OF PEACE AND JUSTICE:

THE IMPACT OF HUMAN RIGHTS IN PEACEMAKING

Master of Arts in Law and Diplomacy Thesis

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INTRODUCTION, DEFINITIONS, AND METHODOLOGY

In July 1999 the President of Sierra Leone, Ahmad Tejan Kabbah, and the notorious leader of the Revolutionary United Front (RUF), Foday Sankoh, signed the Lomé Peace Agreement. The preceding negotiations were the beginning of the end of the civil war in Sierra Leone, which had lasted almost a decade, completely devastated the country, and killed an estimated 75,000 people. The Lomé agreement consisted of power-sharing arrangements; it provided for the disarmament and demobilization of rebels; it established an electoral commission as well as a South-Africa style truth and reconciliation commission; and most controversially, it granted "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives up to the signing of the present Agreement."[1] When the United Nations (UN) Secretary-General learned of this, he immediately instructed his Special Representative, Francis Okelo, who had helped broker the agreement, to dissociate the UN from the amnesty provision. Apparently, Okelo then appended a handwritten note to his signature of the Lomé Agreement, stating that "the United Nations holds the understanding that the amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[2]

From a pure conflict resolution perspective, Okelo's disclaimer does not make much sense. If anything, it may have confused the parties and undermined their confidence in the peace agreement and the role that the UN would play in its implementation. However, it reflects the UN and the

[1] Lomé Peace Agreement, 7 July 1999, art. IX. Available from the United States Institute of Peace (USIP) website: <http://www.usip.org/library/pa/sl/sierra_leone_07071999.html>. [Accessed on 12 April 2008]

[2] Quoted in Michael G. O'Flaherty, *Sierra Leone* (Geneva: International Council on Human Rights Policy (ICHRP), 2005). Available from <http://www.ichrp.org/en/documents>. [Accessed on 12 April 2008], 19. Cf. also Michael G. O'Flaherty, "Sierra Leone's Peace Process: The Role of the Human Rights Community," *Human Rights Quarterly* 26, no. 1 (2004), 29-62, at 34.

international community's increasing emphasis on normative notions of human rights, justice, and accountability. In a sense, Okelo's handwriting on the Lomé Agreement emblematizes the convergence in the post-Cold War world of two distinct vocabularies, priorities, and strategies to achieve peace: one is the principled language of *justice and human rights*, which gives priority to universal norms and suggests that peace comes from their dissemination and acceptance; the other one is the pragmatic language of *negotiation and peacemaking* implying that peace results from a compromise – whatever its form and content – that satisfies the underlying interests of opposing parties. Although different in nature, human rights and peacemaking have increasingly intersected and influenced each other in post-Cold War international affairs. Indeed, most peace agreements since 1989 contain extensive human rights provisions. Also, international peace mediators have increasingly incorporated human rights in their work, as exemplified by the Sierra Leone case mentioned above.

The nexus of human rights and peacemaking constitutes a highly significant feature of post-Cold War international conflict intervention. However, its understanding and conceptualization by advocates, policy-makers, and academics remains unsatisfactory. The nature of the interplay between peacemaking and human rights – or between peace and justice – is often described in simplistic terms. In policy circles, human rights and peacemaking are often portrayed as either completely antagonistic – peace versus justice – or as inherently compatible – no peace without justice. The equivalent academic debate opposes *constructivists* and *realists:* the former claim that norms shape people and countries' behaviors and therefore human rights in a peace agreement herald democracy and the rule of law in the post-conflict phase;[3] the latter, on the other hand, argue that norms are merely a product of the political context and that their blind projection without evaluation of their actual impact cause peace processes to collapse.[4]

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[3] Cf., e.g., Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998), 887-917.

[4] Cf., e.g., Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (Winter 2003/04), 5-44.

Manifestly, reality is infinitely more ambiguous and nuanced. Accounts of peace negotiations by mediators and negotiators suggest that in some instances human rights complement peacemaking, while in other situations the emphasis on justice can be a complicating factor.

Thus, the aim of this thesis is to get at the heart of the interplay between peace and justice in order to grasp the complexity of the impact of human rights in peace negotiations. The following research question will guide the thesis:

- *What is the impact of human rights norms, policies, and actors in peace negotiations? Under what circumstances and why are human rights and peacemaking compatible, and when are they incompatible?*

In order to assess the impact of human rights in peacemaking, it is essential to understand the broader context in which such interactions take place. The first part of the thesis thus examines post-Cold War international relations and finds that human rights and peacemaking grew out of the same normative changes, namely the eroding importance of the principle of sovereignty as well as the increasing role of legitimacy in international affairs. The second part examines three cases, where human rights norms, policies, and actors have played a significant, yet different role in peace negotiations. It looks at the position of human rights in the Salvadoran peace negotiations from 1990 to 1992; the role of the High Commissioner on National Minorities (HCNM) in mediating interethnic conflict in Macedonia during the 1990s; and the impact of the International Criminal Court (ICC) in the ongoing peace process in Northern Uganda. The third part then formulates tentative propositions regarding the impact of human rights in peace negotiations, which are deduced from findings of the case studies as well as from concepts in negotiation and mediation theory. It finds that if applied in an adversarial logic against insurgent groups, whose primary interest is security, human rights can have a negative impact on peacemaking. On the other hand, human rights can be important vehicles of legitimacy for peacemakers, both internally and externally. In the conclusion, it is argued that there is an inherent intellectual and historic

connection between the pursuit of justice and the quest for peace. While peacemaking and human rights are generally compatible, a fundamentalist promotion of norms in the context of peace negotiations, without regard to opportunity costs and alternative strategies, can lead to negative outcomes. In order to mitigate this, human rights should be deployed pragmatically taking into account their impact in terms of conflict resolution. Finally, the thesis proposes a selected bibliography, which covers works, chapters, articles, and papers dealing with the interplay of human rights and peace negotiations. Full citations can be found in footnotes and therefore, publications that are not fully relevant for the overall theme have been omitted from the bibliography.

The study and practice of peace processes are characterized by a conflation and confusion of terms and concepts. Thus, it is important to have at our disposal working definitions of relevant terms. An international lawyer defined human rights as

> legal entitlements of individuals against the state or state-like entities guaranteed by international law for the purpose of protecting fundamental needs of the human person and his/her dignity in times of peace and war.[5]

From a social science perspective this definition is too narrow, but it contains the core elements of the concept of human rights and the idea of justice, as they will be used in this thesis. One is that human rights are based on and give priority to *norms* derived from international law. The other core element is that human rights put emphasis on the rights of *individuals,* rather than larger groups.[6] Thus, in this thesis, the term "human rights" will be used broadly to describe vocabularies, policies, and actors, which, in order to prevent and resolve conflict, prioritize norms and individual justice over alternative values and strategies. It encompasses a broad range of norms

[5] Walter Kälin, "What are Human Rights?" in Walter Kälin, Lars Müller and Judith Wyttenbach, eds., *The Face of Human Rights* (Baden: Lars Müller Publishers, 2004), 14-37, at 17.

[6] The human rights framework also includes collective rights, so-called third generation rights. These rights are, however, marginal, as human rights lawyers and advocates tend to focus on the rights of individuals.

including *prima facie* human rights, international criminal law, minority rights, as well as the rights of displaced people.

In the Agenda for Peace of 1992, then UN Secretary-General Boutros Boutros-Ghali defined peacemaking as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations."[7] Thus, article 33 of the UN Charter stipulates:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[8]

Our use of the term "peacemaking" closely follows article 33. It encompasses non-coercive instruments to end violence and settle conflicts between contending parties via negotiations, mediation, and facilitation. However, judicial methods of conflict resolution are excluded from this analysis. Peace negotiations will be used as a synonym of peacemaking. The term "peace process," in contrast, refers to a more extensive and longer process that includes peacemaking, and the following post-agreement implementation phase. Broadly speaking, peacemaking in this thesis describes a pragmatic strategy of conflict prevention and resolution that takes into account the *realities of power* and seeks to achieve the *best outcome for the greatest number* of those affected by armed conflict.

The impact of human rights in peace negotiations varies significantly and it generally constitutes a highly complex process, with a multitude of intervening variables playing a role. Thus, a detailed comparative analysis of a relatively small number of peace negotiations that takes into account the specific context and role of human rights represents the most promising

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[7] Boutros Boutros-Ghali, *Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping. Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on January 31, 1992* (New York: UN, 1992), para. 20.

[8] Charter of the United Nations, 26 June 1945, art. 33. Available at: <http://www.un.org/aboutun/charter/>. [Accessed on 12 April 2008]

approach. In light of John Gerring's analysis, it appears that the case study method is the most suitable in this context.[9] More specifically, this thesis examines three case studies that observe three single units, i.e. peace negotiations, through time with the aim of generating tentative propositions regarding the impact of human rights in peacemaking. In terms of selecting the case studies, three criteria have been considered. First, as this thesis attempts to draw conclusions about peacemaking in the post-Cold War era, all case studies should examine peace negotiations after 1989, and the three cases should be distributed in time. Second, this thesis does not focus on one particular regional context and therefore, the three case studies should be somewhat representative geographically. Third, according to Gerring, in order to draw general conclusions, it is necessary to choose the most "crucial" cases.[10] Therefore, in all three cases, human rights should have played a significant and possibly controversial role. El Salvador, Macedonia, and Northern Uganda fit all of the above-mentioned criteria.

This thesis is based on a qualitative methodology that employs a *deductive* analysis. Thus, the findings regarding the impact of human rights in peacemaking are drawn from the existing theoretical framework in the field of negotiation and mediation, on the one hand, and from the three selected case studies, on the other hand. This thesis relies principally on secondary sources, that is, material published by scholars as well as practitioners dealing with human rights and peacemaking. A particular emphasis is put on accounts of peace negotiations by mediators and negotiators. In addition, information will be used from a limited number of interviews with people, who were directly involved in peace negotiations. Most of the interviewees insisted on confidentiality, as their statements revealed sensitive information, in some cases pertaining to ongoing peace negotiations.

[9] John Gerring, "What is a Case Study and What is it Good for?" *American Political Science Review* 98, no. 2, (2004), 341-354.
[10] *Ibid.,* 347.

PART I: HUMAN RIGHTS AND PEACEMAKING IN CONTEXT

A. Background Norms and Post-Cold War Change[11]

Principles, such as sovereignty, free trade, or colonialism have at different times in history constituted a consensus about global order among the most powerful by fixing the borders of legitimacy and determining which actions and behaviors constitute acceptable practice in international affairs and which do not. These "background norms" do not operate in a vacuum; colonialism and self-determination, multilateralism and unilateralism, sovereignty and human rights, free trade and protectionism are examples of conflicting global orders whose relative importance or irrelevance depends on the prevailing distribution of power in world politics. For example, colonialism as an idea was a dominant feature of international society in the 19th century because European states involved in the colonial project had largely unlimited power. Similarly, anti-colonialism and self-determination prevailed after the Second World War when the old colonial powers, i.e. the United Kingdom (U.K.) and France, largely lost, while anti-colonial countries, most importantly the United States (U.S.), gained prestige and power. However, background norms have a certain degree of autonomy and they are not only products, but can be vectors of change. Decolonization in the late 1950s and early 1960 is a case in point: provided that colonialism was an acceptable practice in international affairs for centuries, it may seem surprising that colonial powers disengaged in such a short period of time. This was because those involved in the de-colonization project succeeded in shifting the borders of legitimacy and establish anti-colonialism and self-determination as dominant background

[11] This section is inspired by the course "International Law and Organization" taught by Prof. David Kennedy at the Fletcher School of Law and Diplomacy in the Fall Semester 2006. Cf., e.g., David Kennedy, "Receiving the International," *Connecticut Journal of International Law* 10, no. 1 (Fall 2004), 1-26.

norms of international affairs;[12] and they successfully appropriated international institutions, in this case, the United Nations, for their cause.[13]

The end of the Cold War initiated two related developments that fundamentally changed the background regime in which world politics operates. One was the erosion of the perceived importance of the principle of sovereignty, and its corollary, the principle of non-interference in states' domestic affairs. While remaining one of the cornerstone principles of international affairs, the ability for states to invoke sovereignty as defense against international interference diminished significantly at the end of the Cold War. The other development was the growing role of legitimacy in world politics. Increasingly, states and other international entities were concerned with legitimacy, or in Joseph S. Nye's terminology, "soft power."[14] Governments' ability to affect change in world politics was more and more influenced by the perception of their foreign and domestic policies as lawful, ethical, and in compliance with public or international communal interest.

1. Eroding Importance of the Principle of Sovereignty

According to Oscar Schachter, the idea of sovereignty has two distinct meanings: with regards to the political structure within the state, sovereignty "refers to the supreme political authority in that territorial community." On the international level, sovereignty "refers to the absence of an external superior authority" in the relations between states.[15] Also implied here is the prohibition of foreign interference against the will of the state concerned. Consequently, the UN Charter stipulates that "nothing …

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[12] Neta C. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002).
[13] Cf., e.g., UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples,* Resolution 1514 of 14 December 1960.
[14] Joseph S. Nye, *Soft Power: the Means to Success in World Politics* (New York: Public Affairs, 2004).
[15] Oscar Schachter, "Sovereignty and Threats to Peace" in Thomas G. Weiss, ed., *Collective Security in a Changing World* (Boulder, CO: Lynne Rienner, 1993), 19-44.

shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[16]

In 1648, faced with the destructive potential of foreign, in this case religious, interference, European states concluded the Treaty of Westphalia and made sovereignty the dominant ordering principle of international affairs. Sovereignty became "part of the dominant psychology of an era"[17] and the world came to be seen as divided into sovereign territorial states, whereas other political structures, such as empires or lose feudal and tribal associations came to be regarded as irrelevant and illegitimate.[18] Of course, the ideal-type of sovereignty does not fully correspond to reality: a large proportion of the world in 1648 and afterwards was not made up of consolidated nation-states; large states continued to use and abuse their power to intervene in smaller states; colonialism flourished as many European rulers pursued their imperial ambitions; and states were exposed to transnational phenomena, such as trade, migration, and diseases. In a nutshell, no state, no matter how powerful, big, or geographically isolated, is free of foreign influence and in that sense the idea of absolute sovereignty represents a fiction, or more cynically, in the words of Stephen Krasner, an "organized hypocrisy."[19]

This held particularly true during the Cold War. Despite the sovereignty-centered UN Charter and frequent rhetorical reference by states across the board, the practices of regional and super-powers to maintain or extend their respective spheres of influence often constituted blatant violations of the principle of sovereignty.[20] Therefore, the end of the Cold

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16 UN Charter, art 2 (7).

17 Thomas G. Weiss, David P. Forsythe and Roger A. Coate, *The United Nations and Changing World Politics,* 4th ed. (Boulder, CO: Westview Press, 2004), xlv.

18 Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000).

19 Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

20 The Soviet Union's interventions in its "satellite states," most infamously in 1956 in Hungary and 1968 in Czechoslovakia, are obvious examples in this context. The U.S.' domination of its sphere of influence was not as direct and as coercive, but military interventions did nonetheless occur. In one case, i.e. Nicaragua, the International Court of Justice (ICJ) explicitly condemned the U.S. for having violated the sovereignty of another

War did not lead to the erosion of sovereignty as such, for this would imply that sovereignty was "uneroded" during the Cold War. Rather, sovereignty was re-conceptualized in the 1990s to include a notion of responsibility that prevents states from invoking sovereignty to justify violations against their own population. In the words of David P. Forsythe, "Reference to the idea of state sovereignty no longer provided an automatic and impenetrable shield against international action on issues once regarded as essentially domestic."[21] Similar to successful efforts in the late 1950s and early 1960s that transformed sovereignty from a tool, which legitimized to one which de-legitimized colonialism, the post-Cold War project has been to move from a notion of sovereignty permitting abuses to one that restricts them. Noteworthy in this regards is the work of the Canadian-funded International Commission on Intervention and State Sovereignty (ICISS), whose influential report of 2001 *The Responsibility to Protect* provided a new blueprint for humanitarian intervention.[22] According to the ICISS, the moral imperative of preventing or stopping mass atrocities trumps a state's sovereign prerogatives. In other words, sovereignty is conditional on a state's decent treatment of its citizens. Gareth Evans and Mohamed Sahnoun, two members of the ICISS, describe the new concept of sovereignty as follows:

> Indeed, even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people. It is now commonly acknowledged that sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.[23]

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state. (Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Merits, ICJ Reports (1986))

[21] David P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), 24-25.

[22] ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, December 2001)

[23] Gareth Evans and Mohamed Sahnoun, "The Responsibility to Protect," *Foreign Affairs* 81, no. 6 (November/December 2002).

Gradually, sovereignty as responsibility came to represent a new consensus opinion replacing Westphalian sovereignty as the dominant background norm in international affairs. Few states today regard external criticism of their human rights record as completely illegitimate; they may challenge such criticism on factual grounds, but not because they see it in contravention of their sovereignty. Thus, within UN bodies Art 2 (7) is hardly ever invoked by countries targeted by a resolution condemning their human rights record.[24]

The reasons for the eroding importance of the principle of absolute sovereignty are complex and go beyond the scope of this analysis. However, the growing interdependence in the context of globalization[25] as well as the ability for the "victors" of the Cold War, i.e. "the West" and in particular the U.S. to use a re-defined principle of sovereignty to challenge the *status quo* in a way that suits their interests have probably both played a role. In any case, the post-Cold War change in background norms paved the way for new developments including increasing pre-occupation with human rights and peacemaking.

