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Armed Groups in Peace Processes: Who Gets a Seat at the Negotiating Table?

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Abstract

This paper examines the participation of non-State armed groups in contemporary peace processes. It argues that, despite the controversy surrounding the international legal status of both armed groups and the peace agreements that they sign, both can and should be understood within the parameters of international law. Focusing on the peace process that ended the Second Congolese War, this paper reveals that there is currently no clear strategy for determining which non-State armed groups get a seat at the peace negotiating table. Instead, there appears to be a clash between the mainstream conflict resolution theory, which advocates including all the parties to the conflict, and the reality on the ground, where many armed groups are excluded from the peace process, seemingly on the basis of ad hoc, arbitrary standards that are never clearly articulated. This approach is problematic because it undermines the chances of building a durable peace and because it does not provide incentives for armed groups to comply with their obligations under international human rights and humanitarian law. This paper argues that both of these weaknesses can be addressed by adopting a principled approach to armed group participation in peace processes, under which participation would be guided by compliance with a code of minimum humanitarian standards.

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Introduction

Today, most contemporary armed conflicts are non-international (internal) and are characterized by the involvement of non-State armed groups.[1] In addition, most of these conflicts are now won at the negotiating table and not on the battlefield, ending in a negotiated peace agreement rather than military victory.[2] The presence of non-State armed groups in these conflicts means that many of these peace agreements are signed by non-State entities.[3] Because the international legal status of non-State armed groups is unclear, however, the international legal status of the peace agreements that they sign is also controversial.[4] So far, the legal scholarship has generally neglected these issues.[5]

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[1] Lotta Harbom, Stina Högbladh, & Peter Wallensteen, *Armed Conflict and Peace Agreements*, 43 J. PEACE RES. 617, 618-19 (2006) (peace agreements of some kind were signed in 46 of the 121 armed conflicts recorded between 1989-2005) (concluding that in 2005, all 31 recorded armed conflicts were intrastate (although 6 were "internationalized")). For information on the prevalent role of armed groups in these conflicts, see Int'l Council on Human Rights Policy, *Ends and Means: Human Rights Approaches to Armed Groups* 1 (2001), *available at* http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf [hereinafter *Ends and Means*] (noting that since only 2 out of the 25 major conflicts during 1998 were inter-State, as a result, "a bewildering variety of organisations, in widely different contexts, have taken up arms against the state (or are armed and outside state control). These armed groups are a key feature of modern conflict.").

[2] Centre for Humanitarian Dialogue, *Charting the roads to peace: Facts, figures and trends in conflict resolution*, Mediation Data Trends Report 2007, 12 (2007) [hereinafter *Charting the roads to peace*] (four times more conflicts were resolved by negotiated settlement than by military victory); *id.* at 5 (mediation efforts were active in 58% of on-going conflicts in 2006); Harbom et al., *supra* note 1, at 622 (peace agreements of some kind were signed in 46 of the 121 armed conflicts recorded between 1989-2005).

[3] Examples include the Lusaka Ceasefire Agreement (Democratic Republic of the Congo, 10 July 1999), the Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (7 July 1999), the Memorando de Entendimento Complementar ao Protocolo de Lusaka para a Cessção das Hostilidades e Resolução das Demais Questões Militares Pendentes nos Termos do Protocolo de Lusaka (Angola, 4 April 2002), the Cessation of Hostilities Framework Agreement Between Government of the Republic of Indonesia and the Free Acheh Movement (9 Dec. 2002), the Agreement on a ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam (22 Feb. 2002), and the Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) (21 Nov. 2006).

[4] *See* Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 380-81 (2006).

[5] With some notable exceptions, including Bell, *supra* note 4; Peter H. Kooijmans, *The Security Council and Non-State Entities as Parties to Conflicts*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 333 (Karel Wellens ed., 1998); Jeremy I. Levitt, *Illegal Peace?: An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa*, 27 MICH. J. INT'L L. 495, 504-06 (2006).

An additional issue is raised in armed conflicts involving *multiple* armed groups, which appear to be increasingly common.[6] In a more traditional civil war, between State forces and insurgent forces, once the (often very difficult) decision has been made to negotiate a settlement, then the sole armed group participating in the conflict must necessarily be included in the peace process: after all, since there are only two parties to the conflict, any settlement to resolve the conflict must necessarily be between them. In conflicts characterized by the involvement of multiple armed groups, however, once the decision has been made to negotiate a settlement, a second decision has still to be made: which of the many armed groups participating in the conflict ought to be invited to the table?

In this paper, I examine one such conflict in particular: the Second Congolese War in the Democratic Republic of the Congo (DRC). This examination reveals that in armed conflicts characterized by multiple armed groups, there is currently no clear policy determining which non-State armed groups get a seat at the peace negotiating table.[7]

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[6] Some possible explanations for the increase of armed conflicts involving multiple armed groups are: the break-down of the prominent role of the State in international relations; the prevalence of weakened or failed States; globalization increasing the ability of non-State groups to organize, communicate, and acquire sophisticated weaponry; predicted shortages of basic natural resources such as water and oil are also likely to result in "resource wars" dominated by non-State actors. *See* Daniel Thürer, *The "Failed State" and International Law*, 836 INT'L REV. RED CROSS 731, 736-37 (1999); *Cf.* Michael T. Klare, *The Deadly Connection: Paramilitary Bands, Small Arms Diffusion, and State Failure, in* WHEN STATES FAIL: CAUSES AND CONSEQUENCES 116, 120-21 (Robert I. Rotberg ed., 2004) (noting that rebel groups in countries like Sierra Leone and the DRC finance their activities through their control over lucrative natural resources); Michael T. Klare, *The Coming Resource Wars* (7 March 2006), *available at* http://www.tompaine.com/articles/ 2006/03/07/the_coming_resource_wars.php (citing British Defense Secretary John Reid's warning that global climate change and dwindling natural resources "will make scarce resources, clean water, viable agricultural land even scarcer . . . [and this will] make the emergence of violent conflict more rather than less likely.").

[7] Rob Ricigliano, *Introduction: Engaging Armed Groups in Peace Processes*, 1, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, ACCORD (2005), *available at* http://www.c-r.org/our work/accord/engaging-groups/contents.php (noting that although armed groups have become key players to the success of both peace processes and humanitarian initiatives, there is still no coherent policy on how to engage with them).

Instead, there appears to be a clash between the mainstream conflict resolution theory, which advocates including all the parties to the conflict, and the reality on the ground, where many armed groups are excluded from the peace process, seemingly on the basis of ad hoc, arbitrary standards that are never clearly articulated.

This divorce between the theory of inclusion and the reality of exclusion is problematic, I argue, for two primary reasons. First, it creates negative incentives for armed groups that ultimately undermine the likelihood of building a durable peace at the negotiating table. In particular, this approach makes it more likely that armed groups will use force indiscriminately, splinter into factions in the run-up to a peace process, and resort to force if they are excluded from the talks or if they are dissatisfied with the outcome of the negotiations. Second, it reduces incentives for armed groups to comply with their obligations under international humanitarian and human rights law.

To solve these problems, I argue that mediators and negotiators must begin to develop a principled approach to armed group participation in peace processes, under which participation would be guided by compliance with a code of minimum humanitarian standards grounded in international law. This approach would build the basis for a more durable peace by using the peace process as a means for norm diffusion, helping to transform warlords into democratic leaders during the peace process so that when they take power, these values have already taken root. In addition, this principled approach would diminish incentives for armed groups to factionalize during peace processes and reduce incentives for those groups excluded from the process or unhappy with the agreement's terms to take up arms and restart the conflict. Finally, this principled approach would open up new possibilities for holding armed groups

accountable to their international obligations, potentially diminishing the level of abuses by armed groups in contemporary conflicts. Because armed groups stand to benefit heavily from signing a peace agreement, mediators can use participation in the peace process as a carrot with which to induce higher levels of armed group compliance with minimum humanitarian standards during the armed conflict. In effect, a principled and standardized approach to peace process participation could be used to change the incentives of armed groups in the way they fight their way to the negotiating table.

To date, most of the legal scholarship on peace agreements has taken place within the parameters of the "peace vs. justice" debate.[8] Within these parameters, the debate has focused on a "conundrum"[9] under which the goals of restoring peace and achieving justice for the victims of international crimes are presented as irreconcilable because

[8] For a general description of both sides of the peace vs. justice debate, see CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 271-72 (2000). Briefly summarized, the arguments in favor of criminal accountability despite the risks to the peace are based on the following rationales: deterrence, needs of the victims, legitimacy of new political institutions, and international law. The arguments against requiring prosecution focus on: the destabilizing effect of trials, the resumption of hostilities, the undermining of reconciliation, and a lack of capacity. For other summaries of this widely discussed debate, *see, e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J.INT'L L. 251 (2007). Of course, this debate assumes a more extreme position than what often applies in reality, where human rights advocates are often sensitive to the needs of ending the conflict to prevent further abuses, and where peacemakers are not immune to the positive effects of criminal accountability. *See* Ellen Lutz, Eileen F. Babbitt, & Hurst Hannum, *Human Rights and Conflict Resolution from the Practitioners' Perspectives*, 27 FLETCHER F. WORLD AFF. 173, 173 & 179 (2003) (arguing that there is overlap between the conflict resolution field and the human rights field). Nevertheless, there is a tension between these goals that exists not only in theory but also in reality. As Morris Abrams, former U.S. Ambassador to the UN Commission on Human Rights, summed it up in relation to the Haiti peace process:

> It is a very tough call whether to point the finger or try to negotiate with people. As a lawyer, of course, I would like to prosecute everybody who is guilty of these heinous things. As a diplomat or as a statesman, I also would like to stop the slaughter, bring it to a halt. You have two things that are in real conflict here . . . I don't know the proper mix.

Roy Gutman, *War Crime Unit Hasn't a Clue: U.N. Setup Seems Designed to Fail*, NEWSDAY, at 8 (Mar. 4, 1993).

[9] Paul R. Williams, *The Role of Justice in Peace Negotiations*, *in* POST-CONFLICT JUSTICE 115, 117 (M. Cherif Bassiouni ed., 2002) (describing the conundrum as "If you exclude those responsible for war crimes, then you are unlikely to secure a negotiated peace. If you include them in the process, you legitimize them as individuals as well as their agenda, and likely increase the possibility of continued atrocities or of a fundamentally flawed peace agreement which encourages additional ethnic aggression.").

"negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction, and human suffering."[10] This debate has often focused on whether or not it is permissible to include blanket amnesties for international crimes in peace agreements.[11]

Some efforts have been made to resolve the peace vs. justice dilemma by arguing that these two ideals are not in contradiction because there can be no peace without justice.[12] Nevertheless, these efforts retain the focus of the original debate on the

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[10] Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 342 (2006).

[11] The UN Secretary-General has made it clear that the UN will not recognize an amnesty in a peace agreement for "genocide, crimes against humanity, and other serious violations of international humanitarian law." *See* U.N. Sec'y-Gen., *Report on the Establishment of a Special Court for Sierra Leone*, ¶ 22 & 23, U.N. Doc. S/2000/915 (4 Oct. 2000) [hereinafter *Report on the Establishment of a Special Court for Sierra Leone*] (stating that the Secretary-General instructed his Special Representative to include a disclaimer to this effect in the Lomé Peace Agreement); U.N. Sec'y-Gen., *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616 (23 Aug. 2004) at ¶ 64 (c) [hereinafter *Report on Rule of Law and Transitional Justice*] (to the effect that blanket amnesty provisions in peace agreements would no longer be recognized by the UN). Some authors conclude that, as a result of the UN's position, blanket amnesties are "no longer a bargaining option." Robert Cryer, *Post-Conflict Accountability: A Matter of Judgement, Practice or Principle? in* THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 267, 284 (Nigel D. White & Dirk Klaasen eds., 2005). Others suggest that the prohibition on amnesties is narrow and "that there does not yet exist a customary international law rule requiring prosecution of war crimes in internal armed conflicts or crimes against humanity," instead there is only a limited duty to prosecute under certain crimes, under certain treaties. Scharf, *supra* note 10, at 342; *see also* Williams, *supra* note 9, at 129 (arguing that in practice "it is better to negotiate a peace deal with those responsible for atrocities than to insist on the inclusion of norms of justice which may derail the peace process"). *But see Almonacid-Arellano et al v. Chile*, Judgement, IACtHR Series C 154 (26 Sept. 2006), ¶¶ 99-114 (concluding that under customary international law "crimes against humanity are crimes which cannot be susceptible of amnesty."); *see also* Orentlicher, *supra* note 8, at 2582-94 (arguing that there is a customary international legal prohibition on blanket amnesties). At the very least, the legality of using blanket amnesties as an incentive to secure the peaceful resolution of conflicts has certainly become "more contested" in recent years. Stromseth, *supra* note 8, at 255.

[12] *See* Kofi Annan, U.N. Sec'y Gen. (2 Sept. 1998) (reprinted in the ICTR Handbook for Journalists, *available at* http://69.94.11.53/default.htm ("For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law."); Scharf, *supra* note 10, at 342 (describing the phrase "no peace without justice" as the "catch phrase of the 1990s"). This idea comes from Johan Galtung's distinction between "positive peace" and "negative peace" Johan Galtung, *After Violence: 3Rs, Reconstruction, Reconciliation, Resolution: Coping with Visible and Invisible Effects of War and Violence*, Transcend: A Peace and Development Network, July 1998, www.transcend.org/TRRECBAS.HTM; *see also* Abdul Aziz Said & Charles O. Lerche, *Peace as a Human Right: Towards an Integrated Understanding*, *in* HUMAN RIGHTS AND CONFLICT: EXPLORING THE LINKS BETWEEN RIGHTS, LAW, AND PEACEBUILDING 129, 132 (Julie Mertus & Jeffrey W. Helsing eds., 2006) ("In

substantive goals themselves, rather than on the process in which the balance between these goals must be struck.[13] I suggest, on the other hand, that new attention must be paid to the parameters within which the justice vs. peace debate plays out and to the peace process itself.[14] Rather than focusing primarily on the contents of peace agreements, I argue that greater attention must be paid to the issue of participation in peace processes. In other words, the focus must shift away from the *what* and towards the *who*. Who gets a seat at the negotiating table, where the balance between the goals of peace and justice is struck?

To answer this question and to explore its twin—who *should* get a seat at the negotiating table—this paper proceeds as follows. In Part 1, I observe that there are currently no standard criteria used to select armed groups to participate in peace processes and ultimately sign a peace agreement. Instead, armed groups appear to be selected on the basis of ad hoc, informal standards that are not clearly articulated and that

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the first decade of the twenty-first century there is increasing support for the idea that peace is more—much more, in fact—than the absence of war."); Elizabeth M. Cousens, *Introduction*, *in* PEACEBUILDING AS POLITICS: CULTIVATING PEACE IN FRAGILE SOCIETIES 1, 13 (Elizabeth M. Cousens, Chetan Kumar, & Karin Wermester eds., 2001) (collapsing the distinction between "negative peace" and "positive peace" by arguing that "those elements of positive peace that hold the most promise for peacebuilding—effective public institutions, meaningful political inclusion, norms of fairness and access, legal protection for groups and individuals, and so on—are precisely those that create mechanisms for addressing grievances and resolving conflict.").

[13] *Cf.* Harim Peiris, *The Limits of External Influence*, *in* POWERS OF PERSUASION: INCENTIVES, SANCTIONS AND CONDITIONALITY IN PEACEMAKING, ACCORD (2008), *available at* http://www.c-r.org/our-work/accord/incentives/index.php (arguing that "[r]ather than try to force or induce certain outcomes,[international actors] should encourage a process-oriented approach to transforming Sri Lanka's conflict, not solely focused on the end solution but what political dynamics are required to get there and what is required to get those political dynamics.").

