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

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

Michal Saliternik*

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—states and international organizations that act 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 the secondary duties of facilitators, who can afford to contemplate long-term justice and sustainability considerations and often have considerable influence on negotiator decisions.

This Article presents a novel theory of sovereign authority that 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 should collectively 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. This Article explores ways to translate facilitator responsibilities into concrete legal obligations. The potential

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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. Present-day peace agreements no longer include devastating arrangements that brutally infringe on human life or dignity, for example by endorsing slavery.¹ However, contemporary peace agreements can still 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

1. 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 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 Bryan Edwards, *Observations on the Maroon Negroes of the Island of Jamaica*, in MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS 230, 238 (Richard Price ed., 3d ed. 1996); R.K. Kent, *Palmares: an African State in Brazil*, in MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS 170, 184 (Richard Price ed., 3d ed. 1996).

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 of whether 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—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 negotiations that led to the Dayton Agreement on Bosnia, the U.S. government used military and economic incentives to induce the negotiating parties to cooperate with international criminal proceedings and to facilitate refugee return. The U.S. government thereby promoted justice considerations; however, it also supported exclusionary power-sharing arrangements that the European Court of Human Rights later deemed to violate human rights norms.² In the Bonn peace talks on Afghanistan, the United Nations made sure to invite representatives from all major Afghan ethnic, religious, and geographic groups. But at the same time, the United Nations accorded legitimacy to the exclusion of women from the talks.³ In Sierra Leone, UN mediators endorsed power-sharing arrangements that assigned central governmental positions to murderous militia leaders, yet they opposed the granting of blanket amnesty to the same persons and took measures that paved the way for future prosecution of militia leaders.⁴ 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.⁵ Despite the discriminatory nature of his statement, which sought to deprive Israeli Arabs—an ethnic minority group—of their citizenship, the U.S. government remained silent. It is hard to tell how the U.S. government will react if a transfer of the Triangle is seriously contemplated in future negotiations.

2. See *infra* Part III.A.1.

3. See *infra* Part III.B.

4. See *infra* Part III.C.

5. See Barak Ravid, *Lieberman: Several Israeli Arab Towns Must Be Made Part of Palestine Under Peace Deal*, HAARETZ (Jan. 5, 2014, 10:23 AM), <http://www.haaretz.com/news/diplomacy-defense/1.567063> [<http://perma.cc/F65W-GEUW>] (archived Oct. 2, 2014) (quoting the Minister of Foreign Affairs' statement: "This is not a transfer. Nobody will be expelled or banished, but the border will move").

This Article argues that international law should recognize the responsibility of third-party facilitators, like the United States and the United Nations, to prevent peace-related injustices. It presents a novel theoretical framework for establishing and developing this responsibility. The heart of this framework is human sovereignty, a humanity-oriented conceptualization of the principle of state sovereignty. The 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 non-citizens' own governments are unable or unwilling to do so. Applied to the context of peacemaking, human sovereignty requires that a government engaged in peace negotiations would attempt to reach a just peace agreement that reflects equal concern and respect for all its citizens. At the same time, all the world's other governments—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 the international community is susceptible to collective action problems that may lead to inaction, it is necessary to identify specific actors within the international community who will have the major duty of discharging this responsibility. This Article asserts that third-party peace facilitators should be selected for this task in view of their potential contribution to peace injustices and their special ability to prevent them.

The theory of third-party 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, this Article also assumes that to focus 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, this Article 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 the facilitators implicitly or 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 peace agreements, it acknowledges the need to balance these secondary duties against the primary duties facilitators still have 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. This 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 third-party 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. The responsibility of third-party facilitators to prevent human rights violations committed directly by their agents is an important issue that is gaining increasing attention, for example, in the context of sexual abuses of local women by peacekeeping personnel.⁶ However, the responsibilities that may accrue to facilitators 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 of 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 shown 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 third-party facilitator actors, describing what functions they fulfill, and explaining their motivations. Part III demonstrates the influence of facilitators on the

6. 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) (addressing sexual exploitation in peacekeeping operations); Olivera Simić, *Does the Presence of Women Really Matter? Towards Combating Male Sexual Violence in Peacekeeping Operations*, 17 INT'L PEACEKEEPING 188 (2010) (addressing sexual violence in peacekeeping operations).

human rights dimensions of peace agreements through an analysis of past peace negotiations in Bosnia, Afghanistan, and Sierra Leone. Part IV presents the human 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 (Parties)—the conflict's protagonists who negotiate a peace agreement and undertake the main obligations under its terms—with various services to support 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.⁷ The main task of a 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 the Parties stand to gain by ending it, suggest creative

7. See, e.g., Jacob Bercovitch, *Mediation in International Conflicts, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES* 163, 169–170 (I. William Zartman ed., rev. ed. 2007) (highlighting the number of conflicts that have been mediated); INT'L PEACE INSTITUTE, *Mediation and Peace Processes: Task Forces on Strengthening Multilateral Security Capacity: IPI Blue Paper no. 8*, Oct. 9, 2009, at 6, 9, available at <http://www.ipinst.org/publication/policy-papers/detail/273-mediation-and-peace-processes-ipi-blue-paper-no-8.html> [<http://perma.cc/5LM6-NBFM>] (archived Oct. 2, 2014) (describing the increase in the use of mediators).

solutions, and so forth.⁸ Not infrequently, however, mediators with suitable capacities use more coercive mediation strategies, such as the threat to use economic and even military sanctions.⁹ Moreover, rather than merely suggesting possible solutions to the parties, mediators sometimes take a proactive role in drafting and formulating the peace agreement.

The majority of mediators are official representatives of international organizations or third-party governments.¹⁰ The most prominent mediators are the United Nations and the United States.¹¹ However, regional organizations such as the African Union, the Economic Community of West African States (ECOWAS), and the European Union, as well as small states like Switzerland, Norway, Kenya, and Qatar, are also quite frequently involved in peace mediation.¹² 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, non-state actors have also increasingly assumed mediation roles: most notably EU- and U.S.-based transnational non-governmental organizations (NGOs). For instance, the Carter Center, the Centre for Humanitarian Dialogue, the Crisis Management Initiative, and Conciliation Resources have been involved in mediation efforts in countries as diverse as Ethiopia, Sudan, Liberia, Azerbaijan, Philippines, Indonesia, and Cambodia.¹³ In other places, such as Mozambique and Colombia, religious associations have played a crucial role in facilitating peace negotiations.¹⁴

8. For descriptions of the work of mediators and analyses of case studies, see JACOB BERCOVITCH, *THEORY AND PRACTICE OF INTERNATIONAL MEDIATION* (2011); *INTERNATIONAL MEDIATION IN THEORY AND PRACTICE* (Saadia Touval & I. William Zartman eds., 1985).

9. See, e.g., 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, 112 (2012) (defining the manipulative mediator); Saadia Touval, *Coercive Mediation on the Road to Dayton*, 1 *INT'L NEG.* 547 (1996) (discussing manipulative mediators in the Bosnian conflict).

10. See BERCOVITCH, *supra* note 8, at 23 (outlining the characteristics of mediators).

11. See SIMON J.A. MASON & DAMIANO ANGELO SGUAITAMATTI, *ZURICH CENTER FOR SECURITY STUDIES, MAPPING MEDIATORS: A COMPARISON OF THIRD PARTIES AND IMPLICATIONS FOR SWITZERLAND* 17–18, 21 (2011) (describing the involvement of the United Nations and the United States).

12. See *id.* at 20–21.

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

14. See Philipp Kastner, *Towards Internalized Legal Obligations to Address Justice and Accountability? A Novel Perspective on the Legal Framework of Peace*

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 like building peace parks and developing shared natural resources, peacekeeping missions, and the creation of socioeconomic conditions that support sustainable peace through investment in education, employment, and housing. Countries emerging from violent conflicts cannot usually afford the expenses of peace. International fundraising has therefore become a central component of peace processes.¹⁵ The most prominent donors are either wealthy third-party states or international aid agencies like the World Bank and the UN Development Programme.

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."¹⁶ A common method for raising peace-building funds is to convene a country-specific international donor conference. Even though these conferences usually take place only after negotiations have ended,¹⁷ 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.¹⁸

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

Negotiations, 12 CRIM. L.F. 193, 195 (2012) (discussing the effect of religious organizations on negotiations).

