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**PEACE THROUGH ARBITRATION: USING  
INTERNATIONAL ARBITRATION TO SOLVE INTRA-  
STATE CONFLICTS**

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### ***Abstract***

Since World War II, intra-state conflict has been on the rise. The international community has struggled to prevent and resolve intra-state conflicts. Disputants often sign peace agreements, but peace then fails at the implementation phase. This is, in part, due to a lack of effective mechanisms for resolving disputes between states and sub-state entities. To fill this gap, the United Nations has begun to promote the use of mediation as a dispute resolution mechanism in conflict situations. However, mediation is not the only option. International arbitration is available. Arbitration has been used to resolve intra-state territorial disputes, following conflicts, in two cases: in the *Brčko* arbitration, in Bosnia-Herzegovina and the *Abyei* arbitration, in the Sudans. In light of these arbitrations, this paper suggests that arbitration might be an equally useful, if not better, dispute resolution tool for resolving disputes following intra-state conflicts. International arbitration may lead to more lasting peace. In making this argument, this paper attempts to fill a lacunae in the legal literature. Much legal scholarship discusses the general advantages and disadvantages of different dispute resolution mechanisms. However, there is little, if any, scholarship devoted to determining the most appropriate dispute resolution mechanism for use following intra-state conflicts or critically engaging with the UN's preference for mediation.

*Key Words: international arbitration, civil wars, peace, Brčko, Abyei*

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## I Introduction

We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter.<sup>1</sup>

The overriding goal of the international system is the pursuit and maintenance of peace. Historically, that goal was about ending wars between states. Today, inter-state conflict is in decline.<sup>2</sup> A new threat to peace has emerged. Since World War II, the most common conflicts have been intra-state.<sup>3</sup> Intra-state conflicts are complex and multi-faceted.<sup>4</sup> They are “sometimes purely internal and sometimes fuelled by outside involvement”.<sup>5</sup> Intra-state conflicts often involve a range of actors, including the state, state authorities and armies, population groups and sub-state armed groups, such as national liberation armies, insurgents, terrorists and mercenaries.<sup>6</sup> Equally, they involve wide-ranging issues: self-determination; sovereignty; ethnic tensions; boundary disputes; control over natural resources; power sharing; and the demobilisation of armed groups.<sup>7</sup>

However, there are few proven mechanisms for achieving intra-state peace. This paper argues international arbitration is a useful tool for creating lasting peace following intra-state conflicts. This is an institutionalist argument about mechanisms to overcome the obstacles to cooperation between state and sub-state actors in dispute.

This paper does not argue arbitration should replace negotiated or mediated peace agreements. Peace agreements in intra-state conflicts are often reached through negotiation or mediation.<sup>8</sup> Rather it argues arbitration may prevent peace from breaking down after the signing of a peace agreement, by giving parties a mechanism to resolve interpretation and implementation disputes.

The argument is made in four parts.

Part II outlines the nature of contemporary conflicts and explains why attempts at peace after intra-state wars often fail. In doing so, the paper identifies the unique requirements for dispute resolution in this context and sets out criteria against which to assess the

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<sup>1</sup> 2005 World Summit Outcomes GA Res 60/1, A/Res/60/1 (2005) at [5].

<sup>2</sup> See for example Hathaway and Shapiro *The Internationalists: How a Radical Plan to Outlaw War Changed the World* (Simon & Schuster, Pennsylvania, 2017) at 334.

<sup>3</sup> *The Secretary-General’s High-level Panel Report on Threats, Challenges and Change, A more Secure World: our Shared Responsibility* GA Res 59/565, A/59/565 (2004) at [11] and [17].

<sup>4</sup> *United Nations Activities in Support of Mediation* A/72/115 (2017) at [5].

<sup>5</sup> Christine Gray ‘The Use of Force and the International Legal Order’ in Malcolm D Evans (ed) *International Law* (3<sup>rd</sup> ed, OUP, 2014) at 623.

<sup>6</sup> *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* A/66/811 (2012) at [12].

<sup>7</sup> At [13]; *The Secretary-General’s High-level Panel Report*, above n 3, at [5].

<sup>8</sup> See for example Barbara F Walter “The Critical Barrier to Civil War Settlement” (1997) 51(3) *Int Organ* 335.

usefulness of arbitration.

Part III identifies the benefits of arbitration as a dispute resolution tool, and considers its limits. The section argues that other dispute resolution processes, particularly mediation and negotiation, are unlikely to be useful alternatives to arbitration following intra-state conflicts.

Part IV analyses the *Brčko* and *Abyei* arbitrations, these being the best known, and possibly the only, situations in which arbitration has been used to determine intra-state disputes in the manner proposed.

Part V concludes by drawing together the preceding analysis and makes recommendations for how arbitration might be best used following intra-state conflicts.

## *II Framework*

### *A Context of Intra-State Conflicts*

Resolving intra-state conflict is a major challenge facing twenty-first century international law.<sup>9</sup> Intra-state conflicts are on the rise.<sup>10</sup> However, international law developed in a context where intra-state war was uncommon and the international community overlooked the use of force in internal affairs.<sup>11</sup> Consequently, international law's position on purely internal conflicts lacks clarity. The United Nations (UN) Charter bans the use of force in *international relations* and requires states to settle disputes peacefully, but it does not address intra-state conflict.<sup>12</sup> Customary international law prohibits states from inciting or assisting conflict in other states, but traditionally did not prevent states from using force against their own population.<sup>13</sup>

The UN has accepted that it has historically failed to consolidate intra-state peace, particularly where ethnic cleansing and genocide were involved.<sup>14</sup> For example, during the Rwandan genocide, the Security Council gave in to international pressure, withdrawing peacekeepers and failing to respond to the genocide of Tutsi and moderate Hutu.<sup>15</sup> The UN did not take decisive military action to stop the genocides in Bosnia and Herzegovina and

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<sup>9</sup> Antonio Cassese *International Law* (2nd ed, OUP, 2005) at 325.

<sup>10</sup> *The Secretary-General's High-level Panel Report*, above n 3, at [11] and [17]; *Strengthening the Role of Mediation*, above n 6.

<sup>11</sup> *United Nations Activities in Support of Mediation*, above n 4, at [5]–[6].

<sup>12</sup> Charter of the United Nations 1 UNTS XVI (signed 26 June 1945, entered into force 12 June 1968), arts 2(4) and 33.

<sup>13</sup> See *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 25/2625, A/Res/25/2625 (1970).

<sup>14</sup> *The Secretary-General's High-level Panel Report*, above n 3, at [86].

<sup>15</sup> At [13], [41] and [87].

in Kosovo following the dissolution of the Federal Republic of Yugoslavia.<sup>16</sup>

The UN has started to take steps to change this. This has occurred through the peacekeeping framework and the introduction of post-conflict peacebuilding activities, ranging from reintegrating former combatants into civilian society to supporting the development of democracy.<sup>17</sup> The Secretary-General facilitates most peacebuilding activities through the Department of Political Affairs.<sup>18</sup> However, other UN actors play a role in peacebuilding – including the General Assembly, Security Council, Economic and Social Council and newly established Human Rights Council, as well as Member States and regional actors.<sup>19</sup>

As an outcome of the 2005 World Summit, the UN established an intergovernmental advisory body – the Peacebuilding Commission – and a Peacebuilding Fund, funded by donations from member states.<sup>20</sup> The Commission’s role encompasses developing peacebuilding strategies, attracting support for institution-building efforts, and providing predictable financing for early recovery activities.<sup>21</sup> The Commission and Fund have been used effectively to support the implementation of peace agreements.<sup>22</sup>

The UN has focussed on post-conflict peacebuilding because of the understanding that post-conflict states often relapse.<sup>23</sup> The states at greatest risk of conflict are those that have emerged from conflict in the last five years.<sup>24</sup> However, gaps remain in the peacebuilding framework. The international community struggles to provide mechanisms through which state and sub-state parties can resolve disputes. This is a problem; strong dispute resolution mechanisms are required for peace agreements to withstand the stress of implementation.<sup>25</sup>

The current system for resolving public international law disputes involving non-state actors was created to accommodate decolonisation and growing recognition of indigenous

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<sup>16</sup> *The Secretary-General’s High-level Panel Report*, above n 3, at [87].

<sup>17</sup> *Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council A/55/305–S/2000/809* (2000) at [12] and [13]. See also, on peacekeeping, *Progress Report on the Prevention of Armed Conflict A/60/891* ((2006) at [78].

<sup>18</sup> *Preventive Diplomacy: Delivering results* (Report of the Secretary-General) S/2011/552 (2011) at [17].

<sup>19</sup> *Progress Report*, above n 17, at [42] and [79]–[85]; *Prevention of Armed Conflict* GA Res, A/Res/57/337 (2003) at [32].

<sup>20</sup> *2005 World Summit Outcomes*, above n 1, at [97]–[105]; *The Secretary-General’s High-level Panel Report*, above n 3, at [228] and [261]–[265].

<sup>21</sup> *The Peace Building Commission* GA Res 60/180, A/Res/60/180 (2005) at [2]. See also *Security Council Resolution 1645 (2005) on Post-conflict Peacebuilding* SC Res 1645, S/Res/1645 (2005).

<sup>22</sup> *Report of the Secretary-General on Enhancing Mediation and its Support Activities* S/2009/189 (2009) at [73].

<sup>23</sup> *United Nations Activities in Support of Mediation*, above n 4, at [10].

<sup>24</sup> *Progress Report*, above n 17, at [84]; *Preventive Diplomacy*, above n 18, at [29].

<sup>25</sup> *Report of the Secretary-General*, above n 22, at [38] and [43].

groups' right to self-determination.<sup>26</sup> The UN, in accordance with its aim of pacific settlement of disputes,<sup>27</sup> requires disputes between States and indigenous peoples which "cannot otherwise be settled [to]...be submitted to competent international bodies".<sup>28</sup>

Yet, it remains unclear what component international body can resolve disputes between states and sub-state entities. The International Court of Justice is the primary judicial organ of the UN,<sup>29</sup> but only states have standing to appear before that court.<sup>30</sup> Enforcement mechanisms through the Security Council are only available to UN members, who are sovereign states.<sup>31</sup>

National courts are also unlikely to be appropriate forums for determining disputes concerning intra-state peace agreements.<sup>32</sup> Sub-state entities are likely to perceive the national courts of the state in which the dispute has arisen as biased towards the government, making such courts an unacceptable forum.<sup>33</sup> Intra-state disputes are also unlikely to be referred to 'neutral' foreign courts. Often, parties cannot agree on a court, due to perceptions of bias.<sup>34</sup> Moreover, the doctrine of sovereign immunity means foreign courts lack jurisdiction to hear disputes involving another state.<sup>35</sup> A state in an intra-state dispute is unlikely to waive immunity. A state has no reason to give control of its affairs to *another state*, especially *after* a dispute has arisen. Of course, states must also waive sovereign immunity to engage in arbitration. However, states are less likely to submit to the jurisdiction of a foreign court (which might act in the foreign state's interests) than they are to acquiesce to the decision of a neutral arbitral. Moreover, waivers to arbitral jurisdiction can be implied from a state having entered into an arbitration agreement,<sup>36</sup> which usually occurs *before* any dispute has arisen.<sup>37</sup>

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<sup>26</sup> Wendy Miles 'The Abyei arbitration: A model for peaceful resolution of disputes involving non-state actors' in Ulf Franke, Annette Magnusson and Joel Dahlquist (eds) *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International BV, The Netherlands, 2016) 222 at 224; Malcolm N Shaw, *Peoples, Territorialism and Boundaries* 3 EJIL (1997) 478 at 480.

<sup>27</sup> Charter of the United Nations, above n 2, Chapter VI.

<sup>28</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295, art 36.

<sup>29</sup> Charter of the United Nations, above n 2, art 92.

<sup>30</sup> Statute of the International Court of Justice 59 Stat 1055; UKTS 67 (1946) (opened for signature 26 June 1945, entered into force 24 October 1945), art 34. See also Charter of the United Nations, above n 2, arts 93 and 94.

<sup>31</sup> Charter of the United Nations, above n 2, art 94(2). See further Miles, above n 26, at 224.

<sup>32</sup> Cindy Wittke *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-State Parties* (Cambridge UP, 2018) at 83.

<sup>33</sup> See for example Wendy Miles and Daisy Mallett "The Abyei Arbitration and the Use of Arbitration to Resolve Inter-State and Intra-State Conflicts" (2010) 1(2) J Int Dispute Settlement 313 at 324.

<sup>34</sup> See generally Nigel Blackaby and others *Redfern and Hunter on International Arbitration* (6th ed, OUP, Oxford, 2015) at 28.

<sup>35</sup> See generally Blackaby and others, above n 34, at 654.

<sup>36</sup> Miles, above n 26, at 655.

<sup>37</sup> Blackaby and others, above n 37, at 13.

In summary, there are few, if any, international or national bodies to which a state and a sub-state actor can bring a dispute for binding resolution.

Non-binding methods of dispute resolution may be available, including negotiation and mediation. Over the last two decades, the UN has promoted mediation as the primary tool for resolving conflicts.<sup>38</sup> The UN uses mediation to both reach peace agreements and to resolve disputes arising after peace agreements have been signed. It has invested significantly in facilitating mediations, organising mediation trainings and developing mediation guidance.<sup>39</sup> These initiatives have been advanced by the Department of Political Affairs and its Mediation Support Unit, established in 2006.<sup>40</sup> However, as will be explained in Part III, mediation and other non-binding dispute resolution mechanisms are often unsuitable for resolving intra-state disputes following conflict.

Accordingly, this paper turns to international arbitration to fill the dispute resolution gap.

### *B Why Peace Fails*

As mentioned at the outset, this paper focusses on dispute resolution during the process of interpreting and implementing intra-state peace agreements.

Sometimes, the initial step of signing a peace agreement is difficult to achieve.<sup>41</sup> There are unique barriers to peace in intra-state conflicts, including the principle of non-interference in domestic affairs, ‘spoilers’ who seek to undermine peace agreements they view as inapposite to their interests, inadequate resources and a lack of political will.<sup>42</sup>

However, it is not true that states rarely end conflicts by settling their disputes and prefer to use coercion to try to ‘win’ – despite this view being promoted by ‘realist’ and ‘neo-realist’ scholars of international relations.<sup>43</sup> In fact, legal dispute settlement is often used

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<sup>38</sup> *Report of the Secretary-General*, above n 22, at [3] and [59].

<sup>39</sup> *Strengthening the Role of Mediation*, above n 7, at Annexe I. See further *United Nations Activities in Support of Mediation*, above n 4; *Strengthening the Role of Mediation*, above n 6; *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* GA Res 65/283, A/Res/65/283 (2011); *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* GA Res 66/291, A/Res/66/291 (2012); *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* GA Res 68/303, A/Res/68/303 (2014); *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* GA Res 70/304, A/Res/70/304 (2016).

<sup>40</sup> *Co-operation between the United Nations and Regional and Sub-regional Organizations on Mediation* A/70/328 (2015) at [19].

<sup>41</sup> *The Secretary-General's High-level Panel Report*, above n 3, at [86].

<sup>42</sup> At [222] and [224].

<sup>43</sup> Beth A. Simmons “Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes” (2002) 46(6) *J Conflict Resolut* 829 at 831-832.



to end conflicts.<sup>44</sup> Most civil wars end in negotiated or mediated peace settlements.<sup>45</sup> This is because war is usually more costly than settlement. It requires vast amounts of military expenditure; diverts resources from other areas; causes instability; and deters foreign investment.<sup>46</sup> Consequently, disputants usually make genuine efforts to settle their disputes and cease fighting.<sup>47</sup>

Settlement is particularly likely in intra-state conflicts. Such conflicts are not zero-sum games where the stronger party, knowing it is likely to win, can act coercively and refuse to settle.<sup>48</sup> One party cannot ‘win’ an intra-state conflict.<sup>49</sup> A ‘win’ will harm other parties within the state and will negatively impact the whole state. Thus, the traditional realist paradigm does not apply. Accordingly, this paper does not focus on the process of reaching peace agreements, but what happens afterwards.

Peace more commonly fails at the implementation phase: when disputants resume fighting *after* a peace agreement has been signed.<sup>50</sup> Such failures may have disastrous consequences. The failures to implement the 1991 Bicesse Agreement for Angola and 1993 Arusha Accords for Rwanda resulted in the loss of several million lives.<sup>51</sup> Implementation failures are partly due to a lack of mechanisms for third party dispute settlement.<sup>52</sup> Most intra-state peace agreements have no dispute resolution clauses. An analysis of the UN Peacemaker Peace Agreements Database shows, from 2008 to 2017, 113 out of 136 English language (or English-translated) peace agreements had no dispute resolution clause.<sup>53</sup> In some, a dispute resolution clause was unnecessary. For example, some agreements merely

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<sup>44</sup> Simmons, above n 43, at 830; see also Todd L. Allee and Paul K. Huth “Legitimising Dispute Settlement: International Rulings as Domestic Political Cover” (2006) 100(2) Am J Polit Sci 219 at 219.

<sup>45</sup> See for example Madhav Jodhi and Michael Quinn “Is the Sum Greater than the Parts? The terms of civil war peace agreements and the commitment problem revisited” (2015) Negotiation J 7 at 9.

<sup>46</sup> Simmons, above n 43, at 832; Allee and Huth, above n 44, at 222.

<sup>47</sup> Virginia Fortna “Scraps of Paper? Agreements and the Durability of Peace” (2003) 57 Int Organ 337 at 340.

<sup>48</sup> Compare, on inter-state conflicts, Stephen E. Gent and Megan Shannon “Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind Author(s)” (2010) 72(2) J of Polit 710 at 719 and 726.