2. Growing Role of Legitimacy in World Politics

The second post-Cold War development in the international background regime concerns the growing role of legitimacy as a source of power in international affairs. Legitimacy is a wide-ranging concept that is used in different disciplines. For Thomas M. Franck, the practice of international relations raises the question "Why do powerful nations obey powerless rules?" The answer is related to the legitimacy of rules, that is, "the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[26] In political science,

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[24] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003), 125.
[25] Cf. David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics, Culture* (Standford, CA: Standford University Press, 1999).
[26] Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 3 and 19.

Max Weber invokes legitimacy to describe different claims to authority made by a ruler, i.e. aristocratic, rational-legal, and charismatic legitimacy.[27] Elaborating on this and attempting to disentangle the concepts of authority and legitimacy, which Weber treats as identical, Carl J. Friedrich states that "authority … is capable of creating legitimacy whenever it provides good *reasons* for title to rule."[28] Thus, legitimacy is generated when a person or an institution's authority is considered rightful in legal as well as ethical terms. Legitimacy engenders compliance with authority without material incentive or credible threat of punishment and in that sense it can be regarded as a distinct source of power. Joseph S. Nye calls the power of legitimacy soft power, that is, "the ability to get what you want through attraction rather than coercion or payments."[29] He distinguishes three sources of soft power: a country's culture, its political values, and its foreign policy.[30] A country obtains legitimacy through foreign policy by systematically complying with international law and respecting the authority of international institutions, in particular the UN. Also useful is a state's effort to promote international law, for example, by incorporating human rights into its foreign policy. Finally, countries can add points to their legitimacy accounts by acting in a way that is perceived to have international public utility, for example by mediating between warring parties or by contributing troops or money to peace missions.

The role of legitimacy in world politics has increased since the end of the Cold War. Nowadays, the judgment of an action as rightful by world public opinion constitutes an important factor for effective international action. The most pertinent example in this respect is the U.S.-led invasion of Iraq in 2003 and its aftermath. The U.S.' decision to act outside the established international legal and institutional frameworks have cost it dearly in terms of reduced financial and military support of allies and Iraqis' perception of the U.S. as an occupier. It can be plausibly argued that the

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[27] Max Weber, *Wirtschaft und Gesellschaft,* 5th revised ed. (Tübingen: Mohr, 1985).
[28] Carl J. Friedrich, *Man and His Government* (New York: McGraw-Hill, 1963), 233. Emphasis in the original.
[29] Nye, x.
[30] *Ibid.,* 11-15.

costs in terms of legitimacy loss outweigh the strategic and economic benefits of the War in Iraq.[31] The reasons for the growing importance of legitimacy and soft power in world politics are multifaceted and the space here is insufficient for exploring them in a differentiated manner. One factor is the relative decline of traditional sources of power. Weapons have become so destructive and the tolerance of societies in the West for war-fighting so low that the use of military force is rarely an option for states. The ability to convert military strength into power is thus diminished and the relative importance of other sources of power grows.[32] Also, in the context of globalization, the importance of transnational issues and the influence of non-governmental actors have grown. On many issues in contemporary world politics, the agenda is set by transnational communities and networks, whose support states are trying to obtain by means of domestic and foreign policies that appear legitimate.[33] Finally, the end of the Cold War has opened up space for progressive small and medium states to pursue an independent foreign policy based on the promotion of norms and contributions to conflict resolution; the successes of "norms entrepreneurs" like Canada and Norway have induced other states to adapt similar legitimacy-based foreign policies.[34] Clearly, the increasing importance of legitimacy as a source of power has significantly contributed to putting issues related to human rights and peacemaking on the map of world politics.

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[31] This is what Joseph S. Nye seems to argue: *Ibid.,* 26-28.
[32] *Ibid.,* 18-21.
[33] *Ibid.,* 30-32.
[34] Christine Ingebritsen, "Norm Entrepreneurs: Scandinavia's Role in World Politics," *Cooperation and Conflict* 37, no.1, 2002, 11-23.

B. Elements of Post-Cold War Change: Human Rights and Peacemaking

1. Expansion of Human Rights

For Francis Fukuyama, the ideal of human rights represents the most complete form of human dignity and the process of history naturally drives people towards the realization of their human rights. When the Cold War ended, Fukuyama famously proclaimed "the end of history" based on the prospect of a world constituted of liberal democracies and characterized by universal respect for human rights.[35] In hindsight, the end of history-theory appears to be an expression of post-Cold War naïveté or perhaps Western triumphalism. However, Fukuyama helps us understand the rationale for the post-Cold War expansion of human rights, which was engendered by the demise of the Soviet Union and the Eastern block countries that had traditionally been very skeptical and even hostile with regards to human rights, claiming that they were a tool used by the West to undermine communist states.[36] Human rights were further facilitated by the two dimensions of post-Cold War change identified above, i.e. the erosion of absolute sovereignty and the growing role of legitimacy. Traditional Westphalian sovereignty implies that "how a state behaved toward its own citizens in its own territory was a matter of domestic jurisdiction, i.e. not any one else's business."[37] This notion is at odds with human rights work which "pre-supposes that it is legitimate and necessary for states or nonstate actors to be concerned about the treatment of the inhabitants of other states."[38] The end of the Cold War has shifted the borders of legitimacy from the former to the latter concept, creating the background for the advancement of human rights in the past two decades. The surge in legitimacy played a role in this respect too. Human rights are an important source of legitimacy

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[35] Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992).
[36] Daniel C. Thomas, "Human Rights Ideas, the Demise of Communism and the End of the Cold War," *Journal of Cold War Studies* 7, no. 2 (2005), 110-141.
[37] Louis Henkin, *How Nations Behave: Law and Foreign Policy,* 2nd ed. (New York: Columbia University Press, 1979), 228.
[38] Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (Summer 1993), 411-441, at 413.

and as international relations increasingly required soft power for effective action, their importance grew. In this context, it was important for states to be perceived as treating their citizens decently and to appear as pro-active agents for human rights in their relations with other states. As a result, state action in support of human rights increased.

According to Jack Donnelly, "the post-cold war era brought national and international action on behalf of human rights to a new level of intensity and effectiveness" causing "a deepening penetration of the international consensus on human rights norms." Thus, "By the end of the millennium, human rights had achieved a firm and modestly expanding place in international relations."[39] The attacks of September 11, 2001 and the emergence of counter-terrorism as a central theme of international affairs have somewhat reduced the momentum, however, "the human rights progress of the 1980s and 1990s has in most places been maintained."[40] Thus, the human rights success story can be distinguished via three dimensions. First, the end of the Cold War stood at the beginning of a normative expansion of human rights. A number of human rights treaties, optional protocols to previous human rights treaties, and regional conventions came into being, closing various gaps in the human rights legal framework. At the same time, the applicability of human rights norms significantly increased, as numerous states ratified or adhered to new and

existing treaties, some of which, such as the Convention on the Rights of the Child, reached near universal adherence.[41] Moreover, human rights gained importance relative to other international legal principles. The 1992 Vienna Declaration stipulating that the "promotion and protection of all human rights is a legitimate concern of the international community,"[42]

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[39] Jack Donnelly, *International Human Rights,* 3rd ed. (Boulder, CO: Westview Press, 2007), 15.

[40] *Ibid.*

[41] The website of the Office of the High Commissioner for Human Rights provides a complete list of human rights treaties and optional protocols as well as dates of signature and entry into force. Available at <http://www.ohchr.org/english/law/>. [Accessed on 7 October 2007]

[42] *Vienna Declaration and Programme of Action,* Adopted by the World Conference on Human Rights on 25 June 1993, para. 4.

catalyzed a departure from the idea that human rights can be trumped by the principles of sovereignty and non-interference.[43]

Second, the creation of new and the reinforcement of existing institutions pertaining to human rights can be observed. Of particular importance is the development in the field of international criminal justice, starting with the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) in 1993 and 1994 respectively and culminating in the creation of the ICC in 2002 via the entry into force of the Rome Statute. The UN human rights regime was also significantly strengthened: the Office of the High Commissioner for Human Rights (OHCHR) was established in 1993; the treaty body system expanded; and in 2006 the Commission on Human Rights was replaced by the higher-standing Human Rights Council. Regionally, the European human rights regime moved towards "strong enforcement" as states accepted the binding nature of decisions of the European Court of Human Rights in Strasbourg.[44] Finally, many countries have established national human rights institutions.

Third, human rights became more institutionalized and accepted as a vocabulary of legitimacy in post-Cold War international affairs. Rhetorical reference to human rights has increased dramatically and some states, typically small and medium Western states, have made human rights an integral part of their foreign policy giving leverage to campaigns of non-governmental organizations (NGOs).[45] Additionally, non-state actors, such as international organizations and multinational corporations, have been brought into the human rights orbit, as their actions are increasingly evaluated in terms of their respect of minimal human rights standards.[46] Whether increased rhetorical reference to human rights has *in reality* improved respect for human rights is unclear. It has certainly made it more

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[43] Tomuschat, 67-68.
[44] Donnelly, 106.
[45] Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (New York: Palgrave Macmillan, 2004).
[46] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

costly for international actors to violate human rights. However, the post-Cold War world of globalization has brought new threats to the fore, making it impossible to conclude whether the evolution is positive or negative.[47] Thus, it is assumed here that the post-Cold War human rights success story pertains first and foremost to a *normative* expansion.

2. Growth of Peacemaking

Peace negotiations and peace agreements occurred occasionally during the Cold War era, but they were far from being the omnipresent feature of international politics that they are today. Peter Wallensteen notes that during the Cold War "there [were] reasons for analysts to believe that peacemaking … is a losing proposition." Rather,

> the emphasis … was victory, not compromise. The ideological components and historical record made the Cold War an existential battle. It was waged between right and wrong, democracy and dictatorship, capitalism and socialism, liberation and imperialism. Compromise was seen as morally questionable.[48]

This changed profoundly towards the end of the 1980s, as the superpower confrontation between the U.S. and the Soviet Union drew to a close. Inversing the prevalent morality of the Cold War, ending wars as a result of military victory came to be regarded as problematic, while a growing emphasis was put on mediation and peace negotiations, in which all conflict parties – state and non-state actors – were granted equal standing.[49] In addition, a plethora of governmental and non-governmental actors became involved in peacemaking activities and contributed to, according to Louis Kriesberg, "the growth of the conflict resolution field." Thus, the end of the

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[47] Tony Evans, *The Politics of Human Rights,* 2nd ed. (London: Pluto Press, 2005), 26-33.
[48] Peter Wallensteen, *Understanding Conflict Resolution,* 2nd ed. (London: Sage Publications, 2007), 4.
[49] Christopher Clapham, "Rwanda: The Perils of Peacemaking," *Journal of Peace Research* 35, no. 2 (1998), 193-210.

Cold War "enhanced the pertinence of the conflict resolution approach;" increased its differentiation; and led to its growing institutionalization.[50]

The growth of peacemaking can be differentiated via five features of post-Cold War armed conflicts as well as third party conflict resolution activities. First, more conflicts ended as a result of a negotiated settlement relative to military victory. According to figures of the Uppsala Conflict Data Program (UCDP), the number of conflicts ending after a peace settlement rose from 21% between 1946 and 1989 to 37% from 1990 to 2005; at the same time, conflict termination via military victory diminished from 44 to 21%.[51] Second, the end of the Cold War brought an increase in the occurrence of mediation in international conflicts. Figures of the International Crisis Behavior Project show that in the 1980s approximately 30% of international crises received mediation; this number rose to 50% in the early and mid-1990s. Peacemaking declined somewhat around the turn of the millennium, but the latest data indicates a renewed surge in the last few years.[52] Third, peacemaking actors have diversified and proliferated. Large and small states have expanded their use of mediation as a foreign policy tool. The end of the Cold War also boosted the role of the UN in conflict management and at the same time regional organizations became more integrated and many of them sought a role in peacemaking. Moreover, NGOs and even eminent individuals have increasingly become involved in peace processes.[53] Fourth, peacemaking activities became more diverse. Traditionally, mediation was seen as a form of government diplomacy with states offering their good offices to conflict parties. After the end of the Cold War, this so-called Track 1 approach was increasingly complemented by Track 1½ – "unofficial" mediators, such as NGOs, working with official

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[50] Louis Kriesberg, "The Growth of the Conflict Resolution Field," in Chester Crocker, Fen Osler Hampson and Pamela Aall, eds., *Turbulent Peace: the Challenges of Managing International Conflict* (Washington, D.C.: USIP Press, 2001), 407-425, at 414.

[51] Human Security Centre, *Human Security Briefing 2006* (Vancouver: University of British Columbia, 2006), 19-20.

[52] Centre for Humanitarian Dialogue (HD Centre), *Charting the Roads for Peace: Facts, Figures and Trends in Conflict Resolution* (Geneva: HD Centre, 2007), 6-7.

[53] Pamela Aall, "Nongovernmental Organizations and Peacemaking" in Chester A. Crocker and Fen Osler Hampson, with Pamela Aall, eds., *Managing Global Chaos: Sources and Responses to International Conflict* (Washington, D.C.: USIP Press, 1996), 433-443.

parties – and Track 2 – "unofficial" peacemakers working with people that have a stake in the conflict but do not officially represent a party – initiatives.[54] Finally, the post-Cold War era has brought qualitative changes and moved peacemakers away from seeing peace negotiations as a zero-sum game. Rather, the emphasis is on "conflict transformation," that is, "the effort to reach accommodation between parties in conflict through interactive processes that lead to reconciling tensions, redefining interests, or finding common ground."[55]

The growth in peacemaking is undoubtedly linked to a changing global political context. The end the Cold War had paradoxical consequences on conflicts: on the one hand, it paved the way for the resolution of civil wars that had been incited and animated by Soviet-U.S. antagonism. In some countries, such as Mozambique and El Salvador, the withdrawal of superpower patronage combined with a military stalemate led to peace negotiations and eventually a settlement between the parties. On the other hand, the end of the Cold War prompted the outbreak of new conflicts. The end of the bipolar world created a vacuum in many countries, which political opportunists – often by manipulating collective fears and appealing to ethnic, religious or national identities – exploited to usurp power.[56] Kenneth Waltz refers to this as the "post-Cold War disorder" caused by the sudden interruption of "superpower managerialism."[57] Many of these conflicts eventually resulted in a stalemate and later peace negotiations. Thus, after the Cold War, there were more conflicts to be resolved and peacemaking was used more often as a means to terminate

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[54] Cf. Guy and Heidi Burgess, eds., *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder, August 2003. Available at <www.beyondintractablility.org>. [Accessed on December 10, 2007].

[55] Committee on International Conflict Resolution, "Conflict Resolution in a Changing World" in Paul C. Stern and Daniel Druckman, eds., *International Conflict Resolution after the Cold War* (Washington, D.C.: National Academy Press, 2000), 1-37, at 5.

[56] David A. Lake and Donald Rothchild, "Containing Fear: The Origin and Management of Ethnic Conflict," *International Security* 21, no. 2 (1996), 41-75.

[57] Kenneth Waltz, "The Emerging Structure of International Politics," *International Security* 18, no. 2 (1993), 44-79.

conflict.[58] In a nutshell, the *demand* for peacemaking increased significantly as a result of the fundamental shifts in international politics post-Cold War.

At the same time, the *supply* of peacemaking grew as well, with the above-mentioned post-Cold War normative changes – diminishing acceptance of absolute sovereignty and growing importance of legitimacy – playing a crucial role. During the Cold War, intervention in conflicts was difficult because "the principle of noninterference in the internal affairs of sovereign states provided that sovereigns had a license to control conflicts within their borders, free from outside influence."[59] The erosion of absolute sovereignty after the Cold War made it more costly for states to reject external intervention in the conflicts they were involved in and, as a result, a space opened up for peacemaking. Most importantly, "The end of the Cold War freed international organizations from their bipolar constraints, and they rushed into mediation and conflict management."[60] In his Agenda for Peace, Boutros-Ghali enthused that "the nations and peoples of the United Nations … have been given a second chance to create the world of our Charter." Thus, the end of the Cold War "affords new possibilities … to meet successfully threats to common security."[61] Subsequent events in Somalia, Bosnia, and Rwanda turned this declaration into hollow, even cynical rhetoric. However, it remains that the UN – along with regional organizations and individual states – became more proactive in conflict management in the 1990s.

The role of legitimacy in international affairs contributed to the growing supply of peacemakers too. According to James Mayall, the post-Cold War world "is now so interdependent, and western governments in particular so vulnerable to public opinion mobilised through the media that

[58] Figures of the UCDP confirm this. Cf. HD Centre, *Charting the Roads for Peace.*
[59] Committee on International Conflict Resolution, 7.
[60] I. William Zartman and Saadia Touval, "International Mediation" in Chester A. Crocker, Fen Osler Hampson and Pamela Aall, eds., *Leashing the Dogs of War: Conflict Management in a Divided World* (Washington, D.C.: USIP Press, 2007), 437-454, at 441.
[61] *Agenda for Peace,* paras. 75 and 8.

they will … repeatedly be drawn into international crises."[62] Indeed, mediation is useful for states to show to domestic constituencies that they are doing something to alleviate the suffering of victims of war, and it also serves to demonstrate to the world that they make a positive contribution to peace and security. Small and medium states are particularly involved in mediation because, as William I. Zartman and Saadia Touval point out, they "have few alternative foreign policy instruments at their disposal, and mediation increases their usefulness and independence in relation to their stronger allies."[63] As legitimacy became a more valuable currency in international affairs after the end of the Cold War, third-party involvement in peace processes was more attractive and consequently more actors – small and medium states, but also NGOs and individuals – sought out and offered their peacemaking services to conflict parties.