15. See, e.g., Shephard Forman & Stewart Patrick, *Introduction*, in GOOD INTENTIONS: PLEDGES OF AID FOR POSTCONFLICT RECOVERY (Shephard Forman & Stewart 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).

16. *Id.* at 1.

17. 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.

18. See *id.* at 368 (discussing how aid pledges can provide incentives).

transitions.¹⁹ Under the broad definition of peacekeeping, which this Article adopts, peacekeeping activities may include ceasefire monitoring, preparation and control of national elections, verification of disarmament, demobilization and reintegration of ex-combatants (DDR), training of police forces, and human rights monitoring. Understood even more broadly, peacekeeping can encompass the establishment and operation of adjudication or arbitration tribunals and 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 United Nations. Especially since the end of the Cold War, the United Nations has established dozens of multitask peacekeeping missions. These include 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.²⁰ Another significant UN peacekeeping mission was that 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.²¹

Regional organizations have also been engaged in peacekeeping missions, often in cooperation with the United Nations. Notable among them is the Economic Community of West African States Monitoring Group (ECOMOG), the permanent monitoring group established by ECOWAS, which was involved in peacekeeping in Liberia, Sierra Leone, and other countries.²² 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

19. See, e.g., Michael Bothe, *Peacekeeping*, ¶¶ 1-16, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum & Frauke Lachenmann eds., 2011) (exploring the term "peacekeeping").

20. See S.C. Res. 696, U.N. Doc. S/RES/696 (May 30, 1991) (establishing a peacekeeping mission in Angola); S.C. Res. 976, U.N. Doc. S/RES/976 (Feb. 8, 1995) (establishing another peacekeeping mission in Angola); see also Manuel J. Paulo, *The Role of the United Nations in the Angolan Peace Process*, 15 ACCORD 28 (2004) (describing the different roles the United Nations played in Angola).

21. See S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (establishing a peacekeeping mission in Côte d'Ivoire).

22. See Bothe, *supra* note 19, ¶ 22 (highlighting the Economic Community of West African States).

United States, France, Syria, Lebanon, and Israel.²³ Finally, the Permanent Court of Arbitration has supported the operation of several judicial and quasi-judicial post-conflict commissions, among them are both the Eritrea-Ethiopia Claims Commission and the Eritrea-Ethiopia Boundary Commission. The Eritrea-Ethiopia Claims Commission 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.²⁴ The Eritrea-Ethiopia Boundary Commission was authorized under the same agreement to demarcate the Eritrean-Ethiopian border.²⁵

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.²⁶ The agreement also assigns a role to the ICRC in the implementation of its refugee and displaced person provisions.²⁷

D. *Facilitator Motivations*

Peace facilitators usually do their job voluntarily, despite having no concrete legal duty to do so. It is quite obvious why international and regional organizations 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 international and regional organizations 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 a state with the opportunity to influence the terms of peace agreements in a manner

23. See ISR. MINISTRY OF FOREIGN AFFAIRS, Israel Lebanon Ceasefire Understanding (Apr. 27, 1996), available at http://www.peacemaker.un.org/sites/peacemaker.un.org/files/IL%20LB_960426_Israel-Lebanon%20Ceasefire%20Understanding.pdf [<http://perma.cc/LZD5-6KW5>] (archived Sept. 28, 2014) (establishing the monitoring group).

24. Agreement for the Resettlement of Displaced Persons, as Well as Rehabilitation and Peace Building in Both Countries, Eth.-Eri., art. 5, Dec. 12, 2000, 2138 U.N.T.S. 94, available at <http://www.refworld.org/docid/4a54bbed0.html> [<http://perma.cc/G3AN-XYGB>] (archived Sept. 28, 2014).

25. *Id.* art. 4.

26. See Letter from Madeline F. Albright, Permanent Rep. of the U.S. to the U.N., to Boutros Boutros-Ghali, Annex 1A, art. IX(1), U.N. Doc. S/1995/999 (Nov. 30, 1995), available at http://www.peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf [<http://perma.cc/NBH3-K4F9>] (archived Sept. 29, 2014) [hereinafter Dayton Agreement] (detailing the requirements for prisoner exchange).

27. *Id.* Annex 7, arts. III(2), V.

that serves that state's particular interests, which may range from strengthening economic relations with the Parties to suppressing negative externalities entailed by war.²⁸ Second, undertaking mediation and other facilitation roles can help states gain general international prestige,²⁹ stand out as regional agenda-setters (especially for small and medium-sized states),³⁰ or maintain a dominant position in the global arena (especially for large states).³¹ Third, states 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.³² Finally, states may find non-selfish satisfaction in the promotion of human welfare worldwide.³³

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,³⁴ 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 efforts.

28. See BERCOVITCH, *supra* note 8, at 23 (explaining how states can be influential through mediation); Saadia Touval, *The Superpowers as Mediators, in* MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT 232 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992) (illustrating why superpowers Russia and the United States intervene using mediation); FOREIGN & COMMONWEALTH OFFICE, DEPT FOR INT'L DEV. & MINISTRY OF DEF., BUILDING STABILITY OVERSEAS STRATEGY 7-8 (2011) (U.K.) (detailing why global stability is important to the interests of the United Kingdom).

29. See 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).

30. See MASON & SGUAITAMATTI, *supra* note 11, at 21-22 (describing the advantages for smaller states to undertake mediation roles).

31. See, e.g., Touval, *supra* note 28 (explaining advantages for superpowers).

32. See 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).

33. 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).

34. See *infra* Part V.D.II (discussing ways in which attributing human rights duties to facilitators can undermine peace prospects).

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 Part 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 facilitator influence was Janus-faced: facilitators helped prevent some peace-related injustices and ignored or contributed to others. The cases of Bosnia, Sierra Leone, and Afghanistan point to the need to regulate facilitator activity so as to increase facilitators' motivations to mobilize their influence to promote justice and human rights rather than undermine them.

A. Bosnia

Bosnia and Herzegovina (Bosnia) is home to three major ethnic groups—Bosniaks (Bosnian Muslims), Serbs, and Croats. These groups make up about 44 percent, 31 percent, and 17 percent of the entire population, respectively.³⁵ 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.³⁶ This war lasted three years and eight months, and it was 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 United States, Russia, and the EU. In practice, however, the negotiations were administered and controlled by the U.S.

35. These data are based on the 1991 Yugoslav Population Census, which was the last official census conducted in Bosnia until 2013. See Neslužbeni podaci o strukturi stanovništva predratne BiH [Yugoslav Population Census] (1991), available at <http://josip.purger.com/other/bih/index.htm> [<http://perma.cc/XZT7-FAB9>] (archived Sept. 29, 2014). In 2013, another official census was conducted. However, the final results of this census have not yet been published. The preliminary results do not include any data on ethnic affiliation. See AGENCY FOR STATISTICS OF BOSNIA AND HERZEGOVINA, PRELIMINARY RESULTS OF THE 2013 CENSUS OF POPULATION, HOUSEHOLDS AND DWELLINGS IN BOSNIA AND HERZEGOVINA (2013), available at http://www.bhas.ba/obavjestenja/Preliminarni_rezultati_bos.pdf [<http://perma.cc/62X2-BKPA>] (archived Jan. 19, 2015).

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

government. The U.S. government 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 down to the smallest details.³⁷ As the only superpower in the post-cold war era and with its deep military and economic involvement in devastated, war-torn Yugoslavia, the United States had considerable leverage over the negotiating parties, which it did not hesitate to use in order to induce the parties to make significant concessions and eventually sign the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement).³⁸

From a human rights perspective, the Dayton Agreement included at least two problematic arrangements that were demanded or approved by facilitators, 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.

1. Exclusionary Power-Sharing Arrangements

Annex 4 of the Dayton Agreement 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.³⁹ 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. The constitution 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.⁴⁰ In other words, it adopts a power-sharing formula that bars members of non-

37. See RICHARD HOLBROOKE, TO END A WAR 203–05, 223–24, 240 (1998) (describing U.S. involvement); see also GRO NYSTUEN, ACHIEVING PEACE OR PROTECTING HUMAN RIGHTS?: CONFLICTS BETWEEN NORMS REGARDING ETHNIC DISCRIMINATION IN THE DAYTON PEACE AGREEMENT 12 (2005) (“Although the draft agreement was subject to a certain amount of negotiation . . . many of the core ideas and concepts of the original draft remained.”).

