



TEL AVIV UNIVERSITY  
THE BUCHMANN FACULTY OF LAW  
ANNY AND PAUL YANOWICZ CHAIR  
IN HUMAN RIGHTS

אוניברסיטת תל-אביב  
הפקולטה למשפטים ע"ש בוכמן  
הקתדרה לזכויות האדם  
על שם אני ופול ינוביץ'



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GLOBALTRUST RESEARCH PROJECT

## GLOBALTRUST WORKING PAPER SERIES 2/2014



### REDUCING THE PRICE OF PEACE: THE HUMAN RIGHTS RESPONSIBILITIES OF THIRD-PARTY FACILITATORS

MICHAL SALITERNIK

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ISSN 2309-7248

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CITE AS: MICHAL SALITERNIK, REDUCING THE PRICE OF PEACE:  
THE HUMAN RIGHTS RESPONSIBILITIES OF THIRD-PARTY FACILITATORS  
GLOBALTRUST WORKING PAPER 2/2014  
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- Non-Final Draft -

**Reducing the Price of Peace:  
The Human Rights Responsibilities of Third-Party Facilitators**

(Forthcoming in *The Vanderbilt Journal of Transnational Law*, 2015)

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Abstract

Peace agreements can bring about serious injustices. For example, they may establish oppressive regimes, provide for the transfer of populations, or allocate natural resources in an inequitable manner. This article argues that third-party facilitators—i.e., states and international organizations acting as mediators, donors, or peacekeepers—should have a responsibility to prevent such injustices. While the primary duty to ensure the justice of peace agreements resides with the governments that negotiate and sign them, directing regulation efforts only at those governments may prove insufficient in protecting human rights under the politically constrained circumstances of peacemaking. It is therefore necessary to complement the primary duties of negotiators with secondary duties of facilitators who can afford to contemplate long-term justice and sustainability considerations and who often have considerable influence on negotiator decisions.

The article presents a novel theory of sovereign authority, which provides a normative basis for holding facilitators responsible to help prevent peace-related injustices. In accordance with this theory, the governments of all the world's countries in common should bear the responsibility for ensuring the compatibility of peace agreements with human rights norms. Peace facilitators, however, should be singled out to discharge this collective responsibility in view of their potential contribution to peace injustices and their special ability to prevent them. After addressing possible criticisms of this proposal, the article explores ways to translate facilitator responsibilities into concrete legal obligations. The potential contribution of such obligations to promoting just and sustainable peace is demonstrated through a critical analysis of the treatment of justice issues in past peace negotiations in Bosnia, Sierra Leone, and Afghanistan.

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## I. INTRODUCTION

The idea that peace agreements can bring about serious injustices is somewhat counterintuitive. Everyone knows that “peace has a price” and that it may involve painful compromises, but few would connect such compromises with human rights violations or other serious forms of wrongdoing. Admittedly, the injustices that result from peace agreements are usually less severe than the injustices of the wars that they seek to end. Furthermore, present-day peace agreements no longer include devastating arrangements that brutally infringe on human life or dignity, for example by endorsing slavery.<sup>1</sup> However, contemporary peace agreements can undermine justice principles and human rights norms in a variety of ways. For example, they can prescribe the establishment of an exclusionary or oppressive regime, provide for the transfer of populations, allocate natural resources in an inequitable manner, or fail to adequately address human rights violations that took place during the conflict. In addition to the contents of peace agreements, the processes through which they are achieved can also be plagued with representation deficits, biased or corrupt decision-making, and other justice problems.

While the final decision whether or not to adopt an injurious arrangement or pursue shady negotiation procedures belongs to the government or quasi-governmental entity that negotiates and signs the peace agreement, that decision is often influenced by various incentives that third-party facilitators—i.e., states, international organizations, and other actors that are involved in peace processes as mediators, donors, or peacekeepers—provide or refrain from providing to the negotiating parties. To give a few examples: In the Dayton negotiations on Bosnia, the United States (U.S.) government used military and economic incentives to induce the parties to cooperate with international criminal proceedings and to facilitate refugee return, thus promoting justice considerations; however, it also supported exclusionary power-sharing arrangements that were later deemed by the European Court of Human Rights to violate human rights norms.<sup>2</sup> In the Bonn peace talks on Afghanistan, the United Nations (UN) made sure to invite representatives from all major Afghan ethnic, religious and geographic groups, but at the same time accorded legitimacy to the exclusion of women from the talks.<sup>3</sup> In Sierra Leone, UN mediators endorsed power-sharing arrangements that assigned central governmental positions to

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<sup>1</sup> Slavery-promoting peace agreements were apparently quite common until the eighteenth century. For example, in the Treaty of Utrecht (1713), which ended a series of wars in Europe, Britain was granted a monopoly on the slave trade from Africa to the Spanish colonies in America. *See, e.g.*, Patricia M. Muhammad, *The Trans-Atlantic Slave Trade*, 19 AM. U. INT’L L. REV. 883, 911 (2004). In another type of slavery-supporting peace agreements, colonial governments granted recognition to rebel slave communities in exchange for the latter’s assistance in capturing new runaway slaves and returning them to their owners. *See, e.g.*, R.K. Kent, *Palmares: an African State in Brazil* in MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS 170, 184 (Richard Price ed., 3<sup>rd</sup> edition, 1996); Bryan Edwards, *Observations on the Maroon Negroes of the Island of Jamaica*, in MAROON SOCIETIES 230, 238.

<sup>2</sup> *See infra* Part III.A.1.

<sup>3</sup> *See infra* Part III.B.

murderous militia leaders, yet they opposed the granting of blanket amnesty to the same persons and took measures that paved the way for their future prosecution.<sup>4</sup> Looking to the future, in the midst of the 2013-2014 U.S.-brokered Israeli-Palestinian peace talks, Israel's Minister of Foreign Affairs stated that his basic condition for supporting a peace agreement would be that its terms would include the transfer of the Israeli "Triangle" area, which is densely populated by Israeli Arab citizens, to the Palestinian state.<sup>5</sup> Despite the discriminatory nature of this statement, which seeks to deprive the members of an ethnic minority group of their citizenship, the U.S. government remained silent, and it is hard to tell how it will react if such a transfer is seriously contemplated by the parties.

This article argues that international law should recognize the responsibility of third-party facilitators to help prevent peace-related injustices of the kind described above. It presents a novel theoretical framework for establishing and developing this responsibility, at the heart of which lies a humanity-oriented conceptualization of the principle of state sovereignty ("human sovereignty"). This theoretical framework asserts that governments bear a primary duty to promote the well-being of their citizens, and at the same time also a secondary duty to promote the well-being of non-citizens if the latter's own governments are unable or unwilling to do so. Applied to the context of peacemaking, it entails that a government engaged in peace negotiations is obliged to attempt to reach a peace agreement that reflects equal concern and respect for all its citizens. At the same time, all the world's other governments, or the "international community" as a whole, should bear a secondary responsibility to ensure that the negotiating government lives up to its duties toward its citizens. However, since attributing such responsibility to all world governments in common is susceptible to collective action problems that may lead to inaction, it is necessary to identify specific actors within the international community that will have the major duty to discharge this responsibility. The article asserts that peace facilitators should be selected for this task in view of their potential contribution to peace injustices (the "contribution criterion") as well as their special ability to prevent them (the "capacity criterion").

The theory of facilitator responsibility put forward in this article thus recognizes that the main duty to prevent peace injustices resides with the governments that negotiate and sign peace agreements. However, it assumes that focusing exclusively on the responsibilities of politically-constrained governments seeking their way out of a bloody conflict may prove inefficient in protecting affected interests. To fill this protection gap, it establishes the complementary duties of third-party facilitators, who can afford to contemplate long-term justice and sustainability considerations and who are often able to use significant side-payments or sanctions to induce negotiators to adhere to justice principles. As we will see, directing regulation efforts at third-party facilitators is all the more crucial when they implicitly or

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<sup>4</sup> See *infra* Part III.C.

<sup>5</sup> See, e.g., Barak Ravid, *Lieberman: Several Israeli Arab Towns Must Be Made Part of Palestine under Peace Deal*, HAARETZ, Jan. 5, 2014 (citing Lieberman's statement that "[t]his is not a transfer. Nobody will be expelled or banished, but the border will move").

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explicitly encourage negotiators to adopt injurious arrangements or pursue exclusionary negotiation procedures that they believe to be necessary for the consummation of peace.

Although this article advocates heavier human rights duties of facilitators toward the populations affected by the peace agreements that they help achieve, it acknowledges the need to balance these secondary duties against the primary duties of facilitators toward their own populations. It also acknowledges the need to respect the self-determination of countries undergoing a transition from war to peace, as well as the need to allow negotiators and facilitators sufficient maneuvering space to find an agreed solution to the conflict. The article suggests that these conflicting considerations should be taken into account when designing and applying international legal constraints to peacemakers.

It is worth emphasizing that this article is concerned with the responsibility of peace facilitators to ensure that their assistance does not *indirectly* support or enable human rights violations by the negotiating parties, as opposed to their duty not to engage directly in such violations. While the responsibility of third-party facilitators to prevent human rights violations committed directly by their employees is an important issue that is gaining increasing attention (e.g., in the context of sexual abuses of local women by peacekeeping personnel<sup>6</sup>), the responsibilities that may accrue to them with respect to more remote, yet often predictable and controllable, acts connected with their assistance seem to involve particularly intriguing ethical and legal questions that have so far not been addressed in a systematic manner. Filling this scholarly gap is crucial for improving the justice and long-term sustainability of peace agreements.

The question examined in this article should also be distinguished from the question whether states should be required in the first place to provide peace-facilitating services to other states struggling to emerge from violent conflicts, and who among all the world's states should be singled out to discharge this collective responsibility. Although the theory of human sovereignty developed in this article can be helpful also in answering this '*jus ad pacem*' question, such an analysis involves various intricacies that cannot be addressed within the present '*jus in pace*' inquiry. In any event, establishing the very duty to assist countries in their quest for peace does not seem to be such an urgent task, for, as we will see in Part II, there is currently no shortage of international peace-facilitating services.

In presenting the case for peace facilitator responsibility, this article proceeds in seven parts. Part II sets the background for the discussion by identifying the various types of peace facilitator actors, describing what functions they fulfill, and explaining their motivations. Part III demonstrates the influence of facilitators on the human rights dimensions of peace agreements through an analysis of past peace negotiations in Bosnia, Afghanistan and Sierra Leone. Part IV presents the "human

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<sup>6</sup> See, e.g., Anna Shotton, *A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel*, 39 CORNELL INT'L L.J. 97 (2006); Olivera Simić, *Does the Presence of Women Really Matter? Towards Combating Male Sexual Violence in Peacekeeping Operations*, 17 INT'L PEACEKEEPING 188 (2010).

sovereignty” concept as a plausible normative ground for establishing and delineating the human rights responsibilities of peace facilitators, and Part V discusses the implications of this theoretical model for peace processes. Part VI considers possible avenues for embedding facilitator responsibilities in international legal doctrine. Part VII concludes.

### II. PEACE FACILITATORS: WHO THEY ARE, WHAT THEY DO, AND WHY THEY DO IT

Intensive third-party involvement is one of the hallmarks of contemporary peace processes. Third parties usually provide the principal parties—i.e., the conflict’s protagonists, who negotiate a peace agreement and undertake the main obligations under its terms (hereinafter the parties)—with various services to support their peacemaking efforts, including mediation, financing, and peacekeeping. Whereas mediators play a crucial role in the pre-agreement negotiation process, the major activity of donors and peacekeepers takes place at the post-agreement implementation stage. However, their contribution is often anticipated and counted on by the parties already at the negotiation stage, a fact which points to their potential influence on negotiators’ early choices regarding negotiation procedures and peace terms.

#### A. Mediators

Mediators have taken part in the majority of peace negotiations in the past century.<sup>7</sup> The main task of the mediator is to help the parties reach an agreed solution to the conflict by facilitating a constructive, integrative dialogue between them. Toward that aim, the mediator may use a range of non-coercive strategies: she can try to alter the parties’ perceptions about the conflict and its sources, point out what they stand to gain by ending it, suggest creative solutions, and so forth.<sup>8</sup> Not infrequently, however, mediators with suitable capacities use more coercive mediation strategies, such as the threat to use economic and even military sanctions, in order to induce the parties to sign a peace agreement.<sup>9</sup> Moreover, rather than merely suggesting possible solutions to the parties, mediators sometimes take a proactive role in drafting and formulating the peace agreement, and in fact act as its ultimate authors.

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<sup>7</sup> See, e.g., Jacob Bercovitch, *Mediation in International Conflicts*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 163, 169-170 (I. William Zartman ed., revised edition, 2007); INTERNATIONAL PEACE INSTITUTE, *MEDIATION AND PEACE PROCESSES: TASK FORCES ON STRENGTHENING MULTILATERAL SECURITY CAPACITY* 6, 9 (2009).

<sup>8</sup> For descriptions of the work of mediators and analyses of case studies, see, e.g., SAADIA TOUVAL & I. WILLIAM ZARTMAN (eds.), *INTERNATIONAL MEDIATION IN THEORY AND PRACTICE* (1985); JACOB BERCOVITCH, *THEORY AND PRACTICE OF INTERNATIONAL MEDIATION* (2011).

<sup>9</sup> See, e.g., Saadia Touval, *Coercive Mediation on the Road to Dayton*, 1 INT’L NEG. 547 (1996); Cindy Daase, *The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking*, 1(3) CAMBRIDGE J. INT’L & COMP. L. 107 (2012).

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In terms of their formal affiliation, the majority of mediators are official representatives of international organizations (IOs) or third-party governments.<sup>10</sup> The most prominent among them are the UN and the U.S.<sup>11</sup> However, regional organizations such as the African Union, the Economic Community of West African States (ECOWAS), and the European Union (EU), as well as small states like Switzerland, Norway, Kenya, and Qatar, are also quite frequently involved in peace mediation.<sup>12</sup> Naturally, large and powerful mediators can employ a greater range of means and incentives to exert influence upon the parties than small states or organizations, which usually adopt a more flexible, “low-profile” mediation style.

In recent years, however, mediation roles have also been increasingly assumed by non-state actors, most notably EU- and U.S.-based transnational non-governmental organizations (NGOs) such as the Carter Center, the Centre for Humanitarian Dialogue, the Crisis Management Initiative, and Conciliation Resources, which have been involved in mediation efforts in countries as diverse as Ethiopia, Sudan, Liberia, Azerbaijan, Philippines, Indonesia, and Cambodia.<sup>13</sup> In other places, such as Mozambique and Colombia, religious associations have played a crucial role in facilitating peace negotiations.<sup>14</sup>

### B. Donors

Peacemaking is an expensive business. The financial costs of peace may include reconstruction of physical infrastructure, refugee return or resettlement, transitional justice mechanisms, demobilization and reintegration of combatants, environmental projects (e.g., building peace parks, developing shared natural resources), peacekeeping missions, and the creation of socioeconomic conditions that support sustainable peace through investment in education, employment, housing, etc. However, countries emerging from violent conflicts cannot usually afford the expenses of peace. International fundraising has therefore become a central component of peace processes,<sup>15</sup> the most prominent donors being wealthy states as well as international aid agencies such as the World Bank and the UN Development Programme.

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<sup>10</sup> See, e.g., BERCOVITCH, *supra* note 8, at 23.

<sup>11</sup> See SIMON J.A. MASON & DAMIANO ANGELO SGUAITAMATTI, MAPPING MEDIATORS: A COMPARISON OF THIRD PARTIES AND IMPLICATIONS FOR SWITZERLAND 17-18, 21 (paper published by the Zurich Center for Security Studies, 2011).

<sup>12</sup> See *id.* at 20-21.

<sup>13</sup> For a detailed description of these organizations and their activities until 2008, see CRISIS MANAGEMENT INITIATIVE, THE PRIVATE DIPLOMACY SURVEY 2008: MAPPING 14 PRIVATE DIPLOMACY ACTORS IN EUROPE AND AMERICA (Antje Herrberg & Heidi Kumpulainen eds., 2008).

<sup>14</sup> See, e.g., Philipp Kastner, *Towards Internalized Legal Obligations to Address Justice and Accountability? A Novel Perspective on the Legal Framework of Peace Negotiations* 12 CRIM. L.F. 193, 195 (2012).

<sup>15</sup> See, e.g., Shephard Forman & Stewart Patrick, *Introduction*, in GOOD INTENTIONS: PLEDGES OF AID FOR POSTCONFLICT RECOVERY (Forman & Patrick eds., 2000) (noting that during the 1990s, the international community pledged more than \$100 billion in aid to three dozen countries emerging from violent conflicts).

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Post-conflict financial assistance can provide important incentives to the belligerent parties to end the conflict. “Providing a bridge between emergency humanitarian relief and long-term development,” peace aid is “designed to persuade formerly warring parties to resolve conflicts peacefully.”<sup>16</sup> A common method for raising peacebuilding funds is to convene a country-specific international donor conference. Even though these conferences usually take place only after negotiations have ended,<sup>17</sup> the prospect of an external peace dividend in the form of financial aid can provide *ex ante* incentives to the parties and induce them to contemplate donors’ expectations already during negotiations.<sup>18</sup>

### C. Peacekeepers

The term “peacekeeping,” which was once used exclusively to describe ceasefire enforcement by international military missions, is now commonly used to refer to a range of military and non-military tasks fulfilled by third parties in the context of post-conflict transitions.<sup>19</sup> Under this broad definition, which this article adopts, peacekeeping activities can include ceasefire monitoring, preparation and control of national elections, verification of disarmament, demobilization and reintegration of ex-combatants (DDR), training of police forces, human rights monitoring, and more. Understood even more broadly, peacekeeping can encompass the establishment and operation of adjudication or arbitration tribunals or commissions dealing with conflict-related reparation claims or with alleged violations of the peace agreement. Peacekeeping tasks are usually specified in the terms of the peace agreement, and are considered a key aspect of its implementation.