[14] *See* Michelle Parlevliet, *Bridging the Divide: Exploring the Relationship Between Human Rights and Conflict Management*, at 14-15, *available at* http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/issues/bridgingthedivide.pdf (reprinted in 11 TRACK TWO 8 (2002)) (arguing that the conflict management field focuses on building legitimacy into the process because without a legitimate process the ultimate agreement cannot be long-lasting, therefore "the process by which the product is agreed upon should, ideally, embody the values that are to be contained in the settlement, as this will enhance its sustainability"). For examples of work that focuses primarily on the contents of peace agreements, see, e.g., BELL, *supra* note 8, at 271-72; *see generally* Orentlicher, *supra* note 8 (discussing the issue of amnesties specifically).

vary depending on the circumstances of the conflict, the mediators, and the characteristics of the groups themselves. This ad hoc approach results in the exclusion of many armed groups from the peace process—a reality that is at odds with the mainstream theory of conflict resolution that supports the inclusion of all the parties to the conflict. This clash between the theory and the reality of armed group participation in peace processes, in addition to the lack of a standardized approach for deciding which groups to include or exclude, creates problematic incentives for armed groups to use violence indiscriminately and undermines the possibility of building a durable peace.

In Part 2, I argue that the current approach is also problematic because it does not maximize the potential of the peace process to increase armed group compliance with international law. While armed groups are increasingly treated as subjects of international humanitarian and human rights law, the international community does not hold them to their obligations under these bodies of law because they are allowed to sign peace agreements irrespective of whether they have respected or violated their international obligations. This approach undermines respect for the rule of law at the international level and also represents a missed opportunity to use the leverage afforded by the benefits associated with peace process participation to increase armed groups' compliance with their international legal obligations.

In Part 3, therefore, I suggest instead a principled approach to armed group participation in peace processes: clear, ex ante guidelines for armed group participation. I discuss how such principles might look and how they might be implemented, suggesting that they ought to be based on the international humanitarian and human rights obligations currently imposed on armed groups. I then argue that these principles could

be used to structure armed group participation from the moment the peace process moves beyond the pre-negotiation phase to the more substantive and formal negotiations concerning important issues such as power-sharing in the transitional government. I caution against using such principles to completely exclude armed groups from peace processes and suggest instead that compliance with these principles be used to structure the substantive and procedural negotiating options available to armed groups. Finally, I end by rebutting three potential counter-arguments to the principled approach: that it sets the bar for peace too high, that it over-estimates the ability of armed groups to comply, and that it is biased in favor of States.

Part 1: A Perfect Storm of Negative Incentives: Why the Rhetoric of Inclusion and Practice of Ad Hoc Exclusion Undermine the Chances of Building a Durable Peace

In this Part, I show that the dominant theory in the conflict resolution literature claims that all parties to the conflict should be included in the peace process. In reality, however, armed groups are frequently excluded from the peace process, apparently on the basis of ad hoc, informal criteria and very little (if any) public justification. As a result, the benefits associated with the inclusive theory are lost. At the same time, the benefits of exclusion are limited because the process is so informal that it cannot send effective signals to armed groups involved in that or other conflicts. Instead, it appears to create negative incentives to use force indiscriminately, to splinter in the run-up to a peace process, and to reject the peace agreement and pick up arms again.

I. The Divorce between the Theory of Inclusion and the Reality of Exclusion

A. The Theory of Inclusion

In theory, all armed groups involved in a conflict are potentially eligible to sign a peace agreement ending that conflict. This is because the prevailing wisdom in the conflict resolution literature holds that, to be successful, a mediated settlement to an armed conflict must include all the stakeholders.[15] As a result, most mediators assert that they strive for an all-inclusive approach and are willing to sit down at the table with all the parties to the conflict, no matter how much blood is on their hands.[16] Even groups that have committed genocide are generally viewed as potential negotiating partners.[17] The result of this all-inclusive approach is that, at least in theory, all armed groups are potential partners for peace; none are so beyond the pale that negotiating with them is viewed as impossible.[18]

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[15] Centre for Humanitarian Dialogue, *A Guide to Mediation: Enabling Peace Processes in Violent Conflicts*, at 10 (2007) [hereinafter *A Guide to Mediation*] ("Talking with individuals responsible for particularly gross human rights violations or those who hold to widely unacceptable ideologies can be very controversial." Nevertheless, mediators need to reach out to these groups because their involvement is key to initiating the peace process and such groups generally "prove to be part of the solution."); Antonia Potter, *In Search of the Textbook Mediator*, *in* HARRIET MARTIN, KINGS OF PEACE, PAWNS OF WAR: THE UNTOLD STORY OF PEACE-MAKING 159, 164 (2006) (arguing that the textbook mediator must live with a "moral ambiguity. They must be prepared to talk to and even befriend those whose hands may be stained with blood."); Cees de Rover, *Waging Peace and Ending Violence in the Twenty-First Century*, *in* FROM CIVIL STRIFE TO CIVIL SOCIETY 132, 142-43 (William Maley, Charles Sampford, & Ramesh Thakur eds., 2003) ("Peace talks, round tables, conferences, negotiations, media drives and campaigns must include all parties to a conflict.").

[16] *See, e.g.*, MARTIN, *supra* note 15, at 25-26 (quoting Lakhdar Brahimi's justification for why he is prepared to talk to all parties: "If you accept these kinds of jobs, you go and mediate between warlords, faction leaders, bandits, all sorts of people, people whom the human rights purists want to see hang. What I tell them is 'Let me finish, and then go ahead and hang them.'").

[17] *See* Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SECURITY 5, 24-26 (Fall 1997) (noting that the UN's insistence that the RPF negotiate a cease-fire with the radical Hutu Presidential Guard sent "a clear message: committing genocide was not enough to disqualify a party in Rwanda from a legitimate place at the bargaining table"); *id.* (noting inclusion of Khmer Rouge in the 1991 Paris Peace Accords, despite their record for human rights atrocities, because it was believed that they could not be defeated militarily).

[18] The one exception to this theory appears to be groups that have been designated as "terrorist." Some mediators now refuse to negotiate with groups that have been designated as terrorists. *The Case for Engagement: An Interview with President Jimmy Carter* 2, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7 [hereinafter *An Interview with President Jimmy Carter*] (noting that despite his policy of being willing to talk to all groups, even "pariahs in the international community," he would be unwilling to talk to a group labeled "terrorist."); *see generally Charting the roads to peace*, *supra* note 2, at 20-21. *But see* Jeffrey Lunstead, *The United States' Involvement in the Sri Lanka Peace Process 2002-2003*, 7 (Asia Foundation, 2007), *available at* http://asiafoundation.org/pdf/Supplementary_to_SCA_Final_WithCovers.pdf (former US ambassador to

There are several sound reasons for this approach. First, it may be impossible to resolve the conflict without talking to all the parties participating in it. At its most fundamental, mediators' emphasis on inclusion is based on the perception that to stop the conflict and prevent further violations of human rights, they need to talk to the parties actually doing the killing and committing the violations. As former U.S. President, now conflict mediator, Jimmy Carter reasoned: "with whom are you going to discuss a conflict if you don't discuss it with the people who are involved in the conflict, who have caused the conflict from the beginning, and who are still engaged in trying to kill each other?"[19]

There is a risk that refusing to talk to certain parties because of the blood on their hands may leave mediators with very few groups to talk to, as no party to a civil war ever has completely clean hands.[20] In fact, excluding powerful parties from the peace processes has in the past undermined the stability of peace agreements concluded during those processes.[21] For example, the exclusion of several powerful armed groups is one of the primary explanations for the failure of the 1999 Lusaka Ceasefire Agreement in the Democratic Republic of Congo (discussed in more detail below).[22]

Sri Lanka arguing that "The U.S. has made it clear that, despite the designation of the LTTE as a terrorist organization, it believes peace can only be achieved by a process that involves the LTTE.").

[19] *An Interview with President Jimmy Carter*, *supra* note 18, at 1. In another example, Nelson Mandela, upon taking over the mediation of the Arusha peace process to the conflict in Burundi in 2000, insisted on involving two armed groups that had previously been excluded, arguing: "this process should be all inclusive—not only government, National Assembly and political parties, but also rebel groups on the ground . . . these are the people slaughtering civilians . . . and unless we include them in the negotiations it will be difficult to stop the violence." Jim Fisher-Thompson, *President Mandela Opens Buruni Peace Talks in Arusha*, U.S. Dep't of State: Washington File, *available at* http://usinfo.state.gov/regional/af/security/a0022203.htm.

[20] Parlevliet, *supra* note 14, at 5.

[21] *See* Parlevliet, *supra* note 14, at 4 (arguing that "Experience indicates that any peace process that does not include all stakeholders is less likely to hold firm.").

[22] Int'l Crisis Group, *The Agreement on a Cease-Fire in the Democratic Republic of Congo*, ICG DRC Report No 5, 18 (20 Aug. 1999) [hereinafter *The Agreement on a Cease-Fire*].

Parties excluded from the process have little or no incentive to lay down their arms and support the peace process.[23] If the excluded parties continue to fight, it becomes unrealistic and even unfair to ask the parties to the peace process to commit to a cessation of hostilities, when other parties to the conflict (perhaps even their direct opponents) have made no similar commitment and continue to use force to further their objectives.[24]

Second, the theory of inclusion is premised on the realization that peace agreements are more likely to be long-lasting if they are "owned by all parties,"[25] because the parties are more likely to respect an agreement that they themselves crafted and because their participation in the process gives them "a stake in governance" and something to lose if the peace were to fail.[26] In reality, moreover, such ownership may be necessary as it will often be impossible to force peace upon the warring parties. Given the necessity of negotiating with the armed groups in the first place—a decision no government is keen to make—it may be assumed that these governments will often lack the capacity to impose the peace agreement by force. They will thus frequently require outside intervention, by the UN or a regional organization, but such organizations have often proven lacking in both the resources and political will necessary to impose the peace.[27] As a result, it may be necessary to negotiate with all the parties, to ensure that peace is in fact achieved.

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[23] *See* Parlevliet, *supra* note 14, at 14 (parties that feel excluded from the peace process "have little incentive to cooperate with the implementation of that settlement, and may be inclined to obstruct it.").
[24] *See The Agreement on a Cease-Fire*, *supra* note 22, at 18 (arguing that the Lusaka Agreement assumes (among other things) "[t]hat those parties who sign the agreement will respect and uphold the commitment to cease hostilities and disengage military units despite the fact that some parties remain outside the agreement by not signing.").
[25] *A Guide to Mediation*, *supra* note 15, at 18.
[26] *See* Levitt, *supra* note 5, 504-06 (in relation to the benefits of power-sharing provisions of peace agreements specifically).
[27] *See* Levitt, *supra* note 5, at 571 (criticizing the UN's inaction and apathy towards atrocities in Africa).

Third, even if mediators were to set the bar extremely high and only exclude groups that are particularly nefarious (perhaps terrorists or génocidaires), refusing to deal with such parties on the basis that their human rights records makes them pariahs may leave violence as their only means of negotiating. In other words, if some groups are considered to be beyond the pale, force may become the only way to deal with such groups and, in turn, force may become the only way for those groups to achieve their objectives. For example, some mediators now refuse to negotiate with groups that have been designated as terrorists.[28] There is evidence, however, that terrorist listings (and their over-use by some governments) have significantly impeded the process of peace in several conflict situations.[29] This may be because "[l]isting an organization as 'terrorist' potentially lengthens the path to non-violent politics for that group as negative perceptions of the group are encouraged, and the group's own perceptions about whether they can or should have a place in non-violent politics may also be negatively affected."[30] On the other hand, bringing an armed group into a peace process can confer a much desired legitimacy upon the group, thereby providing it with a powerful incentive to lessen its reliance on violence, or at least to use it more discriminately, because the group otherwise stands to lose that hard-earned legitimacy.[31]

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[28] *An Interview with President Jimmy Carter*, *supra* note 18, at 2 (noting that despite his policy of being willing to talk to all groups, even "pariahs in the international community," he would be unwilling to talk to a group labeled "terrorist."); *see generally Charting the roads to peace*, *supra* note 2, at 20-21.
[29] *Charting the roads to peace*, *supra* note 2, at 21; *see also* Lunstead, *supra* note 18, at 7 (insisting on need to negotiate with the LTTE despite designation as a terrorist organization).
[30] Liz Philipson, *Engaging Armed Groups: the Challenge of Asymmetries* 2, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7.
[31] Joaquin Villalobos, *The Salvadorean Insurgency: Why Choose Peace?* 2, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7; *see also* Stedman, *supra* note 17, at 41 (noting that in Mozambique, UN mediators successfully leveraged RENAMO's desire for legitimacy by making legitimacy contingent upon RENAMO's commitment to the peace process.).

There are, however, problems with an all-inclusive approach to peace process participation. First, an inclusion-at-all-costs strategy can make an agreement less likely from the outset, because some parties to the conflict may refuse to sit down with parties they view as illegitimate.[32] Second, a policy of including all parties to the conflict in a peace process can undermine popular support for the peace process if some of the groups included in the process lack public support or have no meaningful constituency.[33] Third, more parties at the table means more interests to accommodate, making it more difficult to reach a negotiated settlement.[34]

The greatest weakness of the all-inclusive approach, however, is that it appears to be impossible to implement. Despite the rhetoric favoring inclusion, I will demonstrate in the next section that, in reality, armed groups are frequently excluded from peace processes. As a result, the benefits associated with the all-inclusive approach that I described above are not, in fact, secured.

B. The Reality of Exclusion

In reality, peace mediators are far more selective about which armed groups are invited to participate in peace processes and ultimately sign a peace agreement than their

[32] *See* Richard Goldstone, *The Role of International Criminal Justice in Peace Negotiations*, 25 PENN. STATE INT'L L. REV. 779, 787-88 (2007) (Symposium Issue: The Future of International Criminal Justice) (arguing that "[i]f Karadzic hadn't been indicted, he would have been entitled and free and would have gone to Dayton two months after the massacre at Srebrenica and there's no way that the Bosnian leaders would have entered the same room or sat at the same table as Karadzic. So there [justice] aided peace."); *Ends and Means*, *supra* note 1, at 55 (concluding that "the extent to which one or other party has shown a brutal disregard for human rights will affect the willingness of the other to sit down with it."). *But see* Parlevliet, *supra* note 14, at 4 (arguing that excluding parties undermines ability to build a lasting peace).
[33] *Cf.* Levitt, *supra* note 5, at 576 (making a similar point in reference to amnesty and power-sharing provisions receiving little public support). This was a concern in Sierra Leone, for example, where the RUF had virtually no public support. *See* Int'l Crisis Group, *Sierra Leone: Time for a New Military and Political Strategy*, Africa Report No 28 (11 April 2001) [hereinafter *Sierra Leone: Time for a New Military and Political Strategy*] (advocating dealing with RUF by military force, not peace negotiations).
[34] *See* David E. Cunningham, *Veto Players and Civil War Duration*, 50 AM. J. POL. SCI. 875, 891 (Oct. 2006).

rhetoric suggests.[35] In this section, I show that despite the benefits of the inclusive approach, there are sound theoretical justifications for excluding some armed groups from the peace process. Here too, however, the theory does not translate into the reality: by examining the inclusion and exclusion of armed groups in the DRC's peace process, I conclude that there is currently no coherent justification used to include some groups and exclude others. As a result, armed groups receive a confusing message: in theory, mediators are willing to talk to all of them, but in practice, many of them are likely to find themselves without a seat at the table with very little understanding of why they were excluded.

i. Potential Rationales for the Exclusion of Some Armed Groups

Despite the prevailing wisdom that agreements are more likely to build a lasting peace when all parties are included in the process, mediators nevertheless concede that some parties to the conflict must be excluded, under at least some circumstances. First, under one theory, parties identified as "spoilers" should sometimes be excluded. Second, under another theory, it may make sense to negotiate only with those groups who are "veto players." I discuss each theory in turn.