C. Intersection and Interplay between Human Rights and Peacemaking

Human rights and peacemaking grew out of a similar geopolitical and normative background, and their growth occurred at a similar time, namely in the years following the end of the Cold War. It is not surprising then that the two phenomena influenced and cross-fertilized each other. Thus, practitioners and policy-makers in one field have adapted their approaches to take into account developments in the other. Two processes grew out of this mutual influence. On the one hand, human rights norms, agencies, and policies have been adapted to fit the world's growing focus on conflict management. As a result, human rights were increasingly invoked in the context of military intervention to prevent or stop armed conflicts. Human rights also began to play a bigger role in peace negotiations, as human rights-compatible peace agreements came to be seen as a mandatory

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[62] "Introduction" in James Mayall, ed., *The New Interventionism 1991-1994: United Nations Experience in Cambodia, former Yugoslavia and Somalia* (Cambridge: Cambridge University Press, 1996), 1-24, at 2.
[63] Zartman and Touval, "International Mediation," 441.

precursor of a successful war-to-peace transition. Furthermore, human rights as "transitional justice" were adapted to fit the assumed needs of post-conflict societies and contribute to building stable, peaceful, and democratic states in transitional contexts.

On the other hand, peace negotiators and mediators are increasingly influenced by human rights, and consequently, they have incorporated human rights in their work and increasingly accepted the premise that there are normative barriers to peacemaking. This is particularly the case for mediators of international organizations, such as the UN, whose mandate oblige them to respect human rights. Even state and NGO mediators as well as many negotiators themselves seem to consent to the inclusion of human rights in peace negotiations. Also relevant here is that human rights actors have increasingly become directly involved in peace processes, as exemplified by the ICC's role in various African countries.

1. Human Rights Adapt to Conflict Intervention

James Mayall used the term "interventionism" to describe increasing international action aimed at preventing or stopping conflicts, and building peace in post-conflict societies.[64] Human rights have played a notable role in this development, as activists and policy-makers have projected human rights arguments to justify intervention – coercive and non-coercive – for the purpose of conflict resolution. Indeed, human rights have been adapted and deployed in the context of all types and phases of conflict management: to support coercive *peace enforcement;* to enhance *peacekeeping* and *peacebuilding;* and, most importantly for our purpose, to leverage *peacemaking*.

First, human rights arguments have been used to justify so-called humanitarian intervention, that is,

> the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens,

[64] Mayall.

> without the permission of the state within whose territory force is applied.[65]

Indeed, there is a growing consensus that in extreme cases, where large-scale abuses, for example genocide, are imminent or proven to occur, military intervention can be used to put them to an end. Enforcement of human rights has traditionally relied on non-coercive, mostly judicial and quasi-judicial mechanisms and thus human rights groups were initially reluctant to provide support. However, pragmatism seems to have prevailed and most of them have gradually come to endorse the concept, even as humanitarian intervention has been denounced as a pretext for Western dominance[66] and its legality has been questioned.[67] In any case, it is clear that the deployment of human rights arguments has facilitated coercive outside intervention in armed conflicts since the end of the Cold War.

Second, conflict management pertains not only to intervention before and during wars, but also in the post-conflict phase. Based on the liberal Kantian argument that democratic governance and free trade fosters peace, both within and between countries,[68] many post-Cold War conflict managers have promoted a liberal model of peacebuilding aimed at building reconciled societies and democratic states in post-conflict countries.[69] Human rights were adapted to the needs of liberal peacebuilding and consequently, a new discipline and practice, rooted in international human rights law and tailor-made for war-to-peace transitions, emerged. Under the banner of "transitional justice" the human rights community began to

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[65] J. L. Holzgrefe, "The Humanitarian Intervention Debate" in J. L. Holzgrefe and Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 15-52, at 18.

[66] Cf., e.g., Noam Chomsky, *Hegemony or Survival: America's Quest for Global Dominance* (London: Penguin Books, 2003), 22-26.

[67] For an overview, cf. Thomas M. Frank, "Interpretation and Change in the Law of Humanitarian Intervention" in Holzgrefe and Keohane, eds., *Humanitarian Intervention,* 204-231.

[68] Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy and Public Affairs* 12, no. 3 (1983), 205–235.

[69] Cf. Roland Paris, *At War's End: Building Peace after Civil Conflict* (New York: Cambridge University Press, 2004); Oliver Richmond, *The Transformation of Peace* (London: Palgrave, 2005).

support mechanisms – such as truth commissions, international courts, and administrative purges – aimed at helping post-conflict societies to deal with crimes and atrocities committed by former regimes and to foster reconciliation.[70]

Third, human rights appear in the context of peace negotiations and peace agreements, often the starting point of war-to-peace transitions. Thus, many post-Cold War peace agreements contain extensive references to human rights and increasingly, the post-conflict setting envisioned in a peace agreement centers around the respect for human rights. According to Christine Bell, there are three specific areas, where human rights play an important and often controversial role in peace agreements: first, questions regarding transitional justice, for example, whether perpetrators of past crimes are held accountable and if they are, what form accountability takes; second, issues concerning displaced persons, i.e. whether they are encouraged to return home and whether their property is given back to them or whether they receive compensation for it; third, questions pertaining to transitional institutions, in particular the establishment of judicial institutions fostering the rule of law as well as an accountable and democratically controlled security sector.[71] Against this background, one can argue that peace agreements have become vehicles for the expansion of human rights. At the same time, human rights norms have been shaped and changed as a result of their deployment in peace processes. Thus, the context-specific and sometimes contesting interpretation of human rights in peace negotiations – for example, the right to return, the permissibility of amnesties, or the right to self-determination – have come to the fore and helped to foster an understanding of human rights as pragmatic and practical tools.

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[70] The standard reference is Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: USIP Press, 1995). Also, Aryeh Neier, "The Quest for Justice" in *The New York Review of Books* 48, no. 4 (March 2001).

[71] Christine Bell, *Negotiating Justice? Human Rights and Peace Agreements* (Geneva: ICHRP, 2006). Background analysis for the report was provided by a range of country and thematic researchers, some of whose papers are cited in this thesis.

2. Conflict Intervention Adapts to Human Rights

The post-Cold War era has brought a paradigm shift in the sense that the most prevalent rationalization of conflict intervention is no longer based on strategic or ideological arguments, but rather on the imperative to prevent humanitarian crises and human rights abuses.[72] The above-mentioned concept and increasing practice of humanitarian intervention is one example in this context. Another is the application of a blueprint to rebuild post-conflict societies with a strong focus on human rights norms and institutions, although their effectiveness in post-conflict contexts remains uncertain.[73] A comprehensive analysis of these questions goes beyond the scope of this thesis. In what follows, the focus is on the influence of human rights on the work of one type of conflict manager, that is, mediators and facilitators.

Mediators have traditionally been skeptical about human rights. As Bell writes,

> peace mediators sometimes believe that the introduction of human rights can be an obstacle to successful negotiations. They argue that human rights can restrict their ability to bring all parties to the table, and to explore all options that might lead to a cease-fire, peace process, and peace. … If the choice is between an imperfect peace and a perfect war, imperfect peace may be worth a gamble.[74]

It appears nonetheless that at present, the majority of mediators have accepted and endorsed the premise that there are normative boundaries to their work. For example, it is impermissible for mediators to actively facilitate a settlement that provides for a blanket amnesty for perpetrators of genocide, or an agreement that negates the rights to return and compensation for displaced people. However, the exact scope of mediators'

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[72] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004), 235-323.
[73] Tonya L. Putnam, "Human Rights and Sustainable Peace" in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, CO: Lynne Rienner, 2002), 237-271.
[74] Bell, *Negotiating Justice,* 1-2.

obligations in terms of human rights and their concrete implications remain somewhat controversial.

The commitment of mediators to take into account human rights is corroborated by guidelines and statements to this effect. The United Nations, for example, issued an internal memorandum that provides direction to Representatives of the Secretary-General for how to deal with human rights in peace negotiations, especially with respect to amnesties.[75] These guidelines "serve the purpose of ensuring the consistency and quality of agreements reached in the area of human rights, under the auspices of the United Nations." They explicitly state that UN mediators "[act] within a framework of established purposes, principles and rules." Moreover, "the United Nations has a record and credibility to defend and cannot condone agreements arrived at through negotiations that would violate Charter principles." In the course of negotiations, "[e]arly commitments to respect human rights and humanitarian principles should be encouraged." When an agreement takes shape that does not address human rights in a satisfactory way, for example by proposing a blanket amnesty for all crimes committed during the conflict, "the UN Representative may need to acquaint the parties to a conflict with the existence of a body of international law and practice regarding these issues." Furthermore, "the UN Representative … may even need to warn the parties that, if they cross certain lines, the Unites Nations might be put in a position where it would have to take a stance, on the public record, concerning aspects of the agreement."

Other mediators have expressed their commitment to human rights as well. Norway and Switzerland, two prominent small state mediators, co-sponsored Bell's above-mentioned study "Negotiating Justice," which

[75] "Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution" (on file with the author). All the quotes below are taken from the Guidelines. According to Hurst Hannum, "this is an internal, quasi-confidential document that guides UN mediators in a number of areas, particularly with respect to human rights and accountability for violations of international humanitarian law." (Hurst Hannum, "Human Rights in Conflict Resolution: the Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding" *Human Rights Quarterly* 28, no.1 (2006), Footnote 87)

represents a nuanced, but normatively grounded approach to mediation. In the preface, two representatives of the Norwegian Ministry of Foreign Affairs and the Swiss Federal Department of Foreign Affairs (FDFA) write: "a peace process that concentrates solely on silencing the guns as soon as possible and regardless of the concessions made, almost always creates obstacles for the redress of massive, systematic atrocities." Instead, Norway and Switzerland emphasize human rights because "Refusing to consider immoral forms of impunity may … encourage a more responsible approach to peace-making, and eventually lead to a more fair and lasting peace."[76] NGO mediators have committed to human rights too. For example, the Geneva-based Centre for Humanitarian Dialogue (HD Centre) writes in its "Guide to Mediation": "How much a peace process can prioritize justice for past violations alongside political progress is often a difficult decision for third parties in the process. However, every peace process must pay due respect to international legal norms and human rights standards."[77]

Even large state mediators – often "manipulators" according to Zartman[78] – have incorporated human rights. The United States, for example, has made human rights a part of its effort to end the war in the former Yugoslavia. Most importantly, the U.S. supported the establishment of the ICTY in 1993. Although the commitment to the Court was superseded in importance by other concerns in the implementation phase,[79] the U.S. mediation team led by Richard Holbrooke ensured that justice and human rights issues were addressed in peace negotiations, despite the resistance of the conflict parties. Thus, at a press conference at the beginning of the Dayton negotiations in 1995, Secretary of State Warren Christopher laid out four conditions for a settlement, one of which was that "human rights must be respected and those responsible for atrocities be brought to account."[80] Indeed, the Dayton agreement provides for an

[76] Thomas Greminger and Petter Wille, "Preface" in Bell, *Negotiating Justice,* I.
[77] HD Centre, *A Guide to Mediation* (Geneva: HD Centre, 2007), 12.
[78] Zartman and Touval, "International Mediation," 446-447.
[79] Pierre Hazan, *Justice in a Time of War: The True Story of the International Criminal Tribunal for the Former Yugoslavia* (College Station, TX: Texas A&M University Press, 2004).
[80] Richard Holbrooke, *To End a War* (New York: Random House, 1998), 237.

extensive constitutional and international legal framework that was supposed to guarantee minority and human rights in post-conflict Bosnia.

Human rights have become a part of post-Cold War peacemaking and consequently many peace mediators have incorporated them in their work. Mediators have provided advice to conflict parties on how to address human rights issues; they have drafted peace agreements that include human rights; and in some cases they have used their leverage to persuade parties to integrate human rights in a settlement. In addition, peacemaking has integrated human rights as a result of the influence of activist actors that are interested in, but not formally part of peace negotiations – one might call them "normative entrepreneurs in peacemaking." For example, through the indictment – actual or threatened – of leaders of conflict parties, the International Criminal Court has played an important role in peace negotiations by insisting on the accountability of perpetrators of international crimes. Furthermore, a range of international NGOs, such as the International Center for Transitional Justice (ICTJ), emerged with the specific aim of promoting accountability and human rights in transitional processes. There are also traditional human rights organizations, such as Amnesty International and Human Rights Watch (HRW) that have increasingly looked at human rights issues in peace processes. These groups often have considerable resources and they have skillfully lobbied for the incorporation of human rights in peace negotiations.

3. Tensions between Human Rights and Conflict Resolution: the Peace vs. Justice Debate

As described above, the growing importance of human rights and peacemaking is a result of the normative changes in the post-Cold War era, and in practice the two concepts have increasingly been combined. However, it has been claimed that peacemaking and human rights are, in fact, incompatible. This view is most starkly articulated in an article by an anonymous writer published in *Human Rights Quarterly* in 1996. Assessing the

role of the human rights community in the conflict in the former Yugoslavia, Anonymous argued that the insistence on the apprehension of war criminals indicted by the ICTY discouraged the parties, in particular the Bosnian Serbs, to come to the negotiating table, thus condemning peacemaking efforts such as the Vance-Owen plan to failure and prolonging the war. Anonymous went as far as to say that "thousands of people are dead who should have been alive – because moralists were in the quest of the perfect peace." [81] According to Anonymous, "if one wanted peace, then one had to accept the principle that whatever the parties could agree to freely was acceptable to the peace negotiators"[82] including amnesty for indicted war criminals and a territorial arrangement rewarding Serbs for ethnic cleansing in Bosnia. While Anonymous' article seems exaggeratedly sensational and was criticized by many observers,[83] it had the merit of highlighting a difficult dilemma in peace negotiations: on the one hand, there is a need to ensure that a peace agreement provides for the accountability of those that committed human rights abuses in the course of the war, while at the same time offering incentives to these very perpetrators to lay down their arms and make peace. Confronted with the challenge that the peace agreement in Mozambique neglects human rights, Andrea Bartoli, one of the Community of Sant'Egidio's primary mediators in Mozambique, went to the heart of this tension:

> The text of the agreement represented the reality that Mozambicans wanted *peace* more than they wanted retributive *justice.* … It is interesting that this strategy – the emphasis on political settlement to assure *peace* rather than on *justice* to prosecute a few leaders singled out as the main perpetrators of war crimes – is not particularly appreciated today within the international community as a whole. Yet, at least in the case of Mozambique, it is clear

[81] Anonymous, "Human Rights in Peace Negotiations," *Human Rights Quarterly* 18, no. 2 (1996), 249-258, at 258.
[82] *Ibid.,* 252.
[83] Cf., e.g., Felice D. Gaer, "UN-Anonymous: Reflections on Human Rights in Peace Negotiations," *Human Rights Quarterly* 19, no. 1 (1997), 1-8.

> that a negotiated political settlement that reduces violence will also contribute to a dramatic reduction of human rights abuses.[84]

Bartoli's statement brings to the fore a debate that is often labeled with the catchphrase "peace versus justice." It suggests a trade-off between the insistence on justice, in which case war will continue, or the halting of violence, while paying the price of injustice in the form of impunity for war criminals and territorial arrangements that reward aggression and ethnic cleansing. This framework is reflective of a broader philosophical debate regarding the opposition between *principles* and *pragmatism* and the question of what means are permissible to attain a noble end. In his essay of 1919 *Politik als Beruf* – "Politics as Vocation" – Max Weber distinguishes two fundamentally different and apparently antagonistic maxims for ethical conduct in politics: a means-oriented "ethic of ultimate ends" and a result-oriented "ethic of responsibility."[85] Thus, the ethic of ultimate ends embodies a principled approach, which judges the *intention* of an action and requires that means remain true to the end. The ethic of responsibility, on the other hand, is pragmatic and focuses on the *consequences* of an action, in other words, the end justifies the means.

Along these lines, a divide has manifested itself between practitioners and scholars working in and on conflict. Human rights lawyers, for example, often advocate for the principled approach that gives priority to justice and human rights. They seek to end human rights violations by putting pressure on conflict parties and by insisting that perpetrators are held accountable. On the other hand, conflict resolution and peacemaking actors tend to adopt a more pragmatic approach, exploring all available options to attain the overarching goal of ending war. They engage and negotiate with conflict parties with the aim of bringing about a peace agreement that ends armed conflict. Interestingly, exponents from both

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[84] Andrea Bartoli, "Mediating Peace in Mozambique" in Chester Crocker, Fen Osler Hampson and Pamela Aall, eds., *Herding Cats: Multiparty Mediation in a Complex World* (Washington, D.C.: USIP Press, 1999), 245-275, at 265. Emphases added.

[85] Max Weber, *Politics as Vocation,* Philadelphia, PA: Fortress Press, 1965. (Originally written in German in 1919)

sides believe that their approach ultimately contributes to the fulfillment of the other side's mission. Human rights organization use the slogan "no peace without justice" to support their claim that accountability for past atrocities constitutes an obligatory precursor for sustainable peace in a country emerging from conflict. Peacemakers, on the other hand, often point out, as exemplified by Bartoli's quote above, that ending violence by means of a negotiated compromise is instrumental for justice and human rights in the future.[86]

[86] On the differences and tensions between human rights and conflict resolution approaches, cf., e.g., Pauline Baker, "Conflict Resolution versus Democratic Governance: Divergent Paths to Peace?" in Crocker et al., eds., *Managing Global Chaos,* 563-57; Michele Parlevliet, "Bridging the Divide, Exploring the Relationship Between Human Rights and Conflict Resolution," *Track Two* 11, no. 1 (2002); Ellen Lutz, Eileen F. Babbitt and Hurst Hannum, "Human Rights and Conflict Resolution from the Practitioners' Perspectives," *The Fletcher Forum of World Affairs* 27, no.1 (2003), 173-193.