38. See HOLBROOKE, *supra* note 37, at 271–75, 282, 289 (recounting how the mediation with Bosnia took place); see also Daniel Curran et al., *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 NEGOTIATION J. 513 (2004) (describing Holbrooke’s coercive mediation style at Dayton); Touval, *supra* note 9, at 550 (noting United States’ support of Bosnia).

39. See Dayton Agreement, *supra* note 26, Annex 4, art. I(3) (establishing the two entities that make up Bosnia and Herzegovina).

40. *Id.* Annex 4, arts. IV(1)(a), V.

constituent minority groups from being elected to two central political institutions.

In a landmark judgment delivered in 2009, the European Court of Human Rights 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.⁴¹ While the reasoning of the European Court can be criticized,⁴² the European Court 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 in the House of Peoples 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 abolishing the latter’s veto power, which seems to have been crucial for reaching an agreement.⁴³ However, the Parties did not endorse these alternatives, and their demand for strictly ethnic based power-sharing was ultimately accepted by the international facilitators.⁴⁴

2. Imposed Return of Refugees and Displaced Persons

Annex 7 of the Dayton Agreement asserts the unequivocal right of all refugees and IDPs to freely return to their homes.⁴⁵ It also requires that Bosnian authorities ensure that refugees and IDPs are able to return in safety, without risk of persecution or discrimination, and that the choice of destination shall be up to the returnees.⁴⁶ Despite these important protections, however, the Dayton Agreement’s 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

41. See *Sejdić v. Bosnia*, App. Nos. 27996/06 & 34836/06, Eur. Ct. H.R. (2009), ¶¶ 38–56 (ruling that the lack of a declaration of affiliation was an improper discriminatory basis for exclusion).

42. 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 court).

43. See *Sejdić v. Bosnia*, Eur. Ct. H.R., ¶¶ 22, 48 (citing an opinion issued by the European Commission for Democracy through Law [the Venice Commission]).

44. See *id.* ¶ 13 (discussing facilitators’ reluctant acceptance of these arrangements).

45. See Dayton Agreement, *supra* note 26, Annex 7, art. I(1) (giving the right to displaced persons and refugees to return to their homes).

46. *Id.* art. I(2), (4).

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.⁴⁷ Arguably, the Dayton Agreement 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 Dayton Agreement, with its strong emphasis on the right to return, is clearly unsympathetic to any kind of a right to stay.

The Dayton Agreement'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 Dayton Agreement 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.⁴⁸

The second group 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.⁴⁹ 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

47. See ICG BOSNIA PROJECT - REPORT NO. 33, INT'L CRISIS GROUP, MINORITY RETURN OR MASS RELOCATION? i-ii (1998), <http://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/033-minority-return-or-mass-relocation.aspx> (detailing Bosnian displacement).

48. See Dayton Agreement, *supra* note 26, Annex 7, art. I(5) (promoting the early return of refugees).

49. 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) (detailing ethnic return in Bosnia).

allowed members of the local majority group to occupy them.⁵⁰ 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 under Annex 7 of the Dayton Agreement 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.⁵¹

The insistence on return in the Dayton Agreement represents a strategic policy choice of the United States and the EU, who were determined to undo the consequences of ethnic cleansing.⁵² Another important motivation for insisting on refugee return was the unwillingness of host countries, most notably Germany, to permanently absorb them.⁵³ While it is true that demands for recognizing a right to return also came from within the negotiating parties,⁵⁴ 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.⁵⁵ For example, the UN High Commissioner for Refugees, in collaboration with major international donors, implemented the 'open cities' program. The open cities program rewarded local authorities that supported refugee return by allocating them greater funds.⁵⁶ These aid conditionalities had some

50. See Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1101-02 (1997-1998) (describing the use of abandoned property laws).

51. See *id.*; Dayton Agreement, *supra* note 26, Annex 7, art. XII(2).

52. See Rosand, *supra* note 50, at 1110.

53. 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, 453-55 (1998) (describing Germany's response as unique because Germany is "one of only a few countries not to have made provisions for the transferal of status of any Bosnians").

54. See Pauline Neville-Jones, *Dayton, IFOR and Alliance Relations in Bosnia*, 38(4) SURVIVAL 44 (1996) (describing the parties' demands).

55. See James K. Boyce, *Aid Conditionality as a Tool for Peacebuilding: Opportunities and Constraints*, 33 DEV. & CHANGE 1025, 1028-30 (2002) (describing the efforts of international donors to premise aid to Bosnia on refugee return); see also Black, *supra* note 49, at 183 (characterizing aid linkage to Bosnia as "particularly prominent").

56. For a detailed description and analysis of the Open Cities Initiative, see ELIZABETH M. COUSENS & CHARLES K. CATER, *TOWARD PEACE IN BOSNIA:*

success in enabling the safe return of people to areas where they constituted ethnic minorities.⁵⁷ 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 by facilitators to obtain top-down support for a peace agreement with terms that had been largely predetermined by the U.S. government. As American mediator Richard Holbrooke recalls in his memoirs, he selected the site of the Wright-Patterson Air Force Base in Dayton as a venue for the talks mainly because it could be easily "sealed off from the press and all other outsiders."⁵⁸ Washington presented to Balkan leaders several preconditions for hosting the talks, among them that they 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."⁵⁹ 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.⁶⁰ 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.⁶¹

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.⁶² Particularly troubling is the exclusion of groups who were adversely affected by the Dayton Agreement: non-constituent ethnic minorities (e.g., Jews and Roma), refugees, and IDPs. Also problematic is the absence of representatives of Bosnian

IMPLEMENTING THE DAYTON ACCORDS 71, 77–79 (2001); INT'L PEACE INSTITUTE, *supra* note 7, at 15–21.

57. See Boyce, *supra* note 55, at 1026–27 (describing some incidents of success in linking international aid to Bosnia to refugee return).

58. HOLBROOKE, *supra* note 37, at 203.

59. *Id.* at 199–200.

60. See *id.* (describing considerations faced by organizers of the talks concerning who to include).

61. 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.

62. 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) (detailing the exclusion of representatives from Bosnian civil society, particularly women and women's groups, from the negotiations).

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.⁶³ Had women representatives participated in negotiations, they might have been able to incorporate a gender perspective into the Dayton Agreement and ensure that the special experiences and needs of women in Bosnia be adequately addressed.

B. Afghanistan

Afghanistan is a multicultural, highly fragmented state. It is comprised of four main ethno-linguistic groups: Pashtuns, Tajiks, Hazaras, and Uzbeks. Additionally, Afghanistan is host to over a dozen smaller ethno-linguistic minorities, each of which is, itself, divided into numerous tribes and clans.⁶⁴ 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.⁶⁵

In late November 2001, following a U.S.-led military intervention that ousted the Taliban government, representatives of all major Afghan factions met in Bonn, Germany under UN auspices,⁶⁶ and with the active support of the United States,⁶⁷ in order to establish a

63. See *id.* at 150 (arguing that the negotiations failed to recognize the contribution of women's groups and thus excluded them from the international decision making process). For further discussion of the problem of women's exclusion from peace negotiations, see *infra* Part III.B.

64. 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) (detailing the complex cultural divisions between diverse ethno-linguistic groups in Afghanistan).

65. See Ebrahim Afsah & Alexandra Hilal Guhr, *Afghanistan: Building a State to Keep the Peace*, 9 MAX PLANCK Y.B. OF UN LAW 373, 378–79 (2005) (recognizing that, while the main armed formations throughout previous conflicts were divided along ethnic lines, ethnic diversity was not the cause of division).

66. See U.N. Secretary-General, *The Situation in Afghanistan and its Implications for International Peace and Security: Rep. of the Secretary-General*, 2, U.N. Doc. A/56/875-S/2002/278 (Mar. 18, 2002) (describing the organization of the Bonn conference by the United Nations).

67. See MARK FIELDS & RAMSHA AHMED, INST. FOR NAT'L STRATEGIC STUDIES, 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).

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.⁶⁸ Two quite distinctive groups, however, were conspicuously missing from the talks. One was the Taliban, the other: women. Whereas the exclusion of the rogue Taliban leaders from the Bonn talks may be criticized for its political wisdom,⁶⁹ 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 United Nations 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 United States and Russia), in which they discussed the plan for the upcoming peace talks.⁷⁰ 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."⁷¹

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.⁷² This effort led to the

68. See 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).

69. See, e.g., FIELDS & AHMED, *supra* note 67, at 19 (describing and responding to criticisms of the exclusion of the Taliban from negotiations at Bonn).