Mediators generally concede that, despite their all-inclusive approach and willingness to engage with all parties, it may be counter-productive in some cases to include spoilers in the peace process. Spoilers are "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."[36] Spoilers are a common problem in

[35] *See* de Rover, *supra* note 15, at 142-43 ("Peace talks, round tables, conferences, negotiations, media drives and campaigns must include all parties to a conflict. *All too often this is not the case*.") (emphasis added).
[36] Stedman, *supra* note 17, at 5.

peace processes, since agreeing to negotiate peace often entails a loss of power for a group, because the peace agreement cannot meet all the demands of all the parties and because not all parties may value peace at the same time or on the same terms.[37] While careful analysis is needed to determine what sort of spoiler is involved and how best to deal with that group as a result, Stephen John Stedman suggests that inclusion can be counter-productive with the so-called "total spoilers" who "pursue total power and exclusive recognition of authority and hold immutable preferences," who have no real commitment to peace and are most likely to participate in peace processes strategically, remaining in the process only so long as they believe it is the best means of attaining their goals, or even using their participation to mask a build-up of their military capabilities.[38]

Because this sort of party is not committed to making the compromises necessary to secure a peace agreement, including them at all costs in the process can be counter-productive. Instead, Stedman argues that total spoilers are best dealt through the use of force or through other coercive strategies—such as excluding them from the peace process if they refuse to alter their illegitimate demands.[39] A good example of the exclusion of spoilers in practice can be found in Sierra Leone, where the rebel group RUF had violated several peace agreements, leading the International Crisis Group to take the unusual step of calling for the RUF to be dealt with militarily and to be excluded from any further peace negotiations.[40] Under this reasoning, therefore, some armed groups might find themselves excluded from the peace process because they were identified as spoilers and because of the high risk that including them might derail the peace process.

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[37] *See* Stedman, *supra* note 17, at 7.
[38] *Id.*, at 10-11.
[39] *See id.*, at 13-15.
[40] *See Sierra Leone: Time for a New Military and Political Strategy*, *supra* note 33, at 14-16.

Armed groups might also be excluded, however, because they are not considered important enough to include. Thus, David E. Cunningham argues that because negotiations become more complex (and less likely to succeed) as the number of parties included increases, only those parties that can be considered "veto players" should be included.[41] Veto players are those parties that are "'required' to agree to a change in policy, including an end to civil war,"[42] because they have different goals from the other parties involved in the process, because they have a sufficient degree of internal cohesion to be able to carry out their obligations under any agreement reached, and because they are unilaterally capable of carrying on the war, even if all the other parties reach a peace agreement.[43] As Cunningham argues, the veto player analysis suggests a need to question the recent "shift toward including all politically relevant actors at the negotiating table, turning many civil war negotiations into something resembling a national conference on politics in the country."[44]

Although less formally articulated than the "spoiler" and "veto-player" theories, mediators on the ground also appear to have developed a set of informal, practical criteria to determine which armed groups they will invite to participate in the peace process. Principally, these criteria seem to focus on the groups' capacity to implement their obligations under the agreement (similar to one element of the veto player analysis) and the groups' good faith intention to work towards peace (similar to the spoiler analysis). When assessing the group's capacity to implement the agreement, mediators look for the

[41] *See* Cunningham, *supra* note 34, at 891.
[42] *Id.*, at 878.
[43] *See id.*, at 878-84. It is important to note that, in this last respect, it is not necessary that the party be militarily capable of *winning* the war, simply of carrying it on to such a level that peace cannot be implemented.
[44] *Id.*, at 891.

following sorts of indicators: identifiable leadership structure, chain of command and internal disciplinary system, control over territory, military means, and degree of popular support. When assessing the group's good faith support for the peace process, mediators look to factors such as whether the armed group understands its use of violence to be a means to an end instead of an end in itself, the group's political goals and political infrastructure (e.g. does the group have a functioning political wing), the group's respect for the rule of law and humanitarian values, and whether the group has respected a pre-negotiation cease-fire agreement.[45]

Thus, despite the sound reasons for the an all-inclusive approach to participation in peace negotiations, these arguments suggest that there are also sound reasons to have exceptions to this general rule and, in some cases, to exclude armed groups from participating either because including them is likely to undermine the peace or because they are simply not important enough to warrant a seat at the table. Despite the logic of these theories, however, in reality it actually seems quite arbitrary which groups are included and which are excluded.

ii. Exclusion and Inclusion in the DRC: From Lusaka to Sun City

In order to provide the necessary context and to more clearly illustrate the points that I wish to raise, I will use the peace process in the DRC as a case study. Despite being

[45] For examples of this sort of practical criteria, see, e.g., *An Interview with President Jimmy Carter*, *supra* note 18, at 2 (his criteria include: approval from the White House, an identifiable leadership structure capable of speaking on behalf of the group, and a demonstrated willingness to work towards a peaceful settlement); Sue Williams & Rob Ricigliano, *Understanding Armed Groups*, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7 (arguing that important factors to consider when deciding whether or not to engage with an armed group include assessing the group's respect for the rule of law, political institutions, control over territory, level of support from public constituency, and means of using military force); MARTIN, *supra* note 15, at 144 (citing General Lazaro Sumbeiywo's (mediator in the Sudan peace process) conclusion that a ceasefire agreement is a necessary pre-condition to peace talks); *Assessing Groups and Opportunities: a Former Government Minister's Perspective*, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7 (interview with Marjorie Mowlam, former British Secretary of State for Northern Ireland (1997)) (similarly emphasizing need for commitment to a ceasefire as a condition for participation peace talks).

dubbed "Africa's first world war" and causing over five million deaths,[46] the conflict has been under-discussed in the legal scholarship. For my purposes, moreover, it clearly illustrates the divorce between the theory of inclusion and the reality of exclusion that I laid out above. A detailed examination of the peace process shows that there was no coherent strategy to determining which groups were included and which were excluded.

In the run-up to the beginning of the DRC peace process and the negotiation of the Lusaka Ceasefire Agreement in 1999, the international community toed the mainstream line by emphasizing that there must be all-inclusive peace talks with all parties to the conflict.[47] Although Laurent Kabila, self-appointed President of the DRC, was initially reluctant to negotiate directly with the rebel movements, he eventually bowed to international pressure and agreed that it was necessary.[48]

Despite this message of all-inclusiveness, however, the reality was very different and, in fact, few armed groups ever participated in the peace process. There were so many armed groups involved in the DRC conflict at various times that it is difficult to give a precise count.[49] By conservative estimates, there were at least seventeen armed

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[46] INT'L RESCUE COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS (2007), *available at* http://www.theirc.org/resources/2007/20067_congomortalitysurvey.pdf (concluding that between 1998 and 2007, 5.4 million people have died as a result of war and its effects). The conflict is also infamous for the extremely high levels of sexual violence associated with it. *See* World Health Organization, *Responding to Sexual and Gender-Based Violence in the Democratic Republic of the Congo*, 1 (March 2005), *available at* http://www.who.int/hac/donorinfo/campaigns/cod/en/index.html (reporting that the Joint Initiative on the Fight against Sexual Violence towards Women and Children documented 41,225 cases between 1998-2005 in South Kivu, Maniema, Goma, and Kalemie alone).

[47] *See* UN Security Council Meeting Records, U.N. Doc. S/PV.3987 (19 Mar. 1999)(for statements emphasizing particularly the need for all-inclusive talks, see the statements of Canada, Argentina, United States, United Kingdom, Russia, the OAU (represented by Burkina Faso), the EU (represented by Germany), China, and South Africa).

[48] *See Foreign Minister "Satisfied" With Outcome of Lusaka Talks*, BBC Monitoring Africa – Political (3 July 1999) (noting that the government sat down to negotiate directly with the rebels for the first time on July 3).

[49] *See* Paule Bouvier & Francesca Bomboko, *Le Dialogue intercongolais: Anatomie d'une négociation à la lisière du chaos, Contribution à la théorie de la négociation,* Cahiers Africains (Afrika Studies) no 63-64, série 2003, at 192 (L'Harmattan, 2004).

groups at the time of the signing of the Lusaka Ceasefire Agreement in July-August 1999.[50] Of these seventeen groups, only two (the RCD and the MLC) were invited to sign the Lusaka Ceasefire Agreement.[51] Between the signing of the Lusaka Agreement in August 1999 and the next stage in the DRC's peace process, the opening of the Inter-Congolese Dialogue in Sun City, in February 2002, the number of armed groups involved grew to at least twenty-one.[52] Yet, when the Inter-Congolese Dialogue ended in the Global and All-Inclusive Agreement in 2002 (which paved the way for a transitional government to take power in April 2003 and for elections to be held in 2006),[53] the number of armed group signatories had only increased by three. Despite a renewed emphasis on all-inclusiveness (as aptly demonstrated by the agreement's name), it was

[50] Report of the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo pursuant to General Assembly resolution 53/160 and Commission on Human Rights resolution 1999/56, U.N. Doc. A/54/361 (17 Sept. 1999), at Annex VIII [hereinafter Report of the Special Rapporteur, U.N. Doc. A/54/361] (listing the following groups: Rassemblement congolais pour la démocratie (RCD), Former Rwandan Armed Forces (ex-FAR), Interahamwe, Mouvement de libération du Congo (MLC), National Union for the Total Independence of Angola (UNITA), Mai-Mai of South Kivu, Mai-Mai of North Kivu, Front pour la defense de la démocratie (FDD), Lord's Resistance Army, Sudan People's Liberation Army (SPLA), Simba Brigade, Union des nationalists républicains pour la libération (UNAREL), Mouvement pour la sécurité, la paix et le développement (MSPD), Former Uganda National Army (FUNA), West Nile Bank Front (WNBF), National Army for the Liberation of Uganda (NALU), and Allied Democratic Forces (ADF)).

[51] Lusaka Agreement; *see also One Rebel Group Signs DRCongo Peace Accord*, Agence France-Presse (1 Aug. 1999) (noting MLC's signature of the Lusaka Agreement); *Rebels Sign DR Congo Ceasefire*, Agence France-Presse (31 Aug. 1999) (noting RCD's signature of the Lusaka Agreement).

[52] Bouvier & Bomboko, *supra* note 49, at 191-92 (citing *Congo-Afrique*, no 369-370, novembre-décembre 2002, pp. 570-71) (new groups include: the RCD/Mouvement de libération (RCD-ML, also known as RCD-Kisangani and RCD-Bunia), the Front démocratique pour la libération du Rwanda (FDLR), the Armée de liberation du Rwanda (ALIR I and ALIR II), and the Union des Patiotes Congolais (UPC)). In addition, there is also the RCD-National (RCD-N), another splinter of the RCD, which also signed the Global and All-Inclusive Agreement at the end of 2002. *See* Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo, Signed in Pretoria (Republic of South Africa) (16 Dec. 2002). These numbers are conservative and do not include the less organized or less prominent militias, sometimes no more than groups of criminals, also involved in the fighting throughout the DRC. *See* Bouvier & Bomboko, *supra* note 49, at 192.

[53] *See* Federico Borello, *A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo*, Int'l Center for Transitional Justice Occasional Paper Series (Oct. 2004), at viii, *available at* http://www.ictj.org/images/content/1/1/115.pdf; Int'l Crisis Group, *Securing Congo's Elections: Lessons from the Kinshasa Showdown*, Africa Briefing No 42 (2 Oct. 2006); Int'l Crisis Group, *Congo: Staying Engaged after the Elections*, Africa Briefing No 44 (9 Jan. 2007).

only signed by a total of five non-State armed groups (the MLC, the RCD, the RCD-ML, the RCD-N, and the Mai-Mai).[54]

Before going into detail about which groups were included or excluded and why, I will briefly describe the conflict that is generally known as the Second Congolese War. The Second Congolese War began on August 2, 1998, only fourteen months after the end of the First Congolese War that saw the rebel group ADFL topple Mobutu Sese Seko's dictatorial regime and install rebel leader Laurent-Désiré Kabila as the new President.[55] On July 27, 1998, President Kabila announced the expulsion of the Rwandan and Ugandan military presence in the DRC, which had remained in the DRC to bolster his regime after assisting him to achieve his victory over Mobutu.[56] The expulsion of all foreign forces antagonized factions of the former ADFL (now the official armed forces, the Forces Armées Congoalises, or FAC) who were sympathetic to Rwandan and Ugandan interests and led them to declare a new rebellion against the Kabila regime.[57]

The Congolese rebel movement soon splintered into numerous armed groups, with varying levels of support from the population and with few discernable political objectives. The rebellion, even if it was originally grounded in genuine political grievances against the increasingly dictatorial Kabila, "slowly evolve[ed] into an excuse for personal ventures by its leaders and sponsors. Trade in natural resources and weapons

[54] Global and All-Inclusive Agreement; *see also DRCongo Foes in Pretoria for Penultimate Round of Peace Talks: UN Envoy*, Agence France-Presse (15 Oct. 2002) (noting participation of "smaller" rebel movements and of the Mai-Mai); *DRCongo Peace Talks in SA Doomed-Rebel Leader*, South African Press Assoc. (6 Dec. 2002) (Lambert Mende, one of the leaders of the RCD/Kis-ML warned the process would fail because the RCD-Goma and the MLC "viewed themselves as some kind of victors in the process.").
[55] Int'l Crisis Group, *Congo at War: A Briefing of the Internal and External Players in the Central African Conflict*, Africa Report No 2, at 1 (17 Nov. 1998) [hereinafter *Congo at War*].
[56] *Id.*, at 4.
[57] *Id.*, at 1.

[took] precedence over politics, resulting in rebel leaders becoming warlords instead of genuine revolutionaries with a clear strategy for claiming leadership of the country."[58]

The war quickly became much more complicated, taking on "external dimensions,"[59] with several States intervening on the side of the rebels and others on Kabila's side.[60] Moreover, other armed groups that did not have a domestic Congolese agenda took advantage of the chaos on Congolese territory to launch attacks on neighboring States. Thus, the DRC became the battlefield for a number of different national civil wars (including those of Rwanda, Angola, Uganda, and Burundi). This complex mix resulted in an incredibly violent and bloody situation, as all these conflicts reinforced and fed off one another.[61]

a. *The Veto-Players: the MLC and the RCD*

The only two rebel groups that were invited to sign the 1999 Lusaka Agreement were the MLC and the RCD. Examining the possible reasons why they were included suggests that they were veto-players: without them, peace would not have been possible. Nevertheless, closer examination shows that they do not fit neatly into the veto-player category. Additional factors may also be relevant to explain their inclusion, and, in any case, their lack of popular support and their poor human rights records suggest reasons to question both their capacity to implement their obligations and their good faith intentions to support a peaceful transition to democracy.

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[58] Int'l Crisis Group, *Africa's Seven Nation War*, Africa Report No 4, 24 (21 May 1999) [hereinafter *Africa's Seven Nation War*].
[59] *Id.*, at 12.
[60] Kabila was initially supported by Angola, Namibia, and Zimbabwe, and later also received support from Chad, Libya, and Sudan. The rebels received support from Rwanda, Uganda, Burundi, and other rebel groups. *Congo at War*, *supra* note 55, at 1.
[61] *See* Intl Crisis Group, *Scramble for the Congo: Anatomy of an Ugly War*, Africa Report No 26, 1 (20 Dec. 2000) [hereinafter *Scramble for the Congo*].

