup>63</sup> the 2013 agreement on Darfur, which provides that the government of Sudan 'shall ... promote general welfare and economic growth in Darfur through the provision of basic services and infrastructure including water';<sup>64</sup> and the 2015 agreement for Mali, which contains as a priority issue the rehabilitation of wells

and sinks.<sup>65</sup> International law is directly relevant for the implementation of these provisions, as it sets standards for the right to access to water. As a minimum, identical Article 1(2) of the ICCPR and the ICESCR on the right of peoples to economic determination determines that 'in no case may a people be deprived of its own means of subsistence'. In addition, pursuant to Articles 11 (adequate standard of living) and 12 (right to health) of the ICESCR, everyone is entitled to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.<sup>66</sup> This implies, for example, that a State recovering from armed conflict should make careful choices on the arrangements to be made in implementing these provisions. The right to affordable water can be seriously impeded if a State, for example, fails to make adequate contractual arrangements with private water providers.

Furthermore, international human rights law stipulates that access to water should be provided on a non-discriminatory basis. This can be derived first of all from Article 2(2) of the ICESCR, which stipulates an obligation for the State parties 'to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>67</sup> The Committee on Economic, Social and Cultural Rights has further emphasized that '[w]ater and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds'.<sup>68</sup> These and other standards derived from international human rights law should guide States in the rehabilitation of water services.<sup>69</sup>

Peace agreements also approach water more generally from a sustainable development or environmental perspective. The 2015 Peace Agreement for South Sudan, for example, stipulates that the transitional government 'shall develop a comprehensive policy for the use and management of South Sudan's water bodies, including but not limited to river Nile'.<sup>70</sup> Customary international law provides the principal framework for the implementation of this provision.<sup>71</sup> Particularly relevant for this example is the customary principle of equitable utilization, which aims to balance the different needs of

<sup>62</sup>Most of these agreements have been included in the Language of Peace database. This database has been developed by Cambridge University and United Nations Peacemaker; see <<https://www.languageofpeace.org>>. It enables key word searches of all peace agreements in the database.

<sup>63</sup>Accord Politique de Ouagadougou (4 March 2007) Section 4.2.

<sup>64</sup>Agreement between the Government of Sudan and the Justice and Equality Movement-Sudan on the Basis of the Doha Agreement for Peace in Darfur (6 April 2013) art 2(4).

<sup>65</sup>Accord Pour la Paix et la Reconciliation au Mali – Issu du Processus d'Alger (20 June 2015) (Mali Accord) Annex 3, art I.

<sup>66</sup>CESCR 'General Comment No. 15 on the Right to Water' UN Doc E/C.12/2002/11 (20 January 2003) para 2.

<sup>67</sup>ICESCR (n 51) art 2(2).

<sup>68</sup>CESCR (n 66) para 12(c)(iii).

<sup>69</sup>For an in-depth assessment of a human rights approach to water in post-conflict situations, see M Tignino, 'The Right to Water and Sanitation in Post-conflict Legal Mechanisms: An Emerging Regime?' in E Weintal, J Troell and M Nakayama (eds), *Water and Post-conflict Peacebuilding* (Earthscan 2014) 383.

<sup>70</sup>Agreement on the Resolution of the Conflict in South Sudan (17 August 2015) Section 4.3.

<sup>71</sup>The regional framework governing the Nile river may also be relevant for the implementation of this provision, but this framework is highly fragmented. The upper riparian States (Ethiopia, Rwanda, Tanzania, Uganda, Kenya and Burundi) have adopted the 2010 Nile Basin Cooperative Framework Agreement, which is inspired on the UN Watercourses Convention. The two downstream States, Sudan and Egypt, in contrast hold on to a bilateral agreement concluded between both States in 1959 and which regulates water allocation between these two States only. This is why the current analysis is confined to customary international law.

the riparian States. The relevance of this principle for the management of shared watercourses has been confirmed by the International Court of Justice in its judgment concerning the Gabčíkovo-Nagymaros project between Hungary and Slovakia. In this judgment, the Court recognized a 'basic right to an equitable and reasonable sharing of the resources of an international watercourse' for all riparian States sharing a watercourse.<sup>72</sup> The UN Watercourses Convention, although strictly speaking not binding on South Sudan or the other States sharing the Nile, provides a relevant framework for interpreting the principle of equitable use. In addition to defining the principle in Article 5, the Convention also formulates several factors in Article 6 that need to be taken into account for the purpose of determining whether utilization by a State of a particular watercourse can be considered 'equitable'. These factors include the social and economic needs of the watercourse States concerned, the population dependent on the watercourse in each watercourse State and the effects of the use or uses of the watercourses in one watercourse State on other watercourse States. Articles 5 and 6 together may therefore provide an interpretative framework for the implementation of the provision in the peace agreement.