70. Vadim Polishchuk, *Foreign Ministers of Six Plus Two Groups to Meet UN Envoy on Afghanistan*, AFGHANISTAN NEWS CTR. (Nov. 3, 2001), available at www.afghanistannewscenter.com/news/2001/november/nov312001.html [<http://perma.cc/5TAD-E9PP>] (archived Oct. 6, 2014); see also FIELDS & AHMED, *supra* note 67, at 12–14 (noting that following the six plus two group meeting, which took place on November 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).

71. U.N. SRSG for Afghanistan, Briefing to the Security Council (Nov. 13, 2001), available at <http://www.un.org/News/dh/latest/afghan/brahimi-sc-briefing.htm> [<http://perma.cc/S82X-NP3L>] (archived Oct. 6, 2014).

72. 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

participation of (merely) two women among the twenty-five official Afghan delegates to the talks.⁷³ 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.⁷⁴ 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.⁷⁵ This participation in both conferences allowed 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 Agreement. 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.⁷⁶ 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 Bonn Agreement.⁷⁷ 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.”⁷⁸ However, 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,⁷⁹ however, they

(2002) (noting the pressure for the inclusion of women in the process and the eventual success, as women were included both as delegates and observers).

73. All together, more than fifty delegates from Afghanistan participated in the Bonn talks. See HUSSAIN, *supra* note 68, at 128. However, only twenty-five 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, 7–8, Dec. 5, 2001, available at <http://peacemaker.unlb.org> [<http://perma.cc/GGJ8-7HYT>] (archived Oct. 6, 2014) [hereinafter Bonn Agreement].

74. 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 the United Nations Development Fund for Women. See *Afghan Women's Summit for Democracy*, EQUALITY NOW (Mar. 2002), available at <http://www.equalitynow.org/node/697> [<http://perma.cc/8KUX-GWLR>] (archived Oct. 6, 2014).

75. See Neuwirth, *supra* note 72, at 255.

76. Bonn Agreement, *supra* note 73, at 2.

77. *Id.* Annex IV, at 12.

78. *Id.* art. III(3), at 4.

79. 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).

do not represent anything close to a proportional share of women—out of thirty government members, only two are women.⁸⁰ Even though participation in decision making cannot always guarantee particular outcomes, it is not unlikely 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 Bonn Agreement, the SRSG was asked why only two women were included in the government. He replied briefly that “there were none in the recent times in Afghanistan, so it’s not a bad beginning.”⁸¹ On another occasion he suggested that Afghan women did not and should not have expected more than they got,⁸² adding:

[W]e have 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.⁸³

The SRSG’s answers should trouble anyone concerned with the fair representation of women in the government. Not only do the answers 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

80. One woman was appointed Vice-Chair (one of five) and Minister of Women Affairs, and the other Minister of Health. See Bonn Agreement, *supra* note 73, Annex IV, at 12 (listing the positions and who occupies them).

81. Press briefing by Mr. Lakhdar Brahimi, SRSG for Afghanistan and Mr. Joschka Fischer, Minister of Foreign Affairs of the FR of Germany, UNITED NATIONS NEWS CTR. (Dec. 5, 2001), <http://www.un.org/apps/news/infocus/afghanistan/infocusnews.asp?NewsID=88&slID=1> [<http://perma.cc/4GWS-N7JS>] (archived Oct. 7, 2014).

82. 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. Mary Sack & Cyrus Samii, *An Interview with Lakhdar Brahimi*, 58 J. INT’L AFF. 239, 245 (2004). 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.” *Id.*

83. *Id.* at 246 (emphasis added).

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.⁸⁴ Against this backdrop, the underrepresentation 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.⁸⁵ Brahimi may also be right in proposing that 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.⁸⁶ 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.⁸⁷

Despite all these problems and excuses, however, it is hard to be satisfied with the Bonn Agreement's treatment of women's right to equality. This is particularly true in view of the fact that the Bonn

84. See AMNESTY INT'L, WOMEN IN AFGHANISTAN: A HUMAN RIGHTS CATASTROPHE 1-2 (Nov. 3, 1995), available at <http://www.amnesty.org/en/library/asset/ASA11/003/1995/en/942a70a6-eb60-11dd-b8d6-03683db9c805/asa110031995en.pdf> [<http://perma.cc/B7GF-2GMX>] (archived Nov. 5, 2014) (detailing the history of women in Afghanistan and how these discriminatory practices began); 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, 5-7 (2003).

85. 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 percent of Afghan 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 11 (Oct. 2004), available at <http://www.hrw.org/legacy/backgrounder/asia/afghanistan1004/afghanistan1004.pdf> [<http://perma.cc/7CVX-7R78>] (archived Oct. 14, 2014).

86. See Sack & Samii, *supra* note 82, at 246. For similar views expressed in Afghan feminist scholarship, see 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, 244-45* (Helen Durham & Tracey Gurd eds., 2005).

87. See Bonn Agreement, *supra* note 73, art. I(1), at 3 (establishing an interim government). 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.

process took place only one year after the adoption of the landmark UN Security Council Resolution 1325 on Women, Peace and Security. Stressing “the importance of [women’s] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security,”⁸⁸ this resolution calls upon member states to ensure increased representation of women in conflict resolution processes and to adopt a gender perspective when negotiating peace agreements.⁸⁹ One might have expected that the United Nations 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.⁹⁰ 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 United Nations’ 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 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.⁹¹ 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.⁹²

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

89. *Id.* paras. 1, 8.

90. See, e.g., Hilary Charlesworth & Christine Chinkin, *Editorial Comment: Sex, Gender, and September 11*, 96 AM. J. INT’L. L. 600, 602–03 (2002) (describing the history of the intervention).

91. See Dena Montague, *The Business of War and the Prospects for Peace in Sierra Leone*, 9 BROWN J. WORLD AFF. 229, 230–31 (2002) (detailing the history of the RUF).

92. See HUM. RTS. WATCH, *GETTING AWAY WITH MURDER, MUTILATION, AND RAPE: NEW TESTIMONY FROM SIERRA LEONE* pt. IV (1999), available at

In May 1999 the President of Sierra Leone Ahmad Kabbah met in Lomé, Togo, with representatives of the RUF to negotiate a peace agreement. An international committee headed by Togolese Foreign Minister Joseph Koffigo on behalf of ECOWAS, and Special Envoy Francis Okelo on behalf of the United Nations, mediated the negotiations. International participants also included representatives of the Organization of African Unity, the United States, and the UK.⁹³

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.⁹⁴ 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.⁹⁵ At this meeting, Kabbah explicitly stated that the government would not agree to power-sharing with the RUF.⁹⁶

Eventually, however, the Peace Agreement between the Government of Sierra Leone and the RUF (Lomé Agreement) did provide for power-sharing with the RUF, which was allocated four out of eighteen ministerial posts as well as four deputy ministerial positions.⁹⁷ In addition, the Lomé 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.⁹⁸ 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."⁹⁹ This power-sharing formula was supported by all the international facilitators, who believed that it would be impossible to put an end to the conflict without conceding to some of the RUF's core demands.

<http://www.hrw.org/reports/1999/sierra/> [<http://perma.cc/WDN7-RLEE>] (archived Oct. 14, 2014) (discussing implementation of the agreement); David Lord, *The Struggle for Power and Peace in Sierra Leone*, 9 ACCORD 10 (2000). For background literature on the Sierra Leonean conflict and peace process, see generally HIRSCH, *supra* note 29; DAVID KEEN, *CONFLICT AND COLLUSION IN SIERRA LEONE* (2005).

93. See Ismail Rashid, *The Lomé Peace Negotiations*, 9 ACCORD 26, 29 (2000) (detailing the setup behind the Lomé negotiations).

94. See HIRSCH, *supra* note 29, at 81.

95. *Id.* at 80.

96. *Id.*

97. 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* <http://peacemaker.unlb.org> [<http://perma.cc/GGJ8-7HYT>] (archived Oct. 6, 2014) [hereinafter Lomé Agreement].

98. *Id.* art. V(2).