The original rebel movement that launched the Second Congolese War was known as the Rassemblement congolais pour la démocratie (RCD). The RCD was in reality a loose alliance of people with different interests and goals, pushed into a coalition by Rwanda and Uganda just one day before the war began.[62] The "only common denominator" between the various groups merged under the RCD umbrella was their opposition to Kabila and a vaguely asserted goal of restoring democracy.[63] This loose alliance was doomed to fail: during the run-up to the signing of the Lusaka Agreement, the RCD split into two factions: the RCD-Goma, backed by Rwanda, and the RCD-Kisangani (or, RCD-Mouvement de libération, RCD-ML) supported by Uganda.[64] Later, in 2002, the RCD-Goma split again, creating the RCD-National (RCD-N), also supported by Uganda.[65]

The other armed group signatory to the Lusaka Agreement was the Mouvement national pour la libération du Congo (MLC), lead by Jean-Pierre Bemba, a businessman who had made millions under Mobutu. The MLC emerged in the fall of 1998 with the same stated goal as the RCD: the overthrow of Kabila.[66] It was backed by Uganda, which believed that the RCD had failed to mobilize any public legitimacy.[67] Bemba had the popular support that the RCD lacked, at least in Équateur province (where he is from) and

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[62] *Africa's Seven Nation War*, *supra* note 58, at 15.
[63] *Id.*, at 17.
[64] *See* Bouvier & Bomboko, *supra* note 49, at 52; *The Agreement on a Cease-Fire*, *supra* note 22, at 11.
[65] *See* Bouvier & Bomboko, *supra* note 49, at 52; *DR Congo Rebel Chief Pushes for Ceasefire in Northeast*, Agence France-Presse (26 Dec. 2002) (noting RCD-N's alliance with the MLC). While these splinter groups are well recognized, it appears that there were also several less prominent spin-off groups. *See* Bouvier & Bomboko, *supra* note 49, at 191 (mentioning the "RCD-Congo," the "RCD-Populaire," and the "RCD-Originel."); Cunningham, *supra* note 34, at 878 ("RCD-Goma actually saw further splintering across the conflict, although none of these other splinter factions was large enough to have a significant effect on the fighting.").
[66] *See* Bouvier & Bomboko, *supra* note 49, at 78 (noting that although the MLC actually began operating in September 1998, its statute (stating that the group's goals included ending dictatorship and installing democracy founded on respect for human rights) date from 30 June 1999, mere days before the signing of the Lusaka Agreement).
[67] *Africa's Seven Nation War*, *supra* note 58, at 18.

where the MLC was able to make quick military gains[68] and "unlike both branches of the RCD, he [was] in sole command of his troops."[69]

Cunningham explicitly qualifies the MLC as a veto player because it represented diverse interests from the other rebel groups, was internally cohesive, and was capable of carrying on the war unilaterally if it was excluded from the peace process.[70] The RCD-Goma, on the other hand, lacked the degree of internal cohesion required to qualify as a veto player, according to Cunningham.[71] Although this lack of internal cohesion undermined the RCD's ability to implement its obligations under the Lusaka Agreement,[72] there are other reasons why including the RCD (and the MLC) was likely viewed as crucial for the viability of any peace agreement. First, the RCD and the MLC controlled roughly sixty percent of the DRC's territory at the time the Lusaka Agreement was signed.[73] Thus, by the time the Lusaka Agreement was signed, the DRC was essentially partitioned into three relatively autonomous regions.[74] As a result, the RCD

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[68] *Id.*

[69] *Scramble for the Congo*, *supra* note 61, at 36; *see also The Agreement on a Cease-Fire*, *supra* note 22, at 12.

[70] *See* Cunningham, *supra* note 34, at 878 (noting that the MLC "had a completely separate leadership structure from that of the RCD, received support from a separate external patron (Uganda, instead of Rwanda), and represented a different ethnic base of support than the RCD did."). *But see The Agreement on a Cease-Fire*, *supra* note 22, at 12 (Bemba claims that his only difference with the RCD is with respect to military and political strategy).

[71] *See* Cunningham, *supra* note 34, at 883 (RCD-Goma was not cohesive because it "could never agree on anything other than their opposition to Kabila's government," not merely because it split into two factions.).

[72] *See id.*, at 879.

[73] Report of the Special Rapporteur, U.N. Doc. A/54/361, *supra* note 50, at ¶ 13. As Bemba himself reluctantly acknowledged in the run-up to the signing of the Global and All-Inclusive Agreement: "One cannot reunify the country without the RCD." *UN Envoy, not Kabila, Must Order New DRCongo Talks: Rebels*, Agence France-Presse (10 Sept. 2002).

[74] *See* Bouvier & Bomboko, *supra* note 49, at 28. The MLC and the RCD served as the de facto governments of their regions. *See* Human Rights Watch, *DRC Eastern Congo Ravaged: Killing Civilians and Silencing Protest,* Vol. 12 Number 3 (A) (2000), at Introduction [hereinafter *Eastern Congo Ravaged*] ("RCD-Goma has created an administration, divided into a series of 'departments,' each with a 'head,' and has named governors and other officials. It does not call itself a government but claims to administer this area according to Congolese law.").

and the MLC were the two most powerful groups in the "club des bélligérents."[75] Second, both the RCD and the MLC had powerful external State allies (Rwanda and Uganda respectively), who pushed for their proxies to be included in the peace process so that they could continue to influence domestic Congolese affairs.[76] In military terms, these groups were the most important and, despite the RCD-Gomas's lack of cohesion, the most capable of implementing a peace agreement.

Nevertheless, there are reasons to be concerned at their inclusion in the peace process, especially in the case of the RCD. Closer examination suggests that there were reasons to fear that both the RCD and the MLC were spoilers because their good faith commitment to peace was questionable. First, their commitment to peace was questionable because neither group had a strong political cause, aside from a vague ambition to oust Kabila.[77] Despite their proclaimed opposition to dictatorship, both groups administered the territories under their control in a dictatorial manner and both groups were responsible for serious human rights abuses of the populations under their control and violations of international humanitarian law in the way they conducted

[75] Bouvier & Bomboko, *supra* note 49, at 159-60 (arguing that their strength comes form their territorial control, their military capacity, their external support, and, as the peace process progressed, the fact that they were signatories and drafters of the Lusaka Agreement. They also have efficient logistics and a lot of knowledge about both domestic and international politics.).

[76] The second Congolese war began when Laurent Kabila demanded that Rwanda and Uganda, the allies that had brought him to power, withdraw their troops from the DRC. *See* Filip Reyntjens, *Briefing: the Second Congo War: More than a Remake*, 98 AFRICAN AFF. 241, 245-46 (1 April 1999). In order to maintain their influence in the DRC and to give their opposition to Kabila a Congolese face, Uganda and Rwanda created the RCD. *See Scramble for the Congo*, *supra* note 61, at 23 (noting that this strategy largely failed, as the RCD was perceived as a mere proxy for Rwandan and Ugandan interests). Later, Uganda supported Bemba in creating the MLC because it believed the MLC had more popular legitimacy than the RCD. *See Africa's Seven Nation War*, *supra* note 58, at 18-19 (based on Ugandan newspaper accounts, the International Crisis Group believes that Uganda supported Bemba rather than the RCD because it believes he has more popular support and represents a real, Congolese insurrection.).

[77] *See Africa's Seven Nation War*, *supra* note 58, at 17 (noting that the only common goal shared by the different members of the RCD was to oust Kabila); Bouvier & Bomboko, *supra* note 49, at 78 (noting that the MLC only promulgated a statute outlining its political goals on 30 June 1999, almost a year after it began operating (in September 1998) and just days before the signing of the Lusaka peace agreement).

hostilities.[78] This lack of a political platform, combined with their indiscriminate use of violence, suggests that for both the MLC and the RCD, violence was not merely a necessary means to achieve their ends, but rather had either become the end itself[79] or had become a means for each group to reap the huge financial benefits that flowed from their exclusive control over a significant proportion of the DRC's extensive natural resources (control that would be lost if they agreed to a peace deal that saw them subsumed into a transitional government and perhaps ousted from power altogether by elections).[80] Second, the nature of the participation of both the MLC and the RCD in the peace process suggests that they were using their participation strategically and were

[78] *See, e.g.,*Report of the Special Rapporteur, U.N. Doc. A/54/361, *supra* note 50, at ¶¶ 38-41 (noting that there is only other, small party allowed to operate in the RCD's territory and that the RCD rules the population using an abusive paramilitary "self-defense" force); *id.* at ¶¶ 74-106 (noting other violations of international human rights and international humanitarian law by both the RCD and the MLC); Roberto Garreton, *Report on the situation of human rights in the Democratic Republic of the Congo*, submitted by the Special Rapporteur, in accordance with Commission on Human Rights resolution 1999/56, U.N. Doc. E/CN.4/2000/42 (18 Jan. 2000) (same); *Africa's Seven Nation War*, *supra* note 58, at 17-18 (quoting UN Special Rapporteur Roberto Garreton as stating that: "The rebel forces must understand that they do not have any popular support and that they are seen as aggressors who have placed the people under a climate of terror."); *Scramble for the Congo*, *supra* note 61, at 22 ("RCD-Goma's lack of legitimacy can be attributed to its failure to provide the average Congolese with a modicum of security. Indeed, instances of RCD troops abusing the civilians under their protection occur frequently."). Although the MLC initially appeared to have a better human rights record, claiming that it did not treat the people under its control badly, it also came under criticism on these lines. *See* Bouvier & Bomboko, *supra* note 49, 264 (noting that increasing international and domestic criticism of Bemba's MLC (accused of cannibalism and other human rights violations, especially towards the Pygmies) weakened Bemba's position and ended the MLC's offensive in Ituri).

[79] *See* Williams & Ricigliano, *supra* note 45 (arguing that one critical factor to assess before engaging with armed group is "how the group accounts for the fact that it is armed." An armed group that perceives its use of violence as a necessary means to an end is different from a group that understands violence as an end in and of itself.). For an example of an armed group that understood violence as a means to a political end, see African National Congress, Umkhonto we Sizwe Military Code, ¶ 2, *available at* http://www.anc.org.za/ancdocs/history/conf/kabcode.htm (subordinating the military wing to the political wing because "[o]ur military line derives from our political line").

[80] *See Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, U.N. Doc. S/2001/357 (12 April 2001), at ¶¶ 143-47 [hereinafter *Report of the Panel of Experts*] (noting that both MLC and RCD-Goma derive revenue from their control over resource-rich areas, leading to their increased independence from their State sponsors and increasing the likelihood that "clashes for the control of mineral-rich areas will be recurrent; so goes the vicious circle of war and exploitation of nature resources on the side of the rebellion."); *see also Scramble for the Congo*, *supra* note 61, at 21 (noting that the RCD's "ineptitude and *blatant opportunism*" has led to its "widespread rejection by the Congolese population.") (emphasis added); *id.*, at 37 (noting that Bemba can finance his own war effort, partly from revenues derived from taxes on tea, coffee, timber, gold, and diamond exports from territory under his control.).

not genuinely committed to a negotiated solution; for example, the RCD, after insisting on direct negotiations with Kabila, walked out on those negotiations shortly after securing them.[81] Both groups also violated their commitment to cease hostilities almost immediately after signing the Lusaka Agreement, throwing into question the decision to include them in the Sun City negotiations in 2002.[82] In fact, it seems that the only reason the RCD and the MLC were willing to sign on to the Global and All-Inclusive Agreement was because their positions had greatly weakened over the course of 2002, while the government's position had been strengthened.[83]

Thus, it seems likely that the RCD and the MLC won their seats at the negotiating table primarily because they were the strongest non-State armed groups involved in the conflict. Their strength derived principally from their military capacity, their control of territory, and their powerful State allies. Nevertheless, their inclusion was problematic because there were good reasons to question the RCD and the MLC's good faith commitment to peace. Most importantly, however, none of the reasons offered for or against including the MLC and the RCD were ever openly stated; rather, they can only be gleaned from reading between the lines of official statements and from deduction based

[81] For example, the RCD, despite proclaiming its desire to negotiate, frequently walked out of the Lusaka negotiations. *See Africa's Seven Nation War*, *supra* note 58, at 28 (describing the RCD's attitude towards the negotiations as inconsistent). *Compare Rebel Leader Ngoma Says "Internal" Talks Should Precede Cease-Fire*, BBC Monitoring Africa – Political (23 April 1999) (RCD opposed to a cease-fire), *with DR Congo Rebels Demand Ceasefire Before Negotiations*, Agence France-Presse (26 April 1999) (a mere 3 days later, demanding a ceasefire before agreeing to negotiate); *see also Ilunga-Led Rebel Group Sets Conditions for Lusaka Talks*, BBC Monitoring Service: Africa (24 June 1999) (RCD imposing conditions that Kabila must meet before it will sit down to negotiate with him).

[82] *The Agreement on a Cease-Fire*, *supra* note 22, at 12 (noting that Bemba's commitment to the Lusaka Agreement is uncertain because his troops never respected its cease-fire provisions); *Rebels Take Zongo – Government Soldiers, Refugees Flee to Bangui*, BBC Monitoring Service: Africa (2 Aug. 1999) (one day after Bemba signed the Lusaka Agreement, his troops seized the town of Zongo).

[83] *See* Bouvier & Bomboko, *supra* note 49, at 310 (observing that power dynamics had shifted since the opening of the Inter-Congolese Dialogue in Sun City, where the government was in a weak position. The split of the MLC and RCD-Goma alliance, the general weakening of both the MLC and the RCD-Goma, and a shift in international attitude (definitively away from any territorial division of the DRC) strengthened the government's negotiating position by the time the Dialogue resumed in Pretoria.).

on the circumstances. Inclusion therefore appears to have been arbitrary or, at the very most, to be based purely on a "might is right" rationale, creating perverse incentives for other armed groups who want to ensure that they also get a seat at the table.

b. *Including the Spoilers? The RCD-ML, the RCD-N, and the Mai-Mai*

A more inclusive approach to the peace process was adopted by the time the Inter-Congolese Dialogue (ICD) opened in Sun City on February 25, 2002.[84] To some extent, a more inclusive approach was mandated by the terms of the Lusaka Agreement itself, which specifically provided that the "national dialogue" process should include members of the unarmed opposition and of the "forces vives" (civil society).[85] But the ICD process included three new armed groups—a level of inclusion that was not provided for by Lusaka's terms, which defined the "armed opposition" exclusively as "the RCD and the MLC."[86] The three new armed groups included in the process were the Mai-Mai, the RCD-ML, and the RCD-N.