As with other peace facilitation roles, the most salient provider of peacekeeping services is the UN. Especially since the end of the Cold War, the UN has established dozens of multitask peacekeeping missions, including, to name just a few, the UN peacekeeping missions in Angola, which were mandated to monitor national elections and to observe and verify the disarmament and withdrawal of military forces,<sup>20</sup> and the UN peacekeeping mission in Côte d’Ivoire, which was mandated to facilitate the implementation of the 2003 Linas-Marcoussis Agreement by way of, *inter alia*, supporting DDR and security sector reform processes, protecting civilian population, and monitoring human rights violations.<sup>21</sup>

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> See, e.g., James A. Boyce, *Beyond Good Intentions: External Assistance and Peace Building*, in GOOD INTENTIONS, supra note 15, at 367, 368 (comparing the convening dates of donor conferences on Cambodia, El Salvador, Mozambique, Palestine, and Bosnia). International donor conferences have also been held shortly after the signing of peace agreements in Afghanistan, Somalia, Sudan, Mozambique, and elsewhere.

<sup>18</sup> See *id.* at 368.

<sup>19</sup> See, e.g., Michael Bothe, *Peacekeeping*, paras. 1-16, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (updated 2011).

<sup>20</sup> See S.C. Res. 696, U.N. Doc. S/RES/696 (May 30, 1991); S.C. Res. 976, U.N. Doc. S/RES/976 (Feb. 8, 1995). See also Manuel J. Paulo, *The Role of the United Nations in the Angolan Peace Process*, 15 ACCORD 28 (2004).

<sup>21</sup> See S.C. Res. 1528, U.N. Doc S/RES/1528 (Feb. 27, 2004).

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Regional IOs have also been engaged in peacekeeping missions, often in cooperation with the UN. Notable among them is ECOMOG, the permanent monitoring group established by ECOWAS, which was involved in peacekeeping in Liberia, Sierra Leone, and other countries.<sup>22</sup> Other peacekeeping operations have been launched by multinational ad-hoc missions or “contact groups,” as in the case of the Monitoring Group set up to oversee compliance with the 1996 Israeli-Lebanese Ceasefire Understandings, which is comprised of representatives from the U.S., France, Syria, Lebanon and Israel.<sup>23</sup> Finally, the Permanent Court of Arbitration has supported the operation of several judicial and quasi-judicial post-conflict commissions, among them the Eritrea-Ethiopia Claims Commission, which was established pursuant to the 2000 Algiers Peace Agreement with the mandate to decide all claims for loss, damage or injury submitted by Eritrea and Ethiopia against each other,<sup>24</sup> and the Eritrea-Ethiopia Boundary Commission, which was authorized under the same agreement to demarcate the Eritrean-Ethiopian border.<sup>25</sup>

Although not a common practice, implementation roles can also be assigned to non-state actors. For example, the Dayton Agreement prisoner exchange article provides that the International Red Cross Commission (ICRC) will prepare and assist in the implementation of a plan for the release and transfer of all prisoners.<sup>26</sup> The agreement also assigns a role to the ICRC in the implementation of its refugee and displaced person provisions.<sup>27</sup>

### D. Facilitator Motivations

Peace facilitators usually do their job voluntarily, despite having no concrete legal duty to do so. It is quite obvious why global and regional IOs that were created with the purpose of promoting peace and security decide to engage in peace-facilitating tasks. But why do individual states take upon themselves such tasks and bear their costs, instead of leaving them to IOs that can distribute these costs among their members? What benefits do states have to gain from undertaking peace-facilitating roles?

First, acting as peace facilitators provides states with the opportunity to influence the terms of peace agreements in a manner that serves their particular interests, which may range from strengthening economic relations with the parties to

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<sup>22</sup> See, e.g., Bothe, *supra* note 19, para. 22.

<sup>23</sup> See Israel-Lebanon Ceasefire Understanding (Apr. 26, 1996), available at the UN online peace agreements database, ‘UN Peacemaker’, <http://peacemaker.unlb.org>.

<sup>24</sup> Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, art. 5, Dec. 12, 2000, available at <http://www.refworld.org/docid/4a54bbed0.html>.

<sup>25</sup> *Id.* art. 4.

<sup>26</sup> See General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A, art. IX(1), available at ‘UN Peacemaker’, *supra* note 23 [hereinafter Dayton Agreement].

<sup>27</sup> *Id.* Annex 7, arts. III(2), V.

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suppressing negative externalities entailed by war.<sup>28</sup> Second, undertaking mediation and other facilitation roles can help states gain general international prestige,<sup>29</sup> stand out as regional agenda-setters (especially for small and medium-sized states),<sup>30</sup> or maintain a dominant position in the global arena (especially for large states and IOs).<sup>31</sup> Third, governments may wish to contribute to the resolution of conflicts that involve populations who have special ethnic or religious ties with influential groups within their own country in order to increase their domestic power.<sup>32</sup> Finally, facilitators may find non-selfish satisfaction in the promotion of human welfare worldwide.<sup>33</sup> As far as NGO peace facilitators are concerned, such altruism as well as personal reputation concerns appears to provide the main drive for their activities. As we will see later,<sup>34</sup> recognizing the benefits that states draw from facilitating peace processes is important for addressing a possible criticism against the recognition of facilitators' human rights responsibilities, according to which such recognition may deter them from offering help in the first place and thus be detrimental to peace.

### III. PEACE FACILITATORS AND JUSTICE CONSIDERATIONS IN BOSNIA, SIERRA LEONE, AND AFGHANISTAN

To better understand how peace facilitators operate and to appreciate their potential influence on negotiators with respect to human rights and other justice issues, this section examines three past peace processes that raised serious procedural or substantive justice concerns and analyzes how they were treated by facilitators. It shows that in all three cases—namely, the cases of Bosnia (1995), Sierra Leone (1999), and Afghanistan (2001)—facilitators' influence was Janus-faced: they helped prevent some peace-related injustices, while ignoring or contributing to others. These cases point to the need to regulate facilitators' activity so as to increase their motivation to mobilize their influence to promote justice and human rights rather than undermine them.

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<sup>28</sup> See, e.g., BERCOVITCH, *supra* note 8, at 23; Saadia Touval, *The Superpowers as Mediators*, in *MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT* 232 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992); UK Government, Foreign and Commonwealth Office, Department for International Development, and Ministry of Defence, *BUILDING STABILITY OVERSEAS STRATEGY* 7-8 (2011).

<sup>29</sup> See, e.g., JOHN L. HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* 81 (2001) (noting that the Togolese president was keen to broker the Sierra Leonean peace process since he wanted to improve his dubious international reputation).

<sup>30</sup> See, e.g., Mason & Sguaitamatti, *supra* note 11, at 21.

<sup>31</sup> See, e.g., Touval, *supra* note 28.

<sup>32</sup> See, e.g., Mason & Sguaitamatti, *supra* note 11, at 22 (suggesting that the efforts by Malaysia to mediate the internal conflict in the Philippines and by Turkey to mediate the nuclear crisis in Iran were significantly motivated by the desire of the Malaysian and Turkish governments to gain popularity among their domestic Muslim populations).

<sup>33</sup> See STEPHEN KRASNER, *INTERNATIONAL REGIMES* 13-15 (1983) (distinguishing between the use of state power to enhance particular national interests and the use of power to promote cosmopolitan ends).

<sup>34</sup> See *infra* Part V.D.II.

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### A. Bosnia

Bosnia and Herzegovina (hereinafter Bosnia) is home to three major ethnic groups—Bosniaks (Bosnian Muslims), Serbs, and Croats—which make up about 44%, 33%, and 17% of the entire population, respectively.<sup>35</sup> For many years, the three groups lived together in peace in mostly mixed communities. But as waves of ethnic nationalism swept the former Yugoslavia, Bosnian inter-ethnic coexistence quickly collapsed into a wholesale civil war.<sup>36</sup> This war lasted three years and eight months, which were marked by genocide and ethnic cleansing

After several unsuccessful mediation attempts, the presidents of Yugoslavia, Croatia and Bosnia convened in a U.S. military base in Dayton, Ohio, on November 1, 1995, to find an agreed solution to the Bosnian conflict. The Dayton negotiations were formally co-chaired by the U.S., Russia, and the EU. In practice, however, they were administered and controlled by the U.S. government, who not only determined the timing and location of the talks, but also decided who would be invited to participate, and drafted many parts of the agreement from general principles down to the smallest details.<sup>37</sup> As the only superpower in the post-cold war era and with its deep military and economic involvement in devastated, war-torn Yugoslavia, the U.S. had considerable leverage over the negotiating parties, which it did not hesitate to use in order to reach a peace agreement. By explicitly threatening to impose economic sanctions on the Serbs and by offering financial and military support to the Bosniaks,<sup>38</sup> the U.S. government was able to induce the parties to make significant concessions and eventually sign the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter Dayton Peace Agreement, or DPA).

From a human rights perspective, the Dayton agreement included at least two problematic arrangements, one referring to power-sharing and the other to refugees and internally displaced persons (IDPs). In addition, the negotiation procedures were highly exclusionary and did not allow for adequate representation of affected interests.

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<sup>35</sup> The last official census in Bosnia was conducted in 1991. See Yugoslav Population Census, available at <http://josip.purger.com/other/bih/index.htm>. An unofficial 1996 UNHCR census recorded slightly different shares of the three ethnic groups.

<sup>36</sup> For general accounts of the Bosnian war and its background, see, e.g., NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1996); STEVEN L. BURG & PAUL S. SHOUP, *THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION* (1999).

<sup>37</sup> See RICHARD HOLBROOKE, *TO END A WAR* 203-205, 223-224, 240 (1998). See also Gro Nystuen, *Achieving Peace or Protecting Human Rights?: Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* 12 (2005) (noting that “[a]lthough the draft agreement was subject to a certain amount of negotiation... many of the core ideas and concepts of the original draft remained”).

<sup>38</sup> See *Id.* at 271-5, 282, 289. See also Touval, *supra* note 9, and Daniel Curran et al., *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 *NEGOT. J.* 513 (2004) (describing Holbrooke’s coercive mediation style at Dayton).

### *1. Exclusionary Power-Sharing Arrangements*

Annex 4 of the DPA prescribes a new constitution for Bosnia. Under this constitution, Bosnia is to become a consociational democracy comprised of two entities: the (predominantly Bosniak-Croat) Federation of Bosnia and Herzegovina, and the (predominantly Serb) Republika Srpska.<sup>39</sup> The constitution distinguishes between two kinds of Bosnian citizens, namely, “constituent peoples” (Bosniaks, Serbs, and Croats) on the one hand, and “Others” (e.g., Roma and Jews) on the other hand, and provides that all seats in the three-member Presidency of Bosnia and the fifteen-member House of Peoples (the vetoing chamber of the Bosnian Parliamentary Assembly) shall be allocated among the three constituent peoples on an equal basis.<sup>40</sup> In other words, it adopts a power-sharing formula that bars members of non-constituent minority groups from being elected to two central political institutions.

In a landmark judgment delivered in 2009, the European Court of Human Rights (ECtHR) found that the total and permanent exclusion from the Presidency and House of Peoples of Bosnian citizens that do not affiliate themselves with one of the three “constituent peoples” was in violation of the prohibition on discrimination embedded in the European Convention of Human Rights.<sup>41</sup> While the reasoning of the ECtHR can be criticized,<sup>42</sup> it importantly points to alternative, less injurious, power-sharing formulas that could have been adopted, which would have ensured adequate representation of all constituent peoples without entailing the total exclusion of “Others.” For example, instead of allocating a fixed number of seats to each constituent people, the Constitution could have determined a maximum number of seats to be occupied by representatives from each group including “Others.” It might have also been possible to significantly reduce the powers of the Presidency and House of Peoples without, however, abolishing the latter’s veto power, which seems to have been crucial for reaching an agreement.<sup>43</sup> These alternatives, however, were not endorsed by the parties, and their demand for strictly ethnic based power-sharing was ultimately accepted by international facilitators.<sup>44</sup>

### *2. Imposed Return of Refugees and Displaced Persons*

Annex 7 of the DPA asserts the unequivocal right of all refugees and internally displaced persons (IDPs) to freely return to their homes.<sup>45</sup> It also requires the Bosnian authorities to ensure that refugees and IDPs are able to return in safety,

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<sup>39</sup> See DPA, *supra* note 26, Annex 4, art. I(3).

<sup>40</sup> *Id.* Annex 4, arts. IV(1)(a), V.

<sup>41</sup> See *Sejdić and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06), Judgment of the Grand Chamber (Dec. 22, 2009), paras. 38-56.

<sup>42</sup> See, e.g., CHRISTOPHER MCCRUDDEN & BRENDAN O’LEARY, *COURTS AND CONSOCIATIONS: HUMAN RIGHTS VERSUS POWER-SHARING* (2013) (criticizing the short and ambiguous argumentation of the ECtHR in the *Finci* case).

<sup>43</sup> See *Sejdić and Finci*, *supra* note 41, para. 22, 48 (citing an Opinion issued by the European Commission for Democracy through Law [the Venice Commission]).

<sup>44</sup> See *Id.* parag. 13.

<sup>45</sup> See Dayton Agreement, *supra* note 26, Annex 7, art. I(1).

without risk of persecution or discrimination, and that the choice of destination shall be up to the returnees.<sup>46</sup> Despite these important protections, however, the Dayton refugee and IDP provisions appear to suffer from a serious human rights defect in that they do not provide any protection or support to refugees and IDPs who wish to remain in their places of refuge rather than return to their original homes. It should be noted in this context that during more than three and a half years of war, over 1.3 million Bosnians fled to other countries and about one million were displaced within Bosnia.<sup>47</sup> Arguably, the Dayton architects should have taken into account that the return of such a huge number of people and the creation of conditions that would allow them to be safely reintegrated would take a few years, if not decades, and that during all these war and postwar years some displaced persons would change their situation and develop legitimate expectations to stay in their new places. However, the DPA, with its strong emphasis on the right to return, is clearly unsympathetic to any kind of a “right to stay.”

The DPA’s bias in favor of return seems to have been particularly detrimental to two groups. The first is refugees who have accommodated to their new countries, found jobs or established businesses there, or educated their children in the local culture and language, and do not wish to be relocated and disoriented once again. While the granting of a permanent status to refugees in host countries is obviously subject to the sovereign discretion of the latter, the DPA could have at least urged them to consider the naturalization of refugees in appropriate cases rather than merely calling upon them to promote the early return of refugees.<sup>48</sup>

The second group whose rights have been undermined by the DPA’s unrestrained endorsement of the right to return is IDPs who fled from areas where they constituted ethnic minorities to areas that were controlled by their own ethnic group, and settled in houses that had been vacated by local minorities in earlier stages of the war.<sup>49</sup> Dayton’s uncompromising return policy has meant that IDPs who occupied such evacuated homes have been forced to leave. While the expectations of some of those IDPs to remain in their places are not necessarily superior to the property rights of the original owners, they should not have been entirely ignored. This is particularly true in view of the fact that moving into abandoned houses was usually in accordance with special laws adopted by the two entities (the Federation and the Republika Srpska), which defined vacated houses as “abandoned property” and allowed members of the local majority group to occupy them.<sup>50</sup> Although these laws may in themselves be illegitimate and supportive of ethnic cleansing, displaced individuals in desperate need of housing solutions are not to be blamed for relying upon them. It would therefore seem to have been appropriate to have allowed the Commission for Real Property Claims of Displaced Persons and Refugees established

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<sup>46</sup> *Id.* arts. I(2), I(4).

<sup>47</sup> See Int’l Crisis Group, *Minority Return or Mass Relocation?* i-ii (May 14, 1998).

<sup>48</sup> DPA, *supra* note 26, Annex 7, art. I(5).

<sup>49</sup> See, e.g., Richard Black, *Return and Reconstruction in Bosnia and Herzegovina: Missing Link, or Mistaken Priority?* 21 SAIS REV. INT’L AFF. 177, 191-92 (2001).

<sup>50</sup> See Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT’L L. 1091, 1101-2 (1997-1998).

under Annex 7 of the DPA sufficient discretion to balance between competing claims of ownership and occupancy rights, instead of requiring it to automatically award restitution to the original owner of the property concerned.<sup>51</sup>

The insistence on return in the DPA represents a strategic policy choice of the U.S. and the EU, who were determined to undo the consequences of ethnic cleansing.<sup>52</sup> Another important motivation for insisting on refugee return was the unwillingness of host countries, most notably Germany, to permanently absorb them.<sup>53</sup> While it is true that demands for recognizing a right to return also came from within the negotiating parties,<sup>54</sup> it would probably not have been given such clear priority over other solutions if it had not been so important to the international facilitators.

Facilitator resolve to reverse ethnic cleansing was significant also during the implementation stage. In a rather unprecedented move, prominent donors decided to make aid to Bosnia conditional upon the parties' compliance with their commitment to facilitating refugee and IDP return.<sup>55</sup> For example, the UN High Commissioner for Refugees, in collaboration with major international donors, implemented the 'open cities' program, which rewarded local authorities that supported refugee return by allocating them greater funds.<sup>56</sup> These aid conditionalities had some success in enabling the safe return of people to areas where they constituted ethnic minorities.<sup>57</sup> However, by linking reconstruction and development aid to refugee return, international donors also made the alternative option of remaining in one's place of refuge all the more unfeasible.

### 3. Exclusionary Negotiation Process

The Dayton negotiations were highly exclusionary and nondemocratic, and were designed to obtain top-down support for a peace agreement whose terms had been largely predetermined by the U.S. government. As American mediator Richard Holbrooke recalls in his memoirs, the site of the Wright-Patterson Air Force Base in Dayton was preferred over other sites as a venue for the talks mainly because it could be easily "sealed off from the press and all other outsiders."<sup>58</sup> Washington presented to Balkan leaders several preconditions for hosting the talks, among them that they

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<sup>51</sup> DPA, *supra* note 26, Annex 7, art. XII(2)

*The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1101-2 (1997-1998).