<sup>49</sup> Muzaffer Ercan Yilmaz “Intra-State Conflicts in the Post-Cold War Era” (2007) Intl J World Peace 11 at 31.

<sup>50</sup> *United Nations Activities in Support of Mediation*, above n 4, at [6].

<sup>51</sup> *The Secretary-General’s High-level Panel Report*, above n 3, at [86].

<sup>52</sup> M Boltjes *Implementing Negotiated Agreements: the Real Challenge to Intra-State Peace* (Cambridge UP, Cambridge, 2007); Nina Caspersen *Peace Agreements: Finding Solutions to Intra-State Conflicts* (Polity Press, Cambridge, 2016).

<sup>53</sup> Of those agreements that contained dispute resolution clauses, 14 would refer the disputes to a joint working group made up of representatives from both states, four to mediation, one to arbitration and four to ad hoc bodies. There were also 46 peace agreements in other languages that had not been translated and could not be analysed by this author. A table of the data year by year is set out at Appendix One to this paper.

expressed a willingness to have talks,<sup>54</sup> or were part of a series of agreements that contained a dispute resolution clause elsewhere.<sup>55</sup> However, many comprehensive peace agreements also lacked dispute resolution clauses.

This is problematic. Disputes often arise during the implementation phase. These are most commonly due to differences over the interpretation or implementation (or non-implementation) of a peace agreement.<sup>56</sup> They may also arise due to genuine misunderstandings, like troops inadvertently straying over a cease-fire line.<sup>57</sup> The nature of these disputes may include:<sup>58</sup>

- how to implement agreed-upon power sharing arrangements;
- boundary delimitation and/or demarcation that the parties did not agree on when the peace agreement was signed (being the subject of the *Brčko* and *Abyei* arbitrations);
- the related issue of control over natural resources;
- issues around the process of disarming, transforming or demobilising armed groups and/or redeploying government armed forces (relevant in *Abyei*);
- reintegration of ex-combatants;
- other security and defence issues;
- upholding human rights and child protection; and
- the return of displaced persons.

Most of these disputes are legal in nature or have legal implications. Some involve interpreting or enforcing peace agreements as legal documents, other concern human rights, international humanitarian law or legal issues of control over territory and/or natural resources. Many of these legal issues are more international than domestic in nature. Particularly, solving inter-state boundary disputes is already a key role of international arbitral tribunals; accounting for a quarter of arbitrated disputes by some accounts.<sup>59</sup>

Parties often fail to resolve their disputes, resulting in a relapse into conflict.<sup>60</sup> Even if

<sup>54</sup> See for example General Consensus on Peace Dialogue Process, Government of Thailand–Ustaz Hassan Taibon on behalf of unspecified insurgent groups (signed 28 February 2013).

<sup>55</sup> See for example Chapeau of the Comprehensive Peace Agreement, Government of the Republic of Sudan–Sudan People's Liberation Movement/Sudan People's Liberation Army (signed 9 January 2005) [Comprehensive Peace Agreement].

<sup>56</sup> Kreddha Institute “International Adjudication Mechanisms for Intrastate Peace Agreements” (Report of Expert Meeting, November–December 2005) at 5, 10 and 31.

<sup>57</sup> Fortna, above n 47, at 334.

<sup>58</sup> *Report of the Secretary-General on Enhancing Mediation and its Support Activities*, above n 22 at [44]; Kreddha, above n 56, at 31.

<sup>59</sup> Freya Baetens and Rumiana Yotova “A Model Procedure for Intra-State Dispute Settlement in Resource-Rich Conflict Areas?” (2011) 3(1) *Goettingen J of Intl Law* 417 at 438; Srecko Vidmar “Compulsory Inter-State Arbitration of Territorial Disputes” (2002) 31 *Denv J Intl L & Pols* 87 at 93–94.

<sup>60</sup> Kreddha Institute, above n 56, at 10.

actual fighting does not ensue, disputes cause delays and instability. For example, the Comprehensive Peace Agreement, signed in the Sudans, contained no mechanism for resolving disputes over the agreed equal division of oil revenue. This caused delays in redistributing the revenue and hampered peacebuilding.<sup>61</sup>

The reason why disputes arise in the implementation phase can be explained using Barbara Walter's credible commitment theory: the dominant theoretical approach to civil conflict in international relations.<sup>62</sup> Disputes are likely because disputants in intra-state conflicts cannot credibly commit to abide by a peace agreement, fuelling an environment of mistrust. This is because, in the aftermath of civil war, disputants:<sup>63</sup>

...are asked to do what they consider unthinkable. At a time where there is no legitimate government and no legal institutions exist to enforce a contract, they are asked to demobilize, disarm, and disengage their military forces and prepare for peace...civil war adversaries cannot credibly promise to abide by such dangerous terms.

This makes intra-state conflict fundamentally different from inter-state conflict. To implement an intra-state peace agreement, parties must disband their armed forces and abandon all protections against the other party violating the agreement. In the international sphere, even a state that surrenders unconditionally is unlikely to be required to go so far.<sup>64</sup>

Therefore, even when intra-state disputants want peace in theory, implementing a peace agreement may be too risky. Non-implementation is thus highly likely. The probability of non-implementation is exacerbated by other factors: a lack of political will; dissatisfaction with the agreement; a lack of endorsement by important stakeholders; or a failure to institute effective power sharing arrangements.<sup>65</sup>

Even where disputants genuinely attempt to implement a peace agreement, the implementation phase will be characterised by mistrust. Implementation leaves parties in a potentially worse situation than continuing to fight.<sup>66</sup> Parties know if they 'cheat' and resume fighting, they might achieve a better outcome than if they comply with the agreement. This is especially true if the other party has executed the agreement's terms and

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<sup>61</sup> Kreddha Institute, above n 56, at 5.

<sup>62</sup> Walter "The Critical Barrier", above n 8. See further Barbara F. Walter "Designing Transitions from Civil War: Demobilization, Democratization and Commitments to Peace" (1999) 24(1) Int Security 127.

<sup>63</sup> At 335–336

<sup>64</sup> At 338.

<sup>65</sup> Kreddha, above n 56, at 9.

<sup>66</sup> Walter "The Critical Barrier", above n 7, at 338.

disarmed, so can be easily defeated. This situation:<sup>67</sup>

...has two devastating effects on cooperation. First, it discredits any promise to abide by the terms of an agreement even if offered in good faith, and, second, it increases groups' anxiety about future security and makes them hyper-sensitive to even the smallest treaty violation.

This high-tension environment increases the likelihood of disputes and of conflict being reignited. Therefore, mechanisms that create credibility are necessary. Walter argues for third party guarantors for peace agreements to ensure the cost of cheating exceeds the benefits.<sup>68</sup> Such arrangements empirically increase the likelihood of peace.<sup>69</sup>

This paper argues that providing for recourse to international arbitration might also help solve the credible commitment problem. Through arbitration, parties can resolve disputes before they spiral back into conflict and seek remedies in the event of 'cheating'.<sup>70</sup>

### *C Criteria for a Successful Dispute Resolution Process*

Recourse to an effective dispute resolution process thus seems likely to be helpful following intra-state conflicts. Is international arbitration an appropriate process? To answer this question, it is necessary to identify the qualities needed for successful dispute resolution in this context. The above discussion suggests that peace might be more likely to succeed where disputants have recourse to a dispute resolution process that:

1. allows disputes to be resolved, preventing disputants spiralling back into war;
2. offers solutions perceived as legitimate and credible, to help alleviate the credible commitment problem;
3. as part of this, has neutral third-party involvement;
4. resolves disputes in a final and binding manner, reducing uncertainty and mistrust; and
5. is enforceable, raising the cost of breaking a peace agreement and giving parties an option for recourse for non-implementation, thus making commitment more credible.

### *D Standing*

Before this paper moves into its substantive core, it is worth considering whether intra-state disputes are a proper subject matter for international arbitration. It is not settled law that all sub-state entities possess legal personality and have standing to appear before international arbitral tribunals. In practice, the question of legal personality has not proven to be an impediment to arbitration. Legal personality was not an issue in the *Brčko* and *Abyei* arbitrations (discussed below). Standing appears to have been accepted based on

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<sup>67</sup> Kreddha Institute, above n 56, at 338–339.

<sup>68</sup> At 340.

<sup>69</sup> At 349; see similarly, in the context of inter-state wars, Fortna, above n 47, at 359.

<sup>70</sup> Fortna, above n 47, at 344.

party autonomy and consent.

Nevertheless, the issue is important to consider. In intra-state disputes, the parties' relationship is fraught with mistrust. Consent to arbitration is likely to be unreliable.<sup>71</sup> Therefore, if in future arbitrations the standing of the sub-state entity is contested and it eventuates that there is no independent legal basis for standing, the arbitral process will fail. A real basis for standing would alleviate this risk.

The issue of standing arises because intra-state conflicts are, by definition, not disputes between states. Often, they involve a state and an autonomous sub-state entity.<sup>72</sup> However, international arbitration has "for its object the settlement of differences between states".<sup>73</sup> International arbitral tribunals apply international law, in which the state is the primary subject.<sup>74</sup> Traditionally, states were "solely and exclusively" the subjects of rights and duties under international law.<sup>75</sup> Even today, only states have full international legal personality and the capacity to make claims before the International Court of Justice.<sup>76</sup> Non-state entities cannot possess full legal personality. This may affect their standing.

Other actors are increasingly recognised as subjects of modern international law with different rights and duties to states.<sup>77</sup> Individuals have been granted rights and duties under international human rights law, humanitarian law and criminal law (primarily via multilateral treaties).<sup>78</sup> Individuals can sometimes bring claims under international law.<sup>79</sup> International organisations, such as the UN, may have legal personality,<sup>80</sup> where this is intended by the member states and the organisation's functions necessitates that it exercises rights and duties on the international plane.<sup>81</sup> Equally, mixed arbitration is not new. In 1993, the Permanent Court of Arbitration (PCA) created the Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (PCA Optional Rules).<sup>82</sup>

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<sup>71</sup> See further Bart L Smit Duijzentkunst and Sophia L R Dawkins "Arbitrary Peace? Consent Management in International Arbitration" (2015) 26(1) Eur J Int Law 139.

<sup>72</sup> See for example *Abyei (Sudan v The Sudan People's Liberation Movement/Army) (Final Award)* XXX RIAA 14 (2009).

<sup>73</sup> Hague Convention (I) of 1907: Convention for the Pacific Settlement of International Disputes (opened for signature 18 October 1907, 26 January 1910), art 37.

<sup>74</sup> Wolfgang Friedmann *The Changing Structure of International Law* (Steven & Sons, London, 1964) at 67, quoting Jessup *A Modern Law of Nations* (Macmillan Publishers, London, 1948) at 17.

<sup>75</sup> See for example Kate Parlett *The Individual in International Law* (Cambridge, Cambridge University Press, 2011) at 14, particularly n 38–40.

<sup>76</sup> Statute of the International Court of Justice, above n 30, art 34.

<sup>77</sup> Parlett, above n 75, at 32.

<sup>78</sup> At 121, 224–228, 274 and 337–339.

<sup>79</sup> At 120–124 and 339.

<sup>80</sup> James Crawford *Brownlie's Principles of Public International Law* (8ed, OUP, 2012) at 120–121, and 166–171.

<sup>81</sup> Parlett, above n 75, at 32; *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 at 174 and 179.

<sup>82</sup> Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993) [PCA Optional Rules].

Corporations possess some legal personality and already pursue international arbitration to resolve investment disputes with states.<sup>83</sup>

Given broadening understandings of international law and precedent for mixed arbitration, it makes sense for international arbitration to be available for sub-state entities. Nevertheless, for this to be conceptually coherent sub-state entities must be proven to have international legal personality. This entails the possession of international rights and duties and the capacity to bring international claims.<sup>84</sup> Sub-state entities might have legal personality because they have: entered into peace agreements; are entities legally proximate to, or with the potential to be, states; or are recognised as belligerent or insurgent armed groups.

### *1 Peace agreements*

A peace agreement which forms the basis of an implementation dispute may demonstrate that a sub-state has legal personality. Peace agreements between states are treaties and confer binding rights and duties under international law.<sup>85</sup> If intra-state peace agreements are also binding, sub-state parties to those agreements would possess rights and duties under international law, demonstrating legal personality. Notably, though this will not be discussed in detail, a legally binding agreement could also be the basis for a tribunal's jurisdiction over a dispute.<sup>86</sup>

Historically, agreements between states and sub-state entities, which resemble international treaties in language and form, have been accepted as creating rights and duties under international law.<sup>87</sup> For example, in 1979, Mauritania and POLISARIO (a national liberation movement in Western Sahara) entered an agreement in which both sides promised to respect the others' territory, and this agreement was reported to the UN as if it were a legally binding treaty.<sup>88</sup> Another agreement between South Africa and the entity that became Southern Rhodesia was considered a valid international agreement.<sup>89</sup>

Prima facie, this appears logical. Agreements between states are binding treaties under international law where they are intended to be binding and possess binding character.<sup>90</sup> That is, they must be agreements of a normative nature, using obligatory, precise and

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<sup>83</sup> Collier and Lowe *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP, 2000) at 38–39; Crawford, above n 78, at 123–124.

<sup>84</sup> Parlett, above n 75, at 32, discussing *Reparation for Injuries*, above n 81, at 179.

<sup>85</sup> Wittke, above n 32, at 63.

<sup>86</sup> Christine Bell “Peace Agreements: Their Nature and Legal Status” (2006) 100 Am J Intl L 373 at 387.

<sup>87</sup> See further Geoffrey R Watson *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (OUP, Oxford, 2000) at 94–98.

<sup>88</sup> At 97.

<sup>89</sup> *State v Eliasov* (1967) ILR 52 at 408.

<sup>90</sup> Wittke, above n 32, at 65–68.

detailed language, not subject to any domestic legal system.<sup>91</sup> Logically, similar agreements between states and sub-state entities should have similar effects. However:<sup>92</sup>

what is a treaty or an international agreement is not determined by the classification of a transaction...but whether the agreement is regarded as such under international law and regulated by international law.

Whether an agreement appears binding or is treated as having binding *character* is not decisive. Such agreements still might not have binding *status* as international law.<sup>93</sup> Intra-state peace agreements are not a traditional source of international law rights and duties.<sup>94</sup> Some agreements may codify elements of customary law, but are unlikely to do so in their entirety.<sup>95</sup> Intra-state peace agreements are not usually treaties governed by the Vienna Convention on the Law of Treaties, as this defines treaties as agreements between states.<sup>96</sup> In some intra-state conflicts, the final peace agreement is between states. Entities that were not states at the outset of a conflict may obtain statehood by the time a peace agreement is reached.<sup>97</sup> However, in such cases the legal personality and standing of the former sub-state entity will not be at issue.

Some peace agreements concluded with entities less than full sovereign states may be treaties. Federal states, protected states, and dependent states, such as colonies, have occasionally been found to possess treaty-making capacity, where they have been authorised to enter into treaties by their parent state or under their constituent instruments.<sup>98</sup> Autonomous territories can be recognised as having treaty-making capacity, such as through admission to international organisations; entry into a comprehensive bilateral treaty of commerce and navigation; or recognition of belligerency (discussed below).<sup>99</sup>

Decolonisation also provides relevant examples. A mandate or trusteeship can have the character of a treaty.<sup>100</sup> Agreements between mandatory territories and mandated powers,

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<sup>91</sup> Wittke, above n 32, at 66–67

<sup>92</sup> *Prosecutor v Kallon (Decision on Jurisdiction)* SCSL Appeals Chamber SCSL-2004-15-AR72(E), 13 March 2004 at [44].

<sup>93</sup> Wittke, above n 32, At 92–95.

<sup>94</sup> Refer Statute of the International Court of Justice, above n 30, art 38(1).

<sup>95</sup> See for example Watson, above n 87, at 78–83, discussing the Oslo Accords.

<sup>96</sup> Vienna Convention on the Law of Treaties 1155 UNTS 331, A/Conf.39/27 (opened for signature 23 May 1969, entered into force 27 January 1980), art 2(a); Statute of the International Court of Justice, above n 30, art 38(1)(a).

<sup>97</sup> Bell, above n 86, at 380.

<sup>98</sup> Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9<sup>th</sup> ed, OUP, Oxford, 2008) [*Oppenheim*] vol 1 at 278 and 1217–1218.

<sup>99</sup> At 169–175 and 1218.

<sup>100</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 330. See also *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) (Advisory Opinions)* [1971] ICJ 16 at 46–47.

or even other mandated territories, have been characterised as treaties.<sup>101</sup> Finally, agreements with national liberation movements have been recognised as treaties, as aforementioned.<sup>102</sup> In all these examples, the non-state entity possesses some inherent or recognised legal personality. In such cases, the entity's legal personality does not flow from the rights and duties bestowed under the treaty itself.<sup>103</sup>

The more difficult question is whether a peace agreement concluded with a sub-state entity otherwise lacking in legal personality can be a treaty or some other binding agreement under international law. Some scholars have argued art 3 of the Vienna Convention precludes agreements with such sub-state entities from being binding. Article 3 arguably shows non-inter-state legally binding agreements may exist but must be “between States and other subjects of international law”.<sup>104</sup> This would mean an intra-state peace agreement could only be binding where the sub-state party already had legal personality. A peace agreement alone could not bestow binding rights and duties, and consequently legal personality, on a sub-state entity.<sup>105</sup> However, this argument has limited persuasiveness. Article 3 may be better taken as a statement about the Convention's scope, rather than as defining agreements outside its ambit.