99. *Id.*

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 that received little support outside Sierra Leone.¹⁰⁰

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.¹⁰¹ In an unprecedented step, UN Special Envoy Okelo, following instructions from above, announced the United Nations' objection to the Lomé Agreement's amnesty provisions. Okelo signed the Lomé Agreement on behalf of the United Nations but added a handwritten reservation to the agreement declaring that the United Nations could not endorse any amnesty for genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law.¹⁰² 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 Lomé Agreement.¹⁰³

How should we evaluate the United Nations' approach to justice issues in Sierra Leone? On the one hand, the United Nations might have been expected to not only add a belated reservation to the Lomé Agreement but also 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.

100. See, e.g., Rashid, *supra* note 93, at 27 (detailing the battle between the RUF and the ECOMOG).

101. *Id.* art. IX. It should be noted, however, that the Lomé Agreement 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 *id.* art. XXVI(2). 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. In Sierra Leone, however, amnesty was unconditional and cooperation with the TRC was completely voluntary. See Promotion of National Unity and Reconciliation Act, No. 34 of 1995, §§ 16–22 (1995) (S. Afr.).

102. See 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).

103. 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).

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 advancing sustainable peace in Sierra Leone. On the other hand, it is possible that the RUF would not have signed the Lomé Agreement without these concessions.¹⁰⁴ Moreover, as things evolved in Sierra Leone, the 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 United Nations and the government of Sierra Leone.¹⁰⁵ It seems, then, that by generally endorsing the Lomé Agreement, including its power-sharing provisions, while at the same time rejecting its blanket amnesty, the United Nations struck a reasonable balance between justice considerations and political constraints. It is also possible, however, that a better informed and planned position of the United Nations, 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 United States 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

104. See Laura R. Hall & Naha Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 293–94 (2003) (discussing Sierra Leone peace process and implications of amnesty); see also Helga Malmin Binningsbø & Kendra Dupuy, *Using Power-Sharing to Win a War: The Implementation of the Lomé Agreement in Sierra Leone*, 44 AFR. SPECTRUM, no. 3, 2009, at 87, 96 (contending that granting the CMRRD chairmanship to Foday Sankoh, 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").

105. Malmin Binningsbø & Dupuy, *supra* note 104, at 88–89.

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.¹⁰⁶

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.

Finally, in Sierra Leone, the United Nations endorsed a peace agreement that allowed the RUF leaders to sit in the government and enjoy the fruits of their brutal aggression. At the same time, however, the United Nations 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 United Nations later 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 circumstances of Sierra Leone, allowed the United Nations to limit the negative impact of an injurious arrangement that it could arguably not prevent from being adopted.

To conclude, facilitators' actual, and potential, roles in peace processes vary widely among countries and conflicts and depending on the identity, skills, and resources of facilitators. Yet, a close analysis of these three different peace processes shows that in quite different settings facilitator choices have had remarkable 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, the next two Parts offer a theoretical justification for such regulation.

106. See Dayton Agreement, *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").

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 international organizations' legal responsibilities. Existing international law recognizes the duty of states to protect and promote the human rights of their own citizens¹⁰⁷ as well as the duty of states to protect non-citizens from certain forms of serious abuse by their respective governments.¹⁰⁸ It is also generally accepted today that international organizations are under a duty to prevent and remedy human rights violations conducted by their own personnel.¹⁰⁹ By contrast, the idea that international organizations and states may also have a duty to ensure that other states are not engaged 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,

107. See, e.g., International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Each State . . . undertakes to respect and ensure all individuals within its own territory . . . the rights recognized in the present Covenant."); International Covenant on Economic, Social and Cultural Rights pt. 2, art. 4, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of all Forms of Racial Discrimination art. 2, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD] ("Each State shall prohibit and bring to an end . . . racial discrimination . . ."); Convention on the Elimination of all Forms of Discrimination Against Women pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] ("[T]he States . . . have the obligation to ensure the equal rights of men and women . . ."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; American Convention on Human Rights pt. 1, art. 1, Nov. 21, 1969, 1144 U.N.T.S.143 [hereinafter ACHR]; African Charter on Human and Peoples' Rights art. 1, June 27, 1981, 21 I.L.M. 58 ("The Member States . . . shall recognize the rights, duties, and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.").

108. See, e.g., Convention Relating to the Status of Refugees art. 1, 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 [hereinafter Genocide Convention] (circumscribing the duty of states to prevent genocide); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. v. Serb.), 2007 I.C.J. 43, 120 (Feb. 26) [hereinafter Bosnian Genocide Case] (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).

109. See 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, 129 (2010) (explaining a two-prong test for liability of international organizations).

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 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 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 duty-bound to respect and protect the human rights of its people. Third, the "human" model 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. This Article asserts 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 view of their potential contribution to peace injustices, as well as their greater ability to prevent such injustices, facilitator states and international organizations (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 is assumed to have its origins in the 1648 Peace of Westphalia. This model 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. 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.¹¹⁰ Upon its establishment in 1945, the United Nations formally endorsed the Westphalian notions of sovereignty and non-intervention.¹¹¹ The UN Charter states that the United Nations 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.”¹¹² 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 United Nations as an organization, the Declaration on Friendly Relations among States 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.¹¹³ Similarly broad interpretations of the principle of non-intervention can be found in the constitutive documents of some regional peace and security

110. See Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L L. 20, 20 (1948) (describing the Peace of Westphalia's establishment of “untrammelled” internal State sovereignty); David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 3–4 (2002) (explaining the emergence and characteristics of classical state sovereignty).

111. Cf. LUKE GLANVILLE, *SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY* 132 (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).

112. U.N. Charter art. 2, ¶¶ 1, 7.

113. See G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (declaring limitations on intervention).

organizations.¹¹⁴ In the case of *Nicaragua v. 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."¹¹⁵ The ICJ considered that these matters included the choice of political, economic, social, and cultural systems, and the formulation of foreign policy.¹¹⁶

However, while the right to non-intervention has been formally embedded in key treaties, judicial decisions, and UN resolutions, at the same time 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 a state's own borders.¹¹⁷ These legal developments have most notably been associated with the emergence of international human rights law. The main purpose of international human rights law is to ensure that state governments will not use their power to abuse their

114. See, e.g., Charter of the Organization of American States arts. 19–20, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361 (stipulating that States may not intervene in, or use coercion against, another State's affairs); Conference on Security and Cooperation in Europe Final Act princ. VI, Aug. 1, 1975, 14 I.L.M. 1292 ("The participating States will refrain from any intervention, direct or indirect . . ."); Constitutive Act of the African Union art. 4(g), July 11, 2000 (stating that its principles include the "non-interference by any Member State in the internal affairs of another").

115. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 205 (June 27).

116. *Id.*

117. 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 HUM. RTS. L. REV. 1, 3 (2012) (clarifying the legal status of responsibility to protect). 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, arts. 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).

citizens and, moreover, that state governments will take positive measures to protect and promote human rights for their citizens. 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.¹¹⁸ To give one more example, the so-called law on democratic governance—which, at 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.¹¹⁹

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 genocide¹²⁰ and perhaps also of ethnic cleansing, crimes against humanity, and war crimes.¹²¹ In

118. *E.g.*, Rome Statute of the International Criminal Court pts. II, IX, U.N. Doc. A/CONF.183/9 (July 17, 1998); Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 1–10, S.C. Res. 827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda arts. 1–10, S.C. Res. 955 (Nov. 8, 1994); *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”).

119. *See* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (describing the emerging role of democratic governance on the global stage); Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 48, 50 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter DEMOCRATIC GOVERNANCE] (examining the influence of democratic governance processes on participation in international law).

120. As noted above, in the 2007 Bosnian Genocide 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* Bosnian Genocide Case, *supra* note 108.

121. 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.” 2005 World Summit Outcome, G.A. Res.60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (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

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,¹²² 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 and 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.¹²³

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 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

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), U.N. 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.

122. 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. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE, *supra* note 119, at 239, 243.