AT 50, at 195; Rosand, *supra* note 50, at 1110.

<sup>53</sup> See, e.g., Richard Black et al., *Temporary Protection and the Assisted Return of Refugees from the European Union*, 10 INT'L J. REFUGEE L. 444 (1998).

<sup>54</sup> See, e.g., Pauline Neville-Jones, *Dayton, IFOR and Alliance Relations in Bosnia*, 38(4) SURVIVAL 44 (1996).

<sup>55</sup> See James K. Boyce, *Aid Conditionality as a Tool for Peacebuilding: Opportunities and Constraints*, 33 DEV. & CHANGE 1025 (2002). See also Black, *supra* note 49, at 183.

<sup>56</sup> For a detailed description and analysis of the Open Cities Initiative, see, e.g., ELIZABETH M. COUSENS & CHARLES K. CATER, *TOWARD PEACE IN BOSNIA: IMPLEMENTING THE DAYTON ACCORDS* 71, 77-79 (2001); Int'l Crisis Group, *supra* note 47, at 15-21.

<sup>57</sup> See Boyce, *supra* note 55.

<sup>58</sup> See Holbrooke, *supra* note 37, at 203.

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not talk to the press and that they “come to the United States with full power to sign agreements, without further recourse to parliaments back home.”<sup>59</sup> Another strategic choice that undermined the democratic legitimacy of the process was to limit participation in the talks, apart from facilitators, to the three presidents of Bosnia, Yugoslavia (Serbia and Montenegro), and Croatia.<sup>60</sup> This meant that two of the Bosnian constituent peoples—Bosnian Serbs and Bosnian Croats—were not represented by leaders of their own communities but rather by the governments of their kin states.<sup>61</sup>

Civil society representatives were also excluded from the Dayton negotiations. Apparently, the views and preferences of the “people who lived through the conflict” were deemed irrelevant for deciding how to resolve it.<sup>62</sup> Particularly troubling is the exclusion of groups who were adversely affected by the DPA, including non-constituent ethnic minorities (e.g., Jews and Roma), and refugees and IDPs. Also problematic is the absence of representatives of Bosnian women’s groups, especially in view of the systematic use of rape and other forms of gendered violence as a means of ethnic cleansing during the Bosnian conflict.<sup>63</sup> Had women representatives participated in negotiations, they might have been able to incorporate a gender perspective into the DPA and ensure that the special experiences and needs of women in Bosnia be adequately addressed.

### B. Afghanistan

Afghanistan is a multicultural, highly fragmented state comprised of four main ethno-linguistic groups (Pashtuns, Tajiks, Hazaras, and Uzbeks), and over a dozen smaller ethno-linguistic minorities, each of which is itself divided into numerous tribes and clans.<sup>64</sup> Most Afghans are Sunni Muslims, but there is a significant minority of Shi’a Muslims as well as some other religious groups and subgroups. Afghan society is also divided along geographic lines, with most of the population living in rural areas and being effectively controlled by regional and local power holders. Although intercultural tensions were not a major catalyst in the Afghan war, which lasted from 1979 to 2001, during some of the war’s phases the main armed factions were largely organized along ethnic and regional lines.<sup>65</sup>

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<sup>59</sup> See *id.* at 199-200. See also *id.* at 236.

<sup>60</sup> See *id.*

<sup>61</sup> In fact, Bosnian Serb representatives from the Republika Srpska were physically present at Dayton; however, they were actually excluded from most discussions and were “essentially isolated.” See *id.* at 243. See also *id.* at 256, 293, 310

<sup>62</sup> See Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT’L L. 103, 149 (2001).

<sup>63</sup> See *id.* For further discussion of the problem of women’s exclusion from peace negotiations, see *infra* Part III.B.

<sup>64</sup> See Reeta Chowdhari Tremblay, *Afghanistan: Multicultural Federalism as a Means to Achieve Democracy, Representation and Stability*, in FROM POWER SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 198, 200-202 (Sid Noel ed., 2005).

<sup>65</sup> See Ebrahim Afsah & Alexandra Hilal Guhr, *Afghanistan: Building a State to Keep the Peace*, 9 MAX PLANCK YEARBOOK OF UN LAW 373, 378-79 (2005).

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In late November 2001, following the U.S.-led military intervention that ousted the Taliban government, representatives of all major Afghan factions met in Bonn, Germany under UN auspices,<sup>66</sup> and with the active support of the U.S.,<sup>67</sup> in order to establish a new government that would bring peace and stability to Afghanistan. Participants in the Bonn talks came from different ethnic, religious and geographic groups and represented various political interests.<sup>68</sup> Two quite distinctive groups, however, were conspicuously missing from the talks. One is the Taliban, and the other is women. Whereas the exclusion of the rogue Taliban leaders from the Bonn talks may be criticized for its political wisdom,<sup>69</sup> it does not seem to raise any human rights concerns. The exclusion of women, by contrast, has seriously undermined the justice and legitimacy of the Bonn peace process.

There is quite clear evidence that the identity of the Bonn talks' participants was determined or at least approved in advance by the UN and other international actors involved in the peace process. In the weeks that preceded the Bonn conference, the UN Secretary General's Special Representative for Afghanistan (SRSG), Lakhdar Brahimi, held intensive meetings with representatives of the Afghan factions as well as with the foreign ministers of the "six plus two" group (the six countries bordering Afghanistan plus the U.S. and Russia), in which they discussed the plan for the upcoming peace talks.<sup>70</sup> Following these meetings, Brahimi briefed the Security Council about the planned peace conference, emphasizing that its main goal would be to establish a multiethnic "broad-based government that would be representative of all groups in the country... and [enjoy] internal and external legitimacy."<sup>71</sup>

Apparently, the participation of women in the talks was not deemed necessary for achieving these goals. So much so that initially not even a single woman was invited to participate in the Bonn talks. It was only under intensive pressure on the part of transnational women's organizations that the SRSG finally engaged in an effort to include some women in the Bonn talks.<sup>72</sup> This effort led to the participation of (merely) two women among the twenty five official Afghan delegates to the

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<sup>66</sup> See, e.g., UNAMA/OCPI, UN in Afghanistan: 11 September 2001-11 September 2002, 2 (Aug. 11, 2002) (describing the organizations of the Bonn conference by the UN).

<sup>67</sup> See, e.g., Mark Fields & Ramsha Ahmed, *A Review of the 2001 Bonn Conference and Application to the Road Ahead in Afghanistan*, 5-6 (Nov. 2011) (describing the role of U.S. Envoy to the Afghan Opposition, James Dobbins, in preparing and conducting the Bonn talks).

<sup>68</sup> See, e.g., IMTIAZ HUSSAIN, AFGHANISTAN, IRAQ, AND POST-CONFLICT GOVERNANCE: DAMOCLEAN DEMOCRACY? 127, 130 (2010) (presenting the ethnic identities, external loyalties, and political preferences of the different groups that participated in the Bonn talks).

<sup>69</sup> See, e.g., Fields & Ahmed, *supra* note 67, at 19.

<sup>70</sup> See, e.g., Vadim Polishchuk, *Foreign Ministers of six plus two groups to meet UN envoy on Afghanistan*, AFGHANISTAN NEWS CENTER (Nov. 3, 2001), [www.afghanistannewscenter.com/news/2001/november/nov312001.html](http://www.afghanistannewscenter.com/news/2001/november/nov312001.html). See also Fields & Ahmed, *supra* note 67, at 12-13 (noting that following the six plus two group meeting, which took place on Nov. 12, the U.S. Envoy to the Afghan Opposition met with Afghan faction leaders, at the request of the UN SRSG, to ensure their participation in the peace talks).

<sup>71</sup> U.N. SRSG for Afghanistan, *Briefing to the Security Council* (Nov. 13, 2001), <http://www.un.org/News/dh/latest/afghan/brahimi-sc-briefing.htm>.

<sup>72</sup> See Jessica Neuwirth, *Women and Peace and Security: The Implementation of U.N. Security Council Resolution 1325*, 9 DUKE J. GENDER L. & POL'Y 253, 254-55 (2002).

talks.<sup>73</sup> As luck would have it, at the same time that formal peace negotiations were taking place in Bonn, the Afghan Women's Summit for Democracy—an informal, NGO-initiated event that brought together prominent Afghan women to discuss the future of Afghanistan—was held in Brussels.<sup>74</sup> The two women delegates that attended the Bonn Talks were also among the participants of the Brussels Summit, which created an opportunity for some interaction between the meetings. These delegates traveled from Bonn to Brussels, briefed the Summit participants on the negotiations, and reported back to Bonn,<sup>75</sup> thus allowing an even more effective—albeit far from adequate—representation of women's voices at the peace talks.

The Bonn talks were concluded on December 5, 2001 with the signing of the Bonn Peace Agreement (hereinafter also BPA). This agreement provided for the establishment of an Interim Authority, which would form the basis for the subsequent establishment of “broad-based, gender-sensitive, multi-ethnic and fully representative” permanent governmental authorities in Afghanistan.<sup>76</sup> At the heart of the Interim Authority was an Interim Administration, whose members were selected directly by the participants in the Bonn talks and listed in an Annex to the BPA.<sup>77</sup> Although it is stated in the agreement that this selection was made “with due regard to the ethnic, geographic and religious composition of Afghanistan and to the importance of the participation of women,”<sup>78</sup> the list that appears in the Annex tells a somewhat different story. The members of the interim government indeed represent more or less proportionally the various ethnic, linguistic and religious groups of Afghanistan;<sup>79</sup> however, they do not represent anything close to a proportional share of women—out of thirty government members, only two are women.<sup>80</sup> Even though participation in decision-making cannot always guarantee particular outcomes, it is quite likely that increased representation of women in the Bonn Talks would have led to increased representation of women in the Bonn-established government.

At a press briefing held shortly after the publication of the BPA, the SRSR was asked why only two women were included in the government. He replied briefly

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<sup>73</sup> Altogether, more than fifty delegates from Afghanistan participated in the Bonn talks (see Hussain, *supra* note 68, at 128). However, only 25 delegates formally signed the Bonn Agreement, among them two women, Ms. Amena Afzali and Mrs. Sima Wali. See Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Dec. 5, 2001, available at ‘UN Peacemaker’, *supra* note 23 [hereinafter Bonn Peace Agreement, or BPA].

<sup>74</sup> The Afghan Women's Summit on Democracy was organized by a coalition of women's organizations in collaboration with the Gender Advisor to the Secretary-General of the United Nations and UNIFEM. See Equality Now, *Afghan Women's Summit for Democracy* (March 2002), <http://www.equalitynow.org/node/697>.

<sup>75</sup> See Neuwirth, *supra* note 72, at 255.

<sup>76</sup> BPA, *supra* note 73, pmb1.

<sup>77</sup> *Id.* Annex IV.

<sup>78</sup> *Id.* art. III(3).

<sup>79</sup> See Thomas H. Johnson, *Afghanistan's Post-Taliban Transition: The State of State Building after the War*, 25 CENTRAL ASIAN SURVEY 1, 5-6 (2006) (mentioning the affiliations of the members of the Interim Administration).

<sup>80</sup> One woman was appointed Vice-Chair (one of five) and Minister of Women Affairs, and the other Minister of Health. See BPA, *supra* note 73, Annex IV.

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that “there were none in the recent times in Afghanistan, so it’s not a bad beginning.”<sup>81</sup> On another occasion he suggested that Afghan women did not and should not have expected more than they got,<sup>82</sup> adding:

[We] had from the very first day two women in the government. We now have three in Afghanistan, six in Iraq, which is huge, *too much*, but I think we have got to be lucky, we’ve got very good women. In Afghanistan there are two or three women, one in particular is doing very well.... But the point is don’t run before you can walk. Don’t try.<sup>83</sup>

The SRS’s answers should trouble anyone concerned with the fair representation of women in the government. Not only do they reflect a very low standard for women’s political participation in non-liberal countries, but they also reveal skepticism about the ability of women from such countries to undertake governmental roles. Moreover, they seem to demonstrate a sense of indifference and even disdain towards the whole issue of women’s representation.

This does not mean that Brahimi’s approach is entirely unfounded. The Bonn peace process found Afghan women living under a strict gender apartheid regime. During the last decades of the twentieth century, Afghan women suffered extreme repression, and were increasingly excluded from public life. They were prevented from attending schools and working, were not allowed to leave home unless covered with a head-to-toe *burqa* and accompanied by a male relative, and were regularly attacked by men. While these discriminatory practices and policies culminated in the Taliban period, they also prevailed in earlier years under the Mujahdeen regime and were rooted in patriarchal tribal cultures.<sup>84</sup> Against this backdrop, the under-representation of women in the Bonn talks as well as in the Bonn-established government can be attributed not only to a strong domestic opposition to including women, but, as implied by Brahimi in the above cited paragraph, also to the practical difficulties of finding Afghan women that would have both the competency and the willingness to assume ministerial posts.<sup>85</sup> Brahimi may also be right in proposing that

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<sup>81</sup> United Nations News Centre, *Press briefing by Mr. Lakhdar Brahimi, SRS for Afghanistan and Mr. Joschka Fischer, Minister of Foreign Affairs of the FR of Germany*, transcript (Dec. 5, 2001), <http://www.un.org/apps/news/infocus/afghanistan/infocusnews.asp?NewsID=88&SID=1>.

<sup>82</sup> In an interview to the Journal of International Affairs, Brahimi noted that while people based in Western countries may have expected an equal representation of women in the Afghan government, the expectations of women in Afghanistan were (rightfully) much lower. To make his point, he cited an Afghan woman who told him: “we would like to have one or two women in [the commission for the preparation of the Loya Jirga]. If it is not possible then there are some men who are in favor of women’s rights. Try to find men who are in favor of women’s rights. We don’t want 50 percent.” See Mary Sack & Cyrus Samii, *An Interview with Lakhdar Brahimi*, 58 J. INT’L AFF. 239, 245 (2004).

<sup>83</sup> *Id.* at 246 (emphasis added).

<sup>84</sup> See, e.g., Amnesty Int’l, *Women in Afghanistan: a Human Rights Catastrophe* (Nov. 3, 1995); U.N. Secretary-General, *Discrimination against Women and Girls in Afghanistan: Report of the Secretary General*, U.N. Doc. E/CN.6/2002/5 (Jan. 28, 2002); Huma Ahmed-Ghosh, *A History of Women in Afghanistan: Lessons learnt for the future*, 4(3) J. INT’L WOMEN’S STUD. 1 (2003).

<sup>85</sup> Among the data that can illustrate the socioeconomic barriers to Afghan women’s participation in the government is the high rate of female illiteracy. According to the UN, in 2001 only 5% of Afghan

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from the perspective of many Afghan women, the participation of even merely two women in the talks and the appointment of two women as ministers was an important achievement.<sup>86</sup> Finally, we should remember that the government established in Bonn was a temporary one, and was soon to be replaced by a democratically elected government.<sup>87</sup>

Despite all these problems and excuses, however, it is hard to be satisfied with the BPA's treatment of women's right to equality. This is particularly true in view of the fact that the Bonn process took place only one year after the adoption of the landmark UN Security Council Resolution 1325 on Women, Peace and Security, which stresses "the importance of [women's] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security,"<sup>88</sup> and calls upon member states to ensure increased representation of women in conflict resolution processes and to adopt a gender perspective when negotiating peace agreements.<sup>89</sup> One might have expected that the UN would treat the Bonn process as the litmus test of Resolution 1325 and make special efforts to ensure the participation of women, not only because it was the first UN-brokered peace process to take place after the resolution was adopted, but also because the situation of women in Afghanistan occupied a prominent place on the international agenda at that time, and was even invoked as a justification for the military intervention in the country.<sup>90</sup> The failure to adequately address the situation of Afghan women and provide guarantees for their human rights in Bonn seriously undermined the credibility of the UN's commitment to promoting the participation of women in peace processes celebrated in Resolution 1325.

### C. Sierra Leone

The civil war that plagued Sierra Leone from 1991 to 2002 has come to be known as one of Africa's cruelest natural resources conflicts. It began with an attempt by the Revolutionary United Front of Sierra Leone (RUF), led by chief commander

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women were able to read and write. See U.N. Secretary-General, *supra* note 84, at 5-6. However, even those Afghan women who were capable of assuming public positions must have been afraid of being harassed or attacked by fundamentalists. Such fears turned out to be quite founded, as women who dared to step into public life in the post-Taliban period suffered from regular intimidations. See Hum. Rts. Watch, *Between Hope and Fear: Intimidation and Attacks against Women in Public Life in Afghanistan* (Oct. 5, 2004).

<sup>86</sup> See *supra* note 82. For similar views expressed in Afghan feminist scholarship, see, e.g., Sima Wali, *Afghanistan: Truth and Mythology*, in *WOMEN FOR AFGHAN WOMEN: SHATTERING MYTHS AND CLAIMING THE FUTURE 1* (Sunita Mehta ed., 2002); Rina Amiri, *Fine Lines of Transformation: Afghan Women Working for Peace*, in *LISTENING TO THE SILENCES: WOMEN AND WAR 243, 244-245* (Helen Durham & Tracey Gurd eds., 2005).

<sup>87</sup> See BPA, *supra* note 73. That being said, we should also bear in mind that the composition of an interim government may significantly influence the composition of a successor permanent government.

<sup>88</sup> S.C. Res. 1325, pmb., U.N. Doc. S/Res/1325 (Oct. 31, 2000).

<sup>89</sup> *Id.* paras. 1 & 8.

<sup>90</sup> See, e.g., Hilary Charlesworth & Christine Chinkin, *Editorial Comment: Sex, Gender, and September 11*, 96 AM. J. INT'L. L. 600, 603 (2002).