Historical agreements between indigenous peoples and colonising states might provide examples of binding agreements with sub-state entities otherwise lacking legal personality. Agreements with indigenous nations in the United States and Canada have been regarded as international treaties by some courts and academics.<sup>106</sup> The Treaty of Waitangi, an agreement signed in New Zealand between the indigenous Māori and Britain in 1840 is arguably binding under international law.<sup>107</sup> The debate on whether agreements with indigenous peoples that purport to cede sovereignty have binding status is particularly interesting.<sup>108</sup> Not all such agreements actually cede sovereignty.<sup>109</sup> Those that do are not

<sup>101</sup> Watson, above n 87, at 97, with reference to the Compact of Free Association between the United States and the Federated States of Micronesia.

<sup>102</sup> At 97.

<sup>103</sup> Illustrated by the defendant's arguments in *Prosecutor v Kallon*, above n 92, at [30].

<sup>104</sup> Vienna Convention, above n 96, art 3; Bell, above n 86, at 381; Wittke, above n 32, at 63, 71 and 76; Watson, above n 87, at 94.

<sup>105</sup> See similarly, on the international legal personality of corporations, Stephen J Toope *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Grotius Publications Limited, Cambridge, 1990) at 88.

<sup>106</sup> See for example, Siegfried Wiessner “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” (1999) 12 Harv Hum Rts J 57, on the United States, at 61 n 19, and on Canada, at 66–69.

<sup>107</sup> Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008), part 2; see further Mark Hickford and Carwyn Jones (eds) *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2019).

<sup>108</sup> See Crawford, above n 80, at 227–228.

<sup>109</sup> See for example *Waitangi Tribunal He Whakaputanga me te Tiriti The Declaration and the Treaty* (Wai 1040, 2014) at xxi, though c.f. *Treaty of Waitangi, Waitangi Tribunal Ngai Tahu Land Report* (Wai 27, 1991) at 4.3.7.



usually regarded as treaties of cession.<sup>110</sup> However, international courts and tribunals have held some such agreements are a kind of treaty that confer a form of derivative title under international law (that differs from title obtained by occupation).<sup>111</sup>

It may be difficult to extrapolate these examples beyond their particular context. Under modern international law, indigenous peoples are increasingly thought to possess legal personality, based on their entitlement to self-determination short of independent statehood under customary law.<sup>112</sup> This may influence how historical international agreements with indigenous groups are viewed. However, what these examples do suggest, is that tribunals are not always precluded from treating peace agreements as binding international agreements, even where the sub-state party otherwise lacks legal personality.

Entering into an agreement with a previously non-recognised entity might alternatively constitute implied recognition that the entity has the capacity to enter binding international agreements.<sup>113</sup> However, few intra-state peace agreements will have this effect. Without undeniable intention to the contrary, agreements with revolutionary groups do not usually constitute recognition, especially where the only other party is the parent state.<sup>114</sup> States are usually wary of recognising revolutionary groups as having legal status for fear of giving them legitimacy.<sup>115</sup> Even if recognition is intended, one act of recognition may be insufficient to show legal personality.<sup>116</sup>

Overall, the legal status of peace agreements is not always clear. It might be pragmatic for tribunals to treat peace agreements as binding, and sub-state entities as possessing legal personality for the purposes of those agreements, where this allows them to adjudicate a dispute.

## 2 *Entities proximate to states*

Different sub-state entities in different settings might possess legal personality in theory and practice. Particularly, entities legally proximate to states, or possessing the potential

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<sup>110</sup> Crawford, above n 80, at 227.

<sup>111</sup> *Island of Palmas (or Miangas) (United States of America v Netherlands)(Award)* (1928) II RIAA 829; (2001) 40 ILM 900 at 858–859; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at 39 and 123–124; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Counter-Claims)* [2002] ICJ Rep at 404–407.

<sup>112</sup> See for example S James Anaya *Indigenous Peoples in International Law* (2nd ed, OUP, Oxford, 2004) at 61; *International Labour Organisation Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) 28 ILM 1382.

<sup>113</sup> *Oppenheim*, above n 98, vol 1 at 170 n 6.

<sup>114</sup> At 164 and 170–174.

<sup>115</sup> Hilaire Mc Coubrey and Nigel D White *International Organizations and Civil Wars* (Dartmouth Publishing Company Limited, England, 1995) at 61.

<sup>116</sup> See, in the context of investment arbitration between states and corporations, Toope, above n 105, at 85–87.

for statehood might possess personality, or the capacity to acquire it through recognition.

Entities that are effectively states in form and function possess inherent legal personality.<sup>117</sup> These are entities with a degree of autonomous government; a defined territory and population; the power to exercise jurisdiction within their territory; and the capacity to make international treaties.<sup>118</sup> One example is the free city of Danzig, which was created by the Versailles Peace Treaty.<sup>119</sup>

Entities that are technically sovereign states, but are part of “composite international persons” such as real unions or federal states, may possess international legal personality.<sup>120</sup> In particular, the constituent member states of a federal state may retain some rights on the international plane, depending on the characteristics and constitutional structure of the federation.<sup>121</sup> For example, the constitution of the Federal Republic of Germany allows member states to conclude treaties with foreign states (with federal government approval).<sup>122</sup> However, where the federal state assumes the member states’ external representation in all ways, as in the United States of America, the member states lose international legal personality.<sup>123</sup>

As mentioned, entities less than full sovereign states may possess treaty-making capacity where such powers are recognised by third states, granted by parent states or conferred in constituent documents. These entities possess some legal personality, as they have ‘effective power’ to exercise legal rights and duties.<sup>124</sup> Though the particular point has been underexplored, semi-autonomous provinces within states, such as Kosovo or Bogainville, might similarly gain legal personality through being granted state-like international rights in their constituent documents.<sup>125</sup> Notably, peace agreements, are sometimes constitutional documents (as distinct from whether they have binding status under international law).<sup>126</sup>

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<sup>117</sup> Crawford, above n 80, at 117.

<sup>118</sup> At 117–118.

<sup>119</sup> At 117–118 and 135; see further Treaty of Peace with Germany (Treaty of Versailles) 225 CTS 188 (signed 28 June 1919, entered into force 10 January 1920); *Free City of Danzig and International Labour Organization (Advisory Opinion)* (1930) PCIJ (series B) No 18; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* (1932) PCIJ (series A/B) No 44 at [23]–[24].

<sup>120</sup> *Oppenheim*, above n 114, at 245, 246 and 249.

<sup>121</sup> At 249–255.

<sup>122</sup> Basic Law for the Federal Republic of Germany (Germany), art 32.

<sup>123</sup> *Oppenheim*, above n 98, vol 1 at 252.

<sup>124</sup> Refer Roland Portmann *Legal Personality in International Law* (Cambridge UP, Cambridge, 2010) at 208.

<sup>125</sup> The status of semi-autonomous provinces is not mentioned in, for example, *Oppenheim*, above n 114; Crawford, above n 80; Jane Elisabeth Nijman *The Concept of International Legal Personality* (Cambridge UP, Cambridge, 2004); Roland Portmann *Legal Personality in International Law* (Cambridge UP, Cambridge, 2010).

<sup>126</sup> Bell, above n 86, at 389–394; Wittke, above n 32, at 50–62, with reference to the General Framework Agreement for Peace in Bosnia and Herzegovina 35 ILM 75 (14 December 1995) S/1995/999 [Dayton Peace Agreement], Annexe 4.

Where such a peace agreement grants an entity state-like functions on the international plane this might show that the entity has legal personality.

National liberation movements also possess limited inherent legal personality. National liberation movements represent a self-determination unit, so have potential for sovereign statehood.<sup>127</sup> Consequently, they possess international rights and legal personality.<sup>128</sup> This status is independent of recognition.<sup>129</sup> The legal status of certain national liberation movements has been recognised by states, regional organisations, such as the League of Arab States, and the UN.<sup>130</sup> National liberation movements may have the capacity to conclude treaties;<sup>131</sup> might participate in UN proceedings as observers (as Palestine has done);<sup>132</sup> and likely have rights and duties under humanitarian law, particularly the Geneva Protocol I of 1977 concerning conflicts in pursuit of self-determination.<sup>133</sup>

As noted, indigenous nations may also possess rights to self-determination (though not sovereignty) and have a limited claim to legal personality. This might give them capacity to enter binding agreements, especially where the agreement concerns self-determination, such as a peace agreement following a violent land dispute.<sup>134</sup>

Revolutionary groups that act as governments and/or are recognised as such may also possess legal personality.<sup>135</sup> A group acts as a government where it: possess effective governmental control over all or a large part of a national territory, performs acts of administration such as levying taxes, is recognised as having governing authority by most of the domestic population, and acts with the rights and duties of a state on the international

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<sup>127</sup> Wittke, above n 32, at 71; Crawford, above n 80, at 124;

<sup>128</sup> See further G L Tunkin (ed) *International Law* (Moscow: Progress Publishers, 1986) at 110.

<sup>129</sup> At 109.

<sup>130</sup> *Oppenheim*, above n 98, vol 1 at 163; see for example, on the South West Africa People's Organization in Namibia being affirmed as the sole representative of the Namibian people and being granted observer status at the UN, *Question of Namibia* GA Res 3111 (XXVIII), A/RES/3111(XXVIII) (1973) at 94; *Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa* GA Res 31/146, A/RES/31/146 at 131; *Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa* GA Res 39/50A, A/RES/39/50 (1984) at 30.

<sup>131</sup> Crawford, above n 80, at 124.

<sup>132</sup> *Oppenheim*, above n 98, vol 1 at 163; on Palestine see further Elisabeth Koek and Susan Power "International Legal Personality for Palestine" 20(2/3) *Palestine-Israel J of Polit Econ & Cult* 51.

<sup>133</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978), art 1(4); see also Crawford, above n 80, at at 123; McCoubrey and White, above n 114, at 61–64.

<sup>134</sup> See further, Bell, above n 86, 381–382.

<sup>135</sup> *Oppenheim*, above n 98, vol 1 at 162, 164 and 166; see examples of recognition in *M Salimoff & Co v. Standard Oil Co* 262 NY 220, 186 NE 679, 89 ALR 345 (NY 1933) and *Madzimbamuto v Lardner-Burke* [1969] AC 645.

plane.<sup>136</sup> There is some debate about whether third states must recognise such groups as a government before they will possess legal personality.<sup>137</sup>

This shows that tribunals might have legal bases for finding that many types of sub-state entities possess legal personality, depending on that entity's individual characteristics.

### 3 *Armed conflict*

A sub-state entity may also have legal personality where it is an armed group. Armed groups engaged in non-international armed conflicts can possess rights and duties under international law, usually international humanitarian law.<sup>138</sup> Possessing such rights may give the armed group some legal personality.<sup>139</sup>

Some armed groups can be recognised by states as having belligerent or insurgent rights.<sup>140</sup> Belligerency arises where the character and scope of hostilities require that any sub-state entity involved be treated as a belligerent engaged in an international war between two sovereign states.<sup>141</sup> That is:<sup>142</sup>

...first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; second, the insurgents must occupy and administer a substantial portion of national territory; third, they must conduct the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.

If these conditions are met, there may be a duty to recognise the sub-state entity as a

<sup>136</sup> See *Hopkins (USA) v United Mexican States (Award)* 4 RIAA 41; DW Greig *International Law* (2<sup>nd</sup> ed, Butterworths, London, 1976) at 138; ND Houghton "The Responsibility of the States for the Acts and Obligations of General De Facto Governments: Importance of Recognition" (1931) 6(7) *Ind LJ* 422 at 423–424.

<sup>137</sup> Compare Hersch Lauterpacht *Recognition in International Law* (Cambridge UP, Cambridge, 1947) at 91 with Greig, above n 136, at 137 and 141. For a discussion of acts constituting recognition see further *Oppenheim*, above n 98, vol 1 at 169–174.

<sup>138</sup> Geneva Conventions (I-IV) (opened for signature 12 August 1948, 21 October 1950), common article 3. See further Sandesh Sivakumaran "Re-envisaging the International Law of Internal Armed Conflict" (2011) 22(1) *EJIL* 219.

<sup>139</sup> *Oppenheim*, above n 98, vol 1 at 166.

<sup>140</sup> At 17 and 174. See further *The Fjeld* (1950) 17 *ILR* 345; *The Flying Trader* 17 *ILR* 440; *Certain German interests in Polish Upper Silesia (Germany v Poland) (Merits)* (1926) PCIJ (series A) No 7.

<sup>141</sup> Kelson "Recognition in International Law" (1941) 35 *Am J Intl L* 605 at 616; Louise Arimatsu and Mohbuba Choudhury *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (paper presented to workshop on Syria hosted by Chatham House, London, March 2014) at 19.

<sup>142</sup> Lauterpacht, above n 137, at 176.

belligerent.<sup>143</sup> A belligerent acquires, at minimum, rights and duties under humanitarian law.<sup>144</sup> Belligerent often acquire many other rights and obligations of statehood.<sup>145</sup>

If the threshold for belligerency is not met, there may be a state of insurgency.<sup>146</sup> Insurgency involves an organised civil disturbance, in a limited part of a state, which goes beyond private individuals committing unlawful acts.<sup>147</sup> Insurgency is not as clearly defined as belligerency and does not bestow definite legal rights and duties.<sup>148</sup> Recognition of insurgency ranges from third states refraining from treating the revolutionary group as law-breakers to third states recognising the group as possessing the rights and duties of a *de facto* government within a territory.<sup>149</sup> Insurgent, or belligerent, rights and recognition may form a basis for legal personality.

#### 4 Conclusion

The reasons canvassed suggest sub-state entities might possess legal personality for a variety of reasons. Legal standing seems unlikely to present an insuperable obstacle to arbitration in intra-state disputes.

### III Why Arbitrate?

This section uses the criteria set out in Part II(C) to outline some ways in which arbitration might help parties to intra-state conflicts resolve disputes in the peace agreement implementation phase. In doing so, it compares arbitration to negotiation and mediation.

Joint working groups are not discussed separately to negotiation. In the last decade, 14 intra-state peace agreements provided for the referral of disputes to joint working groups.<sup>150</sup> Joint working groups are institutions with representatives from both parties that solve

<sup>143</sup> See for example Richard A Falk “Janus Tormented: The International Law of Internal War” in James N Rosenau (ed) *International Aspects of Civil Strife* (Princeton UP, New York, 1964) 185 at 205, 206 and 226.

<sup>144</sup> See further Geneva Conventions, above n 138; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978); Hague Conventions (I–XIV) of 1907 (opened for signature 18 October 1907, entered into force 26 January 1910).

<sup>145</sup> See further J G Starke (1984) *Introduction to International Law* (9<sup>th</sup> ed, Butterworths, London) at 554–557; Eyal Benvenisti “The Origins of the Concept of Belligerent Occupation” (2008) 26(3) *Law & Hist Rev* 621; “Bruges Declaration on the Use of Force” (The Institut de Droit International, September 2003) at 3.

<sup>146</sup> Lauterpacht, above n 142, at 274; *Oppenheim*, above n 98, vol 1 at 166; *Beckman Instruments Inc v Overseas Private Instruments Corporation (Award)* (1988) ILM 27 at 1260.

<sup>147</sup> *Pan American World Airways Inc v Aetna Casualty and Surety Co (Award)* (1974) ILM 13 at 1376 and 1403–1405.

<sup>148</sup> Lothar Kotzch *The Concept of War in Contemporary History and International Law* (Librairie Droz, Geneva, 1956) at 233.

<sup>149</sup> Lauterpacht, above n 142, at 274, 276 and 279.

<sup>150</sup> Refer Appendix 1.

disputes through negotiation.<sup>151</sup> However, there is no meaningful distinction between solving disputes through pure negotiation and using joint working groups following intra-state conflicts. Joint working groups might suggest a willingness to cooperate and their use in the inter-state context weakly correlates with more lasting peace.<sup>152</sup> However, following intra-state conflicts, parties generally regard expressions of a willingness to co-operate as insincere, because they fall short of a credible commitment to co-operate in good faith.<sup>153</sup>

The comparison to mediation is particularly important, as mediation is the UN's preferred dispute resolution process, including for post-conflict implementation disputes.<sup>154</sup> The UN considers mediation to be a beneficial conflict resolution tool because it involves an impartial third party that can diffuse tensions between disputants;<sup>155</sup> is flexible;<sup>156</sup> gives parties autonomy and ownership of the process;<sup>157</sup> and is perceived as a legitimate process.<sup>158</sup> Similar benefits are present in arbitration, as will be further discussed.

The UN has not explained why it adopted mediation as its preferred route. Two possible reasons may exist. First, mediation gives disputants autonomy to resolve disputes outside of the adversarial process, having regard to more than legal considerations.<sup>159</sup> The process may allow parties to reach creative solutions that address the causes of a dispute.<sup>160</sup> Secondly, the UN likely never considered promoting a binding dispute resolution process, due to the common belief that disputants prefer not to relinquish control of the outcome of a dispute.<sup>161</sup> The UN has even expressed concerns that parties might refuse to consent to mediation because they view it as a threat to sovereignty.<sup>162</sup>

This paper questions mediation's primacy as a tool for resolving disputes following intra-state conflicts. Some of the traits that make arbitration a useful dispute resolution tool following intra-state conflicts are absent from mediation (and negotiation). Interestingly, third party mediation after ceasefires in inter-state conflicts is weakly correlated with peace breaking down more quickly than situations where negotiation is used to solve disputes.<sup>163</sup> It is unclear whether a similar correlation is present following intra-state conflicts.

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<sup>151</sup> Merrills, above n 161, at 8.

<sup>152</sup> Fortna, above n 47, at 362.

<sup>153</sup> See Walter "The Critical Barrier", above n 7.

<sup>154</sup> See for example *Report of the Secretary-General on Enhancing Mediation and its Support Activities*, above n 22, at [44].