123. See, e.g., Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 LAW & CONTEMP. PROBS. 490, 505–06 (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, 181 (Mark Lattimer & Philippe Sands 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).

addressing domestic affairs seem to be turning away from consent-based justifications for intervention. Instead, these efforts 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.¹²⁴ Rather, the mandate of a state to pursue its national policies 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. This Article argues, however, that even the concept of popular sovereignty does not provide adequate justification for international intervention in domestic affairs. Human sovereignty 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, a government is bound to act as a trustee of its people—it must use its power for no other purpose than to promote the collective interests of the 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.¹²⁵

124. See SEYLA BENHABIB, *ANOTHER COSMOPOLITANISM* 13, 16 (Robert Post ed., 2006) (arguing that international human rights law signals a developing trend in international law from a treaty-based model 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) (“The 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.”).

125. See Kofi A. Annan, *Two Concepts of Sovereignty*, *ECONOMIST*, Sept. 18, 1999 (“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*

The concept of popular sovereignty has its roots in the writings of seventeenth century philosophers such as Hugo Grotius and John Locke.¹²⁶ 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* have 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.¹²⁷ 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."¹²⁸ While this Article does not concur with Walzer's non-interventionist approach, it accepts 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, sovereignty of the people entails that the domestic failures of a government should only be corrected by domestic mechanisms that are designed to reinforce

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").

126. See generally 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).

127. 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." Michael Byers & Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE, *supra* note 119, at 259, 269.

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

the popular will, such as elections and judicial review.¹²⁹ 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.¹³⁰

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 a government's internal and international legitimacy. The next section presents 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.¹³¹ Like the popular sovereignty model, the human sovereignty model rejects the

129. See, e.g., Kahn, *supra* note 124, at 3.

130. See John Stuart Mill, *A Few Words on Non-Intervention*, in *DISSERTATIONS AND DISCUSSIONS* III 252–64 (1873) (“[L]iberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent.”); see also MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 87–88 (1977) (discussing Mill’s argument regarding self-determination).

131. This construction of sovereignty draws heavily on Eyal Benvenisti’s recent account of sovereignty as trusteeship of humanity. Note, however, that 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, on the other hand, 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, 314 (2013). For other recent accounts that seek to establish a humanity-oriented understanding of sovereignty, see Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 *EUR. J. INT’L L.* 513, 533 (2009) (offering a “humanized understanding of state sovereignty”); ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM 2* (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”).

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

For historical, practical, and other reasons, the duties of governments toward humanity are divided among 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.¹³³ 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.¹³⁴

It is the task of international law to define exactly how a government's 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.¹³⁵

132. See Benvenisti, *supra* note 131, at 296.

133. 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.*

134. 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 7–16 (Dec. 2001).

135. See *supra* note 118.

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 exists for a state only when it properly protects the human rights of its citizens such that the fiduciary duties owed by the state concerned, as well as by other states, toward these people are satisfied.

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 also is more compatible with basic principles of global justice. In particular, the human sovereignty model finds support in the principles of the shared ownership of all human beings over the world’s natural resources and 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, has been comprehensively discussed elsewhere.¹³⁶ The following paragraphs briefly summarize those principles, while beginning to explain the relevance of the principles 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.”¹³⁷ In this state, so goes the classic social contract theory, people could not really enjoy unlimited rights to use the world’s resources because of the threat of an “all against all” war.¹³⁸ People therefore opted to vest in a common government the power to create and enforce laws that limit their individual rights but also secure them.¹³⁹ To fulfill this task, however, a government must exercise supreme control over the territory inhabited by its subjects¹⁴⁰ and must also limit the size of

136. See Benvenisti, *supra* note 131, at 305–12.

137. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT ch. V, § 25 (1689); see also EMMERICH DE VATTTEL, THE LAW OF NATIONS Book I § 203 (1758) (“The earth belongs to mankind in general; destined by the Creator to be their common habitation . . .”).

138. See THOMAS HOBBS, LEVIATHAN ch. 14 (1651) (theorizing that the human condition can be reduced to “war of every one against every one”).

139. See *id.*

140. See HENRY SIDGWICK, THE ELEMENTS OF POLITICS 252 (4th ed. 1919).

the population under its control.¹⁴¹ 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."¹⁴² In accordance with this regulatory decision, the authority of each government over the territory allocated to it depends on two conditions. The first condition the government must satisfy is 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. The second is 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 protect the interests of those other people.

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.¹⁴³ Liberal nationalists, on the other hand, contend that the principle of equal concern can best be implemented within the framework of democratic nation-states.¹⁴⁴ Despite possible tensions between them,¹⁴⁵ the two political positions represented by these

141. Limitations on the size of states' populations are apparently indispensable for governments to fulfill their tasks effectively. See Benvenisti, *supra* note 131, at 306; *supra* text accompanying note 131.

142. Benvenisti, *supra* note 131, at 309; see also Patrick Macklem, *What is International Human Rights Law?*, 52 MCGILL L.J. 575, 585 (2007) ("[I]nternational 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.").

143. See, e.g., Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48 (1992) ("[T]he ultimate units of concern are human beings . . . rather than . . . states."); Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in NOMOS XLI: GLOBAL JUSTICE 12 (Ian Shapiro & Lea Brilmayer eds., 1999) (arguing that people are more important than states); David Held, *Restructuring Global Governance* 37 MILLENNIUM 535, 535 (2009) (suggesting that states should be judged by their ability to deliver equal liberty and social justice).

144. See, e.g., Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 113 (2005) ("[T]he nation-state is the locus of political legitimacy and the pursuit of justice . . .").

145. 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 toward 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. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY? 2 (Joshua Cohen ed., 1996). On the more

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.¹⁴⁶ 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.¹⁴⁷ Addressing this question is important for delineating the scope of state responsibilities in different situations. In 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 this principle. Human sovereignty 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.

practical level, David Miller has raised the concern that in some cases global human rights protection may impose on the better-off society considerable costs 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. DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* 274 (2007).

146. See 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 toward humanity at large are compatible with non-instrumental particular obligations); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 169 (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).

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

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

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.¹⁴⁸ 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 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 have a strong moral and practical appeal in many 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.¹⁴⁹ 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.¹⁵⁰ 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.”¹⁵¹ The contribution and capacity criteria are, of course, not free from problems,¹⁵² and, as noted above, they are not applicable in all

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

149. See David Miller, *Distributing Responsibilities*, 9 *J. POL. PHIL.* 453, 455–60 (2001) (illustrating the normative interplay of causation, justification, and responsibility for harm).

150. *Id.* at 460–61 (2001).

151. *Bosnian Genocide Case*, *supra* note 108, at ¶ 430.

152. 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

instances where a collective responsibility to protect should exist.¹⁵³ However, as will be elaborated in the next section, in the context of peacemaking both criteria clearly point to peace 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 international organizations. 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 international organizations.¹⁵⁴ However, assigning collective responsibilities to international organizations can only offer a partial solution to problems of inaction at the international level. The reason for that is that international organizations 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 international organizations does not release states from their original responsibility.¹⁵⁵

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.

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

154. See, e.g., Bruce M. Russett & John D. Sullivan, *Collective Goods and International Organization*, 25 INT'L ORG. 845, 846 (1971) (drawing on Mancur Olson's THE LOGIC OF COLLECTIVE ACTION to explain the development of international organizations); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONF. RES. 3, 3 (1998) (asserting that international organizations help states obtain public goods through their centralized structure as well as their independence).

155. See *Bosnian Genocide Case*, *supra* note 108, ¶ 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. *Id.* 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, 401 (2005-06) (asserting that states should be held accountable for the acts of an international organization of which they are members).

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. These governments must represent the interests of all their citizens in a fair and equitable manner while making sure that their human rights are adequately protected. At the same time, all the world's governments bear the responsibility to ensure that the Parties 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 international organization facilitators that inherit from member states the responsibilities associated with the power to make peace.

Both the potential contributions of facilitators to peace injustices, and their special capacity to prevent them, are demonstrated in the cases analyzed above in Part III. With regards to contribution, 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 minorities from participating in key political institutions, and 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 United Nations, 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. The United Nations helped 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 United Nations 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 United States 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.¹⁵⁶ Conditioning such financial assistance upon negotiators' compliance with human rights norms does not involve any additional 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 assistance¹⁵⁷—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

156. See Forman & Patrick, *supra* note 15, at 1 (noting that the in the 1990s, the international community promised \$100 billion in aid to thirty-six countries recovering from violent conflicts).

157. See ACHIM WENNMANN, *THE POLITICAL ECONOMY OF PEACEMAKING* 1 (2010) (discussing the integration of a "political economy perspective into peacemaking").