Foday Sankoh and supported by Charles Taylor's government in Liberia, to overthrow the incumbent government in Freetown and seize control of the country's diamond mines. Within a few years, the weakness and unpopularity of the central government allowed the RUF to grow in power and to effectively control large parts of the country.<sup>91</sup> While it initially enjoyed popular support, the RUF soon acquired a notorious reputation for committing brutal crimes against the civilian population, including forced recruitment of child soldiers, mutilation, rape, and mass killings.<sup>92</sup>

In May 1999 the president of Sierra Leone, Ahmad Kabbah, met in Lomé, Togo, with representatives of the RUF to negotiate a peace agreement. Negotiations were mediated by an international committee headed by Togolese Foreign Minister Joseph Koffigo on behalf of ECOWAS and Special Envoy Francis Okelo on behalf of the UN. International participants also included representatives of the Organization of African Unity, the U.S., and the UK.<sup>93</sup>

In terms of procedures, the Lomé negotiations were quite inclusive and transparent. Several Sierra Leonean civil society groups as well as the Sierra Leonean Inter-Religious Council were allowed to sit in at formal negotiating sessions.<sup>94</sup> President Kabbah also convened a National Consultative Conference in Freetown, bringing together a broad range of civil society actors, to discuss the government's position in negotiations.<sup>95</sup> At this meeting, Kabbah explicitly stated that the government would not agree to power-sharing with the RUF.<sup>96</sup>

Eventually, however, the Peace Agreement between the Government of Sierra Leone and the RUF (hereinafter Lomé Peace Agreement or LPA) did provide for power-sharing with the RUF, which was allocated four out of eighteen ministerial posts as well as four deputy ministerial positions.<sup>97</sup> In addition, the agreement provided that Foday Sankoh would serve as the chairperson of the Commission for the Management of Strategic Resources, National Reconstruction and Development (CMRRD), which was vested with the power to monitor the management and exploitation of Sierra Leone's gold, diamonds and other strategic resources.<sup>98</sup> It was also stated that for this purpose Sankoh "shall enjoy the status of Vice President and shall therefore be answerable only to the President of Sierra Leone."<sup>99</sup> This power-sharing formula was supported by all the international facilitators, who believed that

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<sup>91</sup> See, e.g., Dena Montague, *The Business of War and the Prospects for Peace in Sierra Leone*, 9 BROWN J. WORLD AFF. 229 (2002).

<sup>92</sup> See, e.g., Hum. Rts. Watch, *Getting Away with Murder, Mutilation, and Rape: New Testimony from Sierra Leone* (1999); David Lord, *The Struggle for Power and Peace in Sierra Leone*, 9 ACCORD 10 (2000). For general literature on the Sierra Leonean conflict and peace process, see, e.g., HIRSCH, *supra* note 29; DAVID KEEN, *CONFLICT AND COLLUSION IN SIERRA LEONE* (2005).

<sup>93</sup> See, e.g., Ismail Rashid, *The Lome Peace Negotiations*, 9 ACCORD 26 (2000).

<sup>94</sup> HIRSCH, *supra* note 29, at 81.

<sup>95</sup> *Id.* at 80.

<sup>96</sup> *Id.*

<sup>97</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. V(3)(4), July 7, 1999, available at 'UN Peacemaker', *supra* note 23 [hereinafter Lomé Peace Agreement, or LPA].

<sup>98</sup> *Id.* art. V(2).

<sup>99</sup> *Id.*

it would be impossible to put an end to the conflict without conceding to some of the RUF's core demands. Given the control that the RUF enjoyed on the ground and its successful resistance against ECOMOG peacekeeping forces, the only alternative solution seems to have been a considerable expansion of international military forces in Sierra Leone, a solution which received little support outside Sierra Leone.<sup>100</sup>

The most contested compromise made in Lomé, however, was the blanket immunity from criminal prosecution granted to all RUF commanders, soldiers, and collaborators, with respect to any acts committed by them during the conflict.<sup>101</sup> In an unprecedented step, UN Special Envoy Okelo, following instructions from above, announced the UN's objection to the LPA's amnesty provisions. Okelo signed the LPA on behalf of the UN, but added a handwritten reservation to the agreement declaring that the UN could not endorse any amnesty for genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law.<sup>102</sup> Two years later, this disclaimer facilitated the co-establishment by the Security Council and the government of Sierra Leone of the Special Court for Sierra Leone, which prosecuted RUF members for crimes pardoned under the LPA.<sup>103</sup>

How should we evaluate the UN's approach to justice issues in Sierra Leone? On the one hand, the UN might have been expected to not only add a belated reservation to the LPA, but to refrain from signing it altogether and exert stronger pressure on the parties to refrain from agreeing on a blanket amnesty. It might have also been expected to oppose the inclusion of systematic human rights violators in the Sierra Leonean government. By doing so, it could have arguably contributed to promoting greater justice for RUF victims, strengthening the international rule of law, reducing the future incentives of opposition groups to pursue their goals through violent means, and promoting sustainable peace in Sierra Leone. On the other hand, it is possible that the RUF would not have come out of the bush and signed the LPA without these concessions.<sup>104</sup> Moreover, as things evolved in Sierra Leone, the

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<sup>100</sup> See, e.g., Rashid, *supra* note 93, at 27.

<sup>101</sup> *Id.* art. IX. It should be noted, however, that the LPA did not ignore past abuses altogether. Rather, it established a Truth and Reconciliation Commission (TRC), which was charged with the responsibility to "deal with the question of human rights violations since the beginning of the Sierra Leonean conflict." See LPA, *supra* note 97, art. XXVI(2). However, whereas in other countries, notably South Africa, TRCs and amnesties were essentially linked to each other, so that full amnesty was granted only to those who made full disclosure of their conflict-related crimes (See Promotion of National Unity and Reconciliation Act, No. 34 of 1995, §§ 16-22 (1995) (South Africa)), in Sierra Leone amnesty was unconditional and cooperation with the TRC was completely voluntary.

<sup>102</sup> See, e.g., William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 148-149 (2004).

<sup>103</sup> The government of Sierra Leone, on its part, justified its disrespect for the Lomé amnesty provisions by arguing that the RUF had violated the agreement and that therefore it was no longer binding. See Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786, Annex (Aug. 10, 2000). See also S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

<sup>104</sup> See, e.g., Laura R. Hall & Naha Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 293-294 (2003). See also Helga Malmin Binningsbø & Kendra Dupuy, *Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone*, 44(3) AFR. SPECTRUM 87, 96 (2009) (contending that granting the CMRRD chairmanship to Foday Sankoh,

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power-sharing and amnesty permitted the developments that eventually led to the complete marginalization of the RUF; with RUF leaders sitting in Freetown, it became an easy task to arrest and prosecute them in the Special Court subsequently established by the UN and the government of Sierra Leone.<sup>105</sup> It seems, then, that by generally endorsing the LPA, including its power-sharing provisions, while at the same time rejecting its blanket amnesty, the UN struck a reasonable balance between justice considerations and political constraints. It is also possible, however, that a better informed and planned position of the UN, backed by other international facilitators, would have enabled the government of Sierra Leone to achieve peace at the price of fewer dubious concessions to the RUF.

### D. Learning from Facilitator Experiences

The cases of Bosnia, Afghanistan, and Sierra Leone suggest that facilitators can have considerable influence over the terms of peace agreements and the procedures of negotiations. This is especially true for militarily and economically powerful facilitators like the United States, but it is also true for less powerful yet skillful facilitators such as the UN Secretary General Envoys. The three cases also demonstrate that facilitators' influence can be used to promote human rights and justice considerations but also to undermine them. Moreover, they show that facilitators may fail to acknowledge or refuse to admit their actual or potential influence over the parties.

In Bosnia, the U.S. and its European partners compromised justice and human rights principles by endorsing exclusionary power-sharing arrangements, denying appropriate solutions to refugees and IDPs who wished to remain in their places of refuge, and insisting on exclusionary and non-transparent negotiation procedures. On the other hand, by requiring local authorities to allow for the return of refugees and IDPs, facilitators provided restorative justice to those who did wish to go back to their homes, and they also sent a deterring message to potential future ethnic cleansers. Restorative justice and deterrence were also promoted by facilitators' requirement that the parties cooperate with international criminal proceedings.<sup>106</sup>

In Afghanistan, the UN SRSG was initially tolerant of Afghan leaders' reluctance to include women in the peace talks, and refrained from inviting any women to the Bonn peace conference while presenting this exclusion as the necessary price of peace. Eventually, however, the SRSG responded to NGOs' pressure and managed to convince the parties to include a few women in the talks, and he probably also deserves some credit for the appointment of two women to the government.

In Sierra Leone, the UN endorsed a peace agreement that allowed the RUF leaders to sit in the government and enjoy the fruits of their brutal aggression. At the

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which, as noted, entailed *de facto* control over most of the country's diamond resources, "was probably the single most important element in convincing the RUF to sign the peace agreement").

<sup>105</sup> Malmin Binningsbø & Dupuy, *supra* note 104, at 88-89.

<sup>106</sup> See DPA, *supra* note 26, art. IX (emphasizing the parties' duty "to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law").

same time, however, the UN added a disclaimer to the peace agreement stating that it rejects the granting of amnesty to RUF members with respect to serious crimes under international law. In reliance on this disclaimer, the UN later on co-established the Special Court for Sierra Leone that prosecuted the perpetrators of such crimes. Signing the Lomé Agreement under reservation thus turned out to be a sophisticated strategy, which, in the particular case of Sierra Leone, allowed the UN to limit the negative impact of an injurious arrangement that it could arguably not prevent from being adopted.

To conclude, facilitators' actual and potential role in peace processes vary widely among countries and conflicts and depending on the identity, skills, and resources of facilitators. Yet a close analysis of three different peace processes shows that in quite different settings, facilitator choices have had considerable impact on the justice of peace negotiations and agreements. This article contends that a carefully designed international regulation of facilitators' activities can significantly improve the chances that whenever feasible, they will use their influence to promote justice and human rights. Before suggesting how exactly international law can promote these goals, in the next two Parts I offer a theoretical justification for such regulation.

#### IV. THEORETICAL FOUNDATIONS FOR FACILITATOR RESPONSIBILITY

Placing upon peace facilitators a duty to ensure the justice of peace agreements that they help achieve goes beyond currently accepted notions of states' and IOs' legal responsibilities. Existing international law recognizes the duty of states to protect and promote the human rights of their own citizens,<sup>107</sup> as well as their duty to protect non-citizens from certain forms of serious abuse by their respective governments.<sup>108</sup> It is also generally accepted today that IOs are under a duty to

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<sup>107</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (ICESCR); International Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (ICERD); Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (CAT); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (ECHR); American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S.143 (ACHR); African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

<sup>108</sup> See, e.g., Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (requiring states to provide asylum to non-citizens who are persecuted in their country of origin); Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (asserting the duty of states to prevent genocide); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. Reports 43 (Feb. 26) (adopting a broad interpretation of the duty to prevent genocide under the Genocide Convention and clarifying that it covers genocide taking place beyond state borders) [hereinafter *Bosnian Genocide Case*].

prevent and remedy human rights violations conducted by their own personnel.<sup>109</sup> By contrast, the idea that IOs and states may also have a duty to ensure that other states refrain from engaging in human rights violations that are not of the gravest nature (e.g., exclusion of women from peace negotiations) is far from obvious and requires careful examination, not only because of the burden that it imposes on third parties, but also because it appears to violate the right of the targeted states to non-intervention in their domestic affairs.

To address these challenges, it seems appropriate to begin the theoretical inquiry into facilitator responsibilities with the principle of state sovereignty, which under existing international law serves as the ultimate basis for, as well as a major constraint upon, government powers. To establish the appropriate meaning of this principle and its implications for delineating peace facilitator responsibilities, this Part examines three alternative models of sovereignty: first, the “traditional” model, which assumes that sovereignty resides in states or governments as such. According to this model, sovereignty entails the right of states to manage their internal affairs without external interference. Second, the “popular” model, which asserts that sovereignty belongs to peoples, who vest power in their respective governments in order to promote their collective interests. Under this model, each government is bound to respect and protect the human rights of its people. Third, the “human” model, which suggests that sovereignty belongs to humanity as a whole, and that the powers of governments are vested in them by all human beings in order to promote the welfare of humankind. Under this model, governments have to protect the human rights of all human beings, not only of their own peoples. For various historical and practical reasons, each government bears a primary responsibility to discharge its duties toward humanity vis-à-vis its own citizens. However, governments also retain a secondary responsibility to ensure that other governments fulfill their primary duties toward their citizens. I argue that the human model of sovereignty should be preferred over the two alternative models because it better accounts for the interventionist nature that international law is gradually assuming, and because it is more compatible with global justice principles. These principles suggest that international law, under the model of human sovereignty, should recognize a relatively broad duty of states to protect the human rights of non-citizens, which goes beyond situations of mass atrocities and dire necessity that are currently acknowledged to generate such a duty.

As will be asserted in Part V, in the context of peace processes the human model of sovereignty entails that a negotiating government—and to a great extent, also a government-like negotiating entity—is bound to pursue a peace agreement that best serves the interests of its citizens and that is based on equal concern for them all. At the same time, all the world’s other governments have the responsibility to ensure that the negotiating government lives up to its duties toward its citizens. This secondary responsibility, however, is not equally distributed among governments. In

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<sup>109</sup> See, e.g., Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights By Member State Troop Contingents Serving as Peacekeepers*, 51 HARV. INT’L L.J. 113 (2010).

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view of their potential contribution to peace injustices, as well as their greater ability to prevent such injustices, facilitator states and IOs (as agents of their member states) should bear the main responsibility for discharging the international community's duties toward those affected by peace agreements, while other governments should bear a residual responsibility for discharging these duties.

### A. The Traditional Model of Sovereignty

The traditional model of sovereignty, which is assumed to have its origins in the 1648 Peace of Westphalia, asserts that sovereignty—that is, the power to control a territory and govern central aspects of human life within it—resides in states or governments as such. The most important implication of this conceptualization of sovereignty is the right of states, through their governments, to exercise exclusive authority within their borders free from external intervention in their domestic affairs—the right to non-intervention.<sup>110</sup> Upon its establishment in 1945, the UN formally endorsed the Westphalian notions of sovereignty and non-intervention.<sup>111</sup> The UN Charter states that the organization is based “on the principle of the sovereign equality of all its Members,” and provides that it shall not intervene in matters that are “essentially within the domestic jurisdiction of any state.”<sup>112</sup> The prohibition on intervention in the domestic affairs of states was reiterated and expanded in 1970 in the UN General Assembly's Declaration on Friendly Relations among States. Whereas under the UN Charter this prohibition applies only to the UN as an organization, the 1970 Declaration extends it to individual states, and elaborates that it applies to all forms of intervention, “directly or indirectly, for any reason whatever, in the internal or external affairs” of any state.<sup>113</sup> Similarly broad interpretations of the principle of non-intervention can be found in the constitutive documents of some regional peace and security organizations.<sup>114</sup> In the case of *Nicaragua v. the U.S.*, the International Court of Justice (ICJ) affirmed the customary nature of the principle of non-intervention, articulating that intervention in a state's affairs is prohibited if it has “bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.”<sup>115</sup> Among such matters, the ICJ

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<sup>110</sup> See, e.g., Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L L. 20 (1948); David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 3-4 (2002).

<sup>111</sup> Cf. LUKE GLANVILLE, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY (2014) (providing a novel historical account of the concept of sovereignty, which suggests that the “traditional” right of sovereign peoples to self-government and freedom from external interference is actually not so traditional and was only established for the first time in the UN Charter in 1945).

<sup>112</sup> See UN Charter, 1 U.N.T.S. XVI, arts. 2(1), 2(7).

<sup>113</sup> See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the UN, G.A. Res. 2625(XXV) (1970), 25 UN GAOR Supp. (No. 28) 121, 123.

<sup>114</sup> See, e.g., Charter of the Organization of American States, 46 AM. J. INT'L L. 43, arts. 19, 20 (Supp., 1952); Final Act of the Conference for Security and Cooperation in Europe, 14 I.L.M. 1292, principle VI (Aug. 1, 1975); Constitutive Act of the African Union, art. 4(g) (July 11, 2000).

<sup>115</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.A.)*, 1986 I.C.J. 14, para. 205 (June 27, 1986).

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included the choice of political, economic, social, and cultural systems, and the formulation of foreign policy.<sup>116</sup>

However, while the right to non-intervention has been formally embedded in key treaties, judicial decisions, and IO resolutions, numerous other (and sometimes even the very same) international legal documents have acknowledged an apparently contradictory right of states and international institutions to interfere with the treatment accorded by states to their own citizens within their borders.<sup>117</sup> These legal developments have most notably been associated with the emergence of international human rights law, whose main purpose is to ensure that governments will not use their power to abuse their citizens and, moreover, will take positive measures to protect and promote their human rights. Another major area of international law that emerged during the second half of the twentieth century and challenges traditional conceptions of sovereignty and non-intervention is international criminal law, which has enabled the prosecution by international and foreign tribunals of individuals, including state officials and even heads of state, for violations of international humanitarian law and international human rights law committed against their own people.<sup>118</sup> To give one more example, the so-called law on democratic governance—which, as a minimum, seeks to protect the right to free elections by regulating national election processes—also presents a major inroad into the traditional model of state sovereignty.<sup>119</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> To give just a few examples, Chapter VII of the UN Charter empowers the Security Council to authorize the use of military, economic, or other sanctions against states whose behavior is perceived to pose a threat to international peace and security. In numerous cases, among them in Somalia, Rwanda, Haiti, East Timor, Darfur, Libya, and Cote D'Ivoire, the Security Council relied on its Chapter VII powers to impose economic sanctions against and authorize military interventions in states due to their failure to protect their populations from mass atrocities and humanitarian crises. See Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUMAN RIGHTS L. REV. 1, 3 (2012). In addition, a right to interfere is embedded in the authority of international human rights bodies—such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee against Torture—to monitor states' compliance with their human rights duties toward their citizens. See ICCPR, *supra* note 107, arts. 28-45; ICERD, *supra* note 107, arts. 8-15; CAT, *supra* note 107, arts. 17-24 (establishing and defining the mandates of the abovementioned committees, respectively). An even more intrusive review authority is vested in the regional human rights courts, namely, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and People's Rights, which can deliver binding decisions requiring states to change their human rights practices. See ECHR, *supra* note 107, art. 19-51; ACHR, *supra* note 107, arts. 52-69; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, June 10, 1998, O.A.U. Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (establishing and defining the mandates of the abovementioned courts, respectively).