<sup>155</sup> *Strengthening the Role of Mediation*, above n 7, at [8] and [26]–[28].

<sup>156</sup> At [11].

<sup>157</sup> At [35]–[37].

<sup>158</sup> At [42].

<sup>159</sup> Carrie J Menkel-Meadow and others *Dispute Resolution: Beyond the Adversarial Model* (Aspen Publishers, New York, 2005) at 270

<sup>160</sup> At 270

<sup>161</sup> Merrills *International Dispute Settlement* (5<sup>th</sup> ed, Cambridge UP, Cambridge, 2011) at 26–27.

<sup>162</sup> *Strengthening the Role of Mediation*, above n 7, at [22].

<sup>163</sup> Fortna, above n 47, at 347 and 359–362.

### A *Facilitating Dispute Resolution*

This section argues that recourse to arbitration may increase the likelihood of states resolving implementation disputes.<sup>164</sup> This is because arbitration reduces the costs of making concessions for both parties.<sup>165</sup>

Compromise is necessary to resolve disputes. However, the political cost of ‘voluntary’ concessions (through negotiation or mediation) at the implementation phase is usually high. Leaders who make ‘voluntary’ concessions lose support from their constituents.<sup>166</sup> This is for several reasons. First, concessions make constituents dissatisfied. People generally believe their position in a dispute is correct, so begrudge making concessions to their adversaries,<sup>167</sup> particularly after a peace agreement has been signed – suggesting the dispute was already resolved with finality and is being reopened.<sup>168</sup> Secondly, people think ‘voluntary’ concessions signal weakness.<sup>169</sup> Signalling weakness is thought to open a party up to demands for further concessions and undermine the original agreement. This is exacerbated post intra-state conflicts where there is an environment of mistrust.<sup>170</sup> Finally, the cost of making ‘voluntary’ concessions is particularly high where disputes involve contested territory, ethnic co-nationals or enduring rivalries.<sup>171</sup> Such factors are characteristic of intra-state disputes. Parties often have entrenched and emotional positions on these issues.<sup>172</sup>

Taken together, these factors may make ‘voluntary’ compromise difficult or impossible. Leaders may be unwilling or unable to accept a mediated or negotiated settlement because of the high political costs.<sup>173</sup> Where parties are not willing to settle, parties can end a negotiation or withdraw consent to mediation, causing the process to fail.<sup>174</sup> This means many implementation disputes will not be amenable to resolution through mediation or negotiation. Moreover, even if leaders choose to bear the political cost of a ‘voluntary’ settlement, their constituents will be dissatisfied, reducing the prospects of lasting peace. An unpopular settlement is unlikely to be implemented.<sup>175</sup>

<sup>164</sup> This is empirically true in the inter-state context. See for example, Simmons, above n 43, at 842; Allee and Huth, above n 44, at 220.

<sup>165</sup> Fortna, above n 47, at 340.

<sup>166</sup> Allee and Huth, above n 44, at 222.

<sup>167</sup> At 222; Simmons, above n 43, at 834.

<sup>168</sup> Paul K Huth, Sarah E Croco and Benjamin J Appel “Does International Law Promote the Peaceful Settlement of International Disputes? Evidence from the Study of Territorial Conflicts Since 1945” (2011) 105(2) *Am Pol Sci Rev* 415 at 423; Allee and Huth, above n 44, at 224.

<sup>169</sup> Simmons, above n 43, at 834.

<sup>170</sup> See further Walter “The Critical Barrier”, above n 7.

<sup>171</sup> Allee and Huth, above n 44, at 225–226; Huth, Croco and Appel, above n 168, at 423.

<sup>172</sup> Miles and Mallett, above n 33, at 333.

<sup>173</sup> At 324. See generally, Merrills, above n 161, at 12, 27, 33 and 37.

<sup>174</sup> See generally, *Strengthening the Role of Mediation*, above n 7, at [9]; Merrills, above n 161, at 29–30.

<sup>175</sup> Allee and Huth, above n 44, at 221

Arbitration reduces these harms. Leaders agree in advance that an arbitral award will be binding and cannot withdraw consent.<sup>176</sup> Domestic audiences are more likely to accept concessions ‘imposed’ on their leaders, than ‘voluntary’ concessions.<sup>177</sup> Constituents accept that leaders must comply with awards and hold arbitrators, not leaders, responsible for the outcome.<sup>178</sup> People may still be unhappy with an arbitral award that does not favour their position.<sup>179</sup> However, arbitration enables a leader to partially absolve herself of responsibility for this unhappiness.<sup>180</sup> This is not possible through mediation or negotiation. Arbitration thus makes it easier for leaders to compromise and solve disputes, by reducing the political cost of doing so.

This conclusion is supported by empirical evidence in the inter-state context. Governments are three times more likely to prefer arbitration where domestic audiences are unfavourable to negotiated concessions.<sup>181</sup> This helps alleviate the concern that parties will never want to relinquish control of their disputes.

Domestic audiences may also be more confident in the outcome of arbitrations. Arbitration increases trust, as using a binding dispute resolution process indicates that both parties intend to be bound by the outcome.<sup>182</sup> Moreover, referring the dispute to an independent decision-maker distances parties from emotional or entrenched positions.<sup>183</sup> Finally, arbitration sends a ‘co-operative’ signal, rather than signalling weakness.<sup>184</sup>

Consequently, arbitration not only better facilitates compromise, but also minimises dissatisfaction that might threaten peace. Arbitration’s perceived legitimacy might further reduce dissatisfaction.

### *B Legitimacy*

This section argues that arbitration and arbitral awards are generally perceived as legitimate. This generates trust in awards and helps solve the credible commitment problem, making settlements more durable.

Arbitration has legitimacy because it is procedurally and substantively based on legal principles. Legal bodies follow clearly defined, formal, processes.<sup>185</sup> Legal procedure

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<sup>176</sup> At 223–225.

<sup>177</sup> Huth, Croco and Appel, above n 168, at 423.

<sup>178</sup> Allee and Huth, above n 44, at 223–225.

<sup>179</sup> Simmons, above n 43, at 834 and 838.

<sup>180</sup> Gent and Shannon, above n 48, at 339.

<sup>181</sup> Simmons, above n 43, at 839; Allee and Huth, above n 44, at 223.

<sup>182</sup> Gent and Shannon, above n 48, at 368.

<sup>183</sup> Miles and Mallett, above n 33, at 333.

<sup>184</sup> Simmons, above n 43, at 834.

<sup>185</sup> Miles and Mallett, above n 33, at 325.



creates a sense of familiarity and credibility.<sup>186</sup> Due process considerations apply, meaning parties always have an equal opportunity to make their case.<sup>187</sup> This insulates arbitral decisions against allegations of unfairness or bias.<sup>188</sup> Moreover, except where arbitrators occasionally decide a case *ex aequo et bono*, with the parties' consent, arbitral decisions are made based on legal principles.<sup>189</sup> Arbitral awards made under international law (as this paper proposes) possess particular legitimacy, because international law was created by the international community, of which the parties to the dispute are members in some form.<sup>190</sup>

Mediators also work within legal frameworks.<sup>191</sup> However, mediation is not truly legal in character.<sup>192</sup> Mediation follows no strict procedures; the impact of law on the process is more normative than binding.<sup>193</sup> The settlements are voluntary and not legally binding.<sup>194</sup> Thus, though mediation derives legitimacy from its status as legal dispute resolution process,<sup>195</sup> arbitration might be more legal and have more legitimacy.

Parties also perceive arbitral awards as legitimate because they have autonomy over almost all of the arbitration procedure.<sup>196</sup> Parties can choose the language and location of the arbitration; the characteristics and number of arbitrators; and can opt to expedite proceedings or hold lengthy hearings.<sup>197</sup> Parties value procedural flexibility highly.<sup>198</sup> Giving parties control over procedure increases confidence that the arbitration will be fair. Procedural flexibility might be practically beneficial to parties to an intra-state dispute too. For example, parties could make the proceedings transparent to increase public confidence,<sup>199</sup> or select arbitrators with specialised knowledge.<sup>200</sup>

Procedural flexibility is not a unique benefit. The mediation process is also flexible and parties can have autonomy over the process.<sup>201</sup> Arbitration might give parties less

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<sup>186</sup> Kreddha, above n 56, at 22.

<sup>187</sup> Huth, Croco and Appel, above n 168, at 423.

<sup>188</sup> Allee and Huth, above n 44, at 220 and 224.

<sup>189</sup> At 224; Miles and Mallett, above n 33, at 325.

<sup>190</sup> Gent and Shannon, above n 49, at 368.

<sup>191</sup> *Strengthening the Role of Mediation*, above n 7, at [39]–[40].

<sup>192</sup> See for example Marieke Kleiboer “Understanding Success and Failure of International Mediation” (1996) 40(2) *J Conflict Res* 360 at 380–381.

<sup>193</sup> Scott Sigmund Gartner “Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias” (2014) 6 *YB Arb & Mediation* 269 at 274  
<sup>194</sup> At 274

<sup>195</sup> *Strengthening the Role of Mediation*, above n 7, at [42].

<sup>196</sup> Gary B Born “Keynote Address: Arbitration and the Freedom to Associate” (2009) 38(7) *Ga J Intl & Comp L* 7 at 16.

<sup>197</sup> At 16.

<sup>198</sup> Merrills, above n 161, at 113.

<sup>199</sup> See for example Arbitration Agreement between the Government of the Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area (signed 7 July 2008) [Abyei Arbitration Agreement], arts 8(6) and 9(3).

<sup>200</sup> Kreddha Institute, above n 56, at 22.

<sup>201</sup> *Strengthening the Role of Mediation*, above n 7, at [35]–[38].

autonomy than mediation because it resolves disputes within legal frameworks, as answers to legal questions, instead of allowing parties to air grievances as they choose.

However, arbitration might still have greater legitimacy than mediation or negotiation in the context of implementation disputes because of arbitration's long history of resolving similar disputes. Arbitral tribunals have long been used to resolve inter-state conflicts, particularly boundary disputes and disputes over natural resources.<sup>202</sup> Intra-state conflicts commonly involve disputes concerning boundaries and resources.<sup>203</sup>

This history, taken together with arbitration's legal basis and basis in party autonomy, mean arbitral awards will usually be perceived as highly legitimate.

### *C Independent and Impartial Decision-Making*

This section argues that arbitration, in theory, provides an independent and neutral forum for resolving disputes. This has some limitations in practice.

Parties generally agree to a neutral or balanced panel. Both parties would ideally choose a tribunal biased in their favour, but both know the other party will never agree.<sup>204</sup> A neutral decision-maker is acceptable to both. Neutrality may increase party confidence in the fairness of the tribunal and outcome, and the likelihood of compliance with the award.<sup>205</sup>

Sometimes parties prioritise total neutrality. For example, in 1916 Colombia and Venezuela had Switzerland arbitrate their territorial dispute rather than a state with more geographical proximity or local knowledge.<sup>206</sup> However, tribunals more commonly include equal numbers of arbitrators appointed by both sides and at least one independent member selected by the party-appointed arbitrators or a designated appointment body.<sup>207</sup>

Party-appointed arbitrators may undermine some of arbitration's neutrality benefits. In theory, party-appointed arbitrators have the same duties of impartiality and independence as neutral arbitrators.<sup>208</sup> In practice, parties try to appoint arbitrators that are more likely to

<sup>202</sup> See for example *Dutch-Portuguese Boundaries on the Island of Timor (Netherlands v Portugal) (Award)* (1998) XXII RIAA 211; (2001) 40 ILM 900; *Island of Palmas*, above n 111; *Sovereignty of Various Red Sea Islands (Eritrea v Yemen) (Award)* (1961) XI RIAA 481; (2001) 40 ILM 900; *Maritime Delimitation (Eritrea v Yemen) (Award)* (1999) XXII RIAA 335, (2001) 40 ILM 983; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS) (Barbados v Trinidad) (Award) PCA (Award)* (2006) 45 ILM 839; *Proceedings Pursuant to the Law of the Sea Convention (UNCLOS) (Guyana v Suriname) (Award) PCA*, 17 September 2007.

<sup>203</sup> Baetens and Yotova, above n 59, at 438.

<sup>204</sup> Gent and Shannon, above n 49, at 370.

<sup>205</sup> At 371.

<sup>206</sup> At 371.

<sup>207</sup> Allee and Huth, above n 44, at 224.

<sup>208</sup> Sundaresh Menon "Adjudicator, Advocate or Something in Between: Coming to Terms with the Role of the Party-Appointed Arbitrator" (2017) 34(3) J Int Arb 347 at 357; see also IBA Council *Conflicts of Interest in International Arbitration* (23 October 2014).

favour their interests. This is because “[d]isputants tend to be interested in one thing only: a favourable outcome. In arbitration, they exercise the opportunity to make a unilateral appointment...with that overriding objective in view”.<sup>209</sup>

Involving party-appointed arbitrators may frustrate the dispute settlement process. Parties may refuse to appoint an arbitrator or agree on a neutral member.<sup>210</sup> Party-appointed arbitrators may act with intransigence, as occurred in *Brčko*— where the party-appointed arbitrators refused to recognise the award.<sup>211</sup> Allegations of bias and impropriety against party-appointed arbitrators are not uncommon.<sup>212</sup> For example, in 2015, during the *Slovenia v Croatia* arbitration over a boundary dispute, the Slovenian arbitrator was discovered to be sharing private information with Slovenian representatives and colluding with them to persuade the other arbitrators to find for Slovenia.<sup>213</sup>

These kinds of scandals somewhat undermine arbitration’s legitimacy and may reduce parties’ willingness to arbitrate. Even so, it seems unlikely parties will be convinced to appoint totally neutral panels. Parties prefer to appoint their own arbitrators, as this gives them confidence their interests will be vigorously represented before the tribunal.<sup>214</sup> There is, therefore, a need to articulate clear rules around the conduct of party-arbitrators to ensure arbitration is truly neutral.<sup>215</sup>

Negotiation does not involve independent third parties. Mediation, however, usually involves a neutral third party mediator. However, the benefits of neutrality are smaller where the neutral party is only involved in a supportive capacity and is not the decision-maker. The ultimate outcome still depends on each party’s bargaining power. On balance, the benefits of a mostly neutral panel of decision-makers might be greater than the presence of a truly neutral mediator.

#### *D Final and Binding Awards*

This section argues arbitral decisions are, in theory, final and binding. Mediation and negotiation, in contrast, are non-binding, unenforceable and completely voluntary in both process and outcome.<sup>216</sup>

Parties do not always comply with arbitral awards, as the non-implementation of the *Abyei* award illustrates.<sup>217</sup> However, parties likely treat arbitral awards as final and binding in most cases. States are empirically more likely to comply with binding arbitral awards than

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<sup>209</sup> Jan Paulsson *The Idea of Arbitration* (OUP, London, 2013) at 279.

<sup>210</sup> Vidmar, above n 59, at 102.

<sup>211</sup> See Part IV(C)(2).

<sup>212</sup> Menon, above n 208, at 349 nn 7–10.

<sup>213</sup> At 348.

<sup>214</sup> Vidmar, above n 59, at 100–101.

<sup>215</sup> See for example, Menon, , above n 208, at 363–371.

<sup>216</sup> See for example, Gartner, above n 193, at 274.

<sup>217</sup> See Part IV(C)(1).

non-binding settlements.<sup>218</sup>

There are several reasons why parties treat awards as binding. Awards are manifestations of parties' autonomy, but:<sup>219</sup>

...[i]t is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding, the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award.

Arbitral awards derive authority from, and are binding under, international law. Awards demonstrate how international law would resolve the dispute, where previously this was less clear.<sup>220</sup> An award might demarcate a boundary between conflicting parties' territory, when previously authority over the territory was disputed. Awards highlight one outcome as legal and legitimate in the eyes of the international community.<sup>221</sup> A party that ignores such an outcome would be seen to violate clear international law. International actors usually feel compelled to obey, and do obey, established law.<sup>222</sup>

The cost of violating an arbitral award may also be high, for a number of reasons.<sup>223</sup> First, non-compliance could be followed with costly enforcement proceedings and financial penalties.<sup>224</sup> Secondly, non-compliance has international reputational costs. The international community may eschew a party that has breached international law and reneged on its commitment to uphold an award.<sup>225</sup> Moreover, a non-compliant party risks losing international aid and support.<sup>226</sup> The international community might view retaliation from the other party as legitimate.<sup>227</sup> The risk of a negative international response is high, given modern media allows information about breaches to be rapidly and globally disseminated.<sup>228</sup> There is empirical evidence that states and sub-state entities are concerned with the costs of ignoring legally binding decisions.<sup>229</sup> These concerns incentivise compliance.

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<sup>218</sup> Gent and Shannon, above n 49, at 366.

<sup>219</sup> *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat of the United Nations A/CN.4/92 (1955)* at 105.

<sup>220</sup> Gent and Shannon, above n 49, at 368.

<sup>221</sup> Simmons, above n 43, at 835.

<sup>222</sup> See for example Louis Henkin *How Nations Behave: Law and Foreign Policy* (2<sup>nd</sup> ed, Columbia UP, New York, 1979) at 92–93.

<sup>223</sup> Simmons, above n 43, at 835; Gent and Shannon, above n 49, at 368.

<sup>224</sup> At 843. Discussed further in Part II(E) below.

<sup>225</sup> At 843; Gent and Shannon, above n 49, at 368.

<sup>226</sup> Fortna, above n 47, at 343.

<sup>227</sup> Fortna, above n 47, at 343.

<sup>228</sup> *United Nations Activities in Support of Mediation*, above n 4, at [5].