Both the RCD-ML and the RCD-N were splinter groups of the original RCD.[87] The RCD-ML was formed after an internal coup ousted the RCD's original leader, Wamba dia Wamba; he and his supporters formed their own group based out of Kisangani (known as RCD-Kisangani or RCD-Mouvement de libération, RCD-ML), while the rest of the RCD remained based in Goma (and became known as the RCD-Goma).[88] This split within the RCD, right as the Lusaka Agreement was being negotiated, posed a problem as both factions claimed to be the legitimate RCD, entitled to

[84] *See* Bouvier & Bomboko, *supra* note 49, at 40 (noting that Joseph Kabila argued for a more inclusive approach).
[85] Lusaka Agreement, Art. III, para. 19.
[86] Lusaka Agreement, Art. III, para. 19.
[87] Bouvier & Bomboko, *supra* note 49, at 52.
[88] *Id.*; Cunningham, *supra* note 34, at 878.

sign the Lusaka Agreement. Ultimately, *all* of the founding members of the RCD signed the Agreement.[89] Thus, it is possible to conceive of the RCD-ML as a signatory of the Lusaka Agreement, since its leaders (just like the leaders of the RCD-Goma) had signed the agreement.[90] Nevertheless, it seems more accurate to conclude that the RCD-ML was not a signatory to the Lusaka Agreement; indeed, the Global and All-Inclusive Agreement describes the RCD-ML (along with the RCD-N and the Mai-Mai) as "Entités" while the signatories of the Lusaka Agreement (the MLC and the RCD) are referred to as "Composantes."[91]

Despite being labeled as one group in the ICD and in the Global and All-Inclusive Agreement, the Mai-Mai is in fact a label applied to various groups, originally formed as self-defense militias to protect local inhabitants from the foreign combatants using the DRC as their battlefield.[92] The label has been claimed by a variety of different groups, with different goals, in different parts of the territory; some of these groups were genuine opposition movements (principally opposed to foreign invaders in the DRC), while others

[89] *Rebels Sign DR Congo Ceasefire*, Agence France-Presse (31 Aug. 1999) (noting that it took 45 minutes for the RCD to sign the Agreement because each of the founding members had to sign).
[90] Support for this argument can be gleaned from the fact that on 4 May 2001, the RCD-ML signed the "Déclaration des principes fondamentaux des négociations politiques intercongolaises signée par les parties congolaises signataires de l'accord de cessez-le-feu en République démocratique du Congo" with the MLC and the RCD-Goma. *See* Bouvier & Bomboko, *supra* note 49, at 38. Nevertheless, Bouvier & Bomboko note that the RCD-ML was not, in fact, a signatory of the Lusaka Agreement (despite this document) and describe the Declaration as including the "signataires de l'accord de cessez-le-feu de Lusaka plus le RCD-ML." *Id.* at 53, 112.
[91] In addition to this difference in terminology, the substantive power-sharing provisions of the Global and All-Inclusive Agreement also place the RCD-ML on the same footing as the RCD-N and the Mai-Mai. Global and All-Inclusive Agreement, Art. V(1)(C), Annex I.
[92] *Scramble for the Congo*, *supra* note 61, at 24 (the Mai Mai are part of a "long-standing tradition of rural militias"); Bouvier & Bomboko, *supra* note 49, at 192-93.

were no more than organized criminal bands dedicated to pillage and plunder.[93] Many of the Mai-Mai combatants were children (known as "kadogos").[94]

It is extremely difficult to identify why these three groups were included in the Inter-Congolese Dialogue and were signatories to the Global and All Inclusive Agreement, when the majority of groups remained excluded. In particular, both the RCD-ML and the RCD-N were involved in the heavy fighting in the Ituri district during the ICD process, yet none of the other armed groups involved in the Ituri conflict were invited to join the peace process.[95]

It appears that many of the same reasons that pushed for inclusion of the RCD and MLC in the Lusaka process were also influential here. First, both the RCD-ML and the RCD-N were in control of territory.[96] Nevertheless, they controlled significantly smaller areas than the RCD and the MLC and other Ituri-based armed groups that controlled similar amounts of territory were not included.[97] The Mai-Mai, moreover, never had control over a particular territory to the same degree that even the RCD-ML and RCD-N did.[98] Indeed, the Mai-Mai were generally not considered to be militarily significant.[99]

The second reason may have been that all three of these groups had powerful

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[93] Bouvier & Bomboko, *supra* note 49, at 192-93; Human Rights Watch, *DRC Casualties of War: Civilians, Rule of Law, and Democratic Freedoms*, Vol. 11 No. 1(A) (1999) [hereinafter *Casualties of War*], at Introduction.
[94] Bouvier & Bomboko, *supra* note 49, at 192-93.
[95] For example, the Union des Patriotes Congolaises (led by Thomas Lubanga, who is now facing prosecution before the ICC) and its splinter, the Front de l'intégration et la paix en Ituri (FIPI), were not included, despite the fact that the UPC was in control of Bunia as of August 2002. Bouvier & Bomboko, *supra* note 49, at 266; *see also* S.C. Res. 1445 (12 April 2002) ¶ 15 (expressing concern at ethnic violence in Ituri and calling on the UPC to cooperate with the Ituri Pacification Commission); S.C. Res. 1468 (20 March 2003) ¶ 2 (condemning abuses perpetrated by the UPC).
[96] Bouvier & Bomboko, *supra* note 49, at 190 (MONUC map showing division of territory among the various parties).
[97] *Id.*
[98] *Id.* (the Mai-Mai are not on the map).
[99] *Scramble for the Congo*, *supra* note 61, at 16 (but noting that Rwanda has still struggled to combat them because of their "native legitimacy.").

State and non-State allies whose participation was crucial to the success of the peace process and who may have pushed for these groups to be included, much as I suggested that Uganda and Rwanda were likely influential in the inclusion of the RCD and the MLC at Lusaka.[100] Nevertheless, connections to powerful allies alone were clearly not decisive, since the Ituri-based Union des Patriotes Congolais (UPC) was supported first by Uganda and later by the RCD-Goma, yet still found itself excluded from the negotiating table.[101] In the end, there appears to be no consistent, principled rationale underlying the selection of armed group participants in this peace process.

c. *The Permanently Excluded: Foreign Armed Groups, Génocidaires, and Militias*

Despite the more inclusive approach adopted during the Inter-Congolese Dialogue, most armed groups operating in the DRC nevertheless remained excluded from the peace process. The rationale for permanently excluding these groups remains unclear, much in the same way as the rationale for including the groups discussed above. But it is possible to discern three trends. First, most of the armed groups excluded were foreign armed groups, using the DRC as a safe haven from which to launch attacks on neighboring States but not directly involved in the competition for power in the DRC itself. Second, particular condemnation appears to have been reserved for the former

[100] For example, the two main groups of Mai-Mai, one directed by General Padiri and the other by General Dunia, were both closely allied with the Kinshasa government, while the two other important Mai-Mai groups, the Mudundu 40 and the MLAZ (Mouvement de lutte contre l'aggression au Zaire), were reputed to have been supported by Rwanda and RCD-Goma. Bouvier & Bomboko, *supra* note 49, at 192-93; *The Agreement on a Cease-Fire*, *supra* note 22, at 22-23 (The Mai-Mai "are major actors and have formed alliances with external groups, for example the Mai-Mai are closely allied with the Interhamwe and have been fighting with them against the Rwanda Patriotic Front forces and the Congolese rebels."). The RCD-N, on the other hand, was rumored to be an ally of the MLC. *See DR Congo Rebel Chief Pushes for Ceasefire in Northeast*, Agence France-Presse (26 Dec. 2002). The RCD-ML was rumored to be allied with the Kinshasa regime, Bouvier & Bomboko, *supra* note 49, at 90 (RCD-Goma accused RCD-ML of links to Kinshasa regime), and Uganda. *Id.*, at 84.

[101] Bouvier & Bomboko, *supra* note 49, at 266.

Rwandan génocidaires, and may have contributed to their exclusion. Third, other armed groups, despite their domestic constituency and lack of association with genocide, appear to have been excluded simply because they were not powerful enough to compel a seat at the table. I will briefly discuss some of the problems raised by each of these reasons.

First, most of the armed groups operating in the DRC were not domestically focused; rather they took advantage of the weakness of the Congolese State to use the DRC as a safe haven to launch attacks on neighboring States (e.g. UNITA against Angola and the FDD against Burundi).[102] If one views the DRC peace process as designed to resolve what was really an internal conflict and a struggle for control of the Congolese State, then excluding these foreign armed groups seems perfectly logical: they did not even purport to have an interest in Congolese domestic affairs. What complicates this exclusion is that the DRC peace process, at least during the first stage (the Lusaka Agreement) was designed to resolve both the country's internal conflict and the external dimensions to the Second Congolese War that had seen nine States intervene militarily.[103] As a matter of military strength, these foreign armed groups were certainly as significant as many of the States that were signatories to the Lusaka Agreement and had a proven record of seriously destabilizing the DRC. Clearly, therefore, military might alone was not enough to guarantee armed groups a seat at the negotiating table.

It seems that these foreign armed groups were likely excluded because including them would have been heavily opposed by the States against which they were fighting (e.g. Angola, Burundi, Uganda)—States whose participation in the Lusaka peace process

[102] Report of the Special Rapporteur, U.N. Doc. A/54/361, *supra* note 50, at Annex VIII (these foreign groups included: UNITA, FDD, LRA, SPLA, FUNA, WNBF, NALU, and ADF).
[103] *See Africa's Seven Nation War*, *supra* note 58, at 12, 24; *see also Scramble for the Congo*, *supra* note 61, at 1.

was essential to bring an end to the war.[104] Including these groups in the Lusaka Agreement might have had consequences for their status in their own civil wars and peace processes; the governments against which they were fighting were likely unwilling to allow them to increase their legitimacy in this way.[105]

The second trend in the exclusions in the DRC process is the particular condemnation reserved for the Rwandan génocidaires, the ex-FAR and the Interahamwe.[106] Unlike the other foreign armed groups operating in the DRC, these groups appear to have had some level of domestic support and to have integrated Congolese fighters who were not involved in the genocide into their ranks.[107] The group tried to re-brand itself by re-naming itself as the Armée de Libération du Rwanda (ALiR), generally acknowledged to actually constitute two groups, ALIR I and ALIR II. At the time the Lusaka Agreement was negotiated, ALIR II was more powerful, better equipped, and made up primarily of younger people who did not participate in the 1994 genocide.[108] Their level of popular support varied over the course of the conflict,[109] but they were recognized as the largest rebel force in the DRC[110] and "exhibit[ed] a high

[104] This is why the Lusaka Agreement not only does not include these armed groups, but effectively outlaws them by committing the signatories to assist the UN mission in tracking, disarming, and dismantling these armed groups to prevent their continued operations from the DRC. Lusaka Agreement, Annex A, Chap. 9 & Annex C (defining the term "armed groups" to include these groups, while excluding the MLC and the RCD).
[105] *Cf. Scramble for the Congo*, *supra* note 61, at 20-21 (noting that while the FDD was treated as an "armed group" under the Lusaka Agreement (i.e. targeted for disarmament and demobilization), this contradicts their status as "freedom fighters" in the Burundi peace process.).
[106] Both these groups are also listed as negative forces in the Lusaka Agreement. Lusaka Agreement, Annex A, Chap. 9 & Annex C
[107] MONUC believes that they changed their name following the Lusaka Agreement's designation of the ex-FAR and Interhamwe as a force negative. Bouvier & Bomboko, *supra* note 49, at 196 (citing S/2002/341 (5 April 2002) at p. 5).
[108] *Id.*, at 196.
[109] *Scramble for the Congo*, *supra* note 61, at 24.
[110] Int'l Crisis Group, *Disarmament in the Congo: Investing in Conflict Prevention*, Africa Briefing Paper (12 June 2001) [hereinafter *Disarmament in the Congo*], at 1.

degree of military organization."[111] Nevertheless, despite these factors, there was never any consideration of including them in the peace process and it seems likely that this was because of the high level of international condemnation these groups have received because of their association with the Rwandan genocide.[112] So, it is perhaps not strictly true that even groups that have committed genocide are generally viewed as legitimate negotiating partners.[113]

The third reason for exclusion appears to have been that some armed groups were simply not powerful enough, in terms of their control of territory, their military capacity, or their allies, to compel a seat at the table. In addition to the Ituri militias (discussed above), there are at least two other armed groups that had a domestic political agenda and were not associated with genocide yet also found themselves excluded from the negotiating table. The first group is the Union des Républicains Nationalistes pour la libération (URNL), a rebel group that emerged in February 1999 composed mainly of Mobutu's old Special Presidential Division forces and supported by some parts of Congolese society.[114] The second group is the Front républicain fédéraliste (FRF), an armed group of Banyamulenge (Congolese Tutsi of the Hauts-Plateaux region).[115] Both of these groups represented different sectors of Congolese society than the armed groups

[111] *Scramble for the Congo*, *supra* note 61, at 14 ("Forces are grouped into permanent divisions, brigades, battalions, companies and platoons. They wear uniforms, maintain a formal rank structure, and for an insurgent army are well equipped with small arms and radio communications.").
[112] Indeed, the ex-FAR and the Interahamwe were singled out for particular condemnation by the Security Council on numerous occasions. *See, e.g.*, S.C. Res. 1234 (4 September 1999), ¶ 8; S.C. Res. 1332 (14 December 2000), ¶ 11 (also mentioning the FDD and the ADF); S.C. Res. 1341 (22 February 2001), at ¶ 23; S.C. Res. 1355 (15 June 2001), at ¶ 9.
[113] *See* Stedman, *supra* note 17, 24-26 (noting that the UN's insistence that the RPF negotiate a cease-fire with the radical Hutu Presidential Guard sent "a clear message: committing genocide was not enough to disqualify a party in Rwanda from a legitimate place at the bargaining table"); *id.* (noting inclusion of Khmer Rouge in the 1991 Paris Peace Accords, despite their record for human rights atrocities, because it was believed that they could not be defeated militarily).
[114] *Africa's Seven Nation War*, *supra* note 58, at 6; *The Agreement on a Cease-Fire*, *supra* note 22, at 23.
[115] Bouvier & Bomboko, *supra* note 49, at 193-94; *Congo at War*, *supra* note 55, at 4-5; *The Agreement on a Cease-Fire*, *supra* note 22, at 23.

that were included in the peace process, suggesting that (at least under the veto player analysis) there would have been good reason to include them.[116] On the other hand, neither group appears to have had a particularly strong ally to push for their inclusion; the FRF, for example, was formed precisely because some Banyamulenge felt that their interests were not being well-represented by their Rwandan allies, leading to military clashes between the FRF and Rwandan forces.[117]

There is very little information about why these groups were excluded from the peace process. Nevertheless, examining the groups that were excluded further confirms the fact that there is no consistent rationale guiding the decision to include or exclude certain armed groups: neither the veto player nor the spoiler theories can satisfactorily explain the inclusion and exclusion of armed groups in the DRC peace process.

Based on this examination of the DRC, it is clear that military might alone is not enough to guarantee an armed group a seat at the negotiating table, as even powerful groups can find themselves excluded because of their lack of a domestic political agenda or their association with genocide. On the other hand, it also appears that it is not enough to have a strongly articulated domestic political agenda and to be untainted by genocide: without enough control of territory or powerful allies to push for inclusion, armed groups might still find themselves excluded.

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[116] *See* Cunningham, *supra* note 34, at 878-79. Dissatisfaction with the peace agreement led to a Banyamulenge rebellion, led by General Laurent Nkunda, in May, 20004. *See* Federico Borello, *A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo*, Int'l Center for Transitional Justice Occasional Paper Series (Oct. 2004), at ix, *available at* http://www.ictj.org/images/content/1/1/115.pdf; Human Rights Watch, *Democratic Republic of Congo: Renewed Crisis in North Kivu*, Vol. 19, No. 17(A) (Oct. 2007), *available at* http://hrw.org/reports/2007/drc1007/drc1007web.pdf [hereinafter *Renewed Crisis in North Kivu*]; Joe Bavier, *Congo War Crimes Case Should Not Derail Peace—U.N.*, Reuters News (30 April 2008) (Nkunda signed a ceasefire agreement on January 23, 2008, but that agreement may be jeopardized by the ICC's recent indictment of Nkunda's military commander, Jean Bosco "the Terminator" Ntaganda).

[117] Bouvier & Bomboko, *supra* note 49, at 193-94.

As the DRC example aptly illustrates, therefore, despite the rhetoric of all-inclusiveness, in reality armed groups are frequently excluded on a seemingly ad hoc basis. This divorce between the theory of inclusion and the reality of exclusion is problematic because it eliminates the benefits of both approaches. As this section has demonstrated, peace-makers and mediators do not derive the benefits of the all-inclusive approach because, in reality, they do not put the all-inclusive approach into practice. In addition, they do not derive all of the benefits from excluding some armed groups, because exclusion appears arbitrary as it does not adhere to any clearly articulated exceptions, such as the veto player and the spoiler theories. As the next section will show, the combination of a proclaimed theory of inclusion and a practice of arbitrary exclusion creates a perfect storm of negative incentives for armed groups.

II. This Arbitrary Approach to Armed Group Participation is Problematic Because it Creates Negative Incentives that Reduce the Chances of Building a Durable Peace

The existing approach, as described above, creates problematic incentives for armed groups that undermine the chances of building a durable peace through negotiated settlements in internal armed conflicts involving multiple armed groups. Indeed, forty-three percent of negotiated settlements relapse into armed conflict within five years.[118] There are three primary problems that contribute to reducing the durability of peace agreements under the current approach.