<sup>118</sup> See, e.g., Statutes of ICC, ICTY, and ICTR. See also Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 11 (1998) (noting that the internationalization of criminal processes “constitutes a major inroad into the traditional omnipotence of sovereign states”).

<sup>119</sup> See, e.g., Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC

Moreover, alongside the well-established *right* of states to create norms and collective mechanisms that regulate the domestic affairs of other states, in recent years a new and still contested *duty* to intervene in some domestic affairs has arguably been emerging in international law. To the extent that such a duty exists, however, it is currently limited to the most egregious situations in which states inflict upon their citizens mass atrocities or fail to protect them from such atrocities. These include cases of genocide,<sup>120</sup> and perhaps also of ethnic cleansing, crimes against humanity, and war crimes.<sup>121</sup> In these cases, the world's states are assumed to bear a collective responsibility to prevent, stop, and/or rectify the wrongful acts of the delinquent government.

Seeking to reconcile the interventionist nature that international law has been assuming since the end of World War II with the traditional concept of non-intervention, which still purports to govern international relations,<sup>122</sup> some commentators have argued that intervention in domestic affairs is compatible with the principle of state sovereignty if it is based on previous consent by the intervened state, which can be expressed, *inter alia*, by accession to relevant treaties (e.g., human rights treaties, the Statute of the International Criminal Court) or by ad hoc approval (e.g., in the case of 'invited' military intervention). According to this positivist view, the power of states to enter into international agreements that limit their domestic authority is part of their sovereign competence.<sup>123</sup>

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GOVERNANCE AND INTERNATIONAL LAW 48 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter DEMOCRATIC GOVERNANCE].

<sup>120</sup> As noted above, in the 2007 *Bosnia v. Serbia* case the ICJ affirmed that the duty to prevent genocide under the Genocide Convention includes an extraterritorial duty to prevent genocide committed by foreign actors in a foreign land. *See supra* note 108.

<sup>121</sup> In 2005, the UN General Assembly unanimously adopted the World Summit Outcome Document, which provides, *inter alia*, that "[t]he international community, through the United Nations... has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." *See* UNGA Res. A/60/1, paras. 138-39 (Oct. 24, 2005). Although this resolution does not in itself have binding force, it may be understood to reflect a consensus among states about their existing or emerging duties. The duty to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity can also be inferred from the Draft Articles on State Responsibility articulated by the International Law Commission. These Draft Articles, which are commonly assumed to reflect customary international law, assert the duty of states to cooperate in order to bring to an end any serious breach by a state of a peremptory norm of international law. *See* International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 41(1), UN Doc. A/56/10 (Nov. 2001). For an insightful analysis of these provisions and their legal implications, *see* Glanville, *supra* note 117, at 11-13, 26-28.

<sup>122</sup> Michael Reisman poignantly describes this tension, noting that the UN Charter replicates the "domestic jurisdiction—international concern" dichotomy, but no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state," and hence insulated from international law. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE, *supra* note 119, at 239, 243.

<sup>123</sup> *See, e.g.*, Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community*, 14 LAW & CONTEMP. PROBS. 490, 505-506 (1949) (identifying state consent as the basis for international protection of human rights); M. Cherif Bassiouni, *The Permanent International Criminal Court*, in JUSTICE FOR CRIMES AGAINST HUMANITY 173 (Mark Lattimer & Philippe Sands

However, justifying the international protection of human rights and the rule of law on the basis of state consent seems to be problematic as a matter of principle, because it entails that states do possess the initial authority to mistreat their citizens and that they may decide to retain this authority at their discretion. Moreover, at the practical level, posing states' consent as a precondition for limiting their domestic authority may leave citizens of dissenting countries without sufficient protection for their basic human needs, and may also undermine international interests associated with their protection.

In view of these difficulties, contemporary efforts to mitigate the apparent tension between state sovereignty and international norms addressing domestic affairs seem to be turning away from consent-based justifications for intervention. Instead, they seek to redefine the concept of state sovereignty itself and identify its inherent limitations. Under these alternative conceptualizations of state sovereignty, the international community's mandate to interfere with national policies does not depend on the will of the state concerned.<sup>124</sup> Rather, it is the mandate of a state to pursue its national policies that depends on its subscription to certain international norms.

Two such conditional understandings of state sovereignty are reflected in the concepts of "popular sovereignty" and "human sovereignty." As will be explained in the next section, popular sovereignty asserts that sovereignty belongs to the people rather than to the government, and that government authority is therefore conditional upon its ability to promote the well-being of the people. I will argue, however, that even the concept of popular sovereignty does not provide adequate justification for international intervention in domestic affairs. I will then present the concept of "human sovereignty," which can better account for such intervention.

### B. The Popular Model of Sovereignty

Seeking to justify international intervention in domestic affairs, contemporary scholars commonly argue that sovereignty resides not in governments, as the traditional model suggests, but rather in peoples, who confer upon their governments the power to make policies and execute them on their behalf and for their benefit. Once given such power, the government is bound to act as a trustee of the people—it must use its power for no other purpose than to promote the collective interests of the

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eds., 2003) (identifying state consent as the basis for the ICC's authority); David Wippman, *Pro-Democratic Intervention by Invitation*, in DEMOCRATIC GOVERNANCE, *supra* note 119, at 293 (justifying pro-democratic intervention when the legitimate ousted government gives its consent to the act).

<sup>124</sup> See, e.g., SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 13, 16 (Robert Post ed., 2006) (arguing that international human rights law signals "an eventual transition from a model of international law based on treaties among states to cosmopolitan law understood as international public law that binds and bends the will of sovereign nations.") See also Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 5 (2000) (noting that "[t]he international law of human rights rests on more than the positivist conception of the origins of law. We are, after all, most concerned with applying human rights law against non-consenting regimes. We do not think a state has the option of withdrawing its consent from such norms.")

citizens. A government that fails to do so risks the loss of its sovereign authority and should anticipate an international action to protect the interests of its citizens.<sup>125</sup>

The concept of popular sovereignty has its roots in the writings of seventeenth century philosophers such as Hugo Grotius and John Locke.<sup>126</sup> These writers' main concern was the internal legitimacy of governments. They sought to establish a domestic constitutional theory that would limit the power of the government vis-à-vis its subjects and define the terms under which *the people* has the right to revoke the power of the government. Contemporary discussions on popular sovereignty are different from the Grotian and Lockean classic accounts in that they seek to justify not only domestic resistance but also international intervention against a government that fails to fulfill its duties toward its people. Using the concept of popular sovereignty to justify or require such international intervention is, however, a highly questionable move. It is not clear why the mistreatment of citizens by their government should bear implications not only for its domestic legitimacy, but also for its relationships with other states.<sup>127</sup> It is for this reason that Michael Walzer, in his famous critique of humanitarian intervention, rejects the view that "a tyrannical government... because it has no standing with its own people (no moral claim upon their allegiance), has no standing in international society either."<sup>128</sup> While I do not concur with Walzer's non-interventionist approach, I do accept that under the prevalent understanding of sovereignty, the international standing of a government does not derive directly from its standing with its citizens.

Moreover, it could be argued that the principle of popular sovereignty not only does not provide sufficient justification for external intervention against a bad government, but actually prohibits such intervention. According to this view,

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<sup>125</sup> See, e.g., Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sep. 18, 1999 (asserting that "[s]tate sovereignty, in its most basic sense, is being redefined... States are now widely understood to be instruments at the service of their peoples, and not vice versa.... These changes... oblige us to think anew about such questions as how the UN responds to humanitarian crises"); Reisman, *supra* note 122 (arguing in support of pro-democratic intervention that sovereignty belongs to the people, and that therefore international measures that seek to give expression to the will of the people not only do not violate sovereignty but in fact vindicate it); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?* 22 EUR. J. INT'L L. 315, 325-26 (2011) (noting that the international protection of human rights is a "consummation of the concept that a government is a trustee for its people's interests.")

<sup>126</sup> See HUGO GROTIUS, ON THE LAW OF PRIZE AND BOOTY (1604); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689). For an analysis of the trusteeship theory of sovereignty in the writings of Grotius and Lock, see Jedediah Purdy & Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private Law Concepts and the Limits of Legitimate State Power* 70 LAW & CONTEMP. PROBS. 165 (2007).

<sup>127</sup> Under the common interpretation, internal (domestic) sovereignty is different from external (international) sovereignty, and each of them generates a varied set of rights and duties for different actors. In the context of pro-democratic intervention, Byers and Chesterman similarly note that although "the concept of popular sovereignty plays an important role in modern international law, it simply does not follow that the illegitimacy of one regime authorizes a foreign state... to use force to install a new and 'legitimate' regime." See Michael Byers & Simon Chesterman, "You, the People": *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE, *supra* note 119, at 259, 269.

<sup>128</sup> See Michael Walzer, *The Moral Standing of States*, 9 PHIL. & PUB. AFF. 209, 211 (1980).

sovereignty of the people entails that the domestic failures of a government should only be corrected by domestic mechanisms that are designed to reinforce the popular will, such as elections and judicial review.<sup>129</sup> Even in situations in which such mechanisms are ineffective and the only plausible way to oppose an oppressive government is by use of force, one could argue that this should not be the force of other states' armies. For John Stuart Mill, this is precisely what popular sovereignty and self-determination are about—people must become free by their own efforts, or submit to their unfortunate collective destiny.<sup>130</sup>

It appears, then, that the idea of popular sovereignty alone cannot justify international intervention in states' affairs, let alone require such intervention. A different conceptualization of sovereignty is needed to bridge the gap between governments' internal and international legitimacy. In the next section I present the model of "human sovereignty," which can provide a basis for both a right and duty to intervene in the domestic affairs of states under certain circumstances.

### C. The Human Model of Sovereignty

#### *1. The Principles of Human Sovereignty*

The basic assumption of the human sovereignty model is that sovereignty inheres in humanity as a whole.<sup>131</sup> Like the popular sovereignty model, the human sovereignty model rejects the Westphalian premise that sovereignty resides in the ruler; however, whereas the popular model locates sovereignty within geographically delineated communities identified as peoples or nations, the human model attributes sovereignty to the entire community of human beings. Accordingly, under the human sovereignty approach, it is humanity as a whole that transfers sovereign powers to

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<sup>129</sup> See, e.g., Kahn, *supra* note 124, at 3.

<sup>130</sup> See John Stuart Mill, *A Few Words on Non-Intervention*, in *DISSERTATIONS AND DISCUSSIONS* III 238-263 (1873). See also MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 87-88 (1977).

<sup>131</sup> This construction of sovereignty draws heavily on Eyal Benvenisti's recent account of sovereignty as trusteeship of humanity. However, whereas Benvenisti focuses on the duty of governments to take into account the interests of foreign stakeholders when shaping their domestic policies—which can be defined as the inward implications of the idea of sovereigns as trustees of humanity—I focus on its outward implications, that is, on the right and duty of foreign governments to intervene in the domestic policies of a government that fails to adequately protect the interests of its own citizens. See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 *AM. J. INT'L L.* 295 (2013). For other recent accounts that seek to establish a humanity-oriented understanding of sovereignty, see, e.g., Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 *EUR. J. INT'L L.* 513 (2009) (offering a "humanized understanding of state sovereignty"); ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* (2010) (discussing the "orientation of international law toward the fulfillment of the needs and aspirations of human beings, of peoples and of humankind as a whole"); RUTI G. TEITEL, *HUMANITY'S LAW* 8 (2011) (calling for the "incorporation of humanitarian concerns as a crucial element in the justification of state action").

## The Human Rights Responsibilities of Peace Facilitators

governments in order for them to protect and promote human welfare, and humanity as a whole to which governments owe fiduciary duties.<sup>132</sup>

For historical, practical, and other reasons, the duties of governments toward humanity are divided between them so that each government is primarily responsible for advancing the well-being of a certain portion of the world's population who lives in a delineated territory assigned to that government's jurisdiction.<sup>133</sup> However, since the government's power stems from humanity at large, it also has a secondary responsibility for the well-being of the rest of humanity.<sup>134</sup>

It is the task of international law to define exactly how governments' responsibilities toward humanity should be fulfilled in view of each government's primary responsibility toward its citizens. For example, international human rights law provides that while each government should be the main protector of its citizens' human rights and have considerable discretion regarding how these rights are protected, the protection granted by a government to its citizens may and in some cases even ought to be monitored and enforced by the rest of the world's governments. Similarly, international criminal law provides that while the primary responsibility for prosecuting grave human rights violations rests upon the government in whose jurisdiction these violations occur, other governments have the power to prosecute these violations in the case that the responsible government is unable or unwilling to do so, using their domestic courts, the International Criminal Court, or ad hoc international tribunals.<sup>135</sup>

The human sovereignty model offers a new definition of state sovereignty as the organizing principle of international law. Under this definition, the principle of "sovereign equality of states" can be understood to refer not to their equal right to be free from external interference in their domestic affairs, but rather to their equal duty to protect and promote the well-being of their own citizens and the rest of humanity. Accordingly, the corollary right to non-intervention stands for a state only when it properly protects the human rights of its citizens, so that the fiduciary duties owed by the state concerned as well as by other states towards these people are satisfied.

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<sup>132</sup> See Benvenisti, *supra* note 131.

<sup>133</sup> For a similar argument, see Robert E. Goodin, *What is So Special about our Fellow Countrymen?* 98 ETHICS 663 (1988). Goodin contends that "[t]he duties that states... have vis-à-vis their own citizens are not in any deep sense special. At root, they are merely the general duties that everyone has toward everyone else worldwide." *Id.* at 681. According to Goodin, these general duties are distributed among states because "general duties point to tasks that, for one reason or another, are pursued more effectively if they are subdivided and particular people are assigned special responsibilities for particular portions of the task". *Id.*

<sup>134</sup> For a similar—albeit theoretically obscure—distinction between the 'default' responsibility of states to protect their populations and the 'residual' or 'fallback' responsibility borne by the broader community of states to protect those populations, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001).

<sup>135</sup> See *supra* note 118.

## 2. *The Moral Underpinnings of Human Sovereignty*

The human sovereignty model not only accounts better than the traditional and popular models for the abundance of international norms that seek to regulate domestic affairs, but is also more compatible with basic principles of global justice. In particular, this model finds support in the principle of the shared ownership of all human beings over the world's natural resources and in the principle of the equal moral worth of all human beings. The logic of these principles and the support that they provide to conceptualizing sovereignty as entailing inherent duties toward non-citizens have been comprehensively discussed elsewhere.<sup>136</sup> In the following paragraphs I will briefly summarize those principles, while beginning to explain their relevance for delineating the human rights responsibilities of peace facilitators.

The shared ownership principle goes back to the hypothetical “state of nature” in which the territory of the world and the natural resources it contains belonged “to mankind in common.”<sup>137</sup> In this state, so goes the classic social contract theory, people could not really enjoy their unlimited rights to use the world's resources because of the threat of an “all against all” war.<sup>138</sup> They have therefore opted to vest in a common government the power to create and enforce laws that limit their individual rights, but also secure them.<sup>139</sup> To fulfill this task, however, the government must exercise supreme control over the territory inhabited by its subjects,<sup>140</sup> and must also limit the size of the population under its control.<sup>141</sup> According to this narrative, the dominion of individual states over parts of the earth's surface that originally belonged to mankind in general “can be conceptualized as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns.”<sup>142</sup> In accordance with this regulatory decision, the authority of each government over the territory allocated to it depends on two conditions: first, that it use this territory and the natural resources found therein for the purpose justifying the allocation in the first place, that is, to promote the collective interests of the people residing in it; and second, that it also recognize the original or “natural” right of other people to derive benefits from the territory and resources under its control, and to the extent necessary use the power or influence that it draws from controlling them to also protect the interests of those other people.

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<sup>136</sup> See Benvenisti, *supra* note 131, at 305-312.

<sup>137</sup> See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT*, Ch. V, §25 [1689]. See also EMMERICH DE Vattel, *THE LAW OF NATIONS*, Book I, § 203 [1758].

<sup>138</sup> See THOMAS HOBBS, *LEVIATHAN*, Ch. 14 [1651].

<sup>139</sup> See *id.*

<sup>140</sup> See HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 252 (4<sup>th</sup> ed., 1919) (noting that “the very idea of a modern State involves the notion of dominion exercised over a certain portion of the earth's surface.”)

<sup>141</sup> Limitations on the size of states' populations are apparently indispensable for governments to fulfill their tasks effectively. See Benvenisti, *supra* note 131, at 306, notes 51-52 and accompanying text.

<sup>142</sup> See *id.* at 309. See also Patrick Macklem, *What is International Human Rights Law?* 52 MCGILL L.J. 575, 586 (2007) (“international law does more than regulate the exercise of sovereign power. It determines who possesses sovereignty. It establishes, in other words, sovereignty's international legal existence”).