<sup>229</sup> Simmons, above n 43, at 843–844.

Costs are not associated with breaching mediated or negotiated settlements, which are only binding in the sense that parties have agreed to comply.<sup>230</sup> There are no direct costs to breaching a voluntary settlement. There are also likely to be minimal reputational costs. Accordingly, parties are more likely to comply with arbitral awards than non-binding settlements.

### *E Enforceability*

There is a lack of enforcement mechanisms for arbitral awards given under public international law. This is a significant shortcoming. Even if compliance is likely in most cases, non-compliance may render an award useless. The potential for such failure means arbitral awards do not resolve disputes with finality and certainty. This section considers possible ways to alleviate this concern, but finds few effective enforcement mechanisms. It is, however, worth noting that mediated and negotiated settlements are equally unenforceable. Whilst arbitral award's enforceability is a disadvantage, it is not a disadvantage vis-à-vis the other dispute resolution processes available.

Enforcement might also be an issue at the initial stage of enforcing an arbitration clause. A properly drafted arbitration clause will legally oblige parties to resolve disputes by arbitration. However, uncooperative parties cannot be forced to engage in arbitrations.<sup>231</sup> Consequently, parties should adopt arbitration clauses and/or rules with fall-back provisions. Arbitrators should be empowered to arbitrate and issue awards where one party seeks to arbitrate, but the other refuses to participate. For example, the PCA Optional Rules permit arbitration where a party refuses to appear without good reason and for the appointing authority to appoint an arbitrator where a party fails to do so within 30 days.<sup>232</sup>

However, the issue of enforcing an arbitral *award* is more difficult to solve. Enforcement was an issue in *Abyei*,<sup>233</sup> and enforcing investment arbitration awards has been a recurrent issue, though not in most cases.<sup>234</sup>

Enforcement could theoretically occur in the parent state's national courts, or a foreign court, if the parties agreed to the award being enforceable in those courts.<sup>235</sup> It is unlikely the parties would agree to this. Enforcement through national courts would raise the same issues of mistrust and bias that the parties would have chosen arbitration to avoid.

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<sup>230</sup> Merrills, above n 161, at 26.

<sup>231</sup> Miles and Mallett, above n 33, at 334.

<sup>232</sup> PCA Optional Rules, above n 82, arts 28(1) and 7(2); see also *Abyei* Arbitration Agreement, above n 199, arts 4(8) and 5(5).

<sup>233</sup> See Part IV(C)(2).

<sup>234</sup> Miles and Mallett, above n 33, at 336.

<sup>235</sup> See for example, Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (opened for signature 27 August 1965, 14 October 1966) [ICSID Convention], art 54(1); David D Caron "The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution" (1990) 84 Am J Intl L 104 at 113.

The enforcement framework for arbitral awards created by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is also unlikely to apply to awards made in this context.<sup>236</sup> States can reserve the right to limit the New York Convention to commercial awards.<sup>237</sup> Many do.<sup>238</sup> Enforcing awards concerning intra-state conflicts would not be possible in these states. Moreover, the New York Convention applies only to awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”<sup>239</sup> This means awards rendered in the state in conflict could not be enforced in that state’s courts through the Convention, only in foreign courts. Some states further limit the New York Convention to exclude awards not made in the territory of member states.<sup>240</sup>

Further, whether an award is “made in the territory of a State” within the meaning of the New York Convention arguably refers to the *lex arbitri* of an arbitration, not just its location.<sup>241</sup> International arbitral awards rendered between states and non-state entities may be ‘a-national’ and not subject to any national law.<sup>242</sup> In the investment arbitration context, it has been debated that this means truly international awards are not enforceable under the New York Convention.<sup>243</sup> United States’ courts, to some controversy, have held awards made by the Iran-US claims tribunal are enforceable under the New York Convention.<sup>244</sup> It is unclear whether courts would be willing to enforce arbitral awards made following intra-state conflicts under the New York Convention. This may depend on tribunals’ conclusion as to the law governing the arbitration in question. Such conclusions have varied significantly in investment arbitrations.<sup>245</sup> It may also depend on whether the state party has waived sovereign immunity for enforcement purposes, as well as for the arbitration.<sup>246</sup>

Even where enforcement under the New York Convention is available, it might not be useful. The framework is designed to help commercial parties enforce monetary awards in foreign states where the non-compliant party has assets. Courts can use attachment to give

<sup>236</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 9 June 1958, entered into force 7 June 1959) (1958) [New York Convention]; *UNCITRAL Model Law on International Commercial Arbitration* 24 ILM 1302, GA Res 40/72, A/Res/40/72 (1985).

<sup>237</sup> New York Convention, above n 237, art 1(3).

<sup>238</sup> Miles and Mallett, above n 33, at 335.

<sup>239</sup> New York Convention, above n 237, art 1(1).

<sup>240</sup> Miles and Mallett, above n 33, at 335.

<sup>241</sup> Caron, above n 235, at 113–114.

<sup>242</sup> At 120.

<sup>243</sup> See for example Robert P Lewis “What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States” (1988) 26 Colum J Transnatl L 515 at 548–551.

<sup>244</sup> *Ministry of Defense of Islamic Republic of Iran v Gould Inc* 887 F 2d 1357 (9th Cir 1989, cert denied 494 US 1016 (1990)).

<sup>245</sup> Caron, above n 235, at 120 n 67. For example, c.f. *Saudi Arabia v Arabian American Oil Co (ARAMCO)* (1963) 27 ILR 117 (arbitration not governed by Swiss law) with *Sapphire International Petroleum v National Iranian Oil Co* (1963) 35 ILR 136 (arbitration governed by Swiss law and award subject to enforcement in Swiss courts).

<sup>246</sup> See further Kredha Institute, above n 56, at 29, discussing comments presented by Wendy Miles.

the other party access to these assets.<sup>247</sup> However, the subject matter of an award in an intra-state dispute is unlikely to be monetary. Awards are more likely to require parties to take practical steps, such as disarmament or withdrawal from a territory. It is unclear how any court could enforce such an award, let alone a foreign court. Compliance with these awards is dependent on the good will of the parties.

The New York Convention might have limited use where one party claims financial compensation for non-compliance in foreign states where the non-compliant party holds assets.<sup>248</sup> Including liquidated damages clauses for non-compliance, in awards or subsequent agreements, might make such claims easier. The ability to claim for financial compensation could have two benefits. First, the fear of financial costs incentivises compliance with awards, as already discussed. This incentive may be greater where damages are liquidated and exemplary. Secondly, financial compensation for non-compliance could help a compliant party to take their own steps towards implementation or otherwise advantage them vis-à-vis the non-compliant party.

State parties to public international law arbitrations do not possess a clear independent obligation to comply with arbitral awards under a treaty.<sup>249</sup> Article 37 of the 1907 Hague Convention for the Pacific Settlement of Disputes might possibly have this effect, subject to rights of nullification, where it obliges parties “to submit in good faith to the Award”.<sup>250</sup> Such an obligation might compel compliance. However, it would only help sub-state entities with enforcement if it was incorporated into domestic law. The only international forum such entities would have recourse to would be another arbitral tribunal, which seems ineffective in cases of intransigence.

Soft law pressure from the international community could help with enforcement. Top-down political pressure on parties arguably engenders compliance with international law, so could encourage compliance with arbitral awards.<sup>251</sup> Engaging the international community in arbitrations might increase this pressure.<sup>252</sup> However, parties do not always respond to international pressure. After *Abyei*, the international community called on the

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<sup>247</sup> Miles and Mallett, above n 33, at 335.

<sup>248</sup> Kreddha Institute, above n 56, at 26.

<sup>249</sup> Compare ICSID Convention, above n 235, arts 53(1) and 54(1).

<sup>250</sup> Hague Convention (I), above n 73, art 37; accepted as binding principle in *The Argument of the United States of America on Behalf on the Orinoco Steamship Company against the United States of Venezuela* (Buffalo & Erie County Library, New York, 1909) at 17.

<sup>251</sup> See further Gregory Shaffer “Transnational Legal Process and State Change” (2012) 37(2) *L & Social Inq* 229; Kathryn Sikkink and Margaret Keck *Advocacy Networks in International Politics* (Cornell University Press, New York, 1998); Kathryn Sikkink and Thomas Risse *The Power of Human Rights* (CUP, Cambridge, 1999).

<sup>252</sup> Miles and Mallett, above n 33, at 336.

parties to comply with the award, including through Security Council resolutions.<sup>253</sup> These requests were not heeded. Similarly, Ethiopia refuses to comply with the 2001 decision of the Eritrea-Ethiopia Boundary Commission and has ignored Security Council resolutions.<sup>254</sup>

The international community has recourse to hard law enforcement mechanisms in cases of intransigence that threaten peace. The Security Council can exercise Chapter VII powers, including: mandating sanctions; sending peacekeepers; or organising military action.<sup>255</sup> In these situations, more than a dispute resolution mechanism is necessary.

### *F Preliminary Conclusions*

Arbitration has several unique advantages as a dispute resolution tool following intra-state conflict. It helps parties resolve disputes by reducing the costs of concessions. It is a legitimate process helping remedy the credible commitment problem. Parties may be able to resolve disputes through arbitration where they could not otherwise.

Arbitration offers some flexibility, though perhaps gives parties less autonomy than mediation or negotiation. It has the potential to allow disputes to be resolved by impartial decision-makers. Finally, arbitral awards are doctrinally final and binding, and are complied with more often than non-binding negotiated or mediated settlements.<sup>256</sup>

The difficulties with enforcement are a drawback. Even so, arbitration may still be better than negotiated or mediated settlements, which are equally unenforceable, if not less so.

## *IV Case Studies*

This section considers two situations (to the best of this author's knowledge, the only two situations) in which international arbitration was used to resolve a dispute after the signing of a peace agreement in an intra-state conflict: the *Brčko* arbitration and the *Abyei* arbitration. The section outlines the decisions then considers their implications for the benefits and limitations of arbitration following intra-state conflicts.

### *A Brčko Arbitration*

#### *1 Background*

During the early 1990s, Slovenia, Croatia and Bosnia seceded from the Socialist Federal Republic of Yugoslavia, culminating in war. The war in Bosnia and Herzegovina was long

<sup>253</sup> *Security Council Resolution 1812 (2008) on extension of the mandate of the United Nations Mission in Sudan (UNMIS)* SC Res 1812, S/RES/1812 (2008) at [6]–[7]; *Security Council Resolution 1919 (2010) on extension of the mandate of the UN Mission in Sudan (UNMIS)* SC Res 1919, S/RES/1919 (2010) at [9] and [12]; *Security Council resolution 1990 (2011) on establishment of the UN Interim Security Force for Abyei (UNISFA)* SC Res 1990, S/RES/1990 (2011) at [6]–[9].

<sup>254</sup> Kreddha Institute, above n 56, at 26.

<sup>255</sup> Charter of the United Nations, above n 2, Chapter VII.

<sup>256</sup> Gent and Shannon, above n 49, at 366.



and violent. Many lives were lost.<sup>257</sup> The war involved ethnic tensions between Bosnian-Serbs, Bosnian-Croats and Bosniaks.<sup>258</sup> The Bosnian-Serbs had military superiority. They gained control of 70 per cent of Bosnian territory and engaged in genocide.<sup>259</sup>

In August 1995, Bosnia and Herzegovina was forced to the negotiating table by international pressure – primarily a bombing campaign by the North Atlantic Treaty Organization (NATO).<sup>260</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) was signed with Yugoslavia and Croatia and entered into force on 14 December 1995.<sup>261</sup> A NATO-led implementation force was deployed to help implement the agreement and keep the peace.<sup>262</sup>

Under the Dayton Agreement, Bosnia and Herzegovina remained one nation. However, it was divided into two sub-state entities, the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS), which had emerged during the war.<sup>263</sup> The Agreement divided the territory 51 per cent to FBH and 49 per cent to RS, and established an inter-entity boundary line.<sup>264</sup>

The Agreement left one issue unresolved. The parties reached a deadlock over the boundary line's location in Brčko, a 493-square-kilometre district on the Croatian border, which was an agricultural and transport centre.<sup>265</sup> The Bosnian-Serbs had seized Brčko as a strategic corridor between the two halves of the RS.<sup>266</sup> During the negotiations, both parties stated that without control of Brčko they would quit the negotiations and resume fighting.<sup>267</sup> To avoid a relapse into conflict, the parties agreed to binding arbitration to delimitate the boundary in Brčko, to be completed within a year.<sup>268</sup>

The arbitration was to be ad-hoc under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. The arbitrators were to apply “relevant legal

<sup>257</sup> Michael G Karnavas “Creating the Legal Framework of the Brčko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries” (2003) 97(1) *The Am J of Intl L* 111 at 112.

<sup>258</sup> R Jade Harry “The Brčko arbitration” in Ulf Franke, Annette Magnusson and Joel Dahlquist (eds) *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International BV, The Netherlands, 2016) 177 at 177.

<sup>259</sup> *Brčko Inter-Entity Boundary (Bosnia v Republika Srpska) (Interim Award)* (1997) 36 ILM 396 [*Brčko (Interim Award)*] at [50]–[51], [71] and [74].

<sup>260</sup> Harry, above n 258, at 177.

<sup>261</sup> *Brčko (Interim Award)*, above n 259, at [37].

<sup>262</sup> Duijzentkunst and Dawkins, above n 71, at 150.

<sup>263</sup> Harry, above n 258, at 177.

<sup>264</sup> Dayton Peace Agreement, above n 126, Annex 2.

<sup>265</sup> *Brčko (Interim Award)*, above n 259, at [37], [39] and [44].

<sup>266</sup> At [44].

<sup>267</sup> At [39].

<sup>268</sup> At [37]; Dayton Peace Agreement, above n 126, Annex 2, art V.

and equitable principles”.<sup>269</sup> The FBH and RS could each appoint an arbitrator. The party-appointed arbitrators would elect the presiding arbitrator. If they did not within 30 days the presiding arbitrator would be appointed by the president of the International Court of Justice.<sup>270</sup> This occurred in the case. Moreover, the tribunal was to reach a majority decision.<sup>271</sup> However, both party-appointed arbitrators were uncooperative and refused to sign the awards.<sup>272</sup> Consequently, the presiding arbitrator, Roberts B Owens, ruled if a majority decision could not be reached, his decision would be final.<sup>273</sup> Owens issued the awards alone.

## 2 Awards

The tribunal failed to issue an award by 4 December 1996 as agreed, finding the political situation meant “it would be inappropriate to make a judgment at [that] time”.<sup>274</sup> The Tribunal delivered an Interim Award on 14 February 1997.<sup>275</sup> A Supplemental Award was issued on 15 March 1998,<sup>276</sup> and a Final Award on 5 March 1999.<sup>277</sup>

The Interim Award deferred answering a jurisdictional challenge until the Final Award.<sup>278</sup> RS had argued that the Tribunal lacked jurisdiction as the Dayton Agreement authorised arbitration of the “disputed portion” of the boundary line as defined by the map attached to the agreement, but no map had been attached.<sup>279</sup>

The Award set out the parties’ equitable arguments. FBH argued it had strong historical and socio-economic ties to Brčko and needed Brčko to be connected to the European market, whilst the RS could not control Brčko because it had ‘unclean hands’ due to ethnic cleansing.<sup>280</sup> The RS argued Brčko was the only territorial link between its two halves and

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<sup>269</sup> *Brčko (Interim Award)*, above n 259, at Annex 2, art V(3).

<sup>270</sup> At [2]; see also Hajradin Radončić, Nebojša Janković and Predrag Mladenović “Arbitration as a Means of Resolving Disputes in the Case of Bosnia and Herzegovina” (2017) 69 *Vojno Delo* 212 at 213.

<sup>271</sup> See United Nations Commission on International Trade Law *UNICITRAL Arbitration Rules* GA Res 31/98, A/RES/31/98 (1976: revised in 2010 and 2013), arts 31(1) and 32(4); see further, Christoph Schreuer “The Brčko Award of 14 February 1997” (1998) 11(1) *LJIL* 71 at 73–74

<sup>272</sup> Duijzentkunst and Dawkins, above n 71, at 149.

<sup>273</sup> *Brčko (Interim Award)*, above n 259, at [30].

<sup>274</sup> At [104(II)(A)].

<sup>275</sup> See further Schreuer, above n 271.

<sup>276</sup> *Brčko Inter-Entity Boundary (Bosnia v Republika Srpska) (Supplemental Award)* Roberts B Owens, Cazim Sadikovic, Vitomir Popovic 15 March 1998, S/1998/248 [*Brčko (Supplemental Award)*]; see further Christoph Schreuer “The Brčko Supplemental Award of 15 March 1998” (1999) 11(3) *LJIL* 5493.

<sup>277</sup> *Brčko Inter-Entity Boundary (Bosnia v Republika Srpska) (Final Award)* (1999) 38 *ILM* 53 [*Brčko (Final Award)*]; see further Christoph Schreuer “The Brčko Final Award of 5 March 1999” (1999) 12(3) *LJIL* 575.

<sup>278</sup> *Brčko (Interim Award)*, above n 259, at [14].

<sup>279</sup> See further *Brčko (Final Award)*, above n 277, at [14].

<sup>280</sup> *Brčko (Interim Award)*, above n 259, at [58]–[62] and [64].

integral to its territory.<sup>281</sup> The tribunal did not rule on these arguments or delimitate the boundary.