Another example of a peace agreement that approaches water from a sustainable development perspective is the 2015 Peace agreement for Mali. This agreement contains a provision on measures that are to be taken on the longer term to promote development of the northern provinces, including measures to prevent the siltation of the river Niger.<sup>73</sup> The 2008 Niger Basin Water Charter and its Appendix on Environmental Protection of the Niger Basin<sup>74</sup> include detailed provisions on the prevention of pollution, based on several important international environmental law principles, including the principles of precaution, prevention, public participation and the polluter pays. The 2014 Revised Convention on Establishment of the Niger Basin Authority furthermore provides an institutional framework for cooperation between the member States of this international organization for the purpose of ensuring 'an integrated development of the Niger Basin'.<sup>75</sup> These agreements are all interconnected and provide the principal legal framework for any measures to prevent the siltation of the Niger, as set out in the 2015 peace agreement. This means that Mali must implement the relevant provision within the parameters provided by this regional framework and relevant principles of customary international law.

International water law therefore provides a normative, institutional and interpretative framework for the implementation of the commitments set out in both agreements. One could even argue that the commitments set out in the peace agreements restate existing obligations under international law. In this sense, international law could be considered the primary framework of reference for the interpretation and implementation of these provisions.

In addition to instances where water arrangements in peace agreements are shaped by international law, these arrangements can also shape and further develop international law. A word of caution is appropriate in this respect. The legal status of intra-State peace agreements is unclear and it cannot be assumed that these agreements are part of international law, as set out in Section 2. Peace agreements should therefore be approached primarily as instances of State practice, one of the constitutive elements of the process of customary international law formation. To assess whether natural resource arrangements have developed the international legal regime for the governance of natural resources in post-conflict settings, it must therefore be determined that these arrangements have merged into a consistent practice and that this practice reflects the *opinio juris* of these States.<sup>76</sup> Such an assessment exceeds the limits of this article, which therefore confines itself to some preliminary observations.

The 2013 agreement between the government of the DR Congo and armed opposition group M23 as well as the 2016 agreement between Colombia and the FARC provide relevant examples of practice which has the potential to develop international law. Both agreements contain provisions on the cantonment of former members of the armed groups, as part of transitional security arrangements. Interestingly, the choice for the location and size of the camps is made conditional on the availability of water. The peace agreement between the DR Congo and M23 states in the relevant part: 'The criteria for the selection of the Primary Cantonment Sites shall include the following: ... iv. Availability of water.'<sup>77</sup> Likewise, the peace agreement between Colombia and the FARC states that '[t]he size of the [transitional local points for normalization] will reflect the nature of the terrain, the amount of water and the number of FARC-EP members to be located there'.<sup>78</sup>

These provisions build on the general provisions in the 1949 Geneva Conventions and the 1977 Additional Protocol II on humane treatment of persons deprived of their liberty in non-international armed conflicts. Most relevant, Article 5(1)(b) of Additional Protocol II determines that 'the persons referred to in this paragraph shall, to

<sup>72</sup>Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997], ICJ Rep 7 para 78.

<sup>73</sup>Mali Accord (n 65) Annex 3, art II.

<sup>74</sup>Charter of the Niger Basin Water (adopted 30 April 2008) <[http://www.abn.ne/images/documents/textes/water\\_charter.pdf](http://www.abn.ne/images/documents/textes/water_charter.pdf)> (Niger Basin Water Charter); Appendix No 1 to the Charter of the Niger Basin Water on the Protection of the Environment of the Niger Basin <[http://www.abn.ne/images/documents/textes/annexe1\\_charte\\_eau\\_protection\\_%20environnement\\_eng.pdf](http://www.abn.ne/images/documents/textes/annexe1_charte_eau_protection_%20environnement_eng.pdf)> (Appendix on Environmental Protection of the Niger Basin).

<sup>75</sup>Revised Convention on Establishment of the Niger Basin Authority (adopted 13 August 2014) <[http://www.abn.ne/images/documents/Convention/revised\\_convention.pdf](http://www.abn.ne/images/documents/Convention/revised_convention.pdf)> art 3.

<sup>76</sup>See generally on the process of international customary law formation, the reports of the International Law Commission on the Identification of Customary International Law, available through <[http://legal.un.org/ilc/guide/1\\_13.shtml](http://legal.un.org/ilc/guide/1_13.shtml)>.

<sup>77</sup>See Outcome Documents from the Conclusion of the Kampala Dialogue between the Government of the Democratic Republic of the Congo and the M23 (adopted 12 December 2013) <<https://peacemaker.un.org/drc-kampala-final-declarations2013>> Annex A, Section II, art 26.