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 their choice 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.¹⁵⁸ 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,¹⁵⁹ to convince them that adherence to justice requirements is in their best interest. At 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

158. See *supra* Part II.C (defining the role of peacekeepers in the international community).

159. See *supra* Part II.A (defining the role of mediators in the international community).

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 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).¹⁶⁰

In any event, it is important to bear in mind that while military sanctions, economic sanctions, recognition sanctions, and conditionalities can all induce negotiating governments to respect human rights, they may also have serious adverse effects 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. This Article argues that these principles of proportionality, restraint, and flexibility should apply not only to the secondary human rights duties of facilitators but

160. Traditionally, the main criterion for the recognition of states/governments and their territorial claims was that of effective control. See Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 607-08 (1941); Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L.Q. 545, 546-47 (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 has been posed as a condition for the recognition of new states in Eastern and Central Europe and their admission to international organizations. See, e.g., Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Dec. 16, 1991, 31 I.L.M. 1486 (recognizing "new states in Eastern Europe and the Soviet Union"); Declaration on Yugoslavia, Dec. 16, 1991, 31 I.L.M. 1485 (recognizing the independence of all Yugoslav republics); 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.

also to the primary human rights duties of the Parties, which are the duties that facilitators are supposed 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 apply to peace negotiators under existing international law, and which duties should apply to them as a matter of *lex ferenda*, is a complex one and cannot be fully addressed within the confines of this Article. This section, however, mentions 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, Parties cannot adopt an agreement that provides for the collective punishment of a group whose members were allegedly involved in illegal fighting. Parties 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, grave breaches of international humanitarian law norms.¹⁶¹

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, some legal experts have convincingly argued that certain types of involuntary peace-induced population transfers—including

161. See Genocide Convention, *supra* note 108 (“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–48, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Convention to Protect Civilians], available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument> [http://perma.cc/LD6K-WAL3] (archived Sept. 26, 2014) (listing grave breaches that must be punished).

post-World Wars-style expulsions of ethnic minorities¹⁶² and Triangle-style transfers of populated territories¹⁶³—essentially violate a range of well-established human rights, including the rights to dignity, equality, and freedom of movement.¹⁶⁴ However, in the absence of explicit prohibition on peacetime transfers (as opposed to wartime transfers¹⁶⁵), their illegality might be successfully contested by negotiators. It therefore seems desirable to put in place an explicit prohibition on those types of peacetime population transfers that appear to be incompatible with 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 *Sejdić v. Bosnia* can provide some guidance on this matter;¹⁶⁶ 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 articulate explicit rules on power-sharing which may refer, *inter alia*, to their legitimate scope and to the mechanisms through which they may be adopted and replaced.

However, rather than focusing on the substantive contents of peace agreements, it seems preferable to direct the bulk of

162. 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 with Turkey art. 142, July 24, 1923, 28 L.N.T.S. 11. 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–Aug. 2, 1945, art. XIII, reprinted in 39 AM. J. INT'L L. 245 (1945), available at http://www.trumanlibrary.org/calendar/travel_log/documents/index.php?pagenumber=119&documentid=17&documentdate=1945-08-07&studycollectionid=TL&nav=ok [<http://perma.cc/AG8D-QL6E>] (archived Sept. 26, 2014).

163. See Ravid, *supra* note 5 (examining a possible peace deal under which the Little Triangle and Wadi Ara are transferred from Israel to Palestine).

164. See 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); Eyal Benvenisti, *Lieberman, The State Exists to Serve Its Citizens*, HAARETZ (Apr. 2, 2014), <http://www.haaretz.com/opinion/.premium-1.583258> [<http://perma.cc/SVX2-Y9VV>] (archived Sept. 26, 2014) (asserting the illegality of the transfer of the Triangle area to Palestine); Aeyal Gross, *Population Dump: Is Lieberman's Plan to Redraw Israeli Demographics Legal?* HAARETZ (Mar. 29, 2014), <http://www.haaretz.com/opinion/.premium-1.582613> [<http://perma.cc/G2EX-YHDX>] (archived Sept. 26, 2014) (analyzing the legality of the plan to redraw Israeli borders).

165. Wartime population transfers are explicitly prohibited under the Fourth Geneva Convention. See Convention to Protect Civilians, *supra* note 161, art. 49.

166. See *Sejdić v. Bosnia*, App. Nos. 27996/06 & 34836/06, Eur. Ct. H.R. (2009).

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 incorporation of procedural justice standards into peace negotiations. Procedural justice standards such as participation, transparency, and reason-giving can offer opportunities to affected stakeholders to present their views and preferences and have them considered by negotiators. As this Article argues, 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.¹⁶⁷ 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.¹⁶⁸

At present, the only international legal instrument that directly addresses peace negotiations and introduces into them procedural justice requirements is the Security Council Resolution 1325 (2000). As noted earlier, Resolution 1325 urges member states to ensure “increased representation” of women in conflict resolution processes.¹⁶⁹ This groundbreaking resolution 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.¹⁷⁰

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

167. See *infra* Part V.D.1.

168. See *infra* Part V.D.2.

169. See S.C. Res. 1325, *supra* note 88.

170. It is worth mentioning that the UN Guiding Principles on Internal Displacement, despite having no binding power, have made an important step toward acknowledging IDPs participation rights. These principles assert that IDPs should be able to fully participate in the planning of their return or resettlement, but the principles do not explicitly refer to peace processes. See U.N. Secretary-General Representative, Guiding Principles on Internal Displacement, princ. 28, UN Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

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.¹⁷¹ At the same time, third party facilitating roles, in particular mediation, are also being increasingly assumed by NGOs and other non-state actors.¹⁷² 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 state negotiators, given the similar powers that they exercise. In fact, in some cases—Sierra Leone being an example—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.¹⁷³ The underlying assumption is that where armed opposition is strong, the government is relatively weak and may not be able to effectively protect its citizens. Applying international legal constraints directly to non-state belligerents can therefore improve the protection granted to vulnerable populations.¹⁷⁴

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

171. See CHRISTINE BELL, *ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA* 308 (2008) (estimating that 91 percent of the peace agreements signed since 1990 are intra-state agreements). While the fact that most contemporary peace agreements involve non-state actors surely has to do with the fact that most contemporary conflicts involve such actors, it is worth noting that the parties to the conflict are not always identical to the parties that negotiate and sign the peace agreement.

172. See *supra* Part II (noting the growing involvement of non-state facilitators in peace negotiations).

173. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, common art. 3, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 (extending provisions of Geneva Convention to conflicts non-international in nature).

174. See THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 39 (1987) (“Article 3 should be construed as imposing direct obligations on forces fighting the government.”); LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 34 (2002) (noting the trend in international practice “to diminish the relevance between the law applicable to international and internal armed conflicts”).

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.¹⁷⁵

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 acting as mediators 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 inter-governmental organizations like the United Nations). 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 international organizations rather than non-state actors. Second, as we will see in Part VI, in recent years non-state facilitators have

175. Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in *KRISENSICHERUNG UND HUMANITÄRE SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift für Dieter Fleck 587* (Horst Fischer et al. eds., 2004).

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 Parties and undermine their 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 like few or no other areas of domestic policymaking are.¹⁷⁶ Peace processes 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.'"¹⁷⁷ 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. Facilitators, by contrast, are usually developed states or international organizations

176. 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).

177. 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'").

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 inequalities between developed and developing countries in the enjoyment of the right to self-determination. Moreover, it is not unlikely that developed countries acting as peace facilitators will take advantage of their 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 developed countries, as was the case in Bosnia, but refrain from effective enforcement of the same norm when most refugees are concentrated in developing countries. A counterargument is that regulation can do precisely the opposite, that is, 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.¹⁷⁸ 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. Self-determination

178. For a discussion on the internal dimension of the right to self-determination, see Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225, 225–227 (Christian Tomuschat ed., 1993) (discussing internal self-determination as a legal principle); Jean Salmon, *Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?*, in MODERN LAW OF SELF-DETERMINATION (examining the right to self-determination through the principle of democratic legitimacy); Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION (relating self-determination to federalism); Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus*, 16 MICH. J. INT'L L. 733 (1995). For an illuminating discussion of the tension between external and internal self-determination, see 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 257–60 (2002) (purporting to eschew this tension by offering a relational conceptualization of self-determination, which entails that self-determination is about non-domination, as opposed to non-interference).

concerns should instead 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 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.¹⁷⁹ 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 international organization 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.¹⁸⁰ 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. Procedural justice measures such as participation and

179. See *supra* Part II.D (discussing facilitator motivations).

180. See *supra* note 104 and accompanying text.

transparency can be used by 'spoilers' to stall negotiations¹⁸¹ and can make it hard for negotiators to demonstrate their willingness to make painful concessions. They may also 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.¹⁸² 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.¹⁸³ Explicit substantive constraints, in turn, can help the parties reach an agreement by providing an "objective standard" which they cannot dispute.¹⁸⁴ In the long term, both procedural and substantive constraints can contribute to the sustainability of peace by increasing peace's perceived legitimacy and public acceptance, and by reducing the incentives of discriminated-against groups to resort to violence.¹⁸⁵ 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.