[118] *Charting the roads to peace*, *supra* note 2, at 13 (noting, however, that as yet inconclusive data from 2000-2005 suggests that this may be changing: conflicts ending in victory may be relapsing more frequently than those that ended in negotiated settlement.). The issue of the high rate of failure of peace agreements has generated significant scholarship. *See, e.g.*, Virginia Page Fortna, *Scraps of Paper? Agreements and the Durability of Peace*, 57 INT'L ORG. 337 (2003); James D. Fearon, *Why Do Some Civil Wars Last so Much Longer than Others?*, 41 J. PEACE RESEARCH 275 (2004); ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS (Stephen John Stedman, Donald Rothchild, & Elisabeth M. Cousens, eds., 2002).

First, under the current approach exclusion appears to be arbitrary, therefore armed groups that are in fact excluded from the peace process have every reason to continue fighting in order to create the need for a new peace process which includes them.[119] They have no reason to think that their exclusion was due to any principled objection to their methods; rather, they are much more likely to think that they were simply not powerful enough to compel a seat at *that* peace negotiating table. Because the emphasized message is all-inclusiveness, all armed groups have a basis for believing that the next peace process will include them. Essentially, the current approach sets up a "culture of negotiation" where the possibility of negotiating is never eliminated for any group, at any point.[120] Those groups excluded from the first peace process, those groups unhappy with the terms of the peace agreement they signed, or those groups that become dissatisfied with the terms of the agreement after some time has past (e.g. after they lose an election), have every incentive to pick up arms again.

Second, the current ad hoc approach appears to create incentives for every armed group included to splinter into factions in the run-up to the signing of a peace agreement. To some extent, of course, there is always some risk of "internal splits" when an armed group agrees to participate in a peace process, as the change in strategy and the possible compromising of previously immutable goals opens a space for new leaders to challenge

[119] *Cf.* Levitt, *supra* note 5, at 499 (arguing that power-sharing "sets a negative precedent, as it sends a dangerous message to would-be insurrectionists that violence is a legitimate means to effectuate change and obtain political power.").

[120] *See Charting the roads to peace*, *supra* note 2, at 12-13 (positing that "the emergence of a global negotiating culture—a new willingness of warring parties to negotiate and to be seen to negotiate," pointing to numbers which suggest that conflicts that end in the military victory of one side (rather than in negotiated settlement) may be relapsing more frequently into conflict, suggesting "that no group need ever feel beaten because international negotiation culture is such that they can always start fighting in some small way as a fast track to renewed negotiations . . . the rising culture of negotiation fosters the practice of war as a negotiating method.").

the old and form their own break-away factions.[121] Because mediators generally promote a message of inclusion and do not clearly articulate reasons for exclusion, however, these risks are maximized. [122] There is a strong incentive to splinter, as each faction can hope to be rewarded with its own seat at the negotiating table. These splits undermine the possibility of reaching an agreement, as the old leaders may not want to risk losing control of their forces, and also undermine the possibility of building a lasting peace by making it difficult for the old leaders to enforce compliance with the agreement within their ranks.[123] In fact, one study suggests that a high number of splinter groups greatly increases the difficulty in negotiating a peaceful settlement to the conflict.[124]

Third, the current approach to armed group participation creates perverse incentives for armed groups to use violence indiscriminately, as compliance with their humanitarian obligations is not necessarily rewarded with a seat at the negotiating table and might even reduce their chances of being included at the peace negotiating table. Because the articulated message is that all groups are potentially eligible to participate and because there are no discernable reasons or consistent practice in the actual exclusion of armed groups, the message delivered to armed groups is unclear and inconsistent.

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[121] *See* Clem McCartney, *From armed struggle to political negotiations: Why? When? How?* 2, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7.

[122] For an example of this sort of splintering in the run-up to a peace process, see *West 'pandering to Darfur rebels'*, BBC News, Oct. 4, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7028267.stm (quoting Lakhdar Brahimi as accusing the West of pandering to unrepresentative rebels in a bid to get all parties to the table: "The international community has acted rather irresponsibly on all this in the past by pampering a lot of these people around—not really wondering whether they really represented anybody and whether they were acting responsibly."). These risks might be especially high in peace processes where power-sharing provisions are on the table, as "[t]he effort to extend the process outward [by including all parties] inevitably stimulated various self-appointed clan leaders to call for their inclusion, regardless of whether they had a genuine connection with the clan community." Ian S. Spears, *Understanding Inclusive Peace Agreements in Africa: the Problem of Sharing Power*, 21 THIRD WORLD Q. 105, 110 (2000) (describing failure of attempted power-sharing agreements in Somalia).

[123] *See A Guide to Mediation*, *supra* note 15, at 8.

[124] *See* Cunningham, *supra* note 34, at 888 (although the numbers are not conclusive, they do suggest that "adding splinter factions might have a greater effect of prolonging civil wars than the other types of veto players.").

Based on the DRC example discussed above, it is clear that armed groups will not be excluded because of abuses they have committed and, indeed, committing such abuses might make them a more formidable opponent with whom negotiations are viewed as a necessary means to end the abuses.[125] Essentially, the message of all-inclusiveness suggests that no group need ever fear exclusion, sending a signal that "might is right"[126] and producing incentives for armed groups to use force, perhaps as brutally as possible, in order to secure a seat at the negotiating table.[127] In the run-up to a peace process, armed groups may even increase their use of violence and human rights abuses, hoping to come to the table in the strongest possible position. As I argue in more detail in the next Part, the current approach represents a missed opportunity to use the peace process as an incentive for armed groups to increase their compliance with their international obligations and to view the peace process itself as a vehicle for norm diffusion and acculturation.

Part 2: A Missed Opportunity to Use Peace Process Participation to Increase Armed Group Compliance with International Law

In addition to the problems associated with building a durable peace and creating perverse incentives for armed groups to use violence indiscriminately, I argue in this Part that an ad hoc approach to armed group participation is also problematic because it fails

[125] *See* Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge*, Centre for Humanitarian Dialogue Report (Dec. 2007), at 7 (noting that in the run-up to the Lomé Agreement, there was intense public pressure to bring the war to an end "by whatever means necessary" in order to bring an end to RUF abuses).
[126] *Cf.* Levitt, *supra* note 5, at 502 (in relation to power-sharing provisions specifically).
[127] For example, in Sierra Leone, the brutal RUF appears to have been included in the Lomé peace process primarily out of fear of its brutality. *See Sierra Leone: Time for a New Military and Political Strategy*, *supra* note 33, at 14-16 (noting both the RUF's brutal tactics and its lack of popular support); Hayner, *supra* note 125, at 7 (noting public pressure on government to negotiate a peace deal with the RUF).

to condition the benefits that flow from participating in a peace process on armed groups' respect for their preexisting international obligations. Under the current approach, therefore, armed groups have little incentive to comply with international humanitarian and human rights law because "they can always bargain away their responsibility for crimes by agreeing to peace."[128] The current approach represents a missed opportunity to use the benefits that flow from participating in a peace process as leverage to increase armed groups' compliance with their international legal obligations during the conflict, during the peace process, and during the post-conflict transition. Instead of viewing the peace process as an opportunity for norm diffusion and acculturation, the present approach appears to assume that all parties to the conflict will automatically become peaceful "democrats once sanctioned with state authority."[129]

I. The Difficulty in Ensuring Compliance by Armed Groups with Their International Obligations

The prevalence of non-international armed conflicts today has highlighted the role of non-State armed groups and raised questions surrounding their international legal status and their international obligations.[130] I argue in the next section that there is an evolving consensus that armed groups are subjects of international humanitarian law applicable in internal armed conflicts (either as a matter of custom or of convention) and, in some cases, of customary international human rights law.[131] Nevertheless, I go on to

[128] *Cf.* Scharf, *supra* note 10, at 349 (in reference to amnesties).
[129] Levitt, *supra* note 5, at 499.
[130] *See Ends and Means*, *supra* note 1, at 1 (noting that most conflicts today are internal and as a result, "armed groups are a key feature of modern conflict."); Bell, *supra* note 4, at 380-81 (noting controversy over legal status of these armed groups); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1426 (1992) (today, "most atrocities are caused by governmental *and non-governmental armed groups* in the context, or under the pretext, of conventional warfare.") (emphasis added).
[131] *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 280 (2006) (arguing that armed groups have obligations under both IHL and international human rights law); LIESBETH ZEGVELD,

demonstrate that it is extremely difficult to ensure compliance by armed groups with these obligations.

A. Armed Groups Are Bearers of International Obligations

Under the traditional understanding of international law, often referred to as the Westphalian system, States were considered to be the only subjects of international law. Thus, the bulk of international law developed to limit the harmful effects of armed conflicts was made by States and designed to regulate the actions of States. For example, membership in the UN system, designed "to save succeeding generations from the scourge of war,"[132] is open only to States.[133] The major international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (IESCR), impose obligations on *States* Parties only.[134] Similarly, most of international humanitarian law, codified in the 1949 Geneva Conventions, applies only in international armed conflicts between "High Contracting Parties"—again, only to States.[135]

ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 152 (2002) (arguing that armed groups are subjects of international humanitarian law, but not international human rights law).

[132] U.N. Charter preamble.

[133] U.N. Charter art. 3 & art. 4.

[134] International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, art. 2 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 2 [hereinafter ICCPR].

[135] Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 75 U.N.T.S. I-972 [hereinafter Third Geneva Convention], at art. 1 (Article 1 is common to all four 1949 Geneva Conventions). The exception to this trend is Common Article 3 to the Geneva Conventions, which applies to "each party to the conflict," which includes non-State actors as well as States. Third Geneva Convention, at art. 3; *see* Int'l Comm. Red Cross, Commentaries to Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 1949), at 37, *available at* http://www.icrc.org (noting "The words 'each Party' mark a step forward in international law. Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party -- a Party, moreover, which was not yet in existence and which need not even represent a legal entity capable of undertaking international obligations.").

Under this traditional approach, armed groups were only considered to have "rights and obligations" under international law once they were recognized by at least one State (even implicitly) as insurgents or belligerents.[136] In other words, the fighting had to reach a certain level of intensity in order to qualify as an insurgency, triggering the application of the rules governing international armed conflicts.[137] The problem with this approach was that States were generally reluctant to recognize that the conflict had reached this level, because they were wary of conferring any recognition (and attendant legitimacy) on armed groups.[138] Armed groups were therefore dealt with primarily under ordinary, domestic criminal law—as bandits or outlaws.[139]

This State-centric understanding of international law is at odds with the reality on the ground today, where most armed conflicts are internal and are dominated by armed groups that are not affiliated with a particular State's national armed forces.[140] As a result, it began to seem both unfair and unrealistic to restrict accountability for conflict-related abuses solely to State actors.[141] Instead, it became necessary "to promote basic

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[136] CLAPHAM, *supra* note 131, at 271-72.
[137] *Id.*
[138] *Id.*, at 272.
[139] *See* William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907, 918 (2003). A notable exception to this trend, however, has been the American government's decision to characterize the conflict with Al Qaeda as a "war on terrorism," although a war to which none of the laws regulating armed conflicts apply. *See* Memorandum from John Yoo & Robert J. Delahunty, U.S. Dep't of Justice, Office of Legal Counsel to William J. Haynes II, Dep't of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002), *available at* http://antiwar.com/news/?articleid=2637 (characterizing the struggle with Al Qaeda as a "conflict" to which the Geneva Conventions, the War Crimes Act, and customary international law do not apply).
[140] *Cf.* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 244 (2000) (noting that this reality prompted the growth of jurisprudence developing customary humanitarian norms as "a direct response to a social consensus that demanded efforts to humanize the behavior of states and fighting groups in [internal] armed conflicts.").
[141] *See* Ravi Nair, *Confronting the Violence Committed by Armed Opposition Groups*, 1 YALE HUM. RTS. & DEV. L.J. 1, 8-10 (1998) (arguing that failure to hold armed groups accountable for violations of human rights also threatens the "legitimacy [of human rights organizations] as unbiased observers."); Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, U.N. Doc. A/62/265 (16 August 2007) [hereinafter Report of the Special Rapporteur, U.N. Doc. A/62/265], ¶ 41 (noting that ". . . the consequences of unconditionally refusing to address appeals to armed groups were problematic.");

principles to hold all political actors – government and opposition groups – accountable."[142] This normative gap prompted a shift towards holding armed groups accountable under international law for human rights abuses and violations of international humanitarian law committed during armed conflict, irrespective of their status as insurgents or belligerents.[143]

There is, therefore, an evolving consensus that certain armed groups qualify as limited "subjects" of international law because they are "bearers of international obligations"[144] under international humanitarian law and perhaps international human rights law.[145] Thus, this theory assumes a certain break-down of the traditional understanding of international law, under which States are the sole subjects. This theory is still developing and at present remains contentious, controversial, and fractured. Primarily, there is no consensus over the degree of subject-hood that armed groups have assumed.[146] It also remains disputed what substantive obligations bind armed groups, particularly whether armed groups are bound by international human rights law.[147]

Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405, 429 (2005) (noting that the gap between the law on the books and the reality on the ground "threaten[ed] to make a mockery of much of the international system of accountability for human rights violations.").

[142] Zalaquett, *supra* note 130, at 1426.

[143] *See* CLAPHAM, *supra* note 131, at 272 ("Today, international law imposes obligations on certain parties to an internal armed conflict irrespective of any recognition granted by the state they are fighting against or any third state.").

[144] *Id.*, at 28.

[145] *See* Bell, *supra* note 4, at 380-81; ZEGVELD, *supra* note 131, at 152 (arguing that armed groups are subjects of international humanitarian law, but not international human rights law).

[146] It is clear that they are not treated as full subjects, in the same way as States, because they are still not held to the full panoply of obligations that bind even non-signatory States under customary international humanitarian and human rights law. *But see* Jan Arno Hessbruegge, *Human Rights Violations Arising from the Conduct of Non-State Actors*, 11 BUF. HUM. RTS. L. REV. 21, 39-40 (2005) (arguing that "state-like groups" (e.g. the LTTE) that have established "durable control" over a particular population and territory and have set up state-like administrations there that effectively administer law and order, collect taxes, etc., should be bound by the full panoply of customary human rights law obligations).

[147] *Compare* ZEGVELD, *supra* note 131, at 152 (arguing that armed groups are subjects of international humanitarian law, but not international human rights law ". . . since the accountability of armed opposition groups is a direct consequence of their status as parties to the conflict, there should be a close link between

It is, however, fairly uncontroversial today that armed groups are subject to the principles of international humanitarian law applicable in non-international armed conflicts.[148] There is a general consensus that, at the very least, armed groups are bound by the provisions of Common Article 3 of the Geneva Conventions, which specifically applies to "each Party to the conflict," not only to States.[149] As the Special Court for Sierra Leone concluded, while there is no "unanimity among international lawyers as to the basis of the obligation of insurgents to observe the provisions of Common Article 3 . . . [nevertheless] there is now no doubt that this article is binding on States and insurgents alike and that insurgents are subject to international humanitarian law."[150] Armed groups

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their accountability and their status." As a result, human rights law should not be applied to most armed groups because it "presume[s] the existence of a government, or at least, an entity exercising governmental functions. Armed opposition groups rarely function as de facto governments."), *with* CLAPHAM, *supra* note 131, at 280 (arguing that "the assumption that human rights law only applies to governments and not to insurgents is no longer a universally shared assumption.").

[148] It remains unclear, however, on what *legal basis* armed groups are subject to international humanitarian law. *See* Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004), at ¶ 45 (noting the lack of "unanimity among international lawyers as to the basis of the obligation of insurgents to observe the provisions of Common Article 3"). There are four primary justifications found in the literature to explain how these legal obligations can directly bind armed groups. First, terms in the treaties themselves indicate that certain treaties (or certain parts of those treaties) were intended by the States parties themselves to apply directly to non-State actors such as armed groups. Second, there is an incorporation theory, whereby members of armed groups are bound by those treaties that have been ratified by the State of which they are citizens. Third, there is a capacity argument that reasons that where armed groups have the capacity to implement these treaty obligations (i.e. where they are in essence the de facto government), they have an obligation to do so. Fourth, there is the customary international law theory, which holds that some provisions of international humanitarian and human rights law are binding on armed groups as well as States. *See, e.g.*, CLAPHAM, *supra* note 131, at 279 (describing the various theories); Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 INT'L & COMP. L. Q. 369, 381 (2006) (arguing in favor of the incorporation theory, which he calls the "legislative jurisdiction" approach); Hessbruegge, *supra* note 146, at 39-40 (favoring the de facto government approach, arguing that "state-like groups" should be bound by the full panoply of customary human rights obligations.).