The second principle of global justice that supports the human sovereignty model is the equal moral worth of all human beings. This principle contends that all persons *qua* persons deserve equal respect and concern. In the global justice debate, this moral principle is mainly invoked by cosmopolitans to support the claim that responsibility for the well-being of people must extend beyond state borders.<sup>143</sup> Liberal nationalists, on the other hand, contend that the principle of equal concern can best be implemented within the framework of democratic nation-states.<sup>144</sup> Despite possible tensions between them,<sup>145</sup> the two political positions represented by these claims—cosmopolitanism and nationalism—do not essentially contradict each other. In its moderate versions, cosmopolitanism does not insist on replacing existing nation-states with a single world state, whereas moderate nationalism does not deny that the special obligations of states toward their citizens may coexist with, and should in some cases even yield to, certain obligations toward distant others.<sup>146</sup> The difference between the positions advocated by (most) cosmopolitans and (most) nationalists is, then, not so much about quality as about quantity. The question at stake is how highly we should prize our obligations to compatriots as opposed to how strong our commitment to non-citizens should be.<sup>147</sup> Addressing this question is important for delineating the scope of state responsibilities in different situations. In

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<sup>143</sup> See, e.g., Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48 (1992); Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *NOMOS XLI: GLOBAL JUSTICE 12* (Ian Shapiro & Lea Brilmayer eds., 1999); David Held, *Restructuring Global Governance* 37 *MILLENNIUM* 535 (2009).

<sup>144</sup> See, e.g., Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113 (2005).

<sup>145</sup> One proposition concerning the existence of such tension has been famously asserted by Martha Nussbaum, who has argued that unless one acknowledges, as she does, that special obligations towards fellow citizens are instrumental for promoting the well-being of humanity, such special obligations must be deemed inconsistent with the cosmopolitan ideal of equal moral worth. See Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY? 2* (Joshua Cohen ed., 1996). On the more practical level, David Miller has raised the concern that in some cases global human rights protection may impose considerable costs on the better-off society that can hardly be allocated in an equal manner among its members (for example, the risks associated with humanitarian intervention are mainly borne by individual soldiers and aid workers). In such cases, Miller argues, it may be impossible to achieve global justice in a way that is consistent with the fair treatment of individuals as members of national communities, and a “justice gap”—that is, “a gap between what people in poor countries can legitimately claim as a matter of justice... and what the citizens of rich countries are obliged, as a matter of justice, to sacrifice to fulfil these claims”—may appear. See DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* 274 (2007).

<sup>146</sup> See, e.g., David Held, *Principles of Cosmopolitan Order*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 10, 16-19 (Gillian Brock & Harry Brighouse eds., 2005) (drawing a distinction between ‘thick’ cosmopolitanism, which dismisses special relationships and responsibilities unless they are instrumental for promoting the well-being of humanity, and ‘thin’ cosmopolitanism, which recognizes that obligations towards humanity at large are compatible with non-instrumental particular obligations); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 175 (2<sup>nd</sup> edition, 2008) (distinguishing between legal cosmopolitanism, which is “committed to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties – are fellow citizens of a universal republic,” and moral cosmopolitanism, which presents a moral principle of equal concern that may support a political order less uniform than a universal republic, such as a system of autonomous states).

<sup>147</sup> See *THE GLOBAL JUSTICE READER* xvii (Thom Brooks ed., 2008).

the context of peacemaking, for example, it can help determine how much effort and resources peace facilitators should invest in order to induce the negotiating parties to establish a just peace. The human sovereignty model does not purport to provide a generally applicable answer to this question. However, it clearly endorses a moderate approach to the principle of moral equality and the duties that stem from it. It acknowledges the primacy of the relationship between a government and its citizens, yet it requires governments to invest considerable effort in protecting the interests of non-citizens in case their own governments fail to do so.

### *3. Toward an International Duty to Intervene*

To conclude the forgoing discussion, the human sovereignty model asserts that states draw their powers from humanity, and therefore have, alongside their primary duties toward their citizens, secondary duties toward the rest of humanity. This model should be endorsed for two main reasons. First, the alternative traditional and popular models are at odds with the interventionist character of much of contemporary legal doctrine. They create a logical gap that undermines the coherence and apparent legitimacy of the international legal order. The human model bridges this gap, while still accounting for the right and duty of governments to award priority to the needs of their own populations. Second, the human sovereignty model is more compatible than alternative models with the moral principles of the equal worth of all human beings and their shared ownership over the world's natural resources.

These moral principles introduce human sovereignty as a conceptual framework that not only makes sense of the interventionist elements of existing international law, but also calls for expanding them. It suggests that beyond the established *right* to intervene in the domestic affairs of states in various ways and for various purposes, states and international organizations as their agents should also have a broader *duty* to intervene than they currently have. If governmental authority rests on the sovereign virtue of all human beings, there is no reason why this authority should not be held to encompass greater responsibilities toward humanity than merely preventing genocide or other mass atrocities. As already noted, the secondary duties of governments toward non-citizens cannot be unlimited. They must be constrained to allow governments to properly fulfill their primary duties toward their citizens. However, limiting the duties of governments to protect non-citizens to only the worst human catastrophes does not seem to strike an appropriate balance between their primary and secondary responsibilities. Some less severe but serious enough human rights violations such as human trafficking as well as natural disaster- or poverty-induced neediness may also give rise to an international duty to protect if the government that bears the primary responsibility fails to do so. It need be remembered that effective protection in these cases will usually place a smaller burden on the external protectors than, for example, military intervention in the case of genocide. The same is true for the duty to help states achieve just and sustainable solutions to violent conflicts, which this article suggests should be established.

#### 4. *The Problem of Collective Responsibility*

However, attributing to all the world's governments a secondary responsibility to prevent mass atrocities, alleviate poverty, or promote just peace is susceptible to collective action problems. The concern is that the diffused responsibility to protect will lead to inaction—each potential guarantor will prefer to avoid the costs of protection, knowing that it will not be held individually responsible for the failure to do so.<sup>148</sup> There are at least two possible ways to overcome this problem. One is to set criteria for singling out a specific state or group of states as responsible for discharging all the world's states' collective duties toward humanity in a given situation, another is to assign this responsibility to an international organization that would discharge it on behalf of the world states.

Regarding allocation criteria, it should be noted that these criteria may vary across areas of collective responsibility. However, there are at least two criteria that appear to potentially have a strong moral and practical appeal in many such areas, including peacemaking. The first is special contribution to the wrongful situation, and the second is special capacity to make it better. The contribution criterion resonates with a basic common sense morality principle, according to which the causation of harm should usually generate a remedial responsibility.<sup>149</sup> The logic of the capacity criterion is also straightforward—if we want bad situations put right, we should assign responsibility to those who are best placed to do so.<sup>150</sup> This rationale is apparently so obvious that in the *Bosnian Genocide Case* the ICJ found Serbia responsible under the Genocide Convention for not preventing genocide in Bosnia on the basis of the proposition—which does not find support in the wording of the convention, but which the court did not find necessary to explain—that the first criterion for deciding whether a state has a responsibility to prevent genocide is “clearly the capacity to influence effectively the action of persons likely to commit [...] genocide.”<sup>151</sup> The contribution and capacity criteria are, of course, not free from problems,<sup>152</sup> and, as noted above, they are not applicable in all instances where a collective responsibility to protect should exist.<sup>153</sup> However, as will be elaborated in the next section, in the context of peacemaking both criteria clearly point to peace

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<sup>148</sup> For general literature explaining problems of collective action, see, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

<sup>149</sup> See David Miller, *Distributing Responsibilities*, 9 *J. POL. PHIL.* 453, 455-60 (2001).

<sup>150</sup> See *id.* at 460-61 (2001).

<sup>151</sup> See *Bosnian Genocide Case*, *supra* note 108, at para. 430.

<sup>152</sup> For example, in cases where a state is in urgent need of financial or military assistance, many other states can be assumed to be able to provide at least some funds or troops to assist it. The question thus arises whether the richest and militarily strongest states should bear the ultimate responsibility to act, or perhaps each minimally capable state should bear some responsibility in accordance with its relative capacities. The first option may be problematic from a distributive justice perspective, whereas the latter may raise coordination and efficiency concerns.

<sup>153</sup> For example, the contribution test will usually be irrelevant for determining which state should discharge the responsibility to help countries affected by natural disasters.

facilitators as a distinguished group of actors that should be selected to discharge the collective responsibility to promote just and sustainable peace.

As noted above, another way to overcome collective action problems associated with the common responsibilities of states is to assign those responsibilities to IOs. Indeed, the ability to provide public goods, which may include the discharging of collective responsibilities, is often understood to be one of the main *raison d'être* of IOs.<sup>154</sup> However, assigning collective responsibilities to IOs can only offer a partial solution to problems of inaction at the international level. The reason for that is that IOs themselves often prove to be unable to act effectively to change state practices, *inter alia* because of their limited resources and the problem of capture by powerful states whose interests differ from those of the majority of member states. In any event, under international law, the conferral of state responsibilities upon IOs does not release states from their original responsibility.<sup>155</sup>

### V. IMPLICATIONS OF THEORY FOR PEACE NEGOTIATIONS

#### A. Facilitators' Contribution to Peace Injustices and Their Capacity to Prevent Them

Under the human sovereignty model, the main responsibility for the justice of peace negotiations and agreements is borne by the governments that negotiate and sign them. The latter must represent the interests of all their citizens in a fair and equitable manner and make sure that their human rights are adequately protected. At the same time, all the world's governments bear the responsibility to ensure that the negotiating governments live up to their duties toward their citizens. In accordance with the contribution and capacity criteria, governments that assume facilitating roles in a given peace process should be singled out to discharge this guarantor responsibility. The same is true for IO facilitators that inherit from their member states the responsibilities associated with the power to make peace.

Both the potential contribution of facilitators to peace injustices and their special capacity to prevent them are demonstrated in the cases analyzed above in Part III. In all three cases, facilitators played an important role in determining negotiation procedures and peace terms. In Bosnia, the U.S. government dictated an exclusionary negotiation process, drafted the constitutional annex that prevented small ethnic

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<sup>154</sup> See, e.g., Bruce M. Russett & John D. Sullivan, *Collective Goods and International Organization*, 25 INT'L ORG. 845 (1971) (drawing on Mancur Olson's THE LOGIC OF COLLECTIVE ACTION to explain the development of IOs); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONF. RES. 3 (1998) (asserting that IOs help states obtain public goods through their centralized structure as well as their independence).

<sup>155</sup> See, e.g., *Bosnian Genocide Case*, *supra* note 108, para. 427 (the ICJ notes that even if state parties to the Genocide Convention have delegated the power to prevent genocide to competent UN organs, they are not relieved of their own responsibility to act if the UN fails to do so). For a similar argument, see Ralph Wilde, *Enhancing Accountability at the International Level: The Tension between International Organization and Member State Responsibility and the Underlying Issues at Stake* 12 ILSA J. INT'L & COMP. L. 395 (2005-06) (asserting that states should be held accountable for the acts of an IO of which they are members).

minorities from participating in key political institutions, and, also reflecting the preference of European facilitators, insisted on the return of refugees and IDPs while effectively denying their right to stay in their places of refuge. In Afghanistan and Sierra Leone, the UN as a leading facilitator played a less active role in promoting injurious arrangements; however, it did actively help to consummate and implement the Bonn and Lomé agreements, despite being fully aware of the exclusion of women in the first case and the granting of considerable political power to war criminals in the latter case.

One could argue that an indirect contribution to injustices of the kind that can be attributed to the UN in the cases of Afghanistan and Sierra Leone is too modest to generate any responsibilities. It need be remembered, however, that the contribution principle is not invoked here as an independent basis for attributing responsibilities to facilitators in the first place, but rather as a criterion for assigning the duty to discharge collective responsibilities that arise to all states on the basis of their sovereign powers. For the purposes of such allocation, the threshold of contribution can arguably be lower than for the purpose of attributing remedial responsibility in the first place. This means that whenever third parties facilitate a peace process, they should make reasonable efforts to prevent the parties from pursuing injurious procedures or arrangements, or otherwise be held responsible (on a secondary basis) for these injuries.

As already noted, while the cases of Bosnia, Afghanistan and Sierra Leone illustrate the potential contribution of facilitators to peace injustices, they also point to their special capacity to prevent or reduce such injustices, which, as argued above, provides another reason for selecting them to discharge the collective responsibility of states to do so. As the Bosnian case shows, powerful facilitators like the U.S. can effectively use the threat to employ military sanctions to induce the parties to stop fighting and sign a peace agreement. Theoretically speaking, such a threat can also be used to ensure the consistency of negotiation procedures and peace arrangements with human rights norms. However, imposing a duty to use military sanctions or even allowing their use for that purpose appears to be unjust in terms of the price that it would exact from both facilitators and the negotiating parties compared to the average gravity of peace injustices. Moreover, such sanctions may put into question the consensual basis of the peace agreement and therefore also its validity under international and domestic law.

A duty to use economic sanctions, although somewhat less controversial, may also be too burdensome and perhaps even counterproductive in terms of the antagonism that it might create within the targeted party. However, such sanctions should not be rejected outright as a means of promoting human rights norms in some peace negotiations. Positive economic incentives, by contrast, appear to be an appropriate means for advancing just peace. They are particularly attractive in view of the fact that third parties in any event invest billions of dollars to support the implementation of peace agreements.<sup>156</sup> Conditioning such financial assistance upon negotiators' compliance with human rights norms does not involve any additional

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<sup>156</sup> See Forman & Patrick, *supra* note 15.

allocation of funds, and therefore places no serious economic burden upon facilitators. Even though donors have so far been quite reluctant to explicitly apply conditionalities to post-conflict financial assistance<sup>157</sup>—the linking of funds to refugee return in Bosnia being an exceptional example—this approach can be gradually changed, along with a broader change in the international conceptualization of the role of peace facilitators. It is worth emphasizing again that donors' assistance is usually expected and taken into account by negotiators already at the negotiation stage, which means that financial aid conditionalities can be employed to affect not only the manner in which the parties implement the peace agreement but also their earlier choice of peace terms and even of negotiation procedures. For instance, donors can announce from the outset that they will provide financial assistance to the new government that is about to be established under the peace agreement only if it is inclusive of women or ethnic minorities. In fact, conditionalities can be employed not only by donors but also by peacekeepers, broadly defined.<sup>158</sup> Although the services that peacekeepers offer do not usually translate into immediate financial benefits, they may be valued highly enough by the parties for conditionality to make a difference. For once a government has engaged in peace negotiations, it usually has a strong interest in bringing about an implementable and sustainable peace.

Finally, the least intrusive, but not necessarily least effective, means that facilitators can use to promote the justice of peace negotiations and agreements are the basic diplomatic means of persuasion and shaming. In particular, mediators can use their personal and professional skills, as well as their intimate relationship with the parties and special understanding of their interests and concerns,<sup>159</sup> to convince them that adherence to justice requirements is in their best interest. As a minimum, mediators can alert the parties to justice problems and refer them to relevant international legal norms. This function can be especially important when negotiators do not have their own team of international legal experts. As we have seen, persuasion and appeal to relevant legal norms were the main human rights-promoting methods relied upon by the special UN envoys in Afghanistan and Sierra Leone. In the case of Afghanistan, Lakhdar Brahimi was apparently able to invite women to participate in the peace talks by invoking international expectations from the post-Taliban regime. In Sierra Leone, Francis Okelo unsuccessfully attempted to convince the parties to preclude the most serious crimes from the Lomé Agreement's amnesty provision. Consequently, he added an apparently toothless disclaimer to the agreement regarding the illegality of this amnesty, which later facilitated the prosecution of grave crimes by the Special Court for Sierra Leone.

As noted above, assigning to peace facilitators the main duty to discharge the international community's (secondary) collective responsibility to promote justice in peace processes does not relieve other states of the residual responsibility to do so. In particular, non-facilitator states may be required to take action in three rare but not implausible scenarios: first, when a peace process takes place without significant

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<sup>157</sup> See ACHIM WENNMANN, *THE POLITICAL ECONOMY OF PEACEMAKING* (2010).

<sup>158</sup> See *supra* Part II.C.

<sup>159</sup> See *supra* Part II.A.

involvement of third parties; second, when facilitators are unwilling to act or when their acts do not yield satisfactory results; and third, when the circumstances are suitable for the use of measures that cannot be effectively employed by peace facilitators alone, such as non-recognition of the illegal outcomes of a peace agreement (e.g., non-recognition of an oppressive regime or of a discriminatory transfer of territory).<sup>160</sup>

In any event, it is important to bear in mind that while military, economic and recognition sanctions and conditionalities can induce negotiating governments to respect human rights, they may also have serious adverse effects on their constituencies, that is, on the very same populations that they seek to protect. In view of this risk—as well as the requirements to reduce the burden that is placed on facilitators, to respect the right of the negotiating parties to independently determine their future, and, at the end of day, to also achieve a peace agreement—it is necessary to use justice-promoting measures in a careful and responsible manner, while giving due consideration to all possible implications. As a general rule, less coercive measures such as persuasion and selective financial inducements should be preferred over more coercive ones, which should be reserved for cases of serious human rights violations that cannot be prevented through other means. No less importantly, international law should construct facilitator duties in a manner that allows them sufficient space to adapt legal requirements to the particular circumstances of a given case. As I will argue immediately, these principles of proportionality, restraint, and flexibility should apply not only to the secondary human rights duties of facilitators but also to the primary duties of the negotiating parties, that is, the duties that facilitators are expected to enforce.

### B. Human Rights Obligations to be Enforced by Facilitators

This article is concerned with the secondary responsibilities of third-party facilitators to promote justice in peace processes. These secondary duties essentially stem from the primary duties of negotiators toward their constituencies—it is those primary duties that facilitators have to ensure compliance with. The question which human rights and justice obligations exactly apply to peace negotiators under existing international law and which duties should apply to them as a matter of *lex ferenda* is a

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<sup>160</sup> Traditionally, the main criterion for the recognition of states/governments and their territorial claims was that of effective control. See, e.g., Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 607-608 (1941); Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L.Q. 545, 546-547 (1999). Over time, however, recognition criteria have evolved to include and even give priority to some legality and justice considerations. Most notably, after the dissolution of the communist bloc, compliance with democracy and human rights requirements have been posed as a condition for the recognition of new states in Eastern and Central Europe and their admission to IOs. See, e.g., *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* and *Declaration on Yugoslavia* (Dec. 16, 1991), reprinted in 4 EU. J. INT'L L. 72 (1993); Jean-Francois Flauss, *Les Conditions d'Admission des Pays d'Europe Central et Orientale au Sein du Conseil de L'Europe*, 5 EUR. J. INT'L L. 401 (1994). These developments suggest that the non-recognition of injurious peace outcomes is not an imaginary scenario.

complex one and cannot be fully addressed within the confines of this article. In this section, however, I will mention some of the main substantive and procedural duties that currently apply to peace negotiating governments as well as some obligations that arguably should be applied to them if we accept the human sovereignty model's assertion that governments are duty-bound to promote the interests of all their citizens in a fair and equitable manner.