181. See Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SEC. 5 (1997) (examining the problem of spoilers in peace negotiations).

182. 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 JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996) (discussing the rule of law and possible scenarios of democracy in various postindustrial societies); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 273-339 (Thomas McCarthy trans., 1981) (reflecting on social action, purposive activity, and communication).

183. See *BARRIERS TO CONFLICT RESOLUTION* pt II (Kenneth J. Arrow et al. eds., 1995) (discussing cognitive biases and other psychological barriers to dispute resolution).

184. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81-94 (2d ed. 1991) (outlining the case for using objective criteria).

185. On the connection between procedural justice and outcome acceptance, see ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* ch. 7 (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (discussing the positive impact of procedural justice on compliance with the law).

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

The foregoing discussion offers a starting point for international lawmakers to develop norms that clarify and further develop the primary human rights obligations of peace negotiators, as well as norms that 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 associated with 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.¹⁸⁶ A government therefore will normally agree to join a treaty that limits its discretion only if the benefits that it draws 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, a state may

186. 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 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.").

decide to ratify a treaty that regulates domestic affairs in order to promote its general international reputation. Oona Hathaway suggests that such considerations provide a major explanation for the wide ratification of human rights treaties.¹⁸⁷ 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. International Organization 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 international organization organ is authorized under the constitutive document of the organization to make decisions that are applicable to all member states. Among all existing IO organs, the most serious candidates for creating 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.¹⁸⁸ 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.”¹⁸⁹ While SC recommendations are,

187. See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (discussing the circumstances which influence a country’s decision to join international treaties).

188. See U.N. Charter, *supra* note 112, art. 24(1) (delineating responsibility of Security Council).

189. See *id.* art. 39 (delineating responsibility of Security Council).

as their name suggests, merely hortatory, its decisions are binding upon member states.¹⁹⁰ 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 across conflicts.¹⁹¹ The language of a few of these resolutions suggests that they are intended to create binding obligations for states.¹⁹² Others are formulated as mere recommendations. Among the latter, one can find Resolution 1325, which calls upon member states and the UN Secretary General to promote the participation of women in peace processes.¹⁹³ The growing tendency of the SC to adopt thematic decisions, including decisions addressing the responsibilities of peace negotiators and facilitators, suggests that the SC 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.¹⁹⁴ 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.¹⁹⁵ 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 experts¹⁹⁶ and non-governmental organizations¹⁹⁷ have

190. See *id.* arts. 25, 48(1), 103 (asserting Member States’ obligation to comply with SC resolutions).

191. For an overview of this phenomenon, see Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002) (discussing the Security Council’s legislative turn in the context of counterterrorist measures); Cora True-Frost, *The Security Council and Norm Consumption*, 40 NYU J. INT’L L. & POL. 115 (2007).

192. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (using decisive language to impose counterterrorist duties upon states); S.C. Res. 1540, UN Doc. S/RES/1540 (Apr. 28, 2004) (imposing various anti-terror measures upon states).

193. See *supra* note 88 and accompanying text.

194. See U.N. Charter, *supra* note 112, arts. 1, 10 (providing the purpose of the Charter and process for questions or recommendations to the Members or Security Council).

195. See *id.* art. 13(1) (outlining when the General Assembly can initiate studies and make recommendations).

196. See, e.g., JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 304–10 (2005) (discussing the International Law Commission’s influence on the GA).

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.¹⁹⁸ A close examination of the 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 United Nations.

C. Intra-Organizational Codes of Conduct

Much of the activity of international organizations and transnational NGOs is regulated by internal guidelines, policies, or "codes of conduct" that they adopt through relatively simple and fast standard-setting processes.¹⁹⁹ A few such instruments have been put in place by peace facilitating organizations that address justice issues in peace processes. For example, shortly after he instructed his

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

198. See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/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 several other reports and declarations. See Special Rapporteur on Human Rights and Population Transfer, *Draft Declaration on Population Transfer and the Implantation of Settlers*, E/CN.4/Sub.2/1997/23 (June 27, 1997) (by Mr. Al-Khasawneh) (declaring standards on transfer of populations in all situations, peacetime and distress); Special Rapporteur on Amnesty, *Final Rep. 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) (by Louis Joinet) (discussing the study on impunity of perpetrators of human rights violations); U.N. Secretary-General on Internally Displaced Persons, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (by Francis M. Deng) (stating the rights of IDPs); United Nations, Econ. & Soc. Council, Comm'n on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by the independent expert Diane F. Orentlicher) (reaffirming commitment to human rights by combatting impunity); Special Rapporteur, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) (by Paulo Sérgio Pinherio) (detailing a progress report regarding property restitution for refugees).

199. See Mary Kay Gugerty, *The Effectiveness of NGO Self-Regulation: Theory and Evidence from Africa*, 28 PUB. ADMIN. & DEV. 105 (2008) (discussing self-regulation by NGOs involved in policy making in Africa).

special envoy to sign the Lomé Agreement with a reservation about the legality of its amnesty provision,²⁰⁰ 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.”²⁰¹

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.²⁰² 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.²⁰³

Finally, several financial aid agencies have adopted internal organizational policies that condition their assistance on the “good governance” of recipient 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.²⁰⁴

200. See *supra* note 102 and accompanying text.

201. Press Release, Secretary-General Comments on Guidelines Given to Envoys, U.N. Press Release SG/SM/7257 (Dec. 10, 1999) (noting the comments of Secretary-General Kofi Annan). 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*, 6, U.N. Doc. A/66/811 (June 25, 2012) (emphasizing the role of mediation in settlement disputes).

202. PRISCILLA HAYNER, CTR. FOR HUMANITARIAN DIALOGUE & THE INT’L CTR. FOR TRANSITIONAL JUSTICE, *NEGOTIATING JUSTICE: GUIDELINES FOR MEDIATORS* 20 (2009).

203. See *id.* at 21 (emphasizing that the mediator should provide clear guidance to parties).

204. See World Bank Operational Manual, Operational Policy (OP) 4.01 (Jan. 1999) (*rev’d* Apr. 2013), <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> [<http://perma.cc/3DV3-RMH3>] (archived Sept. 29, 2014) (describing the environmental assessment process); see also

The European Union, too, has adopted development aid policies that emphasize the importance of civil society participation in decision making relating to development projects.²⁰⁵ 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. This is especially true in view of the complexity of more formal international lawmaking processes such as treaty-making and the promulgation of international organization 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 United States, 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,²⁰⁶ 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.²⁰⁷ Adoption by the United States and other facilitator states of foreign policy guidelines directly addressing

World Bank Operational Manual, Operational Policy (OP) 4.10, 4.12, 4.20 (discussing investment projects relating to indigenous people).

205. See The European Consensus on Development art. 4.3, Feb. 24, 2006, O.J. (C46) 1 (encouraging all sectors of civil society to partake in dialogue advancing democracy, human rights, and social justice).

206. 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 United States, 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).

207. See 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).

peacemaking assistance of various kinds (financial, diplomatic, etc.) may similarly have a positive effect on 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, 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 and with civil society representatives. It is also important that they be publicized and made accessible to all parties, a basic requirement of good governance that the above mentioned UN Secretary General Guidelines for Envoys, for example, fails to satisfy.

VII. CONCLUSION

This study seeks to establish, delineate, and attach concrete legal meaning to the human rights responsibilities of third-party peace facilitators. It contends 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 acknowledged duties of states toward non-citizens and applies, *inter alia*, to peace-induced human rights violations.

This Article suggests 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. Lawmakers 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.