[149] *See, e.g.*, CLAPHAM, *supra* note 131, at 272; ZEGVELD, *supra* note 131, at 149-51. Common Article 3 primarily requires that "[p]ersons taking no active part in the hostilities . . . be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." Third Geneva Convention, *supra* note 135, at art. 3 (1).

[150] *Kallon & Kamara*, at ¶ 45; *see also* CLAPHAM, *supra* note 131, at 275 (arguing that Common Article 3 imposes obligations on armed groups by its terms; it applies to "each Party to the conflict"); ZEGVELD, *supra* note 131, at 9 (same).

are also sometimes held to some customary IHL principles, such as the principles of distinction and proportionality.[151]

Some armed groups are also bound by the obligations contained in Additional Protocol II to the Geneva Conventions, which explicitly addresses armed groups and which provides broader protections than Common Article 3.[152] Nevertheless, Additional Protocol II is limited by its terms to applying only to armed groups that control territory and have an established chain of command.[153] As result, a broader applicability of the obligations contained in Additional Protocol II depends on their achieving customary international law status. One particular prohibition which may be en route to achieving such status is Additional Protocol II's prohibition on the use of child soldiers, which seems to be gaining broader applicability.[154]

Beyond international humanitarian law, there are also some indications that armed groups might be subject to some customary norms of international human rights law. The point of contention is whether non-State entities can have obligations under international human rights law, a legal regime that was designed to prevent abuses by States.[155] Many of the rights contained in the human rights treaties implicitly require a State apparatus

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[151] *See* Sivakumaran, *supra* note 148, 390-91.
[152] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, at art. 4 & 5 [hereinafter Additional Protocol II]; CLAPHAM, *supra* note 131, at 278-79; ZEGVELD, *supra* note 131, at 9 (arguing that Additional Protocol II applies to armed groups as a matter of treaty law).
[153] Additional Protocol II, *supra* note 152, at art. 1(1); *see also* CLAPHAM, *supra* note 131, at 277 (arguing that Additional Protocol II has a higher applicability threshold than Common Article 3).
[154] *See* Additional Protocol II, *supra* note 152, at art. 4(3)(c); *see also* Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the General Assembly, U.N. Doc. A/58/328 (29 August 2003) at ¶ 79, *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N03/483/26/PDF/N0348326.pdf?OpenElement [hereinafter Report of the Special Representative of the Secretary-General for Children and Armed Conflict] (concluding that "[t]he struggle to ensure the protection, rights and well-being of children exposed to armed conflict has reached a watershed moment"); *see generally* CLAPHAM, *supra* note 131, at 276.
[155] Unlike international humanitarian law, the human rights treaties do not explicitly apply to armed groups; instead, they impose obligations only on States. *See* ICCPR, *supra* note 134, at art. 2; ICESCR, *supra* note 134, at art. 2.

and set "limits to the intrusion by the government upon those areas of human freedoms thought to be essential to the proper functioning of the human being in society and for his development."[156] Moreover, extending armed group obligations to include human rights may contribute very little, in reality, to the protections already afforded by international humanitarian law.[157]

Despite this controversy, there are several indications that, in practice, armed groups are increasingly treated as subjects of international human rights obligations. First, prominent NGOs such as Human Rights Watch and Amnesty International have, since the early 1990s, reported on human rights abuses committed by armed groups.[158] Now, this reporting has broadened to include some IHL issues such as the recruitment of child combatants.[159] One NGO, Geneva Call, has even dedicated itself to getting armed

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[156] ZEGVELD, *supra* note 131, at 53.
[157] *See id.*, at 52 (arguing that "Common Article 3 and Protocol II provide the most essential protections. The specific contribution of human rights standards to the content of these instruments is not significant, because the non-derogable norms are in essence reflected in international humanitarian law.").
[158] *See,* Nair, *supra* note 141, at 6 (documenting Human Rights' Watch's and Amnesty International's history of reporting on armed group violence); *Ends and Means*, *supra* note 1, at 11; Caroline Holmqvist, *Engaging Armed Non-State Actors in Post-Conflict Settings*, *in* SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 45, 45 (Alan Bryden & Heiner Hänggi eds., 2005). For current examples of Human Rights Watch's documentation of abuses by armed groups, see, e.g., *Renewed Crisis in North Kivu*, *supra* note 116, at 24 ("All parties to the recent military operations in North Kivu—Nkunda's troops, the Congolese army, and the FDLR—have violated the rights of Congolese civilians through killings, crimes of sexual violence, forced displacement, theft, extortion, and destruction of property."); Human Rights Watch, *Maiming the People: Guerilla Use of Antipersonnel Landmines and other Indiscriminate Weapons in Colombia*, Vol. 19, No. 1(B) (July 2007), *available at* http://hrw.org/reports/2007/colombia0707/colombia0707web.pdf (documenting and condemning guerillas' use of landmines as a violation of customary international humanitarian law). For a current statement of Amnesty International's policy regarding armed groups, see, e.g., Amnesty International, *Armed Conflict* (18 Sept. 2007), http://www.amnesty.org/en/armed-conflict ("AI calls on all warring parties to respect IHL and human rights, and emphasises to state forces and armed groups that targeting civilians can never be justified."); Amnesty International, Press Release, *Israel/Occupied Palestinian Territories: Annapolis Talks Must Lead to Immediate, Concrete Action on Human Rights* (24 Nov. 2007), *available at* http://www.amnesty.org/en/for-media/press-releases/israel-occupied-palestinian-territories-annapolis-talks-20071124 ("Both Israeli forces and Palestinian armed groups must immediately end unlawful killings and all other attacks on civilians.").
[159] *See, e.g.*, Human Rights Watch, *"You'll Learn Not To Cry: Child Combatants in Colombia* (Sept. 2003), *available at* http://hrw.org/reports/2003/colombia0903/; *see generally* CLAPHAM, *supra* note 131, at 276.

groups to sign on to a "Deed of Commitment" pledging to enforce a ban against anti-personnel landmines.[160]

Second, various truth and reconciliation commissions over the years have also addressed human rights violations by members of armed groups using the same standards applied to the State actors involved in the conflict.[161] Notably, both in Sierra Leone and earlier in Peru, truth commissions found that armed groups were the *primary* violators of human rights in the conflict.[162] The South African Truth Commission also made the notable finding that even though the ANC had made a declaration to respect the Geneva Conventions, and even though it had in general complied with international humanitarian law, it was still responsible for gross violations of human rights that were not excused by the justness of its cause of overthrowing the apartheid regime.[163]

Third, the UN system—although generally still reluctant in many ways to recognize armed groups as addressees of international law—has also begun to hold armed groups to account under some international obligations.[164] The UN Human Rights

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[160] *See* http://www.genevacall.org/home.htm (last visited on 20 Dec. 2007) ("Geneva Call is an international humanitarian organisation dedicated to engaging armed non-state actors (NSAs) to respect and to adhere to humanitarian norms, starting with the ban on anti-personnel (AP) mines.").
[161] *See generally*, CLAPHAM, *supra* note 131, at 36-37.
[162] Truth & Reconciliation Commission of Sierra Leone, Final Report, available at http://trcsierraleone.org/drwebsite/publish/index.shtml, at Vol. 2, Ch. 2, ¶¶ 106 & 107 (concluding that the rebel group RUF "was the primary violator of human rights in the conflict."); Truth and Reconciliation Commission of Peru, Final Report–General Conclusions (translated from Spanish to English by the International Center for Transitional Justice), at ¶ 13, available at http://www.aprodeh.org.pe/sem_verdad/informe_final/english/conclusions.pdf (concluding that the PCP-SL (Shining Path) "was the principal perpetrator of crimes and violations of human rights. It was responsible for 54 percent of victim deaths reported to the TRC.").
[163] Truth and Reconciliation Commission of South Africa Report (21 March 2003), Vol. 6, Section 5, Ch. 3: *Holding the ANC Accountable*, at 642-43. The TRC also found that "Right-wing groups were responsible for committing gross human rights violations as defined by international human rights law." *Id.* at Ch. 6: *Holding the Right-Wing Groups Accounta*ble, at 725.
[164] *See Ends and Means*, *supra* note 1, at 42 (noting that the Human Rights Council special procedures (working groups and special rapporteurs) generally do not address abuses by armed groups); Report of the Special Rapporteur, U.N. Doc. A/62/265, *supra* note 141, at ¶¶ 37-38 (summarizing the history of the mandate's struggle to address armed groups); *see also* CLAPHAM, *supra* note 131, at 38 & 41 (arguing that the increasing preoccupation with terrorism has led key UN organs to declare that terrorism violates human

Council (formerly the Commission) has developed a practice of calling on "all parties" to internal armed conflicts to cease violations of international humanitarian and human rights law.[165] The Special Representative of the Secretary-General for Children and Armed Conflict has obtained commitments from more than sixty armed groups, which were followed up by monitoring by UNICEF and UN country missions.[166] The Secretary-General has also proposed that the Security-Council use sanctions, such as travel restrictions and the exclusion of violators from transitional governments, to convince rebel leaders not to use child combatants.[167] The Security Council itself has called on armed groups to cease violating human rights and has also imposed sanctions on armed groups.[168]

These developments suggest that armed groups are bearers of international obligations under IHL and perhaps also under international human rights law. Nevertheless, it remains extremely difficult to exact armed group compliance with these obligations, even the clearly applicable prohibitions under Common Article 3.

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rights, even when committed by non-State actors – although this position has been challenged by some States).

[165] *See, e.g.*, U.N. Human Rights Council, Press Release, *Human Rights Council Notes with Concern Serious Human Rights and Humanitarian Situation in Darfur* (28 Nov. 2006) (calling on all parties to the conflict in Darfur to cease violations of human rights and international humanitarian law); U.N. Commission of Human Rights, Res. 1998/67, *Situation of Human Rights in the Sudan*, ¶¶ 4 & 6 (21 April 1998).

[166] Report of the Special Representative of the Secretary-General for Children and Armed Conflict, *supra* note 154, at ¶¶ 21 & 22.

[167] Secretary-General, Report: Children and Armed Conflict, U.N. Doc. A/61/529-S/2006/826 (26 Oct. 2006) at ¶ 137; Secretary-General, Report: Children and Armed Conflict, U.N. Doc. A/59/695-S/2005/72 (9 Feb. 2005) at ¶ 154; Secretary-General, Report: Children and Armed Conflict, U.N. Doc. A/58/546-S/2003/1053 (10 Nov. 2003) at ¶ 105(g).

[168] *See, e.g.*, S.C. Res. 1649 (21 Dec. 2005), U.N. Doc. S/Res/1649 (2005), at ¶ 2 (deploring violations of human rights and humanitarian law by armed groups and imposing travel restrictions and freezing of funds of leaders of armed groups in the DRC); S.C. Res. 1127 (28 Aug. 1997), U.N. Doc. S/Res/1127 (1997), at ¶ 4 (imposing a travel ban against UNITA members).

B. The Difficulty in Ensuring Compliance by Armed Groups with Their Obligations

The major development that allows for some accountability of armed groups has been international criminal law, which provides a basis for prosecuting individual members of armed groups (just like individual members of State forces) for crimes against humanity, war crimes, and genocide.[169] In the *Tadić* case, the ICTY Appeals Chamber established that "violations of the laws or customs of war could be committed in non-international, as well as international, armed conflict,"[170] thus broadening the reach of international criminal law to the internal armed conflicts where abuses by armed groups are most prevalent. As a result, "[i] t is now beyond any doubt that war crimes and crimes against humanity are punishable as crimes of international law when committed in non-international armed conflict. Non-State actors . . . are subject to prosecution on this basis."[171]

Despite their undeniable importance, individual prosecutions for international crimes cannot alone establish armed group accountability that is on a par with the multiple forms of accountability that international humanitarian and human rights law currently impose on States.[172] This is problematic, as a matter of theory, because armed

[169] *See, e.g.*, Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998), at art. 5.
[170] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, ¶¶ 128-36. Although the notion that an individual could be held criminally responsible for violations of international humanitarian law was first established with the Nuremberg trials, it was generally considered that this liability extended only to international armed conflicts and not to the internal armed conflicts where the majority of abuses by armed groups tend to occur. If non-State actors were held accountable at all, therefore, it was under ordinary criminal law (as bandits or outlaws). *See* Schabas, *supra* note 139, at 917-19.
[171] Schabas, *supra* note 139, at 922.
[172] *See* David Matas, *Armed Opposition Groups*, 24 MANITOBA L. J. 621, 629 (1997) (arguing that international humanitarian and human rights law can only bind armed groups through international criminal law); Hessbruegge, *supra* note 146, at 42-43 (pointing out that the consequences of violations differ: a violation of human rights law entitles the victim to compensation, reparation, or satisfaction, whereas a violation of international criminal law generally only entitles the victim to seeing the violator tried. Also noting, however, that this last difference may be dissolving because there is an increasing focus on the

groups "perpetrate atrocities as grave as those of governments."[173] In addition, as a practical matter, individual prosecutions alone are unlikely to prevent future abuses by armed groups. The necessarily selective nature of prosecutions means that the vast majority of perpetrators (both State and non-State) will never face trial, which reduces the deterrence potential of prosecutions.[174] Indeed, in the DRC, the arrest of Thomas Lubanga (leader of the Union des Patriotes Congolais) for trial before the ICC did little to diminish the level of violence and abuse in Ituri.[175]

In addition to the development of international criminal law, there is a growing practice of international monitoring and "naming and shaming" of armed groups for their abuses, much in the same way as is done with States.[176] As noted above, concerns that

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individual's perpetrator's obligation to make reparation to the victim (see e.g. Article 75 of the Rome Statute)).

[173] Matas, *supra* note 172, at 621.

[174] *See* Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 51, 56-57 (2002). As Aukerman notes, although prosecutions offer the possibility of the most stringent sanctions, which suggests that they might result in the most deterrence, "[d]eterrence depends not only on the severity of the sanction but also the certainty of punishment." *Id.*, at 69.

[175] Nevertheless, there are indications that the ICC's investigation in the DRC have had a deterrent effect, even if it has not eliminated abuses completely. *See* William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557, 587-89 (2005) (quoting Thomas Lubanga, shortly before his arrest and transfer to the ICC, reflecting that "the Court [ICC] has been a pressure on the political actors who were killing people . . . these people are very afraid today to commit such slaughter.").

[176] *See Ends and Means*, *supra* note 1, at 39 (examples of such mechanisms include: "fact-finding and public reporting; campaigning for the prosecution of armed group members by international tribunals; asking for sanctions such as a ban on arms sales to the group; 'shaming' the group through national or international media attention; raising awareness of the plight of victims of armed group abuses; raising awareness of abusive practices among the armed group's supporters; engaging in confidential dialogues with leaders on human rights concerns; training members of armed groups in international standards; encouraging groups to adopt codes of conduct that include human rights commitments; assisting groups to establish 'judicial' mechanisms to deal with insubordination and dissent; through mediation or other means, working to end the conflict and secure long-term peace (and thereby abuses)."); *cf.* Marco Sassòli, *Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian law and International Human rights law*, Paper submitted to the Armed Groups Conference (13-15 Nov. 2003), *available at* http://www.armedgroups.org/images/stories/pdfs/sassoli_paper.pdf, at 24 ("Those who have accepted those mechanisms apparently thought that the latter could influence the human being who take the decision whether an abstract entity respects or violates the law. . . . Why should those human beings react in fundamentally different ways when they act for armed groups than when they act for such other corporate entities?").

focusing solely on State abuses was unfair prompted some UN bodies and some prominent NGOs to begin to monitor and report on human rights abuses by armed groups.[177] For example, both Human Rights Watch and Amnesty International report on abuses by armed groups.[178] On the UN side, for example, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has decided to extend his mandate to include those armed groups that exercise "significant control over territory and population and has an identifiable political structure (which is often not the case for class 'terrorist groups')," such as the LTTE in Sri Lanka, regardless of the ongoing controversy over their status in international law.[179]

The effectiveness in deterring future abuses by "naming and shaming" armed groups is extremely difficult to ascertain, just as it is with States.[180] There are certainly consequences for armed groups that are perceived as illegitimate, ranging from a terrorist designation (and attendant freezing of assets or restrictions on foreign travel), to a general lack of international support, which can result in less pressure on the national government to negotiate with the armed group.[181] A group's sensitivity about its reputation may vary

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[177] *See Ends and Means*, *supra* note 1, at 11; Holmqvist, *supra* note 158, at 45 (noting that in the 1980s and '90s, organizations such as Human Rights Watch and Amnesty International "altered their definitions of human rights abuse to include acts committed by non-state actors," which sparked "a global practice of 'naming and shaming' armed groups that perpetrate human rights abuses.").