PART II: CASE STUDIES

The following section examines three cases of post-Cold War peacemaking: the negotiations to end the civil war in El Salvador from 1990 to 1992; the peace process in Macedonia that culminated in the Ohrid Framework Agreement of 2001; and the ongoing negotiations to end the insurgency of the Lord Resistance Army (LRA) in Northern Uganda. The common denominator is that human rights have played a significant, if fundamentally different role in these peace processes – which allows us to elucidate some aspects of the complex interplay between human rights and peacemaking. Each case study briefly describes the root causes as well as the evolution of the respective conflict. It then summarizes the peace negotiations, including entry points for mediators, parties, and key agreements, before looking more specifically at the influence of human rights norms and actors.

A. El Salvador

1. Root Causes and Turning Point in the Conflict in El Salvador

The conflict in El Salvador has its roots in an extremely inequitable system of land tenure that left 60% of the population landless and concentrated most of the land in the hands of a few rich landowners. Similarly, political power was monopolized by a small urban elite, while large segments of the population remained marginalized and excluded from governance. The Salvadoran army helped to preserve this arrangement and they repressed those who sought to challenge it with brutality and complete impunity. Thus, Salvadoran "Society had become highly militarized and civilian affairs subordinated to military power."[87] Consequently, leftist political groups tapped into people's frustration and with the support of the Soviet Union and Cuba, a guerrilla movement took shape in the late 1970s. By the early 1980s a full-fledged civil war had taken hold in El Salvador. The

[87] Martha Doggett and Ingrid Kircher, *El Salvador* (Geneva: ICHRP, 2005). Available from <http://www.ichrp.org/en/documents>. [Accessed on 28 March 2008], 2.

war opposed the Salvadoran government and a coalition of five guerilla groups known as the Frente Farabundo Martì para la Liberacion Nacional (FMLN) and was marked by thousands of political killings, disappearances as well as numerous atrocities committed against civilians. It lasted 12 years and left an estimated 75,000 people dead and over one million – nearly a quarter of the population – displaced.

The turning point towards a negotiated settlement came in 1989. Instrumental were two factors pertaining to the broader political and military context of the conflict. On the one hand, the Cold War drew to a close and as a result, "the United States and Soviet Union were no longer as ideologically committed to continuing their proxy wars in Central America, and were willing to put significant pressure on the two sides to negotiate, including cutting off arms supplies and reducing funding."[88] The end of the Cold War also created political space for the entry of the UN, whose presence in Central America had been categorically rejected by the Reagan Administration. The other decisive factor was that in November 1989, the FMLN, who had gained considerable military strength over the years, launched a massive operation and penetrated into Salvadoran cities. While the offensive inflicted considerable damage on the army, it did not spark the popular uprising that FMLN leaders had hoped would bring them to power. At the same time, the government realized that it could not defeat the FMLN militarily, in particular given the dwindling of U.S. support. Thus, as Alvaro de Soto put it, after November 1989 "the notion that the conflict could not be solved by military means, and that its persistence was causing pain that could no longer be endured, began to take shape. The offensive codified the existence of a *mutually hurting stalemate*. The conflict was *ripe* for a negotiated solution."[89]

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[88] Mark LeVine "Peacemaking in El Salvador" in Michael W. Doyle, Ian Johnstone and Robert C. Orr, eds., *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador* (Cambridge: Cambridge University Press, 1997), 227-254, at 230.

[89] Alvaro de Soto, "Ending Violent Conflict in El Salvador" in Crooker et al., *Herding Cats,* 349-385, at 356. Emphases in the original. Ripeness and mutually hurting stalemate were conceptualized by I. William Zartman. (Cf. I. William Zartman, "Ripeness" in Burgess, Guy and Heidi Burgess, eds., *Beyond Intractability*, Conflict Research Consortium, University of

2. Negotiating the End of the Civil War in El Salvador

Only a few months after the November 1989 offensive, the government and the FMLN both gave their green light for the UN to facilitate peace negotiations. The UN and its chief mediator, Alvaro de Soto, were perceived by both parties as impartial, and equally important, outside actors endorsed the UN's initiative to end the civil war in El Salvador. It was particularly crucial to bring on board the old military patrons of the two sides, i.e., the U.S. and Cuba; furthermore, under the banner of "Friends of the Secretary-General," de Soto managed to secure the commitment of a group of states from the region, – Colombia, Mexico, Venezuela, as well as Spain – all of which, apart from Spain, were original members of the Contadora Group that tried and failed to make peace in El Salvador in the late 1980s.[90]

The beginning of the Salvadoran peace process was marked by the Geneva Agreement of April 1990 and the subsequent Caracas Agenda, which created a framework for negotiations in the future and institutionalized the role of the UN. When substantive discussions started, it became clear that a reform of the armed forces was too difficult an issue, and thus the mediators decided to table human rights first. This resulted in the San José Agreement on Human Rights of July 1990, which, according to Mark LeVine, was "a confidence-building measure [and] a tangible success early on in the negotiations [that] helped to solidify the peace process."[91] However, the negotiations stalled soon afterwards and it was only nine months later that the talks resumed. A further step towards peace in El Salvador was made in April 1991 when the government and the FMLN signed the Mexico Agreement. This agreement dealt with a number of delicate issues, such as reforms of the army, the police, the electoral and judicial systems as well as the establishment of a truth commission. Subsequently, the peace negotiations remained deadlocked and were even in danger of collapse because of disagreements regarding the agenda. Pressure

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Colorado, Boulder, August 2003. Available at <http://www.beyondintractability.org/essay/ripeness/> [Accessed 28 March 2008])

[90] Cf. de Soto, 365-373.

[91] LeVine, 234.

from the UN and the four "Friends" ultimately secured the continuation of the talks. Thus, in September 1991 the parties signed the New York Agreement, which provides for the establishment of an Ad Hoc Commission for the purging of the armed forces. All remaining issues, in particular pertaining to land distribution and economic and social reforms, were dealt with in the framework of the New York Acts I and II, signed on December 31, 1991, hours before the expiration of Javier Pérez de Cuéllar's term as UN Secretary-General. The final peace agreement was formally signed in Mexico City in January 1991 in the presence of foreign dignitaries. Perhaps the term "negotiated revolution"[92] is too optimistic for El Salvador, especially in the light of soaring crime rates and continued inequality post-conflict. However, the peace negotiations were certainly successful insofar as they ended a long-standing and brutal civil war and contributed to stabilizing the region.

3. The Role of Human Rights in the Salvadoran Peace Negotiations

As described above, human rights played an important role in the peace negotiations in El Salvador, and they featured prominently in peace agreements. One explanation for this is that the conflict had a clear human rights dimension in the sense that many quintessential human rights crimes, such as, enforced disappearance, arbitrary arrest and detention, and torture, were extremely prevalent during the war in El Salvador.[93] Another reason is that human rights became a symbol of the post-Cold War era, of which the Salvadoran peace accords were clearly a product. Also, the prominence of human rights may have to do with Alvaro de Soto's normative style of mediation[94] as well as the mandate of the institution that he represented, the UN.

As mentioned above, the first substantive agreement in the Salvadoran peace process dealt entirely with human rights. More specifically, the San José Agreement of July 1990 had two major components: one was a

[92] Terry Lynn Karl, "El Salvador's Negotiated Revolution," *Foreign Affairs* 71, no. 2 (1992).
[93] Interview with Ian Johnston, October 2007.
[94] For a portrayal of Alvaro de Soto as a mediator, cf. Harriet Martin, *Kings of Peace, Pawns of War: the Untold Story of Peace-Making* (Geneva: HD Centre, 2007), 29-64.

catalogue of specific human rights norms and a reiteration of both the government's and the FMLN's commitment to ensuring the respect of these norms. Second, the agreement instituted the UN Observer Mission in El Salvador (ONUSAL), a human rights monitoring mission mandated to receive complaints, investigate, and report about human rights violations committed by either party. Notwithstanding the brutality of the civil war in El Salvador, it was not obvious that the first peace agreement dealt with human rights. The crux of the matter was that neither the government nor the FMLN was ready to make concessions on the most problematic issue, disarmament of the insurgents and their integration into the regular armed forces.[95] Nonetheless, both sides wanted to move the negotiations forward and human rights, even though not a priority for either party, presented an opportunity to do so. Interestingly, the San José Agreement was entirely drafted by the mediation team and signed after only one day of negotiations. Ian Johnstone described the process as follows:

> When early agreement on the armed forces … proved to be impossible, in July 1990, the UN intermediary Alvaro de Soto put the issue of human rights on the table and, after a day of intense negotiations, the San José Agreement was signed. … Even though human rights monitoring was not a priority of either party and in fact rose to the top of the agenda only by process of elimination, it paved the way to the broader political settlement that followed.[96]

Apart from advancing the process, human rights served a distinct purpose for the different stakeholders. For the mediator, it was a way of demonstrating his utility to the parties. Indeed, as Terry Lynn Karl argues, the San José Agreement transformed "de Soto from merely a facilitator of the dialogue to a mediator and permitted the UN team to put forward proposals to either side."[97] For the Salvadoran government and President Cristiani it was an opportunity "to prove he was negotiating in good faith" and to take "pressure off the government for the near future, while forcing

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[95] De Soto, 373.
[96] Ian Johnstone, *Rights and Reconciliation: UN Strategies in El Salvador* (Boulder, CO: Lynne Rienner, 1995), 18 and 21.
[97] Karl, 156.

the FMLN to make the next major concession."[98] Furthermore, a commitment to human rights allowed Cristiani to satisfy the Democratic-controlled U.S. Congress.[99] For the FMLN, an agreement on human rights was useful to show to its constituents as well as civil society groups that the negotiations were fruitful.

ONUSAL was one of the first UN peace missions to be deployed in an ongoing conflict as opposed to post-conflict context. The mission consisted of 100 civilian observers in charge of monitoring and reporting on human rights violations by both the Salvadoran army and the FMLN.[100] Some human rights groups criticized that "ONUSAL's reporting was influenced by a changing set of political realities"[101] and that its lack of assertiveness perpetuated a culture of impunity.[102] Many observers, however, credit ONUSAL for having helped to deter human rights violations and to build confidence among the parties, which contributed to de-escalating the conflict.

The Salvadoran peace accords included two principal institutions for dealing with the past: the Salvadoran Truth Commission created in the Mexico Agreement of April 1991 and a commission to purge the military of human rights violators – the so-called "Ad Hoc Commission" established in the framework of the New York Agreement in September 1991. The Truth Commission's task was "to investigate serious acts of violence that … occurred since 1980 and whose impact on society urgently require that the public should know the truth."[103] Three commissioners, foreign experts with a strong human rights background, were appointed by the UN Secretary-General to lead the investigations. The Truth Commission worked

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98 LeVine, 235.
99 Interview with Ian Johnstone, October 2007.
100 For background, cf. Johnstone, *UN Strategies,* 24-30.
101 Lawyers' Committee for Human Rights, *Improvising History: A Critical Evaluation of the United Nations Observer Mission in El Salvador* (New York: Lawyers' Committee for Human Rights, December 1995), 6.
102 Cf. HRW, *The Lost Agenda: Human Rights and UN Field Operations* (New York: HRW, 1993).
103 Mexico Peace Agreement, April 27, 1991, Annex, para. 2. Available from the USIP website: <http://www.usip.org/library/tc/doc/charters/tc_elsalvador.html>. [Accessed on 29 March 2008]

for eight months in the course of which it registered 22,000 complaints and recorded 7,000 testimonies. Its final report "From Madness to Hope" was made public in March 1993 and generated a serious controversy, in particular with regards to the Commission's decision to name the names of perpetrators and to recommend institutional reforms, most daringly the resignation of the Salvadoran Supreme Court in its entirety.[104] The Ad Hoc Commission was different insofar as it focused explicitly on the army and that it was composed exclusively of Salvadorans. Its mandate was to evaluate the human rights records of the Salvadoran officer corps and to order the transfer or discharge of officers in cases where they lacked respect for human rights. Due to time constraints, the Commission concentrated on the most senior officers and, in the end, recommended the removal of almost half of them including prominent figures, such as the Minister and Vice-Minister of Defense. The work of the Ad Hoc Commission's triggered a strong backlash within the army and the government only partially implemented its recommendations, sparking international criticism as a result.[105]

Both the Truth and the Ad Hoc Commission were the product of a compromise between the parties. Given that most atrocities were committed by the Salvadoran army, the FMLN initially wanted stronger accountability mechanisms, preferably the persecution of members of the army in courts. Furthermore, the FMLN wanted a complete restructuring of the armed forces and complete purging of human rights violators, and they sought to use human rights instruments to achieve this objective. The Salvadoran government felt threatened by these proposals and sought to avoid radical military reforms, partly to protect its own members and partly to prevent the peace process from being undermined by military hardliners. The situation in El Salvador was such that those responsible for most atrocities still held power. In this context, human rights mechanisms were

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[104] For a detailed description, cf. Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," *Vanderbilt Journal of Transnational Law* 27 (1994), 497-544. Buergenthal was one of three truth commissioners in El Salvador.

[105] For background, cf. Margaret Popkin, *Peace Without Justice, Obstacles to Building the Rule of Law in El Salvador* (University Park, PA: The Pennsylvania State University Press, 2000).

potentially counter-productive, as they could have angered powerful military leaders, thus jeopardizing the peace negotiations. It is therefore not surprising that accountability was a particularly contentious subject in the negotiations: according to a senior UN official, the Ad Hoc Commission was "the most carefully negotiated part of the peace agreement."[106] In the end, both the ad hoc as well as the truth commission represented creative compromises that partly satisfied the FMLN's claims for accountability and purges within the army. At the same time, they did not so fundamentally threaten the interests of the military that it was compelled to sabotage the peace process.

Human rights did not only have a role in the Salvadoran peace negotiations as substantive issues, they also provided yardsticks for outside actors to evaluate the performance of the parties and the impact of the talks on the ground. Reports of human rights organizations mattered a great deal, especially in the light of U.S. Congress' demand that the Salvadoran government improves its human rights record. However, it appears that human rights advocates were not sufficiently aware of their impact on the peace process. HRW researcher Jemera Rone stated: "I worked on a report on the FMLN's abductions and killings, and I released it at the moment they were going into negotiations; they accused me of being biased and trying to harm their cause. The truth is I wasn't even aware they were going into negotiations."[107] Alvaro de Soto confirmed that reports accusing parties of human rights violations could impede progress in peace talks. Later in the process, however, de Soto "developed channels that enabled him to anticipate and use the pending release of such reports to urge the parties toward an accord that included significant human rights protections."[108]

Generally speaking, El Salvador exemplifies, as Johnstone put it, a "symbiotic relationship between human rights and the peace process."[109] This is not to say that human rights were not controversial or did not

[106] Quoted in LeVine, Footnote 57.
[107] Quoted in Lutz et al., 188-189.
[108] *Ibid,* 189.
[109] Ian Johnstone, "Rights and Reconciliation" in Doyle et al., eds., *Keeping the Peace*, 312-341, at 314.

complicate the negotiations. Overall however, their impact was positive, as they provided a flexible and non-threatening tool and a vocabulary for the weaker party, the FMLN, to address their grievances and to bring their constituents on board, while allowing the mediators to move the process forward when it stalled.

B. Macedonia

1. Origins and Development of Interethnic Conflict in Macedonia

Macedonia has a multiethnic population consisting of 64% ethnic Macedonians, 25% Albanians as well as a small percentage of Turks, Roma, Serbs, and Vlachs.[110] The country gained its independence in September 1991, the only Yugoslav Republic to secede without bloodshed. Two months later a constitution was adopted that defined Macedonia as a "National state of the Macedonian people, which guarantees the full civic equality and permanent co-existence of the Macedonian people with Albanians, Turks, Vlachs, Roma and the other nationalities."[111] According to Daskalovski, the 1991 Constitution symbolizes

> a classification of peoples into three categories, the Macedonians as the primary bearers of the right to the state, the members of the four mentioned minorities as peoples with equal rights but not being the primary claimants to the right to the state, and the members of the nations not even mentioned in the Preamble specified as 'others'.[112]

Thus, the marginalization of minorities, particularly of Albanians, the largest minority group, constitutes the root cause of the conflict in Macedonia. In many ways, these dynamics are the result of the legacy of Socialist

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[110] Figures are taken from John Phillips, *Macedonia: Warlords and Rebels in the Balkans* (New Haven, CT: Yale University Press, 2004), 79-84.

[111] Constitution of Macedonia, of 17 November 1991. Available at <http://www.servat.unibe.ch/ icl/mk00000_.html>. [Accessed on 31 March 2008]

[112] Zhidas Daskalovski, "Language and Identity: The Ohrid Framework Agreement and Liberal Notions of Citizenship and Nationality in Macedonia," *Journal on Ethnopolitics and Minority Issues in Europe* 3, no. 1 (2002), 14.