The Award noted that neither party would receive territory if they failed to comply with the Dayton Agreement.<sup>282</sup> This made Brčko a “stick and carrot” for bringing both parties into compliance.<sup>283</sup> The Award appointed an international supervisor to stabilise the political situation with broad powers to administer Brčko and make binding orders that could override other laws.<sup>284</sup>

The Supplemental Award observed that both parties had violated the Dayton Agreement, but that change seemed likely.<sup>285</sup> The major Bosnian-Serb political group had distanced itself from the extremist establishment party and the RS had a new centrist Prime Minister.<sup>286</sup> The final decision was postponed to give the region more time to stabilise and increase the likelihood of the boundary line lasting.<sup>287</sup>

The Final Award noted the tribunal’s jurisdiction was broad enough to “fashion a remedy representing a compromise between the parties’ extreme positions” and solve the overall dispute.<sup>288</sup> The Award held that both entities had not totally complied with the Dayton Agreement. Consequently, Brčko was not assigned to either party. A boundary line was not delimited. Instead, Brčko would become a demilitarised, autonomously-administered district held in condominium by the FBH and the RS.<sup>289</sup> Brčko would remain subject to Bosnia and Herzegovina’s national laws and the remaining governance powers would be held in the district, not the FBH or RS.<sup>290</sup>

The Award outlined a new government structure for Brčko under international supervision. This would include a democratically elected legislature, unified multi-cultural police force and independent judiciary.<sup>291</sup> The Award further created a Law Revision Commission to draft a constitution and reform Brčko’s criminal justice, health care, tax and property laws.<sup>292</sup> The supervisor’s broad powers were maintained.<sup>293</sup> Finally, the tribunal was not dissolved. It retained jurisdiction to modify the Award, including to transfer Brčko into one party’s exclusive control, in the event of serious noncompliance, until Brčko’s institutions

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<sup>281</sup> At [71], [81]–[82] and [90]–[91].

<sup>282</sup> At [103] and [104(II)(B)–(C)].

<sup>283</sup> Harry, above n 258, at 184.

<sup>284</sup> *Brčko (Interim Award)*, above n 259, at [104 (I)(B)–(C)].

<sup>285</sup> *Brčko (Supplemental Award)*, above n 276, at [7]–[10].

<sup>286</sup> At [9]–[12].

<sup>287</sup> At [12].

<sup>288</sup> *Brčko (Final Award)*, above n 277, at [38].

<sup>289</sup> At [9]–[11].

<sup>290</sup> *Brčko (Final Award)*, above n 277, at [10].

<sup>291</sup> At [36] and [56]. See further Karnavas, above n 257.

<sup>292</sup> As discussed Duijzentkunst and Dawkins, above n 71, at 148.

<sup>293</sup> *Brčko (Final Award)*, above n 277, at [13].

were “functioning effectively and apparently permanently”.<sup>294</sup> Otherwise, the Award was to be “final and binding”.<sup>295</sup>

## B *Abyei Arbitration*

### 1 *Background*

In many ways, the dispute over Abyei was akin to the dispute over Brčko. Both were territorial disputes over a small region after a brutal, ethnically-driven war. However, the arbitrations and the responses to them differed.

The *Abyei* arbitration arose from the civil war in Sudan. Sudan was colonised by Britain and Egypt in the late nineteenth century. The colonising powers imposed new boundaries for administrative convenience, which differed from the traditional territories belonging to the Muslim Arabs in the north and indigenous tribes with Christian or Pagan beliefs in the south.<sup>296</sup> The colonisers imposed an Anglo-Egyptian condominium government which implemented a ‘Southern Policy’, intended to protect the south’s indigenous people. The policy, however, isolated the south and caused it to be deprived of educational opportunities, development and investment.<sup>297</sup>

Britain and Egypt’s withdrawal in 1954 triggered a civil war. This ended with the signing of the Addis Ababa Agreement in 1972 which gave southern Sudan some autonomy.<sup>298</sup> The discovery of oil in the south in the 1980s reignited the war.<sup>299</sup> The fighting lasted two decades and nearly 2 million people died – one fifth of southern Sudan’s population – whilst over 4 million were displaced.<sup>300</sup>

The Government of Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A) signed a Comprehensive Peace Agreement (CPA) on 9 January 2005.<sup>301</sup> The CPA contained provisions concerning wealth and resource sharing, political power, and security. It required the south to hold a referendum to decide whether it wished to secede.<sup>302</sup> The parties failed to agree on the boundaries and control of *Abyei*.<sup>303</sup>

Abyei was a region of around 26,000 square kilometres (with a capital city of the same

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<sup>294</sup> *Brčko (Interim Award)*, above n 259, at [13] and [67]–[68].

<sup>295</sup> At [35].

<sup>296</sup> Miles, above n 26, at 226.

<sup>297</sup> At 226.

<sup>298</sup> At 226.

<sup>299</sup> At 226.

<sup>300</sup> UN Committee for Refugees and Immigrants “Sudan: Nearly 2 Million Dead as a Result of the World’s Longest Running Civil War” (20 June 2001) Refworld <<http://www.refworld.org>>.

<sup>301</sup> *Brčko (Interim Award)*, above n 259, at [118]

<sup>302</sup> Comprehensive Peace Agreement, above n 55; *Abyei*, above n 72, at [113]–[117]

<sup>303</sup> Lowe and Tzanakopoulos ‘Introduction: The Abyei Arbitration’ in L Bosman & H Clark (eds) *The Abyei Arbitration* (Volume 9, Permanent Court of Arbitration Award Series, 2012), 1 at [11].

name). It was strategically important during the civil war and considered the bridge between the north and south.<sup>304</sup> It is the agricultural homeland of the indigenous Ngok Dinka and Misserya peoples, and contains oil and gas reserves which produce annual revenues of hundreds of millions of United States dollars.<sup>305</sup>

In the CPA, the parties agreed to establish the Abyei Boundaries Commission (ABC) to delimit Abyei's boundaries.<sup>306</sup> Post delimitation, Abyei would be granted special administrative status, the oil revenues would be shared and Abyei's people would have the opportunity to participate in a referendum to decide whether, in the case of southern secession, they would go south or retain administrative status in the north.<sup>307</sup> The ABC's decision was to be final.<sup>308</sup> The task of delimiting Abyei's boundaries was part of "an extraordinarily complex political process".<sup>309</sup> It was a precursor to voter registration, oil revenue sharing and the overall implementation of the CPA.<sup>310</sup>

Each party was entitled to appoint five members to the ABC and the United States and United Kingdom Intergovernmental Authority for Development was to appoint five impartial experts.<sup>311</sup> The ABC was required to make their decision scientifically, based on archived historical documents, local testimony and submissions by representatives of the Government of Sudan and SPLM/A.<sup>312</sup> The parties were to decide via consensus, but the experts' decision was to be final where there was disagreement.<sup>313</sup>

After conducting research, the ABC issued a report in July 2005. No consensus was reached, so the experts made the decision.<sup>314</sup> The ABC used historical materials to define Abyei's boundaries, but found no conclusive map or documentation.<sup>315</sup> The final boundaries encompassed a large area, including two major oil fields, which had not been considered part of Abyei.<sup>316</sup> A "shared rights area" was added on Abyei's northern boundary (with a soft boundary at its centre), where territory belonging to the Ngok Dinka

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<sup>304</sup> Lowe and Tzanakopoulos, above n 303, at [8].

<sup>305</sup> *Abyei*, above n 72, at [104]

<sup>306</sup> At [113]–[117]; Protocol between the Government of the Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) on the Resolution of Abyei Conflict (26 May 2004) [*Abyei Protocol*], arts 1.1.2 and 5.1.

<sup>307</sup> *Abyei*, above n 72, at [591]–[594]

<sup>308</sup> *Abyei Protocol*, above n 306, art 5.1.

<sup>309</sup> *Abyei*, above n 72, at [520].

<sup>310</sup> Duijzenthkunst and Dawkins, above n 71, 160.

<sup>311</sup> *Abyei Protocol*, above n 276, art 2; see further Duijzenthkunst and Dawkins, above n 71, 9 at 160; Miles, above n 26, at 229–230

<sup>312</sup> Duijzenthkunst and Dawkins, above n 71, at 161.

<sup>313</sup> *Abyei Protocol*, above n 306, art 5.1; *Abyei*, above n 72, at [120].

<sup>314</sup> *Abyei Boundaries Commission Report* (July 2005) [*Abyei Report*] part I, at 14.

<sup>315</sup> *Abyei Report*, above 314, part 1 at 4; *Abyei*, above n 72, at [124]–[126].

<sup>316</sup> Miles, above n 26, at 231.

chiefdoms intersected with an area where the Misseriya had grazing rights.<sup>317</sup>

The SPLM/A sought to implement the report, but the Government of Sudan refused. It asserted the experts had exceeded their mandate.<sup>318</sup> There were no mechanisms for enforcement or appeal of the report. Tensions escalated. In May 2008, Abyei again erupted into conflict.<sup>319</sup> The Government of Sudan and SPLM/A then entered into a formal arbitration agreement to resolve the Abyei dispute.<sup>320</sup>

The PCA Optional Rules were to govern the arbitration.<sup>321</sup> The tribunal was to be comprised of five arbitrators.<sup>322</sup> Each party was to appoint two, who together would select a presiding arbitrator.<sup>323</sup> If they could not agree, the presiding arbitrator would be selected by the Secretary General of the PCA, with reference to the parties' lists of preferred candidates.<sup>324</sup> The tribunal was to deliver a final award within nine months of their appointment.<sup>325</sup> The applicable law was to include the Interim National Constitution of Sudan and "general principles of law and practice".<sup>326</sup> The tribunal found this included public international law.<sup>327</sup> The arbitration was to be conducted with transparency. The oral proceedings would be open to the media and broadcast via live webcast, and the written submissions and award would be available online in English and Arabic.<sup>328</sup> The agreement also had funding provisions. Regardless of the outcome, the Government of Sudan was to cover the costs of the arbitration (from their oil revenue).<sup>329</sup> The Government of Sudan could apply for funding from the PCA Financial Assistance Fund and both parties could solicit funding from the international community<sup>330</sup>

## 2 Award

The oral hearings concluded on the 22 July 2009. The tribunal issued its 269-page award 90 days later.<sup>331</sup> There was a scathing dissent by Judge Al-Khasawneh, a Government of Sudan arbitrator.

The tribunal found it had a limited scope of review. It could not consider the delimitation's

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<sup>317</sup> Abyei Report, above 314, part 1 at 22; *Abyei*, above n 72, at [131].

<sup>318</sup> Miles, above n 26, at 232.

<sup>319</sup> See further *Abandoning Abyei: Destruction and Displacement* (Human Rights Watch, 1-56432-364-1, May 2008).

<sup>320</sup> Miles, above n 26, at 232.

<sup>321</sup> Abyei Arbitration Agreement, above n 199, art 1.

<sup>322</sup> Article 5.

<sup>323</sup> Article 5.8 and 5.12.

<sup>324</sup> Articles 5.12.

<sup>325</sup> Article 4.

<sup>326</sup> Article 3.1

<sup>327</sup> *Abyei*, above n 72, at 425–435.

<sup>328</sup> Abyei Arbitration Agreement, above n 199, arts 8(6) and 9(3).

<sup>329</sup> Article 11.1.

<sup>330</sup> Abyei Arbitration Agreement, above n 199, art 11.2.

<sup>331</sup> Lowe and Tzanakopoulos, above n 303, at [63].

correctness in fact or law.<sup>332</sup> Its task was determining whether the ABC Experts had exceeded their mandate.<sup>333</sup> If this question was answered in the affirmative, the tribunal could redraw the boundaries of the Abyei area based on the parties' submissions.<sup>334</sup>

The tribunal found the ABC had interpreted its mandate reasonably.<sup>335</sup> Even if the ABC had exceeded its mandate, it had not done so in a manner that justified setting its decision aside.<sup>336</sup> First, the tribunal held the ABC had not breached its procedural mandate.<sup>337</sup> The ABC's members were properly selected and qualified, whilst proceedings were conducted largely in accordance with the parties' Terms of Reference and the experts' Rules of Procedure.<sup>338</sup> Secondly, the report could not be set aside for breach of substantive mandate, as the tribunal could not examine the decision's correctness.<sup>339</sup>

However, the tribunal found the ABC had exceeded its mandate their implementation of it.<sup>340</sup> The ABC was required to give sufficient reasons for its decisions and had failed to do so for some of the boundaries.<sup>341</sup> The ABC only gave partial reasons for Abyei's northern boundary and almost no reasons for the eastern and western boundaries.<sup>342</sup>

The tribunal redrew these boundaries. It adopted a similar approach to the experts,<sup>343</sup> but engaged in a *de novo* review of the evidence.<sup>344</sup> Its decision reduced Abyei's territory. The tribunal removed the 'shared rights' area from the northern boundary, and narrowed the western and eastern boundaries, excluding a strategic train junction and the two major oil fields.<sup>345</sup> In its decision, the tribunal, as the ABC had done, emphasised the significance of the indigenous rights of the Ngok Dinka and Misseriya in Abyei, and reserved the Misseriya's traditional grazing rights.<sup>346</sup> The Tribunal did not address the issue of who was considered a resident of Abyei and would be eligible to vote in the Abyei referendum.<sup>347</sup>

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<sup>332</sup> *Abyei*, above n 72, at [398]–[400] and [449]–[440].

<sup>333</sup> At [398]–[400], [487] and [508]; relying on *Abyei Arbitration Agreement*, above n 199, art 2(a).

<sup>334</sup> At [398]–[400].

<sup>335</sup> At [616]–[659] and [665]–[672].

<sup>336</sup> At [139] and [237].

<sup>337</sup> At [139].

<sup>338</sup> At [436]–[433].

<sup>339</sup> At [406].

<sup>340</sup> At [511].

<sup>341</sup> At [519]–[536] and [673]–[709]; this is despite the fact that the ABC gave a 45 page decision with 206 pages of appendices.

<sup>342</sup> *Abyei*, above n 72, at [518]–[536] and [673]–[709].

<sup>343</sup> *Lowe and Tzanakopoulos*, above n 303, at [50].

<sup>344</sup> *Abyei*, above n 72, at [398] and [710]–[747].

<sup>345</sup> *Miles*, above n 26, at 241.

<sup>346</sup> *Abyei*, above n 72, at [748]–[766].

<sup>347</sup> *Duijzentkunst and Dawkins*, above n 71, at 162.

### C Implications

This section compares the *Brčko* and *Abyei* arbitrations, and considers their implications.

#### I Success

The *Brčko* arbitration led to more lasting peace than the *Abyei* arbitration.

The *Brčko* arbitration succeeded in bringing about long-term peace. The RS opposed the Final Award initially, and some politicians resigned in protest, but there were no violent responses.<sup>348</sup> The Award was implemented quickly and amassed broad support.<sup>349</sup> A year later, Brčko had been demilitarised; the police had been integrated; 5000 refugees had returned to the region; a new judiciary had been appointed; and the supervisor had started to integrate Brčko's schools.<sup>350</sup> Today, Brčko maintains the political structure in the Final Award; has a diverse local government; and is the only Bosnian city with an integrated school system.<sup>351</sup> Violence has not re-emerged.<sup>352</sup> Some ethnic tensions and low-level corruption endure.<sup>353</sup> However, the arbitration can be deemed successful.

*Abyei* was less successful. Initially, the Award's implementation seemed likely. The Government of Sudan and SPLM/A publically committed to the award (including over live web stream).<sup>354</sup> The parties established a Joint Border Verification and Monitoring Mechanism, the Abyei Joint Oversight Committee and the Joint Military Observation Committee to implement the Award and establish interim governance institutions. The UN Mission in the Sudan (UNMIS) was sent to provide (non-military) support for the demarcation.<sup>355</sup> However, the Misseriya rejected the award.<sup>356</sup> This was rumoured to have been caused by the Government of Sudan and dissenting arbitrator spreading allegations that the award was a conspiracy.<sup>357</sup> The SPLM/A capitalised on the Misseriya's rejection and argued this meant the boundaries reverted to their pre-Award state.<sup>358</sup>

In 2010, when the demarcation team attempted to lay pylons on Abyei's northern border, the Misseriya threatened violence.<sup>359</sup> UNMIS could not respond. The demarcation was halted. The Abyei referendum was postponed too – the parties could not agree on who was eligible to vote. On 19 May 2011, an UNMIS convoy transporting Sudanese Armed Forces

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<sup>348</sup> Harry, above n 258, at 185.

<sup>349</sup> Duijzengkunst and Dawkins, above n 71, at 152

<sup>350</sup> Harry, above n 258, at 186.

<sup>351</sup> At 187.

<sup>352</sup> Duijzengkunst and Dawkins, above n 71, at 152.

<sup>353</sup> Harry, above n 258, at 186.

<sup>354</sup> At 162; Lowe and Tzanakopoulos, above n 303, at [74]; Baetens and Yotova, above n 59, at 435 and 442.

<sup>355</sup> See *Security Council Resolution 1812*, above n 253; Lowe and Tzanakopoulos, above n 303, at [74].

<sup>356</sup> *Report of the Secretary-General on the Sudan S/2010/528* (2010) at [11].

<sup>357</sup> Duijzengkunst and Dawkins, above n 71, at 164; Baetens and Yotova, above n 59, at 444.

<sup>358</sup> Lowe and Tzanakopoulos, above n 303, at [75].

<sup>359</sup> Duijzengkunst and Dawkins, above n 71, at 162.