<sup>78</sup>See Protocol and annexes to the chapter on deployments in the field and zones in the Agreement on the Bilateral and Definitive Ceasefire and Cessation of Hostilities and Laying Down of Arms ('the Ceasefire Agreement') Annex II to UNSC 'SG Letter of 29 March 2017 Addressed to the PSC (Colombia)' (n 31) 217 (emphasis added).

the same extent as the local civilian population, be provided with food and drinking water'.<sup>79</sup> This provision therefore formulates an obligation for a party to an armed conflict to provide drinking water to persons deprived of their liberty in relation to the armed conflict, but qualifies the contents of the obligation on the local circumstances.<sup>80</sup> This is a notable difference with the provisions included in the two peace agreements, which precondition the location and size of the camps on the availability of water in the region. As such, these arrangements expand the protection of detainees in non-international armed conflicts.

Furthermore, the 2016 peace agreement between the government of Colombia and the FARC explicitly recognizes that protection and promotion of access to water is an integral part of sustainable development. This is apparent from the agreement's definition of sustainable development, as one of the principles that will guide the implementation of the package for comprehensive rural reform in Colombia. Sustainable development is defined here as 'development that is environmentally and socially sustainable, requiring protection and promotion of access to water, as part of an ordered concept of territory'.<sup>81</sup> The agreement furthermore contains an explicit reference to the right to water. Article 1.1.10 on 'closure of the agricultural frontier and protection of reserve areas' determines that the government, pursuant to 'the principles of rural community participation and sustainable development', will 'implement an environmental zoning plan to define the agricultural frontier ... with a view to safeguarding biodiversity and the population's *progressive right to water*, and the promotion of its rational use'.<sup>82</sup> In this way, the agreement, as an example of State practice, may play a role in crystallizing the legal status of the human right to water. This right has been recognized as inherent to other human rights (such as the rights to life, enshrined into Article 6 of the ICCPR, and to an adequate standard of living, included in Article 11 of the ICESCR), but its status as an autonomous human right is still debated.<sup>83</sup> The explicit reference to the right to water in the agreement may be taken as evidence of State support for the existence of the right.

These are only some examples in which water arrangements in peace agreements provisions have the potential to shape the international legal regime on water governance. Of course, the

conclusions that have been reached are tentative and require further study. Nevertheless, the examples clearly show that peace settlement practice may play a role in reinterpreting, expanding and confirming international legal norms related to the management of water in post-conflict settings. In these ways, the examples underline the relevance of peace settlement practice for international law.

## 5 | CONCLUSIONS

This article sought to assess how natural resource provisions in peace agreements are embedded in the international legal framework. While it is most appropriate to approach intra-State peace agreements as belonging primarily to the domestic order of States, it is clear that these agreements interact in several ways with the international legal order. Similar conclusions can be drawn for natural resource management. While the management of natural resources is entrenched in State sovereignty, States have also increasingly accepted international obligations that qualify their rights regarding the use of their natural resources. States must therefore take into account these obligations when designing and implementing natural resource arrangements in peace agreements. In addition, international legal frameworks increasingly provide opportunities for cooperation and assistance to States in the implementation of their commitments under peace agreements. In these ways, international legal norms and institutions shape natural resource management as part of peace processes. Conversely, peace agreements aim to address specific challenges, such as the reintegration of former combatants, restoring livelihoods and remedying past wrongs. These challenges require tailor-made solutions, which have the potential to bring important innovations to the international legal framework for the governance of natural resources. In this way, peace settlement practice also shapes international law. This article assessed relevant examples of this interplay with respect to water governance. It showed the relevance of international human rights law, international freshwater law and international environmental law in a broader sense for the implementation of the agreements. It furthermore revealed how peace agreements can reinterpret, confirm and build upon relevant norms of international law.

This article constitutes only a first attempt to clarify the processes of interplay between natural resource arrangements in peace agreements and the international legal order. The conclusions reached are tentative and a more in-depth study needs to be conducted to fully understand these processes. However, it is evident that their implications for the implementation of natural resource arrangements and the international legal framework for the governance of natural resources are potentially significant.

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<sup>79</sup>1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

<sup>80</sup>As the Commentary to this provision clarifies: 'The obligation of the detaining authority [to provide food and water] remains an absolute one, but its content varies, depending on the living conditions prevailing in the area.' See Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Nijhoff 1987) 1387.

<sup>81</sup>See the Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace (n 31) Annex II, 11.

<sup>82</sup>*ibid* 18 (emphasis added).

<sup>83</sup>See, e.g., M Langford and AFS Russell, *The Human Right to Water: Theory, Practice and Prospects* (Cambridge University Press 2017). The human right to water was recognized as an autonomous human right in UNGA Resolutions 64/292 (2010) and 70/169 (2015). See UNGA 'The Human Right to Water and Sanitation' UN Doc A/RES/64/292 (28 July 2010); and UNGA 'The Human Rights to Safe Drinking Water and Sanitation' UN Doc A/RES/70/169 (17 December 2015).

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