Yugoslavia, where "Macedonia was a republic and Macedonians were part of a constituent nation." At the same time "Kosovo was not a republic, and Albanians were only tacitly recognized as a nation, despite the fact that they were twice as numerous as the Macedonians [in Yugoslavia]."[113] Consequently, post-independence Macedonia was built on the principle of Macedonian supremacy and Albanians were marginalized in state institutions and denied equal opportunities. This created resentment among Albanians, 85% of whom declared in 1993 that they considered themselves second-class citizens.[114] According to John Phillips, "The ethnic Albanians' aims were for recognition as equals in the Macedonian constitution, for Albanian to be an official language, and for state-funded university. They also wanted greater representation in the police, armed forces and civil service."[115] Macedonians, on the other hand, wanted to maintain political control of the country. These conflicting interests fostered antagonism and mutual suspicion: "Albanians accuse[d] Macedonians of imposing a unitary ethnopolitical character on the state," while "Macedonians, in turn, equate[d] most Albanian demands for self-determination with irredentism."[116]

Macedonia did not inherent the same level of political conflict with its Albanian minority as other Yugoslav republics, in particular Serbia. Despite wide-spread discrimination, Albanians did participate in state institutions, and demands for Albanian independence or secession were marginal. In the decade after independence, inter-ethnic tensions were latent, but did not escalate, although violent incidents did happen occasionally. The situation deteriorated in the context of the Kosovo crisis, which between March and June 1999 led to an influx of more than 250,000 ethnic Albanian refugees to Macedonia. Indeed, the Kosovo war changed

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[113] Sally Broughton and Eran Fraenkel, "Macedonia: Extreme Challenges for the Model of "Multiculturalism" in Paul van Tongeren, Hans van de Veen and Juliette Verhoeven, eds., *Searching for Peace in Europe and Eurasia* (Boulder, CO: Lynne Rienner, 2002), 264-279, at 267.
[114] Natasha Gaber "The Muslim Population in FYROM (Macedonia): Public Perception" in Hugh Poulton and Suha Taji-Farouki, eds., *Muslim Identity and the Balkan State* (Washington Square, NY: New York University Press, 1997), 111.
[115] Phillips, 80.
[116] Broughton and Fraenkel, 265.

the dynamics of Macedonian-Albanian relations, which ultimately set the ground for the escalation of the conflict in 2001.[117] On the one hand, the refugee flow instilled fears among ethnic Macedonians about a democratic shift in their disfavor, which translated into increased support for radical nationalist parties.[118] Albanians, on the other hand, were politicized by the persecution of their kin across the border, which led them to articulate their claims *vis-à-vis* the Macedonian state more forcefully. Also, the influx of arms, combatants, and the presence of the Kosovo Liberation Army (UCK) fostered the formation of an Albanian insurgency in Macedonia.[119] In January 2001 the National Liberation Army (NLA) led by Ali Ahmeti began attacking police and army posts in the northwestern part of Macedonia near the border to Albania and Kosovo. The battles between the Macedonian army and the NLA in Tetovo, Macedonia's second largest and largest Albanian city, were particularly hard-fought. However, while the violence continued sporadically in the following months, Macedonia never slid into full-fledged war and casualty numbers remained low. International preventive action, in the form of diplomatic initiatives as well as political and military pressure on the parties, certainly played a role in this regard.[120] Most importantly, the military situation soon reached a stalemate: "The Macedonian army was not able to dislodge the rebels; the rebels were not strong enough to create a separate state."[121] Thus, by elimination, the negotiation table became the preferred platform for political action for both parties.

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[117] International Crisis Group (ICG), "The Macedonian Question: Reform or Rebellion," *Balkans Report No. 109,* 5 April 2001.
[118] Broughton and Fraenkel, 268.
[119] Phillips, 72-78.
[120] Henryk J. Sokalski, *An Ounce of Prevention: Macedonia and the UN Experience in Preventive Diplomacy* (Washington, D.C.: USIP Press, 2003)
[121] Quoted in Walter Kemp, "Talking to a Sphinx: An Interview with Max van der Stoel," *Helsinki Monitor* 18, no. 1 (2007), 6-15, at 10.

2. Mediating Interethnic Conflict in Macedonia

The Organization for Security and Co-operation in Europe (OSCE) got involved in official conflict resolution activities in Macedonia well before the conflict escalated in 2001. During his term as OSCE High Commissioner on National Minorities from 1993 to 2001, Max van der Stoel, a former Dutch foreign minister and well-known human rights advocate, traveled to Macedonia more than fifty times. This allowed him to develop an excellent relationship to the Macedonian government as well as Albanian leaders.[122] As a result, the HCNM acted as an intermediary to diffuse tensions between Macedonians and Albanians at different instances, for example in February 1995 when violence broke out after the shooting of an Albanian demonstrator; or in July 1997 when riots took place after the Constitutional Court prohibited Albanians from flying the Albanian flag on public buildings. Most importantly, as discussed below, van der Stoel successfully mediated a dispute regarding the establishment of an Albanian language university, an issue that carried high symbolic value for Albanians and could potentially have escalated interethnic conflict in Macedonia.

The negotiations following the outbreak of violence in 2001 were of a different nature in that they were more high-profile and comprehensive in terms of the issues and parties involved. A first round of talks in Skopje that included President Boris Trajkovski as well as all the major Macedonian and Albanian political parties failed. In order to move the process forward, the U.S. and the European Union (EU) appointed special envoys, James Pardew and François Léotard, who subsequently acted as facilitators, along with OSCE representatives. The North Atlantic Treaty Organization (NATO) also provided stronger military leverage. Against this background, in July 2001 the talks were moved to the lakeside resort of Ohrid in eastern Macedonia. Again, all the major political party as well as government representatives were present, although the NLA did not directly participate. However, Albanian parties "were in constant touch with [NLA leader]

[122] The following paragraph is based on Walter Kemp, ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague: Kluwer Law International, 2001), 183-196.

Ahmeti during the negotiations."[123] After weeks of intensive negotiations the parties signed the Ohrid Framework Agreement in August 2001. The agreement addressed a range of issues related to decentralization and equitable representation of minorities in state institutions and the security apparatus; it also established the official status of the Albanian language in Macedonia and provided for the disarmament of rebel groups.[124] According to Vasko Popetrevski and Veton Latifi, "[n]either the Macedonian nor the Albanian signatories … were completely satisfied with [the Ohrid Agreement]." However, it "satisfied the main demands of the Albanian leaders by enhancing the political and legal status of ethnic Albanians in Macedonia. At the same time, the agreement maintained the unitary character of the state, a provision which the Macedonian leaders had insisted on."[125] Six and a half years later, Armend Reka concludes that Ohrid "saved Macedonia from the brink of civil war" and, although interethnic relations remain difficult, the agreement pacified the country "by empowering not only the sizeable Albanian population but other less numerous communities as well."[126]

3. The Role of the HCNM in Peacemaking in Macedonia

The HCNM was established in 1992 by the Conference on Security and Co-operation (CSCE) as a conflict prevention instrument. His mandate was to collect information and to promote dialogue between the state and minority populations living within their borders.[127] The HCNM differs from

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123 Vasko Popetrevski and Veton Latifi, *The Ohrid Framework Agreement Negotiations* (Camberly: Conflict Studies Research Centre, June 2004), 31.

124 Ohrid Framework Agreement, 13 August 2001. Available at <http://faq.macedonia.org/politics/framework_agreement.pdf>. [Accessed on 2 April 2008]

125 *Ibid.,* 29.

126 Armend Reka, "The Ohrid Agreement: The Travails of Inter-ethnic Relations in Macedonia," *Human Rights Review* 9 (2008), 55-69, at 55.

127 Cf. Diana Chigas et al. "Preventive Diplomacy and the Organization for Security and Co-operation in Europe: Creating Incentives for Dialogue and Cooperation" in Abram Chayes and Antonia H. Chayes, eds., *Preventing Conflict in the Post-Communist World* (Washington, D.C.: Brookings Institution, 1996), 25-98; John Packer "The OSCE High

other peace mediators in that he becomes active *before* the outbreak of conflict, instead of intervening in a context of full-fledged war; the HCNM's focus is on preventing conflicts, more than on making peace. Saadia Touval argues that the HCNM is nonetheless a mediator insofar as he seeks to bring about an agreed arrangement that addresses a dispute between different parties.[128] More specifically, the HCNM is a "normative intermediary," who "uses norms to achieve solutions and seeks solutions consistent with norms."[129] Thus, the compromises he suggests to the parties are derived from international law and standards, in particular minority rights.

Macedonia provides an interesting example of the HCNM's normative approach to mediation. Access to tertiary education was a particularly contentious issue in Macedonia. In fact, Macedonia only had two universities and none of them offered courses in Albanian. As a result, university enrollment among Albanians was extremely low. The issue became a "rallying point for much of the ethnic Albanian community,"[130] especially when in 1995 Albanian leaders unilaterally established the "University of Tetovo," which the Macedonian government subsequently refused to fund or recognize. When the HCNM got involved as a mediator, he proceeded in three steps. First, he tasked a Netherlands-based minority rights NGO, the Council on Interethnic Relations, with the elaboration of a general normative framework regarding minority education. The resulting document, the Hague Recommendations Regarding the Education Rights of National Minorities of October 1996, cited relevant human rights treaties and invoked existing norms and standards to establish a general framework that provides guidance to states in developing minority rights policies. For example, the document stipulates that "Persons belonging to national minorities should have access to tertiary education in

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Commissioner on National Minorities" in G. Alfredsson et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001), 641-656.

[128] Saadia Touval, "Does the High Commissioner Mediate?" *International Law and Politics,* 32 (2000), 707-713.

[129] Steven R. Ratner, "Does International Law Matter in Preventing Ethnic Conflict?" *International Law and Politics* 32 (2000), 668, 622.

[130] *Ibid.,* 626.

their own language when they have demonstrated the need for it and when their numerical strength justifies it."[131] In a second step, van der Stoel applied the normative framework regarding minority education to the situation in Macedonia. In effect, the HCNM acted as a "norms translator" for the parties. He indicated to the government that its refusal to recognize an educational institution solely based on the language of instruction violated international law, in particular the 1966 International Covenants on Civil and Political and on Economic, Social and Cultural Rights as well as the 1998 European Framework Convention for the Protection of National Minorities. At the same time van der Stoel conveyed to Albanian groups that the government was under no legal obligation to provide state funds for private universities or recognize its diplomas.[132] Lastly, and most importantly, the HCNM proposed a compromise that took into account the concerns of both sides, while being consistent with international norms and standards regarding minority education. Thus, he recommended the creation of a private trilingual – Albanian, Macedonian, and English – university under international auspices that would offer classes in a limited range of disciplines, most importantly business administration and teachers' training. The government and moderate Albanian parties accepted van der Stoel's proposal and in July 2000, the Macedonian Parliament passed the Law on Higher Education overriding a previous law that limited university education to courses in Macedonian. The new law paved the way for the successful implementation of the High Commissioner's project. After a successful fundraising effort, the construction of the new South East European University (SEE) in Tetovo began in February 2001and was finished half a year later – with only two weeks delay, despite intense fighting in Tetovo. Shortly before its inauguration in November 2001, SEE was granted official accreditation by the government; in 2002 2,300

[131] The Hague Recommendations Regarding the Education Rights of National Minorities, October 1996, para. 17. Available from the OSCE website: <http://www.osce.org/documents/hcnm/1996/10/2700_en.pdf>. [Accessed on 2 April 2008].
[132] Cf., Ratner, 625-629.

students, 10% of which are non-Albanians, were enrolled in the new university.[133]

Of course, agreement on the university issue did not prevent the outbreak of violence in 2001. However, the HCNM's mediation provided a model for conflict resolution in Macedonia, which was replicated at a later stage, most notably in Ohrid in 2001. Interestingly, in November 1998 the High Commissioner issued a comprehensive statement about interethnic issues in Macedonia. He "said that ethnic groups are obliged to respect the territorial integrity of the State and the constitutional order." Furthermore, "he stressed the need for integrating the Albanian minority into Macedonian society" emphasizing in particular issues related to decentralization, language, and education.[134] A decade later, van der Stoel remarked: "compare the recommendations I made in Macedonia in 1998 … and the Ohrid agreement. It is more or less the same issues."[135] Indeed, the Ohrid Agreement represents in large parts a list of minority rights provisions applied to the specific circumstances in Macedonia, just as the High Commissioner had proposed earlier. It is understood that the context and dynamics of the Ohrid negotiations were different from van der Stoel's earlier mediation efforts. What was similar, however, was that "[t]he norms of the OSCE, the Council of Europe, and the United Nations have provided both a starting point for many … interventions and a continued reference point during the discussions."[136] Indeed, the HCNM's activities in Macedonia demonstrated that human rights can be a useful tool for peacemakers. In many ways, van der Stoel's mediation method – the elaboration of norms; then the application and translation of norms in a particular context; and finally the recommendation of norm-compliant compromise proposals – exemplifies the inherent connection between human rights and security, the founding principle of the OSCE and arguably, post-Second World War European integration in general.

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[133] Cf. Max van der Stoel, "The South East European University in Macedonia" in *OSCE Yearbook 2002* (Hamburg: Institute for Peace Research and Security Policy, 2002), 181-185.
[134] Kemp, *Quiet Diplomacy,* 190-191.
[135] Quoted in Kemp, "Interview with Max van der Stoel," 10.
[136] Ratner, 621.

C. Northern Uganda[137]

1. Emergence and Evolution of the Conflict in Northern Uganda

The conflict in Northern Uganda has to be understood in the context of competition for political and economic resources between different regional and ethnic groups in Uganda. According to Doom and Vlassenroot, the seeds for ethnic fragmentation in Uganda were sown during the colonial era: "British colonial rule effectively created a socio-economic division between north and south that consequently led to an economic marginalization of the north and a further development of the south."[138] While the South was favored economically, northern Ugandans, in particular the Acholi, made up most of the recruits for the army. Thus, "[t]he asymmetric relationship between economic underdevelopment and dominance in the military sector"[139] set the Acholi apart from other peoples in Uganda, defined a distinct Acholi identity, and set the ground for tensions with other groups in the future. After Uganda gained independence in 1962, the Acholi military establishment supported the demagogic rule of Milton Obote and later Tito Okello. When Yoweri Museveni's National Resistance Movement (NRM) usurped power in 1986, "the Acholi were ousted from power in all domains, and many a group in Uganda was in the mood for settling scores."[140] In subsequent years, as Museveni consolidated his reign and modernized the country, the Acholi were kept on the margins of society and largely denied access to political and economic resources.

Against the background of Acholi marginalization, insurgent groups emerged in Northern Uganda in the late 1980s, the most important of which was the LRA led by Joseph Kony. In the 1990s the conflict in Northern Uganda was exacerbated as the LRA became an actor in the broader regional conflict between Uganda and Sudan. As retaliation to

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137 This section is based on an earlier working paper: David Lanz, *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice, Working Paper* (Medford, MA: The Fletcher School Institute for Human Security, May 2007).

138 Ruddy Doom and Koen Vlassenroot, "Kony's Message: A New Koine? The LRA in Northern Uganda," *African Affairs* 98, no. 390 (1999), 5-36, at 7.

139 *Ibid.*

140 *Ibid.,* 10.

Museveni's support of the Southern Sudanese rebel movement, the Sudan People's Liberation Movement (SPLM), the Khartoum-based Sudanese government began financing and arming the LRA as a proxy force, facilitating "the makeover of what had been a motley group of rebels into a coherent, well-supplied military enterprise."[141] At the same time, the LRA dissociated itself from the Acholi and increasingly directed violence against the very community it claimed to defend.[142]

At the turn of the millennium, three developments strengthened the position of the Ugandan government. First, after September 11th, 2001, the LRA was added to the U.S. list of terrorist organization, which provided Uganda with an opportunity to garner increased international support and legitimacy for a military solution of the conflict in the North. Second, Khartoum largely discontinued its support for the LRA as a result of the improvement of its relation with the Ugandan government as well as the conclusion of the Comprehensive Peace Agreement (CPA) with the SPLM in January 2005. Third, in December 2003 Museveni referred the situation in Northern Uganda to the ICC, which, after several months of investigations, issued arrest warrants against senior commanders of the LRA including its leader Joseph Kony for crimes against humanity and war crimes. The indictments served to stigmatize the LRA and increased the legitimacy of the Uganda Peoples' Defence Forces' (UPDF) actions in Northern Uganda. As a result of these factors, Museveni stepped up the military campaign and increased the pressure on the LRA. However, "[t]he LRA … has proved remarkably resistant to military defeat,"[143] which brought home the realization that a military solution is not feasible and that alternative strategies had to be pursued to end the war.

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[141] Frank Van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Ordered," *African Affairs* 103, no. 412 (2004), 335-357, at 338.
[142] Anthony Vinci, "Existential Motivations in the Lord's Resistance Army's Continuing Conflict," *Studies in Conflict & Terrorism* 30, no. 4 (2007), 337-352.
[143] Van Acker, 336.

2. The Juba Peace Talks

The first initiative to make peace in Northern Uganda dates back to 1994 when government minister Betty Bigombe sought direct contacts with the LRA. Bigombe launched a similar initiative in 2004, but in both cases her efforts failed essentially because of both sides' lack of commitment to peace negotiations. This changed in 2006 when representatives of the LRA and the Ugandan government met in Juba for peace talks initiated and mediated by the Vice President of South Sudan, Riek Machar. The parties' decision to talk peace in earnest is the product of the convergence of different factors. The inconclusiveness of UPDF military campaigns has certainly played a role, as has Museveni's desire "to polish an image increasingly tarnished by allegations of corruption, electoral malpractice and inability to end the humanitarian crisis in the north."[144] The LRA's motivations are more difficult to discern. The government's version is that the LRA is a spent force and the negotiations are part of their struggle for survival. However, most observers suggest that the LRA still has significant military leverage. Thus, the decision to negotiate appears to stem from the LRA's perception of increased costs of war due to international pressure, ICC indictments, discontinued Sudanese support and the UPDF force. Also, the Juba talks provide "the LRA [with] the opportunity to portray itself as a legitimate political interlocutor at a time of renewed international interest in bringing security and development to the region, thus saving face."[145] The main mediator, the Government of South Sudan, has a clear interest in neutralizing the LRA threat, given repeated LRA attacks on villages in South Sudan.