(SAF) was attacked.<sup>360</sup> The sparked conflict between SPLM/A and SAF. The SAF violently took occupation of Abyei, the Government of Sudan unilaterally dissolved the Abyei administration and more than 1000,000 civilians fled.<sup>361</sup>

On 20 June 2011, the parties reached a new peace agreement, which provided for the withdrawal of troops, demilitarization and a new interim administration.<sup>362</sup> The United Nations Mission in South Sudan (later the United Nations Interim Security Force for Abyei or UNIFSA) was established to protect civilians and provide humanitarian aid.<sup>363</sup> The SAF troops were not fully withdrawn.<sup>364</sup> Meanwhile South Sudan seceded.<sup>365</sup>

Violence and political instability persisted in Abyei.<sup>366</sup> Today, the border has still not been demarcated, though discussions between both sides have resumed.<sup>367</sup> The capital city remains in rubble, the region has no government or institutions and relies on humanitarian aid.<sup>368</sup> Abyei is relatively stable, in part due to UNIFSA's continued presence.<sup>369</sup> However, UNIFSA's mandate to support the border demarcation expires on 15 October 2018, and will not be extended unless the parties have made measurable progress on the demarcation, whilst the rest of UNIFSA's mandate expires on 15 November 2018.<sup>370</sup> If the mandate is not extended and peacekeepers are withdrawn the region might again erupt into conflict.<sup>371</sup>

There are several reasons for the differences in outcome in *Brčko* and *Abyei*. First, the arbitrations differed in terms of timing. The Final Award in *Brčko* was delayed to give the region an opportunity to stabilise so the award might be better accepted. NATO and the supervisor engaged in peacebuilding activities in the meantime. *Abyei* involved a fast-tracked process. The award was issued before South Sudan's secession, when the region was unstable. This suggests instability may reduce the 'stickiness' of an award.

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<sup>360</sup> *Report of the Secretary-General on the Situation in Abyei* S/2011/451 (2011) at [4].

<sup>361</sup> At [4]–[5].

<sup>362</sup> Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement on Temporary Arrangements for the Administration and Security of the Abyei Area (20 June 2011), arts 4–9, 10–18, 20 and 35.

<sup>363</sup> *Security Council resolution 1990*, above n 253.

<sup>364</sup> Lowe and Tzanakopoulos, above n 303, at [78].

<sup>365</sup> *Security Council resolution 1996 (2011) on establishment of the UN Mission in South Sudan (UNMISS)* at [1].

<sup>366</sup> See further Gary Born and Adam Raviv 'The Abyei arbitration and the rule of law' (2017) 58(1) Harv ILJ 177 at 58; *Report of the Secretary-General on the Situation in Abyei* S/2014/862 (2014); *Report of the Secretary-General on the Situation in Abyei* S/2015/302 (2015); *Report of the Secretary-General on the Situation in Abyei* S/2017/870 (2017).

<sup>367</sup> See further *Report of the Secretary-General on the situation in Abyei* S/2018/293 (2018).

<sup>368</sup> At [25]–[29] and [52].

<sup>369</sup> At [34]–[43].

<sup>370</sup> *Security Council Resolution 2416 on Extension of the Mandate of UN Interim Security Force for Abyei (UNIFSA) until 15 November 2018* SC Res 2416, S/RES/2416 (2018).

<sup>371</sup> Sam Mednick "Conflict in Abyei Could Reignite South Sudan's Civil War" *Foreign Policy* (online ed, 6 June 2018).

Secondly, the arbitrations had different potential enforcement mechanisms. In *Abyei*, no obvious enforcement mechanisms were available. Moreover, international pressure failed to induce compliance. However, in *Brčko*, where the parties did comply with the Award, there was an additional enforcement mechanism available. The tribunal maintained jurisdiction and power to take control of Brčko away from the parties if they did not comply with the Award or the Dayton Agreement.<sup>372</sup> This may have made the parties wary of breaching the Award, as it increased the potential costs of non-compliance. Similar creative methods of exacting compliance may be generally useful.

Thirdly, the implementation process in *Brčko* was facilitated by international supervisors. There was no equivalent in *Abyei*. Some authors have credited the supervisors with the Award's success.<sup>373</sup> The first supervisor, Robert Farrand, facilitated the Award's rapid implementation by dissolving the government and replacing it with the Award's envisioned framework, and helping create the Brčko statute: a constitution-like document that safeguarded minority rights and is still in place.<sup>374</sup> His successor, Gary Matthews, reformed the region's financial system. The supervisor role was maintained until 2012.<sup>375</sup> The supervisors show that localised peacebuilding might help with the implementation of arbitral awards and contribute to long-term peace.

There were some more limited peacebuilding activities after the *Abyei* arbitration. The joint committees and the monitoring mechanism, though supported by UNIFSA, were made up of local actors. They lacked the mandate to govern and failed to set up interim governance institutions.<sup>376</sup> The UN peacekeepers and monitoring operations have also been of limited help. UNISFA has delivered humanitarian aid and restored some stability, but has not addressed larger issues like the failure of the SAF troops to withdraw from the region.<sup>377</sup> All these bodies' powers had more limited than the supervisors' broad legislative powers. UNMIS' role was more similar to the role NATO troops served in stopping the conflict in Bosnia and Herzegovina.

Peacekeeping forces might be necessary to stop conflict. However, following an award, peacebuilding activities with third party involvement are also necessary. Rather than future arbitrators appointing supervisors ad hoc, it seems easier for arbitrators to work with the UN Peacebuilding Commission on such activities.

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<sup>372</sup> *Brčko (Final Award)*, above n 277, at [13] and [67]–[68].

<sup>373</sup> Harry, above n 258, at 190; Baetens and Yotova, above n 59, at 445.

<sup>374</sup> At 186.

<sup>375</sup> At 186.

<sup>376</sup> *Report of the Secretary-General on the situation in Abyei*, above n 367, at [2].

<sup>377</sup> At [52].

## 2 *Tribunal composition*

The *Abyei* and *Brčko* arbitrations further highlight the difficulties with party-appointed arbitrators.

In *Brčko*, the three-person tribunal was required to reach a majority decision. No fall-back options were included in the agreement or the UNCITRAL rules.<sup>378</sup> When the party-appointed arbitrators refused to sign the awards, the presiding arbitrator was forced to declare himself sole arbitrator and issue the awards, without the parties having explicitly consented to this. Fortunately, this was not detrimental. The awards were recognized as binding.<sup>379</sup>

In *Abyei*, there were five arbitrators: two from each party and one neutral.<sup>380</sup> This required the modification of the PCA rules, under which panels consist of one or three arbitrators.<sup>381</sup> The award was to be issued unanimously or by majority.<sup>382</sup> The arbitration agreement allowed three or four arbitrators to issue an award where one or two failed to participate.<sup>383</sup> In the *Abyei* arbitration, all arbitrators participated. However, the dissenting arbitrator, Judge Al-Khasawneh, has been criticised for disregarding his duty to act impartially, much like the arbitrators in *Brčko*.<sup>384</sup> Moreover, the fall-back options might have been insufficient if all the party-appointed arbitrators had been intransigent.

These arbitrations demonstrate the risk that party-appointed arbitrators will fail to act impartially and might frustrate the process. Future parties would be advised to take steps to mitigate this risk. One option would be for parties to appoint a sole arbitrator, as is available under the PCA Optional Rules.<sup>385</sup> However, parties tend to prefer larger panels, particularly five-person panels, in significant matters like boundary delimitations.<sup>386</sup> Larger panels are perceived to make more legitimate decisions, although they increase the length and cost of proceedings.<sup>387</sup>

Parties might be more willing to have a five-person panel consisting of two party-appointed arbitrators (one appointed by each party) and three arbitrators appointed by agreement or

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<sup>378</sup> Harry, above n 258, at 189.

<sup>379</sup> Miles and Mallett, above n 33, at 327.

<sup>380</sup> *Abyei Arbitration Agreement*, above n 199, art 5.

<sup>381</sup> PCA Optional Rules, above n 82, art 5.

<sup>382</sup> *Abyei Arbitration Agreement*, above n 199, art 5(15)

<sup>383</sup> Article 5(14).

<sup>384</sup> See for example, Brooks Daly “The Abyei Agreement: Procedural Aspects of an Intra-State Border Arbitration” (2010) 23 *Leiden J Int Law* 801 at 811.

<sup>385</sup> PCA Optional Rules, above n 82, art 5.

<sup>386</sup> Daly, above n 384, at 810.

<sup>387</sup> At 810.

by an appointing authority.<sup>388</sup> This model was used in the Alabama claims arbitration.<sup>389</sup> The three neutral arbitrators ‘dilute’ potential harms from party-appointed arbitrators.

If parties insist on having a majority of party-appointed arbitrators, they should agree on fall-back options for when a majority decision cannot be reached. Rules containing such provisions can be adopted,<sup>390</sup> or rules can be modified.

### 3 *Arbitral remit: drawing the mandate*

In the *Brčko* arbitration, the tribunal had a wide mandate to apply international legal and equitable principles.<sup>391</sup> Accordingly, the tribunal was able to design an award to solve the whole problem – issuing interim awards, installing a supervisor, and creating a condominium – rather than merely delimiting the boundary line.<sup>392</sup> In *Abyei*, the tribunal had a more limited mandate: to review the ABC’s mandate.

This section leaves to one side the question of whether the tribunals in *Abyei* and *Brčko* exceeded their stated mandate. This has already been debated in other literature.<sup>393</sup> Instead, this section argues that flexible mandates should be given to future tribunals dealing with disputes following intra-state conflicts. *Brčko* led to more lasting peace than *Abyei*, suggesting that tribunals which can order creative solutions might be more successful. Moreover, *Brčko* suggests that it might be possible to use arbitration to resolve underlying issues, as is possible through mediation.

What would this look like in practice? Parties should craft arbitration agreements giving arbitrators discretion to consider principles of equity, alongside public international law.<sup>394</sup> Equity is useful because intra-state disputes are complex and the relevant law might be unclear or outdated, particularly in territorial disputes.<sup>395</sup> Equitable principles also enable tribunals to adapt the law to the specific circumstances of a case.<sup>396</sup> This enhances the administration of justice.<sup>397</sup> Some academics have argued that it is particularly important to have regard to equity to in land and maritime boundary disputes.<sup>398</sup>

<sup>388</sup> See United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 November 1982, entered into force 1 November 1994) [UNCLOS], Annex VII art 3.

<sup>389</sup> Daly, above n 384, at 811

<sup>390</sup> See for example PCA Optional Rules, above n 82, r 13(3) and Arbitration Rules of the International Chamber of Commerce (2017), r 32(1).

<sup>391</sup> *Brčko (Final Award)*, above n 277, at [38]; *Brčko (Interim Award)*, above n 259, at [97].

<sup>392</sup> Miles and Mallett, above n 33, at 326–327.

<sup>393</sup> See particularly, Born and Raviv, above n 366, at 194–206, 210–211; Harry above n 258, 187–188.

<sup>394</sup> Vidmar, above n 59, at 102.

<sup>395</sup> Harry, above n 258, at 187

<sup>396</sup> Vidmar, above n 59, at 103.

<sup>397</sup> *Continental Shelf (Tunis v Libya) (Judgment)* 1982 ICJ 18 at 106 (separate opinion of Judge Jimenez de Arechaga).

<sup>398</sup> See for example M Miyoshi *Considerations of Equity in the Settlement of Territorial and Boundary Disputes* (Martinus Nijhoff Publishers, Dordrecht, 1993).

Other academics have criticised the use of equity in arbitration, claiming it results in tribunals not deciding disputes according to the law.<sup>399</sup> Having regard to equitable considerations is argued to make the outcomes of arbitrations uncertain and unpredictable, potentially reducing parties' confidence in arbitration.<sup>400</sup>

There are a number of ways to mitigate these concerns. First, allowing arbitrators to have regard to established principles of equity is arguably not the same as allowing arbitrators to decide disputes *ex aequo et bono*.<sup>401</sup> Equity might allow a tribunal to fill gaps in the law or moderate the law's harshness, but does not allow a tribunal to ignore the law and decide disputes based on abstract notions of fairness.<sup>402</sup> Secondly, arbitration following conflicts is not purely be a matter of law. Such arbitrations respond to inherently political questions.<sup>403</sup> This makes it important to consider the overall justice of the dispute.

Finally, giving arbitrators wide mandates will not necessarily lead to unpredictability and arbitrators making decisions on a whim. International arbitral awards based on 'equity' do not differ significantly from those based on law.<sup>404</sup> This is because arbitrators "have an inherent incentive to maintain their reputations as rational and fair decision-makers".<sup>405</sup> Arbitrators do not have tenure and need to be reappointed to future tribunals. No-one will appoint an arbitrator who has acted unreasonably. Moreover, parties can insulate themselves against risk by appointing arbitrators with good reputations "who are knowledgeable on the subject of the dispute and who have strong reasons for integrity".<sup>406</sup>

It is also worth considering what remedies fall within the arbitral remit. Creative solutions can only be ordered where they fall within the set of remedies available to a tribunal. A tribunal's jurisdiction to give remedies can derive from a number of sources. First, the availability of certain remedies can be detailed in an arbitration agreement or arbitration rules. However, this is uncommon.<sup>407</sup> Secondly, the *lex specialis* pertaining to a specific dispute might provide for remedies.<sup>408</sup> Both of these options do not help answer the question of what remedies generally available; the remedies agreed upon or present in the

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<sup>399</sup> See Born and Raviv, above n 366, at 211.

<sup>400</sup> Miles and Mallett, above n 33, at 336

<sup>401</sup> See the debate in Leon Trakman "Ex Aequo et Bono: Demystifying an Ancient Concept" (2008) 8 Chi J Intl L 621 at 627–628.

<sup>402</sup> See *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands) (Judgment)* [1969] ICJ Rep 3 at [85].

<sup>403</sup> Duijzentkunst and Dawkins, above n 71, at 167, and Radončić, Janković and Mladenović, above n 270, at 219–220.

<sup>404</sup> Christine D Gray *Judicial Remedies in International Law* (OUP, Oxford, 1990) at 11, citing J Subilia, 'L'Allocation d'intérêts dans la jurisprudence Internationale' (Lausanne, thesis, 1972).

<sup>405</sup> Harry, above n 258, at 188.

<sup>406</sup> At 188.

<sup>407</sup> Gray, above n 404, at 10 and 12; see also Patrick Dunaud and Maria Kostytska "Declaratory Relief in International Arbitration" (2012) 29(1) J Intl Arb 1 at 4.

<sup>408</sup> *Responsibility of States for Internationally Wrongful Acts* GA Res 56/83, A/Res/56/83 (2001), art 37.

*lex specialis* will need to be determined on a case by case basis. Finally, guidance as to remedies can be drawn from customary international law, as set out in past arbitral awards and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles). It is possible, though much debated, that sometimes the *lex specialis* will be a self-contained regime that excludes general customary law remedies.<sup>409</sup>

The ILC Articles cannot be applied to intra-state disputes as a code. The ILC Articles deal with a state's obligations to give remedies to another state for an internationally wrongful act. Whilst under Part I of the ILC Articles, breaches of an international obligation can be breaches of obligations owed to both state and non-state actors,<sup>410</sup> Part II only applies to breaches of obligations owed to states.<sup>411</sup> It is Part II which deals with who can invoke responsibility for a breach and the remedies that follow. The Articles recognise that remedies are available for breaches of obligations owed to non-state entities, but provide no further guidance on the nature of these remedies.<sup>412</sup> Part I of the ILC Articles has been commonly applied by tribunals in intra-state disputes (in the investment arbitration context).<sup>413</sup> However, Part II is not commonly used to deal with remedies in intra-state disputes, though some academics have argued it could be.<sup>414</sup>

However, despite the general observations that follow, the remedies available in intra-state disputes may vary significantly. The relevant primary obligations will determine whether a sub-state entity can invoke responsibility against a state and receive the remedies that follow.<sup>415</sup> Equally, whether states can invoke responsibility or remedies against sub-state entities will depend on the nature of the individual entity's rights and duties under international law.<sup>416</sup> An analysis of the rights and duties of each type of sub-state entity

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<sup>409</sup> See, for example, Christine Gray "The Choice between Restitution and Compensation" (1999) 10(2) EJIL 413; on diplomatic law, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Reports 3, at [80]–[88]; on human rights law, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 14 at [267]–[268], but c.f. Simma "Self-contained Regimes" 16 Netherlands Yearbook of International Law (1985) 110.

<sup>410</sup> James Crawford *State Responsibility* (Cambridge UP, Cambridge, 2013) at 548.

<sup>411</sup> ILC articles, above n 408, art 33(1).

<sup>412</sup> Article 33(2); James Crawford "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" (2002) 96(4) Am J Intl L 874 at 887–888.

<sup>413</sup> See, for example, *Chevron Corp and Texaco Petroleum Corp v Ecuador (Interim Award)* Karl-Heinz Böckstiegel, Charles N Brower, Albert Jan van den Berg, 1 December 2008 at [118]; *EDF (Services) Ltd v. Romania* ICSID ARB/05/13, 2 October 2009 at [185]–[213]; *Gustav F W Hamster GmbH & Co KG v Republic of Ghana* ICSID ARB/07/24 18 June 2010, sections VII–IX.

<sup>414</sup> Christoph Schreuer "Non-Pecuniary Remedies in ICSID Arbitration" (2004) 4(1) *Arb Intl* 324.

<sup>415</sup> Crawford *State Responsibility*, above n 410, at 549.

<sup>416</sup> See further James Crawford, Alain Pellet and Simon Olleson *The Law of International Responsibility* (OUP, Oxford, 2010); Emmanuel Roucouas "Non-State Actors: Areas of International Responsibility in Need of Further Exploration" in Maurizio Ragazzi (ed) *International Responsibility Today* (Martinus Nijhoff Publishers, Leiden, 2005) 391.

that might potentially be involved in an intra-state conflict is beyond this paper's scope.

Generally, damages are the most common remedy awarded by arbitral tribunals and will almost always be available, unless deliberately excluded by the parties.<sup>417</sup> Non-pecuniary remedies are awarded sparingly.<sup>418</sup> However, parties are more likely to seek non-pecuniary remedies in disputes following intra-state conflicts. The position around non-pecuniary remedies is less well-established.