Under existing international law, peace negotiators must refrain from adopting arrangements that clearly infringe on the human rights of their citizens. For example, they cannot adopt an agreement that provides for the collective punishment of a group whose members were allegedly involved in illegal fighting. They are also prevented from establishing a constitutional framework that explicitly denies the basic human rights of any segment of their population. In addition, peace negotiators are not allowed to grant amnesties to persons who during the conflict committed particularly serious crimes such as genocide, and in the case of an inter-state conflict, also grave breaches of international humanitarian law norms.<sup>161</sup>

As noted, however, contemporary peace agreements do not usually include such blunt infringements of international law. Most peace-related injuries are neither clearly in breach of nor unambiguously consistent with international legal norms. Thus, for example, while certain types of involuntary peace-induced population transfers—including post-World Wars-style expulsions of ethnic minorities<sup>162</sup> and Triangle-style transfers of populated territories<sup>163</sup>—appear to violate a range of well-established human rights,<sup>164</sup> in the absence of explicit prohibition on peacetime transfers (as opposed to wartime transfers<sup>165</sup>) their illegality might be successfully contested by negotiators. It may therefore be desirable to put in place an explicit prohibition on peacetime population transfers that appear to be incompatible with

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<sup>161</sup> See Genocide Convention, *supra* note 108; Common Article 49, 50, 129 and 146 to the 1949 Geneva Conventions.

<sup>162</sup> In the aftermath of World War I, Turkey and Greece signed an agreement for the compulsory exchange of their Greek and Turkish minorities, which was later incorporated into the multilateral Lausanne Peace Treaty. See Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Rumania, the Serb-Croat-Slovak state, and Turkey, art. 142, July 24, 1923, 28 L.N.T.S. 11 [1924]. At the end of World War II, the Allies signed an agreement that sanctioned the forced expulsion of millions of ethnic Germans from Poland, Czechoslovakia, and Hungary. See Report of Tripartite Conference in Berlin (Potsdam *Communiqué*), July 17-August 2, 1945, Art. XIII, reprinted in 39 AM. J. INT'L L. 245 (Supp. 1945).

<sup>163</sup> See *supra* note 5.

<sup>164</sup> Among others, peacetime population transfers have been claimed to violate the rights to dignity, equality, and freedom of movement. See, e.g. Alfred De Zayas, *Ethnic Cleansing 1945 and Today: Observations on its Illegality and Implications*, in ETHNIC CLEANSING IN TWENTIETH-CENTURY EUROPE 787 (Steven Béla Várdy & T. Hunt Tooley eds., 2003) (asserting the illegality of Post-World Wars-style expulsion of populations); Aeyal Gross, Population Dump: Is Lieberman's Plan to Redraw Israeli Demographics Legal? HAARETZ (March 29, 2014) and Eyal Benvenisti, Lieberman, The State Exists to Serve Its Citizens, HAARETZ (April 2, 2014) (asserting the illegality of the transfer of the Triangle area to Palestine).

<sup>165</sup> Wartime population transfers are explicitly prohibited under the Fourth Geneva Convention. See Convention relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 75 U.N.T.S. 287.

basic human rights norms. To take another example, it is not clear whether and when power-sharing arrangements that include exclusionary elements are acceptable under international human rights law. The judgment of the European Court of Human Rights in the case of Bosnia can provide some guidance on this matter;<sup>166</sup> however, it does not have the force of a binding precedent, and in any event, its reasoning is somewhat obscure and may be hard to apply in other cases. To clarify the matter and assist countries in tailoring appropriate political solutions to inter-group strife, international lawmakers may wish to articulate some rules on power-sharing that may refer, *inter alia*, to their legitimate scope and to the mechanisms through which they can be revisited.

However, rather than focusing on the substantive contents of peace agreements, it seems preferable to direct the bulk of international regulation efforts at the procedures through which peace agreements are achieved. The goal of such procedural regulation should be to ensure that the views and preferences of all those who might be adversely affected by the terms of the peace agreement are adequately represented in the negotiation process. This goal can be promoted through the introduction of procedural justice standards such as participation, transparency, and reason-giving into peace negotiations. As I will argue later, the main advantage of such procedural constraints over substantive ones is that they can help promote an equitable allocation of the burden of peace among domestic groups without imposing on the parties any particular choice of values.<sup>167</sup> Another important advantage is that procedural constraints do not run the risk of precluding an arrangement that the parties consider to be a *sine qua non* condition for peace. In other words, they seem to pose a smaller threat to the success of negotiations than substantive constraints.<sup>168</sup>

At present, the only international legal instruments that directly address peace negotiations and introduce into them procedural justice requirements are Security Council Resolutions 1325 (2000) and 1820 (2008). As noted earlier, Resolution 1325 urges member states to ensure “increased representation” of women in conflict resolution processes.<sup>169</sup> This requirement is reiterated in Resolution 1820, which goes one step further to present the standard of “equal and full participation” of women in peace processes.<sup>170</sup> Moreover, resolution 1820 explicitly refers to facilitator responsibilities, urging the UN Secretary-General and his Special Envoys to invite women to participate in peace processes.<sup>171</sup> These groundbreaking resolutions can serve as model for developing further procedural justice norms that would require peace negotiators and facilitators to incorporate into the decision-making process not only women but also ethnic minorities, displaced persons, and other affected groups whose interests tend to be disregarded.<sup>172</sup>

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<sup>166</sup> See *supra* note 41.

<sup>167</sup> See *infra* Part V.D.1.

<sup>168</sup> See *infra* Part V.D.2.

<sup>169</sup> See *supra* note 88.

<sup>170</sup> S.C. Res. 1820, art. 12, U.N. Doc. S/Res/1820 (June 19, 2008).

<sup>171</sup> *Id.*

<sup>172</sup> It is worth mentioning that The UN Guiding Principles on Internal Displacement, although they do not explicitly refer to peace processes and despite having no binding power, have made a step in this

### C. The Obligations of Non-State Negotiators and Facilitators

The vast majority of contemporary armed conflicts are not strictly international but rather internal or hybrid, involving a government on the one hand, and an armed opposition group fighting for the reallocation of domestic political power or a national liberation movement fighting for the independence of a secessionist or occupied territory, on the other hand. Consequently, in many peace negotiations at least one of the parties is a non-state actor.<sup>173</sup> At the same time, third party facilitating roles, in particular mediation, are also being increasingly assumed by NGOs and other non-state actors,<sup>174</sup> not least because of their purported advantage over official state facilitators in establishing connections with non-state negotiators.<sup>175</sup> The questions arise, therefore, whether and to which extent non-state negotiators and facilitators should and can be bound by (primary or secondary) human rights duties.

As far as non-state negotiators are concerned, there seems to be much logic in applying to them human rights duties similar to the ones borne by states, given the similar powers that they exercise. In fact, in some cases—Sierra Leone being an example in point—these quasi-state actors have greater control over national territory and population than the official government. The idea that armed opposition groups and national liberation movements should be accountable to the population under their control also finds support in international humanitarian law, which applies to these entities some duties concerning the protection of civilian population during armed conflicts.<sup>176</sup> The underlying assumption is that where armed opposition is strong, the government is relatively weak and may not be able to effectively protect

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direction by asserting that IDPs should be able to fully participate in the planning of their return or resettlement. See Guiding Principles on Internal Displacement, principle 28, UN Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (prepared by the UN Secretary General Representative on IDPs, Mr. Francis M. Deng).

<sup>173</sup> See CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE *LEX PACIFICATORIA* 308 (2008) (estimating that 91% of the peace agreements signed since 1990 are intra-state agreements). As we saw in Part III, the parties to the conflict are not always identical to the parties that negotiate and sign the peace agreement. In Afghanistan, the war's protagonists—the U.S. and the Taliban—were not parties to the peace negotiations, whereas the representatives of factions that did not take an active role in the fighting did participate. In Bosnia, Bosnian Serbs and Bosnian Croats did not have their own delegations in the peace talks and were allegedly represented by the governments of Yugoslavia and Croatia. In Sierra Leone, too, the Liberian government that stood behind the RUF militia did not participate in the peace process.

<sup>174</sup> See *supra* Part II.

<sup>175</sup> See Cindy Daase, *Peace Agreements between State and Non-State Parties and Alternative Dispute Settlement: Lessons Learned from the Abyei Arbitration*, VERFASSUNG UND RECHT IN ÜBERSEE (forthcoming 2014).

<sup>176</sup> See Common Article 3 of the 1949 Geneva Conventions and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (June 8, 1977).

its citizens. Applying international legal constraints directly to non-state belligerents can therefore improve the protection granted to vulnerable populations.<sup>177</sup>

Another justification for applying humanitarian law duties to non-state belligerents focuses on these actors' claims for legitimate political power. As Christian Tomuschat has explained with respect to the duties of non-state belligerents during war, "A movement struggling to become the legitimate government of the nation concerned is treated by the international community as an actor who, already at his embryonic stage, is subject to the essential obligations and responsibilities every State must shoulder in the interest of a civilized state of affairs among nations".<sup>178</sup> In the context of peace negotiations, the rationale articulated by Tomuschat seems to apply even more forcefully, for it is precisely at this stage that opposition demands for legitimate political power start to be realized, whether through internal power-sharing arrangements or through the establishment of a new independent state. It is important to stress, however, that the direct human rights obligations of non-state negotiators during peace processes, just like the direct obligations of non-state belligerents during war, cannot and should not release the state from its duty to make its best efforts to prevent human rights violations within its jurisdiction and ensure that the interests of all citizens are adequately represented in negotiations.

Both legal theory and legal doctrine thus seem to provide at least some support for the application of human rights duties to non-state peace negotiators. It also seems reasonable to allow and even require facilitators to enforce non-state negotiators' compliance with their human rights duties by using sanctions, inducements, and persuasion methods similar to those that should be used in relation to states. As a practical matter, too, distinguishing between state and non-state negotiators can be difficult during the process of the integration of an armed opposition group into the government or the transformation of a national liberation movement into an independent government.

The situation is different, however, with respect to the secondary duties of non-state facilitators. Transnational or domestic peace NGOs cannot be said to exercise quasi-governmental functions that generate state-like responsibilities, nor can they be said to have an agency relationship with states that confer upon them powers and duties (as in the case of IO facilitators). It is therefore hard to attribute to non-state facilitators secondary international human rights duties under the human sovereignty model (or indeed under any other plausible model of sovereignty). This limitation, however, should not be a source of pessimism about the promotion of human rights by peace facilitators, for two reasons. First, as noted in Part II, the vast majority of peace facilitators are states and IOs rather than non-state actors. Second,

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<sup>177</sup> See, e.g., THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 39 (1987); LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 34 (2002).

<sup>178</sup> See Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* 573, 587 (Horst Fischer et al. eds., 2004).

as we will see in Part VI, in recent years non-state facilitators have shown increasing willingness to voluntarily adopt professional codes of conduct that emphasize the need to promote justice and accountability in peace processes. While the scope of the human rights duties acknowledged in these standards is still quite limited, it is not unlikely that the processes that have led to their emergence will also lead to their future expansion.

### D. Problems and Criticisms

The idea that peace facilitators should have a duty to ensure the compatibility of peace negotiations and agreements with substantive and procedural justice requirements is susceptible to criticisms of both a principled and pragmatic order. The main principled concern is that these duties would lead to excessive intervention of third parties in the discretion of the negotiating government, and undermine its people's right to self-determination. The main pragmatic concern is that the imposition of justice constraints upon negotiators and facilitators may undermine their ability to find an agreed solution to the conflict.

#### *1. Undermining Self-Determination*

Peace processes are central to national self-determination as few or no other areas of domestic policymaking are.<sup>179</sup> They change borders, re-allocate political power, instigate constitutional and economic reforms, transform interethnic relations, and redefine collective identities. Indeed, they provide a platform through which peoples answer “the key questions of ‘who we are’ and ‘what we want.’”<sup>180</sup> Hence, requiring third party facilitators to intervene with the procedures and outcomes of these processes runs the risk of undermining national self-determination at its formative moments.

This tension between facilitator intervention and self-determination is further problematized by the fact that the parties to peace negotiations are usually governments of developing states or quasi-governmental entities within those states, whereas facilitators are usually developed states or international organizations dominated by such states. Requiring facilitators to monitor the human rights aspects of peace processes may therefore increase the leverage of developed states over the domestic affairs of developing states, and reinforce North-South inequality in the enjoyment of the right to self-determination. Moreover, it is not unlikely that Northern countries acting as peace facilitators will take advantage of their

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<sup>179</sup> For the purposes of the present discussion, national self-determination can be defined as the international legal principle that peoples should be able to exercise political control over central aspects of their common lives. See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 206 (2004).

<sup>180</sup> See Brian Mello, *Recasting the Right to Self-Determination: Group Rights and Political Participation*, 30 *SOC. THEORY & PRAC.* 193, 194 (2004) (suggesting that self-determination “serves to safeguard the ability for individuals as group members to participate in answering and acting upon the key questions of ‘who we are’ and ‘what we want’”).

responsibility to enforce justice requirements to advance their own interests. For example, they can strictly enforce a norm requiring the repatriation of refugees where many refugees have fled to Northern countries, as was the case in Bosnia, but refrain from effective enforcement of the same norm when most refugees are concentrated in the South. A counter-argument is that regulation can do precisely the opposite, i.e., it can constrain facilitators' discretion so that the pressures that they exert upon negotiators will be directed at promoting just and sustainable peace rather than promoting their own political interests.

These concerns seem to reflect an irresolvable tension between the external and internal dimensions of self-determination, that is, between the need to respect the autonomous choices of peoples as expressed by their national governments, and the need to ensure that these choices do not deny minimum freedom and autonomy to some domestic constituents.<sup>181</sup> Indeed, much as the far-reaching political, economic, cultural and security implications of peace processes make third party intervention particularly problematic from the perspective of domestic groups who believe that their government adequately represents their collective aspirations, they also make it particularly necessary from the perspective of other domestic groups whose preferences and aspirations are played down by the government. Self-determination concerns should therefore not be a bar to international regulation of peacemaking. However, they should be taken into account in the articulation of both the primary human rights duties of negotiators (for example, by focusing on procedural duties, which are generally less intrusive into decision-maker discretion than substantive ones) and the measures that facilitators should employ to enforce these duties (for example, by giving preference to non-coercive measures over coercive ones).

### 2. *Undermining Peace Prospects*

There are two main scenarios as to how establishing facilitators' responsibility to ensure negotiator compliance with human rights norms can undermine peace prospects. First, it may deter potential facilitators from offering their assistance, and negotiators from accepting it, and thus lead to a general decline in peace-facilitating services, which are essential for the conclusion and implementation of peace agreements. Although this is not an improbable scenario, it is quite unlikely to become commonplace. As noted above, facilitators currently do their job voluntarily

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<sup>181</sup> On the internal dimension of the right to self-determination see, e.g., Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?* 16 MICH. J. INT'L L. 733 (1995); Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism*, Allan Rosas, *Internal Self-Determination*, and Jean Salmon, *Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?*, in MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993). For an illuminating discussion of the tension between external and internal self-determination see, e.g., SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 17 (Robert Post ed., 2006) (suggesting that the post-World War II international legal developments have given rise to what she defines as "the paradox of democratic legitimacy"). Cf. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 257-260 (2002) (purporting to eschew this tension by offering a relational conceptualization of self-determination, which entails that self-determination is "about non-domination rather than non-interference").

and invest considerable economic and diplomatic resources in it, while risking international and domestic criticisms in the case that the peace process fails. They consider this effort and the associated risk worthwhile because of the significant benefits that they can draw from helping to resolve conflicts.<sup>182</sup> It is doubtful that the extra weight of secondary human rights responsibilities will significantly change the cost-benefit calculation that currently drives states to offer their assistance. This is all the more true for IO facilitators who see the promotion of international peace as their main objective. It is also doubtful that facilitators' commitment to promoting human rights would significantly deter negotiators from accepting their assistance. As noted, negotiators are exposed to facilitator pressures anyhow, and it is not necessarily to their detriment if these pressures are curbed by legal rules.

The second way in which human rights duties can undermine peace prospects is by denying negotiators and facilitators the maneuvering space they need in order to reach viable solutions to violent conflicts. In particular, substantive constraints on negotiators' discretion might remove essential bargaining chips from the negotiating table. In Sierra Leone, for example, there was speculation that peace would have been impossible without full amnesty and power-sharing with the murderous RUF militia.<sup>183</sup> Procedural constraints do not tie negotiators' hands in the same way, but they too might complicate the already difficult task of reaching a peace agreement. For one thing, procedural justice measures such as participation and transparency can be used by 'spoilers' to stall the process,<sup>184</sup> and can make it hard for negotiators to demonstrate their willingness to make painful concessions. For another, these measures may be very time-consuming and threaten the momentum for peace.

The possibility that procedural and substantive constraints would be an obstacle to the progress of peace negotiations and make it harder to achieve a peace agreement cannot be denied. However, against this risk, we should consider the chance that such constraints will improve peace prospects in both the short and long term. In the short term, the public deliberation entailed by procedural justice requirements can promote rational and cooperative bargaining.<sup>185</sup> These gains must not be underestimated, given that peace negotiations are so often hindered by hostility, distrust, false interpretations of reality, and other cognitive biases.<sup>186</sup> Explicit substantive constraints, in turn, can help the parties reach an agreement by

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<sup>182</sup> See *supra* Part II.D.

<sup>183</sup> See *supra* note 104 and accompanying text.