The Juba talks started in July 2006 and after several weeks of negotiations, the parties signed a cease-fire agreement, whereby the LRA tentatively agreed to relocate its forces to assembly points in Southern Sudan.[146] Many LRA fighters did, in fact, gather at two assembly areas in

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144 ICG, "Peace in Northern Uganda?" *Africa Briefing No. 41,* 13 September 2006, 11.

145 Mareike Schomerus, "International Involvement and Incentives for Peacemaking in Northern Uganda," *Accord* 19 (2008).

146 Given the immediacy of the Juba peace talks, the following paragraph is based on information taken from news sites, in particular BBC World News

South Sudan. However, as a result of insufficient monitoring, fears of UPDF attacks, and lack of commitment to the peace process on the part of the LRA leadership, the rebels abandoned the sites after a few weeks. This caused the Juba peace talks to stall, and it was only after the skilful mediation of UN Special Envoy and former President of Mozambique, Joaquim Chissano, that negotiations resumed in April 2007. Also important in this respect was that South Africa, Kenya, and Mozambique joined the peace talks as observers, as the LRA had demanded. Thus, in May 2007 the government of Uganda and the LRA signed their first peace deal, the "Agreement on Comprehensive Solutions."[147] This was followed seven weeks later by the "Agreement on Accountability and Reconciliation" which provides for both formal justice procedures as well as traditional reconciliation mechanisms to deal with the past. The talks were subsequently interrupted because of power struggles within the LRA, which culminated in the assassination in October 2007 of Kony's deputy and fellow ICC indictee Vincent Otti. However, after the European Union (EU) and the U.S. joined as observers, the Juba talks continued and produced a series of agreements in February 2008: on a permanent cease-fire, on disarmament, demobilization, and reintegration (DDR), and on implementation and monitoring. Most importantly, the parties concluded an annex to the June 2007 agreement on accountability and reconciliation, which proposes the establishment of a special division within the High Court of Uganda to try perpetrators of crimes committed during the conflict in Northern Uganda. The purpose of this provision is clearly to challenge the ICC on the basis of the complimentarity principle enshrined in Article 17 of the Rome State. Accordingly, the Court only has jurisdiction if the

(<http://news.bbc.co.uk/>) and IRIN News (<http://www.irinnews.org/>) as well as policy reports, in particular David Mwaniki and Manasseh Wepundi, *The Juba Peace Talks – The Checkered Road to Peace in Northern Uganda* (Pretoria: Institute for Security Studies, 28 March 2007); ICG, "Northern Uganda Peace Process: The Need to Maintain Momentum," *Africa Briefing No. 46,* 14 September 2007.

147 The texts of all peace agreements of the Juba talks can be found on the website of Resolve Uganda, a U.S.-based advocacy organization working to end armed conflict in Northern Uganda: <http://www.resolveuganda.org/peaceagreement>. [Accessed on 24 March 2008]

country concerned is "unwilling or unable" to prosecute.[148] All the components have been agreed to and the final peace agreement is set to be signed in April 2008. However, the LRA remains reluctant claiming that the ICC indictments must be withdrawn before the final peace deal is signed. In any case, discrepancies between rhetoric and action are common, and the implementation of a future peace agreement in Northern Uganda thus remains uncertain.

3. The Role of the ICC in the Juba Talks

According to Arsanjani and Reisman, the ICC is the quintessential *ex ante* tribunal "established *before* an international security problem has been resolved or … established *in the midst* of the conflict in which the alleged crimes occurred."[149] Thus, it operates in circumstances, where "other authoritative political entities are still engaged in reestablishing order" and therefore, the tribunal's decisions "may influence these political and often military actions."[150] Indeed, it is important to recognize that international criminal tribunals operating in a context of ongoing conflict have political effects, even if their decisions have legal rationales. The case of the ICC in Northern Uganda is a case in point, given that the Court fundamentally influenced and altered the Juba peace talks. Thus, the pressure generated by the ICC was instrumental to bringing parties to the negotiating table; the most difficult negotiations revolved around the issue of transitional justice; the talks stalled several times partly as a result of the LRA's unease about the ICC indictments; and the ICC will continue to play a central role in the implementation phase, as the LRA lays down its arms. In a nutshell, one could argue that the whole process was determined by and structured around the ICC's indictments of Kony and his acolytes.

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[148] The Rome Statute of the International Criminal Court, 17 July 1998, art. 17. Available at <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>. [Accessed on 3 April 2008]

[149] Mahnoush H. Arsanjani and W. Michael Reisman, "The Law-in-Action of the International Criminal Court," *American Journal of International Law* 99, no. 2 (2005), 385-403, at 385. Emphases in the original.

[150] *Ibid.*

The nature of the ICC's influence remains controversial. Three principal clusters of criticisms have been mounted against the ICC's intervention in Northern Uganda. First, there is a notion that the ICC imposes a Western notion of retributive justice, which clashes with the local tradition and desire for restorative justice. Second, the ICC is criticized for being biased in favor of the Ugandan government. The fact that the ICC initially got involved in Uganda at the request of Museveni instigated this perception, which gained further momentum when the ICC Prosecutor decided to spare the UPDF and limit the indictments to members of the LRA. Third, and most importantly, the ICC's intervention is said to impede peace negotiations. Indeed, a coalition of Northern Ugandan civil society actors, spearheaded by the influential Acholi Religious Leaders Peace Initiative (ARLPI) said that the ICC indictment "directly works against efforts to end [the] war peacefully."[151] This echoed the position of a delegation of Ugandan legislators as well as religious and cultural leaders, who complained that "the ICC investigation was hampering … negotiations between the government and the rebels and was counterproductive to peace in the north."[152] The rationale of this argument is threefold. First, the ICC's insistence on accountability precludes the use of amnesties as an incentive for the leaders of the LRA to make peace. Second, the prospect of being arrested and prosecuted in The Hague increases the risk, and therefore the anticipated costs of a peace settlement for the indicted LRA leaders. This makes the option of remaining in the bush and continuing war relatively more attractive and decreases the likelihood that the LRA will agree to a peace deal. Third, the ICC indictments make it more difficult for international actors to engage with the LRA. For example, the UN Office for the Coordination of Humanitarian Affairs (OCHA) was criticized for having provided logistical support to the LRA in the context of the Juba talks.[153] Furthermore, members of the mediation team in Juba were warned

[151] Quoted in The Sunday Monitor, 9 October 2005, 2.
[152] "Uganda: ICC Could Suspend Northern Investigations – Spokesman," *IRIN News*, 18 April 2005. Available at <http://www.irinnews.org/report.asp?ReportID=46680>. [Accessed on 29 April 2007]
[153] Schomerus.

by a British NGO that they could be tried in court for their apparent complicity with individuals under ICC arrest warrants.[154] Whether the indictment of mediators would be legally feasible is highly doubtful; however, raising this possibility certainly affects the reputation of mediators and makes it more difficult for them to seriously engage with the LRA.

The controversy surrounding the ICC has motivated many observers to defend the ICC and rebuff the above-mentioned criticisms. First, it is claimed that people of Northern Uganda are, in fact, interested in strong accountability mechanisms.[155] Also, the ICC complements local reconciliation insofar as it only targets the leaders, while lower-rank LRA combatants, especially child soldiers, can be dealt with in traditional reconciliation procedures. Second, the reproach that the ICC is biased in favor of the Ugandan government is rejected on the grounds that only the crimes committed by the LRA meet the high threshold criteria set out in the Rome Statute.[156] Third, some observers have reversed the peace vs. justice claim and argued that the ICC actually promotes peace in Northern Uganda and elsewhere. Payam Akhavan, for example, held that the ICC's intervention in Northern Uganda had a deterrence effect because allegedly, as the LRA case gained momentum in 2004, "the humanitarian situation had dramatically improved."[157] It has also been argued that dealing with the past is required for sustainable peace to take hold. As Archbishop Desmond Tutu put it, if a country does not "effectively look the beast in the eye, that beast is not going to lie down quietly; it is going, as sure as anything, to come back and haunt you horrendously."[158] With regards to Northern Uganda, HRW found that the impunity of those responsible for human

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[154] Confidential interview 2, November 2007.
[155] ICTJ and Human Rights Center, University of California, Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda* (New York: ICTJ, July 2005).
[156] ICC, "Statement by the Chief Prosecutor on the Uganda Arrest Warrants." Available at <http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf>. [Accessed on 25 April 2007]
[157] Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law* 99, no. 2 (2005), 403-421, at 419.
[158] Desmond Tutu, "Healing a Nation," *Index on Censorship* 25 (1996), 39.

rights violations constitutes the true root cause of the conflict and therefore, the ICC's contribution to "[a]ccountability for gross violations of human rights and justice for the victims of such violations comprises a strong foundation upon which peace and stability are built."[159] As mentioned above, the ICC's involvement has galvanized attention and ultimately pressure on the parties to make peace. Finally, members of the mediation team have welcomed the involvement of the ICC in peace negotiations. Thus, the ICC sets clear limits as to what the mediators can do and what types of agreements they can endorse. The Court also precludes the parties from negotiating a quick-fix agreement that avoids the most difficult issues and excludes civil society groups from affected areas. In the case of Northern Uganda, the presence of the ICC was instrumental to ensure that the peace process addressed broader issues pertaining to the disenfranchisement of the Acholi community within the Ugandan state and society.[160]

In conclusion, it can be said that the impact of the ICC on the peace process in Northern Uganda is highly complex; the benefit of hindsight is required to draw unequivocal conclusions in this regard. However, it is safe to argue that the ICC complicates the peace talks and constitutes, in the word of a mediator in Juba, "a major stumbling block" for the conclusion and implementation of a peace agreement in Northern Uganda.[161] If the ICC's involvement contributes to a broader based peace process and a more sustainable peace agreement, this may have been a price worth paying. In any case, the influence of the ICC in Northern Uganda constitutes an extreme case of the influence of human rights in peacemaking insofar as an actor with a normative agenda gets to dominate peace negotiations, which were traditionally determined by pragmatic considerations of power and interests.

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[159] HRW, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (New York: HRW, September 2005), 59.
[160] Confidential interview 2, November 2007.
[161] Confidential interview 1, April 2007.

PART III: PROPOSITIONS REGARDING THE IMPACT OF HUMAN RIGHTS IN PEACEMAKING

Based on the three case studies the following section attempts to deduce a series of tentative propositions regarding the impact of human rights in peace negotiations. It examines situations where human rights actors, norms and policies were deployed in peace negotiations and assesses the nature of their impact from a conflict resolution perspective. The propositions are devised against the background of the above-mentioned normative changes in world politics since the end of the Cold War, in particular the growing role of legitimacy. Their formulation also takes into account concepts from negotiation and mediation theory. While they go beyond simply appraising individual cases, the employed methodology is obviously not solid enough to draw generally valid conclusions. Therefore, the propositions are tentative and provisional, intended to be points of discussion, rather than definite conclusions. Furthermore, the proposition will be qualified via their association to the particular political and military context from which they arose. Indeed, human rights are effective in one context, but may not work in another context because of differences in the root causes of the conflict, the incentive structure of the parties, the external environment, or the basic structure of the peace negotiations.

The findings in this section revolve around the peace versus justice framework discussed below. Its basic premise is that human rights and peacemaking are incompatible, and that the promotion of one requires abandoning the other. While recognizing its relevance, this analysis aims to expose the simplicity of the peace vs. justice framework and most importantly, to add nuance to it. Thus, in some instances and under certain circumstances, human rights can, indeed, be an obstacle in peacemaking. In other situations, however, they are completely compatible. Decisive are both the context in which human rights and peacemaking interact as well as the strategy of those who choose to deploy human rights in the context of peace negotiations.

A. Human Rights as Obstacles in Peacemaking

- *Proposition 1: Human rights can threaten the underlying interests of conflict parties and transform them into spoilers. This is especially dangerous when parties are primarily interested in their own survival and safety, and when human rights are deployed in an adversarial fashion implying the prosecution of their leaders.*

According to Roger Fisher et al. parties in a negotiation are motivated by their *interests,* that is, the desires, concerns, and fears that underlie their actions and positions with regards to the issues under discussion. What is most fundamental is that "Every negotiator wants to reach an agreement that satisfies his substantive interests. This is why one negotiates."[162] This logically implies that if a negotiation or a proposed agreement fails to satisfy a parties' underlying interests, they will opt out and search for alternative strategies and platforms of action. Other exponents of negotiation theory have developed the related concept of "human needs," arguing that conflicts revolve around people's fundamental and non-negotiable needs – for example, identity, security and recognition. Thus, conflict resolution is only possible when parties are reassured that there needs will be met in the future.[163] Although there are conceptual differences between interests and human needs,[164] they imply the same thing for our purpose: belligerents will only make peace if they anticipate that their interests and needs will be satisfied after they sign a peace agreement. Often, parties in civil wars, such as the LRA, have been fighting for many years. This means that their livelihoods and social standing depends on and their identity is derived from their status as combatants. Making peace and abandoning their weapons, their primary source of power and substance of their identity, carries a high risk for such groups. Peacemaking is a similarly

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[162] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement without Giving In*, 2nd ed. (New York: Penguin Books, 1993), 19.
[163] John W. Burton, ed., *Conflict: Human Needs Theory* (Basingstoke: Macmillan, 1990).
[164] John W. Burton, "Conflict Resolution as a Political Philosophy" in Dennis J. D. Sandole and Hugo van der Merwe, eds., *Conflict Resolution Theory and Practice: Integration and Application,* (Manchester: Manchester University Press, 1993), 55-64.

risky undertaking for members of authoritarian regimes, such as the government of El Salvador or the Apartheid regime in South Africa, as democratic elections inevitably undermine their exercise of power. Thus, unless conflict parties receive credible guarantees that after signing a peace agreement, their safety, status, and at least some elements of their power will be preserved, they will not lay down their arms or agree to democratic elections.

Human rights can be problematic in this regard. If they are deployed in an adversarial manner, they make it more difficult to offer assurances to conflict parties and they may even directly threaten their fundamental interests. By insisting that key leaders of rebel groups or authoritarian regimes are arrested and prosecuted in court, conflict parties can be scared away from the negotiation table. The reason for this is that they estimate the risk of peacemaking to be higher and the option of continuing armed struggle more attractive. Commenting on the transitions in South Africa and El Salvador, Samuel P. Huntington remarked that "clearly no authoritarian leaders will make their system democratic if they expect themselves or their associates to be prosecuted and punished as a result."[165] Indeed, the prospect of arrest and trial potentially transforms belligerents into what Stephen John Stedman calls "spoilers," that is, "leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it."[166] If parties perceive peace negotiations or the implementation of a peace agreement to lead to their disempowerment, stigmatization, and prosecution, they have a strong incentive to act against it via the use of violence or simply by clinging on to authoritarian power or remaining in the bush to fight.

The human rights mechanisms in the Salvadoran peace accords did provide for a certain level of accountability for past abuses committed by the Salvadoran military. However, there were no prosecutions, and the

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[165] Samuel P. Huntington, "The Third Wave: Democratization in the Late Twentieth Century" in Kritz, ed., *Transitional Justice,* 71.
[166] Stephen John Stedman, "Spoiler Problems in Peace Processes," *International Security* 22, no. 2 (1997), 5-53, at 5.

lustration of the officer corps took place after the signing of the peace agreement and left many key leaders unaffected. Consequently, the Salvadoran military refrained from sabotaging the peace negotiations.

Northern Uganda provides a different picture. According to Anthony Vinci, at the time of its establishment the LRA had modest *instrumental* motivations in the sense of a "goal beyond the continuation of the organization itself,"[167] namely to create political change for the Acholi people. However, in the 1990s the LRA transformed into a group solely driven by *existential* motivations, "in the sense that the LRA fights in order to continue providing security and a vocation to its members."[168] Peacemaking and disarmament are risky undertakings for the LRA, especially given the resentment within the Acholi community as a result of the gruesome atrocities committed during the war. Therefore, Joseph Kony and his LRA combatants are fundamentally interested in amnesty and reconciliation with their community as well as a secured income and place to live. However, as a result of the ICC indictments, Kony's fear of being arrested after he disarms and loses military leverage makes his return to Northern Uganda nearly impossible. It is not surprising that Kony is obsessed with the case of Charles Taylor, who left Liberia in 2004 to go into exile in Nigeria, only to be arrested and brought to The Hague two years later. In December 2006, in one of his only interviews, Kony said:

> We seem to have built our own deathbed by committing to this peace process. ...The international justice system is that if you are weak, the justice is on you. For the time being, they think me, I am weak. ...Same with Taylor, when he was in power nobody thought of justice. If you want to remain safe from ICC, you must fight and be strong.[169]

Currently, the LRA demands that the ICC indictments are withdrawn or at least suspended for one year by the UN Security Council. In other words, Kony seeks an arrangement that satisfies his principal interests, that is security and status. If the threat posed by the ICC arrest warrants is not

[167] Vinci, 342.
[168] *Ibid.,* 337.
[169] Quoted in Schomerus.

somehow mitigated, it remains doubtful that the LRA will proceed to disarm, even if they sign the final peace agreement.