For internationally wrongful acts committed by states, the primary remedy owed to other states is reparations, given as *restitutio in integrum* (or restitution in kind).<sup>419</sup> Under the ILC Articles restitution in kind must be given "if it is not materially impossible" or would lead to disproportionate outcomes.<sup>420</sup> *Restitutio in integrum* could take the form of return of territory, persons or property, or the revocation, annulment or amendment of legal agreements (perhaps including peace agreements, where these are legally binding).<sup>421</sup> Such remedies would be useful in disputes following intra-state conflict. However, it is not clear that *restitutio in integrum* can be invoked by a sub-state actor.<sup>422</sup> The Libyan oil arbitrations illustrate that tribunals' positions on this issue vary. Restitution was granted against a state for non-performance of contractual obligations in *Texaco Overseas Petroleum Co v Libya*.<sup>423</sup> However, it was denied in two other awards, though one held the availability of restitution might differ in non-commercial contexts such as territorial disputes.<sup>424</sup>

Specific performance is more likely to be available. This is not provided for specifically in the ILC Articles. However, tribunals have made orders for specific performance in a number of inter-state disputes and suggested they have the inherent capacity to do so.<sup>425</sup> The jurisdiction to order specific performance might arise from other ILC Articles:<sup>426</sup> the

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<sup>417</sup> Gray, above n 404, at 11 and 18.

<sup>418</sup> Gisele Stephens-Chu "Is it Always All About the Money? The Appropriateness of Remedies in Investment Treaty Arbitration" (2014) 30(4) *Abr Intl* 661 at 661 n 1.

<sup>419</sup> *Factory at Chorzow Case (Germany v Poland) (Merits)* (1928) PCIJ (series A) No 17 at [125]; arts 31, 34–35; *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* A/56/10 (2001) at 96.

<sup>420</sup> ILC Articles, above n 408, art 35; see further Dinah Shelton "Reparations in the Articles on State Responsibility" (2002) 96(4) *Am J Intl L* 833.

<sup>421</sup> Stephen-Chu, above n 418, at 655.

<sup>422</sup> See further Gray, above n 404, at 193–194; Stephen-Chu, above n 418, sections II–V.

<sup>423</sup> *Texaco Overseas Petroleum Co v Libya (Award on Merits)* (1977) 53 *ILR* 389 at 497–504.

<sup>424</sup> *BP Exploration Company (Libya) Limited v Libyan Arab Republic (Award)* (1973) 53 *ILR* 297 at 334; see also *Libya American Oil Company (LIAMCO) v Libyan Arab Republic (Award)* (1979) 17 *ILM* 3 at 198.

<sup>425</sup> *Rainbow Warrior Affair (New Zealand v France) (Award)* (1990) 20 *RIAA* 217; 82 *ILR* (1990) 499 at 270, specific performance would have been available if the international obligation had continued to be in force; see further *Martini (Italy v Venezuela) (Award)* (1931) 25 *AJIL* 554, concerning a cancelled contract; *Trail Smelter Case (United States v Canada) (Awards)* (1938/1941) 3 *RIAA* 1905, concerning liability for toxic fumes released by a smelting factory.

<sup>426</sup> Stephen-Chu, above n 418, at 666.

obligations of cessation and non-repetition,<sup>427</sup> the obligation to perform continuing obligations,<sup>428</sup> and the remedy of satisfaction – being “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”.<sup>429</sup> However, specific performance of contracts has also been ordered (against states and sub-state entities) in a number of arbitrations involving states and corporations.<sup>430</sup> This suggests jurisdiction to order specific performance might arise from agreements made between state and sub-state actors. Specific performance thus seems likely to be available where parties seek a remedy for non-implementation of a peace agreement.

Declaratory relief is also likely available. Declaratory relief has been ordered in commercial and investment arbitrations involving states and corporations.<sup>431</sup> Post intra-state conflicts, a declaratory remedy alone (which does not explicitly require action) might have limited usefulness.

The *Brčko* and *Abyei* arbitrations also suggest that boundary delimitations and other directions regarding sovereignty over territory, might be available. It is unclear whether such orders are better conceptualised as orders for specific performances or merely declaratory orders.<sup>432</sup> This distinction may be academic, as given both such remedies are generally be available in intra-state disputes.

Overall, it seems tribunals will generally have recourse to give specific performance or declaratory remedies. However, whether tribunals can generally give other remedies as *restitutio in integrum* is less clear. This will depend on the nature of the specific dispute and the parties involved. This discussion of remedies helps illustrate why it might be important for tribunals to have flexible mandates and recourse to equity. Where a tribunal has restrictive mandates, they may be precluded from giving the type of remedies that might address the dispute.

#### 4 Procedural flexibility

The awards also highlight the advantages of arbitration’s procedural flexibility. The *Brčko* arbitration shows arbitrators have flexibility to ensure awards can be rendered, for example by deferring deciding jurisdictional objections, and issuing Awards without intransigent party-appointed arbitrators.<sup>433</sup>

The *Abyei* arbitration involved three specific procedural innovations, set out by the parties

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<sup>427</sup> ILC Articles, above n 408, art 29.

<sup>428</sup> Article 30.

<sup>429</sup> Article 37(2).

<sup>430</sup> For example *Texaco Overseas Petroleum*, above n 423, at 511; see further Blackaby and others, above n 35, at 9.52; Schreuer, above n 414, at 324.

<sup>431</sup> Blackaby and others, above n 35, at 9.60–9.62; Dunaud and Kostytska, above n 407; consider for example *Saudi Arabia v Arabian American Oil Co*, above n 245.

<sup>432</sup> Gray, above n 404, at 17; Crawford, above n 78, at 575–576.

<sup>433</sup> *Brčko (Interim Award)*, above n 259, at [30].



in the arbitral rules: transparency, funding and fast-tracked proceedings. First, *Abyei* shows transparency could be useful in intra-state disputes. Confidentiality is the norm in arbitration.<sup>434</sup> The transparency in the *Abyei* arbitration was unique and attracted global attention. When the award was read out at The Hague Peace Palace over live webcast, it attracted over 3000 spectators from 50 countries.<sup>435</sup> Transparency may be helpful for engaging the domestic population and international community, so all can support the award's implementation. However, transparency alone was not enough to ensure implementation in *Abyei*.

Secondly, unique steps were taken to fund the *Abyei* arbitration. The proceedings cost several million United States' dollars, though the exact cost is confidential.<sup>436</sup> The Government of Sudan may have been unable to cover the arbitration's costs as agreed if the PCA Assistance Fund had not covered 20 per cent,<sup>437</sup> and the SPLM/A had not received pro bono legal assistance from Wilmer Cutler Pickering Hale and Door LLP and the Public International Law and Policy Group.<sup>438</sup> Such assistance may be necessary in other post-conflict situations. Parties emerging from civil war are unlikely to be well-off.

Unfortunately, the PCA Assistance Fund has no independent source of revenue.<sup>439</sup> France, the Netherlands and Norway donated 500,000 Euro to the Fund for the *Abyei* arbitration.<sup>440</sup> This support is not guaranteed. Alternatively, the UN's Peacebuilding Fund might provide funding. This seems within their mandate.<sup>441</sup> The Fund is also funded via state donations, but has sufficient funds to support a range of peacebuilding operations.<sup>442</sup> Parties to post-conflict arbitrations, and arbitrators, should be aware that these funding options are available. In most cases, cost need not be a barrier to arbitration.

Finally, the *Abyei* arbitration involved fast-track proceedings.<sup>443</sup> It was the fastest boundary delimitation arbitration in modern history.<sup>444</sup> There was a nine-month time limit for completion, despite the parties exchanging over 20,000 pages of pleadings and engaging in extensive oral pleadings and witness examination, in multiple languages.<sup>445</sup> The tribunal

<sup>434</sup> Baetens and Yotova, above n 59, at 434; see further Daly, above n 384, at 819; *Radio Corporation of America and China (Award)* PCA 1934-01, 13 April 1935 and *Eurotunnel (The Channel Tunnel Group Limited v France-Manche SA) (Award)* PCA 2003-06, 30 January 2007.

<sup>435</sup> *Abyei Arbitration Agreement*, above n 199, art 8(6); Daly, above n 384, at 319; Baetens and Yotova, above n above n 59, at 434.

<sup>436</sup> Daly, above n 384, at 820.

<sup>437</sup> Baetens and Yotova, above n 59, at 443.

<sup>438</sup> Daly, above n 384, at 822.

<sup>439</sup> At 822.

<sup>440</sup> Daly, above n 384, at 821.

<sup>441</sup> See *The Peace Building Commission*, above n 21, and Charter of the United Nations, above n 2, art 33 and Chapter VII.

<sup>442</sup> *United Nations Activities in Support of Mediation*, above n 4, at [46]–[49].

<sup>443</sup> *Abyei Arbitration Agreement*, above n 199, arts 4(3), 5, 8(3) and 9(1).

<sup>444</sup> Baetens and Yotova, above n 59, at 432.

<sup>445</sup> At 432–433; Daly, above n 384, at 817–818.

met their deadline. This shows fast-track proceedings are possible when necessary.<sup>446</sup> Sometimes it may be necessary to reach a solution quickly

However, the measured approach in the *Brčko* arbitration should be preferred in most future arbitrations. Intra-state disputes are complex. Fast-track proceedings may mean there is insufficient time to procure evidence and develop the necessary legal arguments required.<sup>447</sup> Fast-track proceedings put pressure on parties, counsel and arbitrators, which seems risky in high pressure, post-conflict scenarios.<sup>448</sup> Recognising these constraints, the PCA Optional Rules provide for some longer proceedings than the UNICTRAL rules (on which they are based).<sup>449</sup> The time periods for nominating arbitrators to an appointing authority, challenging arbitrators, and requesting an additional award are twice as long.<sup>450</sup>

### 5 *Form of arbitration*

Parties should use the PCA and apply the PCA Optional Rules (with a few modifications) as in *Abyei*. Ad-hoc arbitration is available, and ad-hoc arbitration under the UNCITRAL rules was successful in the *Brčko* arbitration. However, institutional arbitration in the PCA has some additional benefits, and no obvious disadvantages.

Using the PCA may increase the legitimacy of an arbitration. The PCA is internationally renowned and has experience solving inter-state border disputes and intra-state disputes, primarily in the investment arbitration context.<sup>451</sup> Using the PCA means parties can adopt the PCA Optional Rules; access the PCA Financial Assistance Fund; and nominate the experienced PCA Secretary-General as an appointing authority.<sup>452</sup>

The PCA Optional Rules are purpose-built for intra-state arbitrations. They are based on the UNICTRAL rules used in *Brčko*,<sup>453</sup> with a few modifications to accommodate for non-state actors,<sup>454</sup> for example, the inclusion of a waiver of sovereign immunity.<sup>455</sup> They are also likely suited to boundary disputes, being almost identical to the PCA Optional Rules for Arbitrating Disputes between Two States, which have been used successfully in several

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<sup>446</sup> Miles and Mallett, above n 33, at 318.

<sup>447</sup> Baetens and Yotova, above n 59, at 442.

<sup>448</sup> At 442.

<sup>449</sup> PCA Optional Rules, above n 82, at 92 (Notes to the Text).

<sup>450</sup> Compare arts 6(2)(b), 11 and 37 with UNICTRAL Arbitration Rules (2010), arts 8(b) 13 and 39.

<sup>451</sup> Miles, above n 26, at 234.

<sup>452</sup> At 234.

<sup>453</sup> Daly, above n 384, at at 806.

<sup>454</sup> At 92 (Notes to the Text).

<sup>455</sup> Article 1(2).

inter-state boundary disputes.<sup>456</sup>

The PCA Optional Rules can be easily incorporated by reference. If the parties drafted procedural rules from scratch these could be even more suited to the dispute, but this would be time consuming.<sup>457</sup> It also seems unnecessary, as modification of the PCA Optional Rules is permitted.<sup>458</sup> Minor modifications to the Rules might be required. First, the Rules require confidentiality: hearings occur *in camera* and awards are not made public without the express consent of both parties.<sup>459</sup> This may need to be altered. Secondly, the Rules provide for the appointment of one or three arbitrators.<sup>460</sup> Parties will need to choose between these options or modify the rules to accommodate a larger tribunal, as in *Abyei*. The Rules have one major limitation – they cannot be applied to disputes involving third parties. This was an issue in the *Larsen v Hawaiian Kingdom* arbitration, being the only arbitration in which parties had tried to apply the PCA Optional rules before *Abyei*.<sup>461</sup> This will not, however, be a problem for truly intra-state disputes.

Parties should maintain autonomy over the procedural rules and not defer selection of rules until the constitution of the tribunal.<sup>462</sup> Without procedural autonomy, parties may have less confidence in the decision.

## V Conclusion

In the aftermath of intra-state conflicts, peacebuilding is difficult and relapses into war are likely. This is caused largely by the credible commitment problem. Disputes are likely, and, moreover, parties often lack recourse to a dispute resolution mechanism.

This paper has shown arbitration has the capacity to help states and sub-state parties solve post-conflict disputes. The standing of sub-state entities seems unlikely to present an intractable barrier to arbitration. Neither does the requirement that states need to turn over control of their dispute to a tribunal. Indeed, recourse to a binding dispute resolution mechanism may be desirable to leaders who want to prevent war, but would prefer to do so without the cost of compromise. The ability to avoid the costs of compromise, may mean leaders can solve disputes, which might not be amenable to mediation or negotiation.

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<sup>456</sup> See for example *Delimitation of the Border between Eritrea and Ethiopia (Eritrea v Ethiopia) (Award)* (2002) XXV RIAA 83 at 97; Eritrea-Ethiopia Claims Commission: Rules of Procedure (2001), art I(I); *Iron-Rhine Arbitration (The Kingdom of Belgium v The Kingdom of the Netherlands) (Award)* (2005), XXVII RIAA 35 at [5].

<sup>457</sup> Daly, above n 384, at 804.

<sup>458</sup> PCA Optional Rules, above n 82, art I.

<sup>459</sup> Articles 25(4) and 32(5).

<sup>460</sup> Articles 5–7.

<sup>461</sup> See *Larsen v Hawaiian Kingdom* (Award) PCA 1999-01, 5 February 2001.

<sup>462</sup> C.f. UNCLOS, above n 388, art 159(4); Investment Incentive Agreement United States-India 1997 UST LEXIS (signed 18 November 1997, entered into force 16 April 1998), art 6(iv).

The UN has promoted mediation as its preferred dispute resolution mechanism. However, for disputes following intra-state conflicts, a binding dispute resolution mechanism that helps generate credible commitment is necessary. Mediation lacks these qualities. Arbitration also possess many of the same benefits as mediation. Arbitration uses impartial decision-makers, excepting the difficulties with party-appointed arbitrators. It has legal legitimacy (possibly more than mediation); is an institution with a history of resolving boundary disputes and inter-state conflicts (particularly through the PCA); and offers the parties procedural flexibility and options to exercise autonomy (though perhaps slightly less so than mediation).

Arbitrators, given a sufficiently flexible mandate and recourse to equitable principles, may be able to develop creative solutions that address the whole of a dispute, as in *Brčko*. This is not an argument that all tribunals need to go as far as the tribunal in *Brčko*. Rather, it suggests tribunals permitted to take a pragmatic and equitable approach, might be better at resolving intra-state disputes than those highly constrained in their mandate – as in *Abyei*. Some of these solutions might be creative territorial divisions, supporting activities that build stability before an award is issued and ordering peacebuilding activities, in cooperation with the UN.

Arbitral awards are doctrinally final and binding, and are complied with more often than non-binding negotiated or mediated settlements.<sup>463</sup> Arbitral awards may be somewhat enforceable under the New York Convention or through international pressure. However, there is no easy answer to the enforcement question. This is a major shortcoming. Even so, the alternatives of mediated or negotiated settlements are also non-binding and unenforceable. The empirical research suggests the non-compliance with the award in *Abyei* should be the exception to the rule. Indeed, if parties even comply with arbitral awards slightly more than with negotiated or mediated settlements, this is a benefit to lasting peace, and reason enough for the UN to rethink its affection for mediation.

Arbitration is not a fix-all. However, it is a credible and sometimes very effective dispute resolution mechanism for resolving implementation and interpretation disputes following intra-state conflicts. It is possible that there is a lack of awareness of the availability or benefits of arbitration, which is why intra-state parties to conflicts have not used arbitration often. More awareness should be brought to arbitration as it option. It is worth critically considering whether mediation really is the best mechanism for dispute resolution in this context. Greater use of international arbitration following intra-state conflicts might be a step the international community can take towards more lasting peace.

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<sup>463</sup> Gent and Shannon, above n 49, at 366.

***Word count***

The text of this paper (excluding table of abstract, contents, non-substantive footnotes, appendix and bibliography) comprises exactly 14,861 words.

## VI Appendix One

Analysis of peace agreements from 2008–2017 on the UN Peacemaker Peace Agreements Database.

	No clause	Joint Working Groups	Arbitration	Other	Foreign Language
<b>2017</b>		1			3
<b>2016</b>		2			
<b>2015</b>	5	3			2
<b>2014</b>	13	2		1: Mediation 1: Independent decommissioning body	5
<b>2013</b>	14	2			6
<b>2012</b>	20			1: Mediation	5
<b>2011</b>	12	3		1: Mediation 1: Government formed interpretation committee 1: Council	2
<b>2010</b>	9	1		1: Mediation	1
<b>2009</b>	10			2: Ad hoc international contact group	13
<b>2008</b>	30		1 ( <i>Abyei</i> )		9

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