<sup>184</sup> On the problem of spoilers in peace negotiations, see Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SEC. 5 (1997).

<sup>185</sup> The potential contribution of procedural justice to promoting rationality has been extensively discussed in deliberative democracy literature. According to Jürgen Habermas, a properly constructed public deliberation that enables the free transmission and processing of views and information is the key to reason-based policies. See, e.g., JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY*, Ch. 3 (Thomas McCarthy trans., 1981); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

<sup>186</sup> See, e.g., *BARRIERS TO CONFLICT RESOLUTION*, Part II (Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky, & Robert B. Wilson eds., 1995) (discussing cognitive biases and other psychological barriers to dispute resolution).

providing an “objective standard” which they cannot dispute.<sup>187</sup> In the long term, both procedural and substantive constraints can contribute to the sustainability of peace by increasing its perceived legitimacy and public acceptance and reducing the incentives of discriminated-against groups to resort to violence.<sup>188</sup> In any event, the possibility that international regulation will hinder peace negotiations, just like the possibility that it will undermine (external) self-determination, should be taken into account by international lawmakers when articulating the human rights duties of peacemakers.

## VI. FROM THEORY TO PRACTICE: AVENUES FOR DEVELOPING AN INTERNATIONAL PEACEMAKING REGIME

The foregoing discussion offers a starting point for international lawmakers to develop a corpus of norms that clarify and further develop the primary human rights obligations of peace negotiators and also recognize the secondary human rights obligations of third-party facilitators. There are numerous ways to develop such peacemaking norms, each with its distinctive advantages and shortcomings. This Part briefly sketches out four principal methods, noting peacemaking norms that have already been formed using each of them. In one way or another, these processes entail the parallel development of negotiator and facilitator obligations, reflecting the proposition that they are inextricably connected. The overview begins with formal and binding lawmaking processes and then moves on to less formal processes. It suggests concentrating lawmaking efforts on the soft end of the spectrum, not only because such efforts are likely to be more fruitful, but also because reliance on soft, flexible norms may somewhat mitigate the principled concerns about self-determination and the pragmatic concerns about peace prospects that accompany the international regulation of peacemaking. The overview concludes with some remarks on the role of facilitators in developing peacemaking norms.

### A. A Peacemaking Convention

The classic way to develop binding international peacemaking norms would be through the adoption of an international convention that articulates the human rights duties of peace negotiators and facilitators. That such a convention would be joined by a significant number of states, however, is quite unlikely. As public choice scholars have observed, governments tend to very much cherish their sovereign powers.<sup>189</sup> They therefore will normally agree to join a treaty that limits their

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<sup>187</sup> See ROGER FISHER & WILLIAM URY (with BRUCE PATTON), *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, Ch. 5 (2<sup>nd</sup> edition, 1991).

<sup>188</sup> On the connection between procedural justice and outcome acceptance, see, e.g., ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, Ch. 7 (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

<sup>189</sup> See, e.g., Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *INTERNATIONAL REGIMES* 115, 117 (Stephen D. Krasner ed., 1983) (“International politics is typically characterized by independent self-interested decision-making, and states often have no reason to eschew such individualistic behavior”); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in*

discretion only if the benefits that they draw from international cooperation are particularly high and exceed the costs of losing sovereign authority. This is usually *not* the case when the issues addressed by a treaty are essentially domestic, as in a peacemaking convention. Admittedly, in some cases states may decide to ratify treaties that regulate domestic affairs in order to promote their general international reputation. Oona Hathaway suggests that such considerations provide a major explanation for the wide ratification of human rights treaties.<sup>190</sup> However, unlike the general idea that basic human rights should be respected, the idea that peacemaking should be subjected to explicit human rights and justice constraints does not seem to be a *bon ton* in contemporary international politics. Quite to the contrary, secret and exclusionary negotiations are an acceptable peacemaking strategy, and the need to make “painful” concessions in order to achieve peace is rarely questioned. As international peacemaking law develops, these perceptions are likely to change. However, as long as they prevail, the desire for international prestige is unlikely to be a significant driving force for the ratification of a peacemaking convention. This is true both for states that consider themselves potential parties to peace negotiations and for states that wish to serve as facilitators, which currently do not seem to have a good enough reason to subject their peace facilitating discretion to strict, binding international obligations.

### B. IO Resolutions

The reluctance of states that expect to be involved in peace processes to adopt a peacemaking convention that limits their sovereign discretion can be bypassed by applying peacemaking norms to them without or against their will. Such non-consensual lawmaking is possible whenever a non-plenary or a majority vote-based IO organ is authorized under the constitutive document of the IO to make decisions that are applicable to all member states. Among all existing IO organs, the most serious candidates for creating widely applicable non-consensual peacemaking norms seem to be the UN Security Council (SC) and the UN General Assembly (GA).

The UN charter assigns the primary responsibility for promoting international peace and security to the SC.<sup>191</sup> In accordance with Chapter VII of the Charter, the SC has the power “to determine the existence of any threat to the peace” and “make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.”<sup>192</sup> While SC recommendations are, as their name suggests, merely hortatory, its decisions are binding upon member states.<sup>193</sup> Traditionally, the SC has used its Chapter VII mandate to adopt resolutions that relate to specific conflicts or situations. In recent years, however, it has increasingly—and controversially—adopted thematic resolutions addressing issues or concerns that cut

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*International Governance*, 54 INT’L ORG. 421, 437 (2000) (“The potential for inferior outcomes, loss of authority, and diminution of sovereignty makes states reluctant to accept hard legalization.”)

<sup>190</sup> See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003).

<sup>191</sup> See U.N. Charter, art. 24(1).

<sup>192</sup> *Id.* art. 39.

<sup>193</sup> *Id.* arts. 25, 48(1), 103.

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across conflicts.<sup>194</sup> The language of a few of these resolutions suggests that they are intended to create binding obligations for states,<sup>195</sup> whereas others are formulated as mere recommendations. Among the latter, one can find resolutions 1325 and 1820, which call upon member states and the UN Secretary General to promote the participation of women in peace processes.<sup>196</sup> The growing tendency of the SC to adopt thematic decisions, including decisions addressing the responsibilities of peace negotiators and facilitators, suggest that it may be willing to further develop international peacemaking norms in the future. It should be noted, however, that the veto power of the permanent members, who often serve as peace facilitators and, in addition, have complex global interests implicating various conflict situations, may be a barrier to the articulation of more controversial or demanding responsibilities than ensuring the participation of women.

The subject-matter authority of the GA is wider than that of the SC and spans all matters within the scope of the UN Charter, including the promotion of human rights.<sup>197</sup> Furthermore, in terms of its “decisional authority,” the GA is explicitly authorized under the UN Charter to make non-binding recommendations with respect to general issues of international concern (and not only with respect to specific conflicts).<sup>198</sup> The formal authority of the GA to adopt non-binding resolutions concerning the human rights responsibilities of peacemakers is thus uncontested. In view of the fact that legal experts<sup>199</sup> and non-governmental organizations<sup>200</sup> have considerable influence over the GA’s agenda, and in view of the fact that non-binding norms are usually more easily adopted than binding ones, the prospects for the articulation of peacemaking standards by the GA seem to be quite good. That being said, it should also be noted that so far only a fraction of the reports, recommendations and resolutions addressing post-conflict justice concerns, which have been adopted by the UN Commission on Human Rights or by one of its Sub-Commissions, were ultimately endorsed by the GA.<sup>201</sup> A close examination of the

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<sup>194</sup> For an overview of this phenomenon, see, e.g., José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003); Cora True-Frost, *The Security Council and Norm Consumption*, 40 NYU J. INT’L L. & POL. 115 (2007).

<sup>195</sup> See S.C. Res. 1373, UN Doc. S/Res/1373 (Sep. 28, 2001); S.C. Res. 1540, UN Doc. S/Res/1540 (Apr. 28, 2004) (imposing various anti-terror measures upon states).

<sup>196</sup> See *supra* notes 88 and 170-171 and accompanying text.

<sup>197</sup> UN Charter, arts. 1, 10.

<sup>198</sup> *Id.*, art. 13(1).

<sup>199</sup> See, e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 310 (2005).

<sup>200</sup> See, e.g., Paul Szasz, *General Law-making Processes*, in THE UNITED NATIONS AND INTERNATIONAL LAW 27 (Christopher C. Joyner ed., 1997).

<sup>201</sup> The GA has adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res. 40/34 (Nov. 29, 1985), as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 (Dec. 16, 2005). The origins of these resolutions can be found in the reports submitted to the Commission on Human Rights by the independent experts Theo van Boven and Cherif Bassiouni. The GA did not adopt the Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), E/CN.4/Sub.2/1997/20/Rev.1, Oct. 2, 1997 (prepared by the Special Rapporteur on Amnesty Louis Joinet); the Updated Set of Principles for the Protection and Promotion of Human Rights through

history and evolution of these normative initiatives, which goes beyond the scope of this article, may be beneficial for planning future legislative efforts in the area of peacemaking within the framework of the UN.

### C. Intra-Organizational Codes of Conduct

Much of the activity of IOs and transnational NGOs is regulated by internal guidelines, policies, or “codes of conduct” that they adopt through relatively simple and fast standard-setting processes.<sup>202</sup> A few such instruments have been put in place by peace facilitating organizations to address justice issues in peace processes. For example, shortly after he instructed his special envoy to sign the Lomé Agreement with a reservation about the legality of its amnesty provision,<sup>203</sup> the UN Secretary General issued general guidelines to his envoys addressing the issue of amnesties. According to the Secretary General, these guidelines, which were not published, were intended “to assist [envoys] in tackling human rights issues that may arise during their efforts,” and be “a useful tool with which the UN can assist in brokering agreements in conformity with law and in a manner which may provide the basis for lasting peace.”<sup>204</sup>

An example of a non-governmental initiative to develop a code of conduct for mediators can be found in a joint report published by the Center for Humanitarian Dialogue (HD) and the International Centre for Transitional Justice (ICTJ). The report, entitled “Negotiating Justice: Guidelines for Mediators,” seeks to design best practice to help mediators address justice issues during peace negotiations.<sup>205</sup> The report includes concrete advice and recommendations to mediators, among them to provide clear guidance to the negotiating parties on the demands and limits of international law, using expert input where necessary.<sup>206</sup>

Finally, several financial aid agencies have adopted internal organizational policies that condition their assistance on the “good governance” of recipient

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Action to Combat Impunity, UN Doc E/CN.4/2005/102/Add1 (Feb. 8, 2005) (prepared by the independent expert Diane F. Orentlicher); the Draft Declaration on Population Transfer and the Implantation of Settlers, (prepared by the Special Rapporteur on Human Rights and Population Transfer, Mr. Al-Khasawneh); the Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, (Feb. 11, 1998) (prepared by the UN Secretary-General Representative on Internally Displaced Persons, Francis M. Deng); and the Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (prepared by the Special Rapporteur Paulo Sérgio Pinheiro).

<sup>202</sup> See, e.g., Mary Kay Gugerty, *The Effectiveness of NGO Self-Regulation: Theory and Evidence from Africa*, 28 PUB. ADMIN. & DEV. 105 (2008).

<sup>203</sup> See *supra* note 102 and accompanying text.

<sup>204</sup> See Secretary-General Comments on Guidelines Given to Envoys, U.N. Press Release SG/SM/7257 (Dec. 10, 1999). According to a recent report submitted to the GA by the Secretary General, the guidelines for mediators were revised in 2006. See U.N. Secretary General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution: Report of the Secretary General*, U.N. Doc. A/66/811, p. 6 (June 25, 2012).

<sup>205</sup> Center for Humanitarian Dialogue and the International Centre for Transitional Justice, *Negotiating Justice: Guidelines for Mediators* 20 (authored by Priscilla Hayner, 2009).

<sup>206</sup> *Id.* at 21.

countries. The World Bank's Environmental and Social Safeguard Policies, for example, require borrowing countries to submit to the Bank detailed assessments of the environmental and social risks of development projects, referring, *inter alia*, to adverse effects on indigenous peoples and on potentially displaced persons. Such assessments should be prepared after informed consultations with affected populations and local NGOs.<sup>207</sup> The European Union, too, has adopted development aid policies that emphasize the importance of civil society participation in decision-making relating to development projects.<sup>208</sup> Although these policies do not refer explicitly to peace-induced development projects, they may have an influence on the design of various arrangements during negotiations, including refugee return or resettlement programs, ex-combatants reintegration schemes, and plans for the development of shared natural resources.

As we can see, the scope of existing organizational peacemaking guidelines is still quite limited, and covers only a fraction of the human rights concerns associated with peace processes. Inclusion of a larger set of human rights commitments within organizational codes of conduct and the adoption of such codes by other organizations that regularly assume peace-facilitating roles can be crucial for the protection of human rights in peace processes, especially in view of the complexity of more formal international lawmaking processes such as treaty-making and the promulgation of IO resolutions.

### D. National Foreign Assistance Guidelines

Finally, states that often engage in peace-facilitating tasks can adopt domestic laws, guidelines, and policies addressing human rights issues in peace processes. The main global financial aid provider, the U.S., has long been formally linking foreign aid to the human rights policies and performance of recipient countries, and so have done other prominent donor countries. This strategy, although not always rigorously implemented,<sup>209</sup> has had some influence on the human rights norms and practices of recipient states in such areas as trafficking of women, freedom of speech, and refugee protection.<sup>210</sup> Adoption by the U.S. and other facilitator states of foreign policy guidelines directly addressing peacemaking assistance of various kinds (financial,

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<sup>207</sup> See World Bank Operational Manual, Operational Policy (OP) 4.01. See also OPs 4.10, 4.12, and 4.20. All OPs are available at the World Bank's Official Website.

<sup>208</sup> See *The European Consensus on Development*, art. 4.3, 2006/C 46/01 (24.2.2006).

<sup>209</sup> See, e.g., Clair Apodaca & Michael Stohl, *United States Human Rights Policy and Foreign Assistance*, 43 INT'L STUD. Q. 185 (1995) (asserting that in the U.S., human rights played a role in the allocation of foreign aid during the Carter, Reagan, and Bush administrations but not during the Clinton administration); Eric Neumayer, *Do Human Rights Matter in Bilateral Aid Allocation? A Quantitative Analysis of 21 Donor Countries*, 84 SOC. SCI. Q. 650 (2003) (arguing that contrary to their verbal commitment, donor countries do not consistently reward respect for human rights in their foreign aid allocation).

<sup>210</sup> See, e.g., Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006) (noting that the linkage of U.S. foreign aid to states' struggle against human trafficking has had tremendous influence on domestic anti-trafficking worldwide).

diplomatic, etc.) may also have a potential for positively affecting the human rights practices of negotiating governments.

#### E. The Role of Facilitators in Developing Peacemaking Norms

This Part described four potential sources of peacemaking norms: treaty provisions, IO resolutions, organizational codes of conduct, and national foreign assistance guidelines. For reasons explained above, I asserted that the two latter—which represent a form of self-regulation by facilitator states and organizations—are more feasible than the two former, at least in the near future. This assertion supports the main thesis of this article, namely, that the road to achieving just peace agreements passes through third party facilitators. For as it appears, negotiating countries are not only likely to downplay human rights considerations in the course of negotiations, they are also unlikely to create for themselves *ex ante* incentives (in the form of explicit international peacemaking norms) to behave differently. Third party facilitators, by contrast, can be more realistically expected to both develop human rights norms for peace processes and ensure their implementation.

It is noteworthy that although they may be viewed as self-regulating measures, facilitators' 'internal' codes and policies indirectly create peacemaking norms applicable to negotiators. In this sense, and even though soft international norms are generally understood to constrain state discretion to a lesser degree than hard norms, reliance on facilitators' internal standards might exacerbate the self-determination problems associated with the international regulation of peacemaking, for it entails that negotiators will be required to subject their peacemaking discretion to various norms in whose formulation they did not even take part. Even if the bulk of these norms are of procedural nature (requiring the representation of affected stakeholders in negotiations, etc.), they still have costs that are harder to justify when negotiators are alienated from the relevant decision-making process. To somewhat mitigate this democratic deficit, organizational codes of conduct and foreign assistance policies should be formulated, to the extent possible, after consultation with potentially affected governments. It is also important that they be publicized and made accessible to all parties, a basic requirement of "good global governance" that the above mentioned UN Secretary General Guidelines for Envoys, for example, fail to satisfy.

## VII. CONCLUSION

This study sought to establish, delineate and attach concrete legal meaning to the human rights responsibilities of third-party peace facilitators. It contended that these responsibilities can be based on a humanity-oriented conceptualization of the principle of state sovereignty, which asserts that governments have a primary responsibility to protect the human rights of their citizens as well as a secondary responsibility to protect the human rights of non-citizens if the latter's own governments fail to do so. This secondary responsibility extends beyond the currently

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acknowledged duties of states toward non-citizens, and applies, *inter alia*, to peace-induced human rights violations.

The article suggested that peace facilitators should be selected to discharge the international community's collective responsibility to prevent peace-induced human rights violations in view of their potential contribution to such violations and their special ability to prevent them. The human rights responsibilities of peace facilitators, however, are not unlimited. When translating these responsibilities into concrete legal obligations, international lawmakers must balance them against facilitators' primary duty to protect their own populations. They should also take into account the need to allow negotiators and facilitators sufficient maneuvering space to reach a peace agreement as well as the need to respect the external self-determination of countries undergoing transition from war to peace.

It is important to note that in order to make a difference, the theoretical ideas and legal reforms suggested in this article do not have to be translated into a comprehensive legal corpus of peacemaker duties. This discussion can well make a contribution to the justice and sustainability of peace agreements if it informs some of the laws and practices of major peace facilitators, or even if it merely serves to instigate a much needed academic and policy discussion on facilitators' human rights responsibilities. In particular, it can help place peace processes on the radar of the "responsibility to protect" movement, and it can also fill an important gap in the theoretical underpinnings of this responsibility.