- *Proposition 2: Human rights can compromise peacemaking by limiting the parties' range of possible agreements and by reducing the mediator's flexibility to suggest creative options for settlement.*

Negotiations conclude when parties reach a settlement that lies within their "zone of possible agreement" (ZOPA), the borders of which are defined by the parties' respective "best alternative to a negotiated agreement" (BATNA).[170] One of the most important contributions of mediators is to suggest creative options that are better than the parties' respective BATNAs, while at the same time satisfying their underlying interests. In peace mediation, it is particularly important for the intermediary, in the words of Fisher et al., "to invent options for mutual gain," given that the relationship between conflict parties is usually characterized by intense mistrust and broken communication channels. In the context of peace negotiations options for mutual gain have often come in the form of an arrangement whereby the parties grant each other amnesty for crimes committed in the past. Jack Snyder and Leslie Vinjamuri have argued that when amnesty schemes "create the right incentives and constraints that leave perpetrators feeling weak, but secure and reconciled to peaceful political change," they can be "an effective midwife for the birth of peace and democracy." Furthermore they remind us that "Despite increased pressure from activists for criminal accountability, more than two-thirds of wars since 1989 ended with formal amnesties."[171] One of these cases is Mozambique, where both parties during the peace negotiations between 1990 and 1992 initially insisted that the other one be held accountable for atrocities committed during the civil war. The stalemate was only broken

[170] Fisher et al.

[171] Jack Snyder and Leslie Vinjamuri, "A Midwife for Peace: Amnesty," *The International Herald Tribune,* 27 September 2006, 9. This op-ed is a synopsis of a longer article by the same authors, "Trials and Errors" cited above.

when the mediators of the Community of Sant'Egidio's suggested that both parties grant each other amnesty.[172] A similar suggestion by a mediator would be hard to conceive of today. The impermissibility of amnesty for so-called "serious crimes in international law" constitutes a consensus not only among international lawyers, but increasingly among peace mediators.[173] Thus, one can argue that the mediators' commitment to human rights reduces their ability to suggest creative options for settling disputes.

Amnesty seems to be an essential ingredient to peacemaking in Northern Uganda. The Kampala-based Refugee Law Project (RLP), for example, argued "amnesty [is] the most feasible option to ending the conflict and ensuring that … abducted children can be persuaded to come home."[174] However, the ICC arrest warrants against Kony and his acolytes make such a deal unfeasible. Allowing Kony to go into exile is not a realistic option either, particularly in light of the Charles Taylor precedent. Thus, the absence of amnesty as an option in the negotiations significantly complicates peacemaking in Northern Uganda.

El Salvador provides a different example. The peace accords did not explicitly provide for an amnesty scheme. However, the parties agreed that general amnesty would be granted when they signed the final peace agreement in January 1992. Consequently, President Cristiani issued a sweeping amnesty law in March 1993, a few days after the publication of the report of the Salvadoran Truth Commission.[175] The law was sharply criticized both within and outside of El Salvador. However, the amnesty scheme has arguably contributed to preventing a violent backlash against the democratic transition by the still powerful Salvadoran army.

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[172] Synder and Vinjamuri, "Trials and Errors," 34.
[173] Bell, *Negotiating Justice,* 80-84.
[174] RLP, *Position Paper on the ICC* (Makerere: Faculty of Law, Makerere University, July 2004).
[175] Popkin, 150-151.

- *Proposition 3: Human rights can hamper the impartiality and neutrality of mediators and constrain their ability to talk to all relevant parties in a conflict. This may make it more difficult for mediators to run an effective process.*

In mediation theory, there is a debate about whether a mediator should be *impartial,* i.e. indifferent *vis-à-vis* the outcome of the negotiations or *neutral*, i.e. not biased towards the parties. Zartman and Touval attach little importance the mediator's impartiality and neutrality. What counts, according to them, is that peacemakers can deliver whatever the parties deem has added value.[176] Christopher Moore, on the other hand, argues that the independence of a mediator is a critical factor for the parties' commitment to the process.[177] In any case, it appears that evenhandedness is more important for facilitative mediators, such as NGOs or small states, as opposed to large state manipulative mediators.[178] Human rights potentially conflict with mediators' impartiality and neutrality. If parties themselves do not give priority to human rights, mediators are expected to raise these issues. Thus, mediators may be perceived as having an agenda of their own, which could cause resentment among parties. The internal dynamics of a conflict may be such that parties disagree over whether human rights should be included in a peace agreement. Bell pointed out that human rights are more often invoked by non-state parties in order to level power imbalances with regards to the government and the army.[179] Thus, mediators who explicitly support the inclusion of human rights in a peace agreement may be criticized for their lack of neutrality. In El Salvador, human rights were primarily associated with the FMLN. There are, however, no indications that the Salvadoran government felt discriminated because of de Soto's initiative with regards to human rights. Similarly, there

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176 Zartman and Touval, "International Mediation," 443-444.
177 Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict,* 3rd ed. (San Francisco: Jossey-Bass, 2003), 52-55. Note the debate about neutrality and impartiality in other areas of conflict management, e.g. peacekeeping: cf. Alex J. Bellamy, Paul Williams and Stuart Griffin, *Understanding Peacekeeping* (Cambridge: Polity Press, 2004), 171.
178 Cf. Jacob Bercovitch, "Introduction: Putting Mediation in Context" in Jacob Bercovitch, ed., *Studies in International Mediation* (New York: Palgrave Macmillan, 2002).
179 Bell, *Negotiating Justice,* 38.

is no evidence that the Macedonian government perceived van der Stoel as biased because of his insistence on minority rights. In Northern Uganda, Riek Machar had no influence on the ICC. Thus, the argument that human rights jeopardize the mediator's impartiality and neutrality remains empirically unconfirmed.

One cornerstone principle for most mediators is inclusion. According to Lutz et al., mediators' "preferred approach is to include as many stakeholders as possible, even those that might be potentially disruptive, on the grounds that those left on the sidelines will have a greater incentive to undermine any agreement that is reached."[180] Some human rights advocates have argued that it is not permissible to negotiate with leaders of armed groups who are known to be responsible for atrocious human rights violations. Doing so would confer status on these groups and reward their violence. In many ways, this discourse is the leftist equivalent of the right-wing slogan "We do not negotiate with terrorists!" This approach is problematic in terms of conflict resolution because it may be that negotiations are the only way to achieve a desirable outcome in a given situation.[181] For example, in order to end the civil war in Northern Uganda and to allow hundreds of thousands of displaced people to return to their homes, it is unavoidable to negotiate with the LRA, notwithstanding the horrible crimes they have committed. Stigmatizing mediators and even threatening them with prosecution for their engagement with the LRA has the effect of discouraging mediation efforts. Against this background, states that support the ICC and emphasize human rights in their foreign policies may find it hard to justify their involvement with alleged war criminals. A case in point is the debate within the Swiss FDFA about whether its involvement in the Juba talks could be reconciled with its strong support of the ICC.[182]

[180] Lutz et al., 177.
[181] Fisher et al., 161-165.
[182] Confidential Interview 2, November 2007.

B. Human Rights as Facilitating Peacemaking

- *Proposition 1: Human rights can increase the legitimacy of peacemaking within conflict societies, in particular when affected groups have used human rights as a vocabulary to voice their grievances. This can contribute to enhancing the internal acceptance of a peace process, to building a coalition for peace, and to marginalizing those who oppose peacemaking.*

Explaining the universal appeal of human rights for those that are vulnerable and oppressed, Michael Ignatieff argued that "The language of human rights is the only universally available moral vernacular that validates [their] claims." Marginalized groups across the world "seek out human rights protection precisely because it legitimizes their protest against oppression."[183] It is not surprising then that groups affected by conflict have used the human rights vocabulary to raise awareness about their suffering and to urge the world to do something to help them. In certain contexts, in particular in Latin America, the human rights rhetoric is particularly common. Presumably, the reason for this is that human rights instruments are particularly well suited to addressing the patterns of conflict in Latin America as well as the resulting crimes: authoritarian governments oppressing opposition groups and social movements by means of censorship, torture, and enforced disappearances. Also, the emphasis of human rights probably has to with the relative strength of civil society in Latin American conflict societies. The link between civil society and human rights is confirmed by Bell. She found that peace negotiations with greater civil society participation are more likely to produce an agreement that includes significant human rights provisions.[184] Thus, by including human rights in peace negotiations, parties increase the legitimacy of peace negotiations within conflict societies. Human rights make it more likely that affected groups perceive the peace process to address their grievances and

[183] Michael Ignatieff, "The Attack on Human Rights," *Foreign Affairs* 80 (November/December 2001), 102-116, at 109.
[184] Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), 231.

demands. This possibly contributes to building an internal coalition for peace against those who oppose peacemaking.

El Salvador is a case in point. Indeed, there were a range of relatively active human rights NGOs in El Salvador, whose principal focus during the conflict had been to investigate and denounce human rights cases as well as to support the victims of human rights violations.[185] The prominent role of human rights was instrumental in securing their support for the peace negotiations. This, in turn, contributed to fostering popular support for peacemaking, in particular among groups sympathetic to the FMLN.

Macedonia is another case that underscores the internal legitimacy-generating function of human rights in peacemaking. The HCNM's insistence on minority rights was popular among Albanian civil society groups. Indeed, the grassroots support for van der Stoel's mediation allowed the negotiations about the Albanian language university to go ahead, despite the intransigence and opposition of radical Albanian leaders, including the head of the illegally founded University of Tetovo, Fadil Suleymani.

Northern Uganda highlights a different point. As Katherine Southwick points out, the ICC is "widely opposed by those groups the Rome Statute is designed to serve: the victims."[186] Rather than retributive justice, it appears that Acholi victims of LRA-violence want reconciliation and reintegration of perpetrators into their communities. This can be achieved via local mechanisms of reconciliation and via a policy of amnesty, which is "integrate[d] into Acholi traditions of forgiveness … and a long-term strategy of breaking a cycle of violence."[187] Thus, the ICC's emphasis on punishment and accountability has alienated local civil society groups. If a future peace agreement centers around these notions, the Acholi may come to see it as externally imposed and be less enthusiastic about its implementation.

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[185] Doggett and Kircher.
[186] Katherine Southwick, "Investigating War in Northern Uganda: Dilemmas for the International Criminal Court," *Yale Journal of International Affairs* 1 (2005), 105-119, at 113.
[187] *Ibid.,* 114.

- *Proposition 2: Human rights can increase the legitimacy of peacemaking in the eyes of the outside world. The support of external actors thus generated can enhance peace dividends for conflict parties insofar as it increases international involvement in peacemaking as well as post-conflict reconstruction.*

As described at the outset, the growing role of legitimacy characterizes post-Cold War international relations. At the same time as it has become more difficult for states to deploy their military strength to achieve foreign policy objectives, the importance of soft power, and legitimacy as its vehicle, has grown. When states intervene in conflicts, they are particularly keen to ensure that the result of their actions is recognized as lawful and ethical, in other words, legitimate. Human rights as generators of legitimacy are crucial in this context. Thus, human rights have become an integral part of the "liberal peace framework" for the rebuilding of post-conflict states. [188] Manifestly, human rights have also increasingly influenced peace negotiations and mediation. Indeed, the international community's reception of a peace agreement, and its willingness to support and provide resources for its implementation – for example via the provision of peacekeeping troops or funds for reconstruction projects – depends, among other factors, on whether the agreement includes human rights. Moreover, the endorsement by conflict countries of international law and human rights can enhance their chances of being granted lucrative membership in supranational organizations, such as the EU. In both cases, the inclusion of human rights in peacemaking is beneficial for parties insofar as it generates legitimacy, which potentially increases their gains in the post-conflict phase.

Macedonia is a case in point in this regard. Ignatieff elaborates on the reasons for governments' acceptance of the HCNM's mediation, despite the relatively intrusive nature of his activities. He posits that newly emerging states in Europe seek international legitimacy and recognition, which is required to join military alliances like NATO, economic organizations like the EU, or security collectives like OSCE:

[188] Richmond.

> Van der Stoel understood that this need for international legitimacy and eventual membership constituted his chief political leverage in newly emerging States in the European area. Without having to make this point explicit, the High Commissioner served, in effect, as a crucial institutional gatekeeper, holding out the prospects of eventual integration into European security and economic institutions in return for compliance with international standards of minority protection.[189]

Macedonia was particularly interested in integration in Europe given its small size, encirclement by potentially hostile states, such as Greece and Albania, as well as economic difficulties. The government's cooperation with a normative intermediary like the HCNM signaled to international community that Macedonia respects minority rights and that it would therefore be a worthy member of European security and economic institutions. Thus, the HCNM's emphasis on norms actually facilitated his task of mediating interethnic conflict in Macedonia.

The central role of human rights in the Salvadoran peace negotiations has also been useful in terms of generating legitimacy. The most important external actor in the context of the civil war in El Salvador was undoubtedly the U.S.; the Salvadoran government, in particular, relied heavily on military aid from the U.S. As a result of allegations of human rights violations by the Salvadoran army, the newly elected U.S. Congress in 1989 put pressure on the Bush Administration to cut military aid to El Salvador. This was such a powerful factor that the Salvadoran peace negotiations were "played out in Mexico, Caracas, San José or wherever the talks took place, but the audience was frequently the Democratic-controlled Congress."[190] In this context, an agreement on human rights was interesting for Cristiani insofar as it allowed him to increase his legitimacy and to defuse the criticisms mounted against the Salvadoran government by Congress. The agreement also enhanced the legitimacy of the UN as a facilitator, and contributed to increasing the acceptance of its role within the initially skeptical U.S. government.

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[189] Michael Ignatieff, "Foreword" in Kemp, ed., *Quiet Diplomacy in Action,* xiii-xvii, at xvi.
[190] De Soto, 372.

Even in Northern Uganda, the role of legitimacy provides an argument for addressing human rights in the peace negotiations. If the LRA and the Ugandan government were to conclude an agreement that completely ignored accountability and reconciliation – in the worst case by providing for a blanket amnesty for all crimes committed during the war – this would most likely cause protest within the international community. Consequently, as the International Crisis Group (ICG) argued, "If there were blanket amnesty, donors would be unlikely to give the diplomatic and financial support essential for implementing a peace agreement."[191] However, international resources and monitors are indispensable, for example to implement a successful DDR process or to facilitate the return of displaced people.

- *Proposition 3: Human rights can be used as a "stick" to increase the cost of war and compel conflict parties to come to the negotiation table. Human rights can also be useful to justify the exclusion from the peace process of spoilers.*

According to Zartman, peace negotiations are most likely to succeed when conflicts are "ripe" for resolution, that is, "when alternative, usually unilateral means of achieving a satisfactory result are blocked and the parties feel that they are in an uncomfortable and costly predicament."[192] The concept of ripeness

> centers on the parties' perception of a mutually hurting stalemate – a situation in which neither side can win, yet continuing the conflict would be very harmful to each... Also contributing to ripeness is an impending, past, or recently avoided catastrophe. This further encourages the parties to seek an alternative policy or "way out," since the catastrophe provides a deadline or a lesson indicating that pain might be sharply increased if something is not done about it soon.[193]

[191] ICG, "Peace in Northern Uganda?" 17.
[192] Zartman, "Ripeness."
[193] *Ibid.*

In other words, conflict resolution is possible when parties realize that the costs of continuing war exceed the benefits to be gained from it. Ripeness is not a static concept; in fact, international action can be instrumental to increasing the costs of war and to heightening the parties' perception that they are in a mutually hurting stalemate. Indeed, human rights can be a useful tool in this regard in that they generate pressure on parties, who are reluctant to join peace negotiations. They also serve to marginalize spoilers, who participate in peace negotiations for tactical reasons, while actually trying to undermine progress in peacemaking. Thus, accusations of human rights violations as well as indictments in international courts and corresponding arrest warrants can be used to stigmatize and isolate uncooperative armed groups. This legitimizes military action, de-legitimizes states that provide support for such groups, and catalyzes international sanctions. Against the background of increasing costs of war, a genuine engagement in peace negotiations thus becomes more attractive.

Northern Uganda is the quintessential example for the use of human rights as "sticks" in the context of peacemaking. The ICC indictments have undoubtedly motivated the parties to engage in peace negotiations. As Juan E. Méndez, President of the ICTJ, remarked: "there is a broad recognition that the indictments have assisted in bringing the LRA to the negotiating table."[194] The ICC indictments signaled to Kony that he will be treated like a pariah unless he makes peace. They have also increased international legitimacy and support of UPDF military campaigns; put pressure on Sudan to stop supporting the LRA; and induced states to restrict Diaspora funding for the LRA. In other words, they made war more costly and risky, which forced the LRA to seek a way out of the war via a negotiated settlement. By raising awareness about the conflict in Northern Uganda, the ICC has also generated pressure on the Ugandan government to end the war and to address the disenfranchisement of the Acholi community.

[194] Juan E. Méndez, "International Judicial Responses to Violence," Speech, University of Pennsylvania, 22 March 2007. Available at <http://www.ictj.org/en/news/features/1184.html> [Accessed 30 April 2007].

In El Salvador, human rights were used more as a "carrot" than as a "stick." However, reports published by human rights NGOs during the negotiations succeeded in putting parties on the defensive. As mentioned above, de Soto initially found the accusatory style of these reports inconvenient, but he later learned to make use of them.[195] Presumably, he deployed the reports to influence the parties' cost-benefit calculations by confronting them with an apparently obvious choice: continuing war, which means chastisement and international isolation; or making peace, which promises recognition, legitimacy, and leadership.

- *Proposition 4: A general commitment to respect human rights can help to move peace negotiations forward when they are stalled. An agreement on human rights at a preliminary stage may ease the way for discussions on more contentious issues.*

Peacemaking is a highly sensitive endeavor. For years, parties have demonized each other and fought on the battle ground. In this context, talking to the other side entails a high political risk, as peacemakers are often accused of "selling out" to the enemy. In the beginning of the process, before being assured that their constituents are fully supportive of peace talks, parties are often unwilling to make substantial compromises. As a result, peace negotiations can be stalled.

This is precisely what happened in El Salvador, where the parties were quick to agree on process design and the agenda, but when it subsequently came to substantive issues, they froze. As described in the case study above, this was the moment when de Soto decided to put human rights on the negotiation table and succeeded in getting a settlement. The San José Agreement "demonstrated that the two sides could reach agreement on divisive issues"[196] and it thus eased the way for a comprehensive agreement later on. As mentioned above, the agreement also enhanced the legitimacy of the peace process within El Salvador and it

[195] Lutz et al., 189.
[196] LeVine, 234.

contributed to building confidence between the parties. However, the risk that the parties took by signing the San José Agreement was not very high. The first section of the agreement in particular merely constitutes a general list of human rights that the two parties are obliged to respect. Thus, El Salvador exemplifies the constructive role that human rights can play in peace negotiations at an early stage: they offer an attractive deal that costs relatively little in terms of the parties' commitment, but yields high benefits in terms of building confidence and momentum for peacemaking.

The Macedonian case does not exactly fit this proposition. However, it can be argued that the agreement on the Albanian-language university, which grew out of the HCNM's insistence on and creative use of minority rights, paved the way for a more comprehensive agreement in Ohrid later on. The agreement was, according to van der Stoel, a "lesson for governments … that they should accommodate legitimate minority grievances at an early stage and as part of the political process rather than later on as part of conflict resolution."[197] Indeed, this is the core premise of peacemaking in Macedonia, which eventually culminated in the Ohrid Framework Agreement.

- *Proposition 5: The deployment of human rights field missions in the context of ongoing negotiations can contribute to building confidence among parties and to deescalating armed conflict. This creates space and opportunity for peacemaking.*

Armed conflicts tend to spiral out of control as "adversaries begin to make greater threats and impose harsher negative sanctions," which leads to "a greater degree of direct violence and both sides suffer[ing] heavy losses."[198] One of the greatest challenges for peacemakers is to reverse these

[197] Quoted in Kemp, "Interview with Max van der Stoel," 10.
[198] Michelle Maiese, "Limiting Escalation / De-escalation" in Guy Burgess and Heidi Burgess, eds., *Beyond Intractability* (Boulder CO: Conflict Research Consortium, University of Colorado, January 2004). Available at <http://www.beyondintractability.org/essay/limiting_escalation/>. [Accessed 4 April 2008]

dynamics and foster an environment of de-escalation.[199] Monitoring and verification mechanisms can be useful tools in this context and ensure that preliminary peace agreements are actually implemented. Specifically, monitoring increases the amount of information shared among the parties, which is crucial in the context of armed conflict where communication and trust are scarce. Also, monitoring counteracts the spreading of rumors and increases parties' accountability for their actions on the battle field. Human rights monitoring and fact-finding missions are particularly conducive to strengthening peacemaking efforts. They can assure that cease-fire violations or attacks on civilians will not remain unnoticed. This deters parties from resorting to violence and focuses them on the peace negotiations. Furthermore, in the words of William G. O'Neill, human rights monitoring missions

> help build institutional safeguards to protect and promote human rights, and insure participation of key elements of civil society to buttress the sustainability of the peace accord. This is crucial since insecurity and on-going human rights violations will undermine confidence in the peace process and could help scuttle any agreement.[200]

In a nutshell, the presence of human rights monitors increases the cost for the parties of deviating from the route to peace. Consequently, this creates space and opportunity for carefully crafted peace negotiations.

El Salvador is particularly illustrative in this regard. The second part of the San José Agreement established a human rights monitoring mission, ONUSAL, in order to verify that the parties respected the provisions they committed to in the first section of the agreement. When they were deployed in July 1991, ONUSAL monitors "enjoyed broad powers to investigate abuses, visit prisons, interview witnesses and victims, travel anywhere in the country, establish offices wherever they deemed it necessary for their work and to report on the human rights situation."[201] Despite the

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[199] Cf. I. William Zartman and Guy Olivier Faure, eds., *Escalation and Negotiation in International Conflicts* (Cambridge: Cambridge University Press, 2005).
[200] William G. O'Neill, *Mediation and Human Rights,* Background Paper (Geneva: HD Centre, 2006).
[201] *Ibid.*

small numbers of observers and the above mentioned criticisms by human rights organizations, ONUSAL has been evaluated positively by most observers. In particular, the mission is credited for its contribution to peacemaking by "increasing the costs to either side of breaking peace talks,"[202] thus making it "difficult for the two sides to intensify the fighting or to walk away from the negotiation table."[203] Most UN peace missions are deployed after a peace agreement is signed. However, a similar type of human rights monitoring mission in the context of an ongoing conflict has been deployed in 2005 in Nepal. The ICG credited the mission for having made "a demonstrable difference on the ground" and for maintaining pressure for the peace process.[204] Unfortunately, a comprehensive analysis of the contributions of human rights monitors to peacemaking in Nepal is still pending.

- *Proposition 6: Human rights can serve as a resource for mediators. Human rights organizations can put their expertise at the disposal of mediators, and human rights norms can be used as "objective standards" in negotiations as well as to provide clarity to mediators about what kind of agreement they can endorse.*

Human rights can be a useful resource for peace mediators in three areas. First, parties with different underlying interests in a negotiation often argue about what they are willing and unwilling to accept from the other side. In such situations, according to Fisher et al., "the solution is to negotiate on some basis *independent* of the will of either side – that is, on the basis of objective criteria."[205] In peace negotiations, parties are often highly antagonistic, and in this context a mediator has a particularly important role in proposing agreeable terms and concepts. Human rights can be useful in

[202] Johnstone, *UN Strategies,* 79.
[203] ONUSAL official quoted in David Holiday and William Stanley, "Building the Peace: the Role of the United Nations in El Salvador," *Journal of International Affairs* (1992-3), 4.
[204] ICG, "Nepal's Crisis: Mobilising International Influence" in *Asia Briefing No. 49,* 19 April 2006, 7.
[205] Fisher et al., 82. Emphasis in the original.

this regard, as legal definitions of contested terms, such as "genocide" or "ethnic cleansing" can serve to de-politicize debates among parties.

Second, given the complexity of their task, peace mediators depend on support provided by outside actors. Most importantly, they rely on accurate information from the field, for example about troop strength, attacks and human rights violations, or parties' popular support. In this context, O'Neill makes specific reference to the need to make use of the UN's human rights mechanisms, specifically treaty bodies and special rapporteurs:

> Often, [they] have studied these problems in the countries where mediators are working yet mediators rarely incorporate or make references to these studies and their recommendations. This is a lost opportunity; the mediators could use the tested tactic of noting that "the independent experts say you have a problem here, it's not just me or even the other side who says this, so how can we craft a solution to this?"[206]

Third, human rights are useful for mediators insofar as they provide clarity about what mediators can and what they cannot do. In other words, human rights function as a "moral compass" that helps to prevent mediators from facilitating an agreement that violates the dominant consensus on norms and values in international affairs.

Macedonia is a good example for synergies between human rights NGOs and the mediator. Henryk J. Sokalski found that "The HCNM's mandate … [was] enhanced by the strong support from major actors in the OSCE as well as from the NGO community." The Council on Interethnic Relations, in particular, "proved extremely beneficial in facilitating the elaboration of a general framework to assist states in developing minority education policies."[207] Indeed, the above-mentioned The Hague Recommendations, which constituted one of van der Stoel's principal tools to convince the parties of the validity of his compromise proposal, were essentially the product of the Council's work. In El Salvador, Alvaro de

[206] O'Neill.
[207] Sokalski, 187-188, 188.

Soto relied on information provided by the human rights monitors of ONUSAL to gain an understanding of the developments on the ground.

The Northern Ugandan peace process provides an interesting example for the moral compass function of human rights. In the words of an experienced mediator, "If it were not for the ICC, the parties would agree within fifteen minutes to grant general amnesty to each other and sign a peace agreement."[208] The ICC makes this option unfeasible and forces the parties to address the root causes of the conflict, most importantly issues related to the disenfranchisement of the Acholi. Unless these issues are addressed, peace in Northern Uganda will not be sustainable. The involvement of the ICC ensures that mediators do not offer the parties a quick deal, which appears attractive at first sight, but will ultimately be counter-productive. Ideally, the ICC can be a source of leverage for mediators, giving clout to their insistence that parties tackle the most difficult and protracted issues of the conflict.

C. Putting Propositions in Perspective via Contextualization

Manifestly, the impact of human rights in peacemaking is not identical in every case. It very much depends on the broader political and military *context* in which peace negotiations take place. Thus, it is essential to qualify the above-mentioned propositions by contextualizing them. Human rights as obstacles in peacemaking mostly pertain to situations, where those who have committed human rights violations still hold considerable power in the peacemaking phase. In Huntington's typology of democratic transitions, "transplacement" takes place when democratization is produced by the combined actions of moderate government and opposition leaders.[209] Buergenthal addressed this very type of transition when he remarked that "the very governmental institutions and the individuals responsible for many of the most egregious acts of violence in El Salvador remained in

[208] Confidential Interview 2, November 2007.
[209] Huntington, 66.

place and in power."[210] This implies that the perpetrators of human rights violations, who normative entrepreneurs in peacemaking would like to hold accountable, have the ability of derailing a peace process, as is the case with the LRA in Northern Uganda. In order to prevent them from subverting the peace process, peacemakers thus seek to appease potential spoilers, reassuring them that their fundamental interests will not be affected. Calls for human rights, accountability, and punishment have the exact opposite effect. This can, indeed, result in situations where peace and justice are incompatible. Manifestly, transitions where perpetrators have lost their ability to spoil a peace settlement, most likely through their defeat on the battle ground, do not pose the same problems with regards to human rights. Thus, it is not surprising that almost all prosecutions of belligerent leaders – members of the German and Japanese governments during the Second World War, the Hutu *génocidaires* in Rwanda, Slobodan Milosevic in Serbia, Saddam Hussein in Iraq – occurred when they were vanquished and had completely lost power.

The use of human rights as a resource to facilitate peacemaking, as exemplified by the Salvadoran peace negotiations, is most promising when two conditions are fulfilled. The first condition relates to the presence of civil society groups interested in human rights and the parties' accountability *vis-à-vis* their constituencies. In this case, the parties actually have an interest in including human rights in peace negotiations because it enhances their standing among their supporters. It also generates support from civil society groups, which can be highly useful in the event of elections in the future. This is the incentive structure that mediators can manipulate by putting human rights on the table to advance the process. Second, human rights are effective peacemaking tools in the context of conflicts that are ripe for resolution, where parties perceive themselves to be in a mutually hurting stalemate. Thus, the challenge in terms of conflict management is not so much to cajole parties to come to the negotiation table, but to run an effective process that addresses their concerns. Human rights can be helpful

[210] Buergenthal, 512.

in this regard to ease the way for a comprehensive settlement. If, on the other hand, the parties are reluctant about negotiations and fighting is ongoing, it will not be possible to deploy human rights monitors. Moreover, the parties will probably not be very interested in human rights, but will rather prioritize security issues in negotiations.

The use of human rights to generate international legitimacy is also context-specific to some degree. The Macedonian case exemplifies this. The acceptance of the HCNM's normative mediation by the Macedonian government is motivated by the conviction that norm-compliant behavior increases the chances of joining the EU and NATO. In other words, norms in mediation are not effective in and of themselves. Rather, their success depends on the larger "sticks" and carrots" associated with them. In the European context, the incentive for norm-compliant behavior – i.e., enhanced security as a result of NATO membership and economic growth through EU membership – is particularly appealing. This explains why the HCNM's model of mediation was so successful. Thus, according to Ignatieff, "the prospects of exporting the European model of conflict prevention pioneered by Van der Stoel are doubtful."[211] In other contexts, such as Asia, where human rights do not form a regional consensus, the incentive for parties in peace negotiations to seek norm-compliant compromises is much weaker and consequently, the HCNM's method is less pertinent.

[211] Ignatieff, "Foreword," xvii.

CONCLUSION

The first part of this thesis explained that human rights and peacemaking grew out of the same political and normative context. They are, in a way, both products of attempts to build global order by using liberal values of democracy, the rule of law, and the peaceful settlement of disputes as guiding principles. The connection between human rights and peacemaking is evident when one considers the emergence of the modern notion of international human rights at the end of the Second World War when, similarly to the end of the Cold War, new ways of preventing conflicts were sought in the context of a new world order. Antonio Cassese states:

> The main reason was the shared conviction, among all the victorious powers, that the Nazi aggression and the atrocities perpetrated during the war had been the fruits of a vicious philosophy based on the utter disregard for the dignity of human beings. One means of *preventing* a return to these horrors was the proclamation at all levels of certain basic standards of respect for human rights.[212]

Human rights arose in 1945 not because they were universally respected, – of the most powerful states at the time, two maintained colonial empires (the U.K. and France), one had racial segregation (the U.S.) and another one operated a totalitarian system (Soviet Union) – but rather because they were seen as tools to preventing international conflicts. Not only are human rights and peacemaking essentially part of the same historical project, they are also compatible in terms of the objectives and ideals they work towards: drawing attention to conflicts that are often neglected; ending violence and reducing the suffering of people affected by armed conflict; resolving conflicts and building sustainable peace so war does not return; fostering a system based on the rule of law and the respect for human rights in post-conflict societies.

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[212] Antonio Cassese, *International Law,* 2nd ed. (Oxford: Oxford University Press, 2005), 377. Emphasis added.

In light of this, it merits underscoring that what unites peacemakers and human rights advocates is far greater than what divides them. This does not, however, mean that everything contemporary human rights organizations do or demand automatically promotes peace in practice. The peace versus justice dilemma is real, as the Northern Uganda case shows. In particular, human rights can impede peace negotiations if they are deployed in an adversarial fashion with the intention of denouncing, humiliating, arresting, and punishing those, whose acquiescence is required to make peace. Norms can become obstacles to peace if they are interpreted and deployed in an absolutist way that leaves no leeway for compromises by the conflict parties. Incompatibility and contradiction stems from what Adam Branch has called "international law fundamentalism,"[213] that is, when normative entrepreneurs blindly project absolute norms, in disregard of the realities of power, which inevitably shape peacemaking.

In the 1990s, when humanitarian organizations became cognizant that relief operations have, in some cases, become entangled with war economies and thus, unintentionally, contributed to entrenching violent conflict, they adopted a "conflict sensitive" approach. This implied an honest evaluation of the impact of humanitarian operations on conflict and a discontinuation of operations if their effects were negative.[214] Perhaps, a similar conflict sensitive framework is needed for human rights group working in conflict contexts. This does not at all imply that norms and principles have no place in peacemaking. Rather, it suggests a more pragmatic and flexible approach on the part of normative entrepreneurs in order to mitigate negative consequences in terms of peacemaking. For example, in the event that accountability is a particularly difficult issue in peace negotiations, normative entrepreneurs could explore issues of sequencing. Rather than insisting on prosecution immediately, they could propose the inclusion in a peace agreement of a general clause that lays the basis for legal accountability in the future. Moreover, peacemakers could

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[213] Adam Branch, "International Justice, Local Injustice: The International Criminal Court in Northern Uganda," *Dissent* 51, no. 3 (Summer 2004), 22-26, at 25.
[214] Cf. Mary B. Anderson, *Do No Harm: How Aid Can Support Peace – Or War* (Boulder, CO: Lynne Rienner, 1999).

conceive of creative solutions that lay within "grey areas" in terms of international law, for example, as it happened in South Africa, by making amnesty conditional on honest testimony before a truth commission. Also, in order to improve coordination and maximize synergies, it could be useful to establish permanent channels of communications between mediators and facilitators, on the one hand, and normative entrepreneurs in peacemaking, on the other hand. Perhaps it is also necessary need to change our mindset and conceive of human rights in peacemaking not only as "sticks," but as "carrots." Indeed, as the cases of El Salvador and Macedonia demonstrate, human rights can create incentives for compromise and opportunities to engage parties in peace negotiations. If deployed flexibly and in a non-adversarial manner, human rights can be a source of leverage and legitimacy for mediators as well as conflict parties. The main challenge then is to recognize opportunities to reconcile peace and justice, and not be blinded by their potential antagonism.

A successful example for combining principles and pragmatism, justice and peace, or law and politics, was set by the former UN Secretary-General Dag Hammarskjöld. In an essay from 1962, Oscar Schachter wrote about Hammarskjöld, who died the year before: "He regarded himself as a man of law," who firmly believed that "the principles of justice were crucial to the effort to avert disaster and to achieve a secure and decent international order."[215] At the same time, Hammarskjöld was astutely aware of political realities and constraints. "He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established."[216] For example, Hammarskjöld found legal norms useful when he mediated disputes between states: "An examination of his conciliation efforts shows that he relied to a considerable extent on establishing a common ground of principles to which both sides could

[215] Oscar Schachter, "Dag Hammarskjold and the Relation of Law to Politics," *American Journal of International Law* 56, no. 1 (1962), 1-8, at 1.
[216] *Ibid.,* 6.

adhere."[217] Thus, he recognized that legal norms "were flexible in that they did not impose specific procedural patterns or detailed machinery for action; they left room for adaptation to the particular needs and the resources available for a given undertaking."[218] In the sense of Max Weber, Hammarskjöld is "a mature man," – *ein reifer Mensch* – someone, who

> is aware of a responsibility for the consequences of his conduct and really feels such responsibility with heart and soul. He then acts by following an ethic of responsibility and somewhere he reaches the point where he says: "Here I stand; I can do no other."… In so far as this is true, an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements which only in unison constitute a genuine man – a man who can have the "calling for politics."[219]

Perhaps, a similar "calling for peacemaking" applies to men and women, who are well-intentioned, while at the same time being aware of the consequences of their actions. Indeed, this is all it takes for human rights and peacemaking to be compatible.

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[217] *Ibid.*
[218] *Ibid.,* 4.
[219] Weber, *Politics as Vocation.*

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