[178] *See,* Nair, *supra* note 141, at 6 (documenting Human Rights Watch's and Amnesty International's history of reporting on armed group violence). For current examples of Human Rights Watch and Amnesty International's documentation of abuses by armed groups, see supra, text accompanying note 158.

[179] Philip Alston, Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2005/7 (22 Dec. 2004), at ¶ 76, *available at* http://www.extrajudicialexecutions.org/reports/E_CN_4_2005_7.pdf.

[180] *But see Ends and Means*, *supra* note 1, at 41 (at least one study has found that "that there is some reason to believe that adverse publicity based on the public release of critical human rights reports has influenced armed groups in some countries."); *Id.*, at 39 (quoting a former FMLN guerilla from El Salvador reflecting that: "I think that many more violations would have occurred . . . by the guerillas would have occurred if pressure from the [human rights] organisations had not been exerted to respect international rules.").

[181] Sivakumaran, *supra* note 148, at 386-87 (using the example of the LTTE being labeled a terrorist group in the U.K. resulting in the loss of approximately $500 million because it was no longer able to operate a London office to collect funds from abroad).

depending on the circumstances in which the group finds itself at a given moment, so that a particular group may be less susceptible to "naming and shaming" when it is involved in active military operations and much more sensitive to such concerns if it needs to bolster its domestic legitimacy or "when negotiations for peace are taking place or when the group feels a need for international recognition and legitimacy."[182] In addition, there are practical difficulties concerning the monitoring entity's ability to gather information about abuses and to assign blame for them to specific armed groups, especially in situations where multiple armed groups are operating in a given territory and where the leaders of the armed groups in question are difficult to identify and contact.[183]

As a general matter, however, groups that "aspire to establish their own State or to form a new government in the existing State"[184] are thought to be more susceptible to this sort of public condemnation than groups that have vague political objectives or primarily emphasize other purposes such as drug-trafficking and other criminal enterprises.[185] Thus, it seems particularly problematic to rely on "naming and shaming" alone when it comes to the sort of armed conflict that this paper focuses on: internal armed conflicts, characterized by the presence of multiple armed groups. In the case of the DRC in particular, it seems unlikely that "naming and shaming" practices had much effect on the conduct of the MLC and the RCD and even less on the conduct of the smaller armed groups that generally fell below the radar of the human rights organizations.[186]

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[182] *Ends and Means*, *supra* note 1, at 41.
[183] *See id.*, at 29-30.
[184] Christine Byron, *A Blurring of the Boundaries: the Application of International Humanitarian Law by Human Rights Bodies*, 47 VA. J. INT'L L. 839, 893 (2007); *Ends and Means*, *supra* note 1, at 16.
[185] *See Ends and Means*, *supra* note 1, at 17; Philip Alston & William Abresch, *Can Human Rights Monitoring Halt Abuses in Sri Lanka?*, 31:2 FLETCHER FORUM OF WORLD AFFAIRS 21, 21 (2007).
[186] Despite the numerous organizations that now report on armed group abuses in the DRC, armed groups there continue to violate international human rights and humanitarian law. *See* Titinga Frédéric Pacéré,

Given the weaknesses of the current methods for ensuring armed group compliance with international law, it is time to explore other means of providing incentives for armed groups to wage the conflict in accordance with some minimal humanitarian standards. I propose in the next section that conditioning peace process participation on compliance with these international obligations could serve as a powerful incentive to increase compliance, as peace process participation brings significant benefits to the armed groups involved.

II. Using the Peace Process to Increase Armed Group Compliance with International Law

A. Signing a Peace Agreement Brings Significant Benefits to the Armed Group

i. Signing a Peace Agreement Confers Status Benefits Upon Armed Groups

Given the prevalence of non-international armed conflicts, contemporary peace agreements are generally signed by State and non-State actors alike (as aptly illustrated by the above discussion of the DRC peace process).[187] Because the legal status of armed groups under international law is controversial, however, their signature calls into question the international legal status of the peace agreements themselves. They do not appear to be treaties, regulated by the Vienna Convention on the Law of Treaties (VCLT), because the VCLT applies only to inter-State agreements,[188] yet it seems both factually and legally inaccurate to relegate them purely to the domestic sphere. I argue, therefore, that peace agreements do qualify as international agreements. As a result,

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Report of the Independent Expert on the Situation of Human Rights in the Democratic Republic of the Congo, U.N. Doc. A/HRC/4/7 (21 Feb. 2007).

[187] *See* John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 717 (1997) ("In the resolution of conflict situations in the late twentieth century, non-state parties have featured prominently as signatories to agreements.").

[188] Vienna Conventions on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 1 [hereinafter Vienna Convention on the Law of Treaties].

signing a peace agreement enhances the armed group's international legal status (which I refer to as a "status benefit" for armed groups that sign peace agreements).

a. *Contemporary Peace Agreements are International Agreements*

The term "peace agreement" is not a legal term of art in traditional international law. Instead, it is a recent construct that appears to be replacing the three traditional kinds of international agreements that could be used to put an end to armed hostilities: the peace treaty, [189] the armistice, and the cease-fire.[190] Much of the legal uncertainty

[189] As traditionally understood, the peace treaty is a consensual agreement among the parties to the armed conflict used to terminate the "state of war" that exists between them and restore "normal friendly relations between the former belligerents." *See* Wilhelm G. Grewe, *Peace Treaties*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. III 938, 939 (1997) (The principal purpose of the peace treaty is to terminate the "state of war," a primarily "negative understanding of peace, but the peace treaty also includes a positive understanding of peace, including "the restoration of normal friendly relations between the former belligerents."); *id.* at 945 ("A treaty deserves to be called a peace treaty only if it eliminates the causes for a future war."). *See also* M. DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, Vol. II 255 (Carnegie Institution of Washington, 1916) ("Quand les Puissances qui étoient en guerre, sont convenuës de poser les armes; l'Accord, ou le Contrat, dans lequel elles stipulent les Conditions de la paix, & règlent la manière dont elle doit être rétablie and entretenue, s'appelle le Traité de Paix."). A peace treaty, as the term implies, has the international legal status of a treaty: it is "no different juridically from other types of inter-State agreements, and [it is] governed by the general law of treaties." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 33 (3ed., 2001) (citing G. Schwarzenberger, *Peace Treaties Before International Courts and Tribunals*, 8 I.J.I. L. 1 (1968)). By signing a peace treaty, the States parties renounced their right to continue hostilities over this issue; under the traditional understanding, therefore, the breach of a peace treaty therefore entitled the other side to resume hostilities. VATTEL, *supra*, at 265 (the peace treaty terminates the war: "Il ne laisse aux Parties contractantes aucun droit de commettre des actes d'hostilité, soit pour le sujet même qui avoit allumé la Guerre, soit pour tout ce qui s'est passé dans son cours. Il n'est donc plus permis de reprendre les armes pour le meme sujet."). New wars, for new reasons are permissible (because, at this time, there was no prohibition on the use of force). *Id.*, at 266. New wars for new reasons do not breach the peace treaty. *Id.*, at 281-82; *see also* HUGO GROTIUS, THE LAW OF WAR AND PEACE (De Jure Belli ac Pacis) (Louise R. Loomis, trans. 1949), Book Three, Chapter XX, at ¶ 27 & ¶ 38 ("even after the agreement has been broken, it is honorable for the innocent party to keep the peace.").

[190] Unlike peace treaties, armistices, truces, and cease-fires were understood, as a matter of traditional international law, as mere interludes to the hostilities, thus they had no "legal bearing on the termination of a state of war," but merely served as a "*pactum de contrahendo* on the outline of the future peace treaty." Grewe, *supra* note 189, at 941; *see also* Dieter Fleck, *Suspension of Hostilities*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. IV 748, 748 (2000) (noting that there is today no legal distinction between these terms). An armistice was understood as "suspend[ing] military operations by mutual agreement between the belligerent parties." Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 [hereinafter Hague Regulations], at art. 36. A cease-fire, traditionally, was merely "a military order given by a superior to troops under his command to stop shooting." David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 26 VA. J. INT'L L. 801, 809 (1995). Because neither the armistice nor the cease-fire was understood to permanently end the state of war, either side was free to resume hostilities at their discretion. *See* Yoram Dinstein, *Armistice*, *in*

surrounding peace agreements stems from the fact that the legal status and effects of even these traditional constructs is itself unclear, given the fact that these so-called "war conventions" were developed in a pre-United Nations world, when war was not prohibited by international law. Since the United Nations Charter's prohibition on the use of force was enacted,[191] however, much of these conventions have become antiquated and out-dated. Today, given the prohibition on the use of force, States are reluctant to speak of entering a "state of war" and there has been a corresponding decline in the use of formal instruments to end wars: "Nowadays, armed conflicts are often terminated merely by a cease-fire without any peace treaty, or by mere cessation of hostilities."[192]

As a result, the more contemporary term "peace agreement" is often used today. This by no means resolves the legal difficulties, however, as "the term 'peace agreement' remains largely undefined and unexplored."[193] I use the term to refer to written agreements, used by the parties to an armed conflict, to agree primarily on a cessation of hostilities (including cease-fires), but also to agree on a range of other socio-legal issues, such as (but not exclusively) the demilitarization and demobilization of combatants,

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ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Vol. I 256, 256 (1992). In addition, a breach by one side automatically gave the other side the right to resume hostilities. *See* Hague Regulations, *supra*, at art. 40 ("Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.").

[191] U.N. Charter art. 2(4).

[192] Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 58, 63 (Dieter Fleck ed., 1995); *see also* Grewe, *supra* note 189, at 940 & 944 (noting decline in the use of formal peace treaties since the end of World War I); DINSTEIN, *supra* note 189, at 34. There is still some attempt to remain within the general confines of the traditional categories. Thus, some authors argue that armistices have replaced peace treaties as the means of formally ending the state of war, while cease-fires have replaced armistices as mutual agreements between the parties to temporarily cease hostilities. *See* Dinstein, *supra* note 190, at 256 ("as currently understood in the practice of States, an armistice often signifies a total cessation of hostilities and is viewed as at least a prelude to peace."); DINSTEIN, *supra* note 189, at 39-40 (a modern armistice generally "puts an end to the war, and does not merely suspend the combat."); Greenwood, *supra*, at 58 (describing the purpose of an armistice agreement as "to terminate hostilities permanently," unlike a ceasefire, and noting that since the end of WW II, several conflicts have ended with an armistice agreement and no subsequent peace treaty (e.g. Korea)).

[193] Bell, *supra* note 4, at 374.

provision for the establishment of a transitional government (including power-sharing provisions and/or elections), respect for human rights, access for humanitarian relief, neutral peacekeepers, etc.[194]

The contemporary consensus regarding the international legal effects of contemporary peace agreements seems to be that so long as the parties sign an agreement with the intent to bring a complete end to the armed conflict, then the agreement should be so interpreted—regardless of what the parties call it.[195] So long as all the parties

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[194] *See* Lusaka Agreement for examples of many of these provisions. *Cf.* Bell, *supra* note 4, at 374 (who defines the concept "peace agreement" as "documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures.").

[195] *See* Greenwood, *supra* note 192, at 54; *see also* Andrej Lang, *"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution*, 40 N.Y.U. J. INT'L L. & POL. 107, 115 (2008) (arguing the Lusaka Agreement should be understood as a "peace agreement" despite the fact that it is called a "ceasefire agreement"). *But see* Bouvier & Bomboko, *supra* note 49, at 57, 59 (suggesting that since Lusaka set the signing of a peace treaty as one of the objectives for the Inter-Congolese Dialogue, the parties did not believe that Lusaka was a *final* peace settlement). Moreover, in a world where the prohibition on the use of force is central, the breach of any agreement to permanently end hostilities is likely a new breach of U.N. Charter article 2(4), entitling the other side to resume hostilities only as an exercise of their right to self-defense under article 51. *See* Dinstein, *supra* note 190, at 258 (noting that, under the contemporary understanding of "armistices," a violation is not considered a mere "resumption of fighting," but rather the "unleashing of a new war," constituting a violation of art. 2(4) of the UNC and entitling the other side to self-defense.); Greenwood, *supra* note 192, at 59 ("today it would be a violation of Art. 2(4) for a state to resume hostilities unless the behavior of the other party to the armistice or ceasefire amounted to an armed attack of the threat of an armed attack [triggering the right to self-defense under Art. 51]."); Fleck, *supra* note 190, at 749 ("Where the suspension of hostilities has already led to a pacified situation, the reopening of hostilities is only permissible within the limits of the use of force permitted by general international law, especially as a measure of self-defence. Today, these principles supersede the rules enshrined in Arts. 36 to 41 of the Hague Regulations."). Dinstein argues, however, that cease-fires retain a different status and still constitute a mere interlude in the hostilities, such that a "[r]enewal of hostilities before a cease-fire expires would obviously contravene its provisions. None the less, it must be grasped that hostilities are only continued after an interruption, and no new war is started. For that reason, a cease-fire violation is irrelevant to the determination of armed attack and self-defence." DINSTEIN, *supra* note 189, at 52. The debate over the legal status of a cease-fire (contained in a Security Council resolution) and the legal effects of a breach of that cease-fire peaked in the run-up to the Iraq war, with some scholars arguing that the war was justified due to Iraq's material breach of the cease-fire and others challenging that argument. *See, e.g.,* Yoram Dinstein, *Comments on War*, 27 HARV. J.L. & PUB. POL'Y 877, 889 (2003-2004) (a cease-fire does not end the war, so no new resolution is needed); Christopher Greenwood, Memorandum on the Legality of Using Force Against Iraq, United Kingdom, House of Commons, Select Committee on Foreign Affairs, Minutes of Evidence (24 Oct. 2002), ¶¶ 16-19, *available at* http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm (no new resolution needed); Simon Chesterman, *Just War or Just Peace After September 11: Axes of Evil and Wars Against Terror in Iraq and Beyond*, 37 N.Y.U. J. INT'L L. & POL. 281, 289 (2005) (challenging that argument); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 178 (2003) (also challenging the argument).

signing the peace agreement are States, therefore, then the agreement can constitute a treaty as defined by the Vienna Convention on the Law of Treaties, regardless of whether the agreement is called a "peace agreement" or a "cease-fire" or an "armistice."[196]

When non-State parties sign peace agreements, however, then the VCLT does not apply, as a matter of law, because the VCLT applies only to international agreements "concluded between States."[197] As discussed above, however, the majority of conflicts today are internal and end in negotiated settlements that involve at least one, sometimes multiple, non-State signatories. Thus, as a matter of law, it appears that the VCLT does not apply to the majority of contemporary peace agreements.

As a result, there are three possible categorizations for peace agreements signed by non-State armed groups: first, these agreements may belong to some independent category of international law (separate from the realm of general public international law); second, these agreements may be purely domestic law instruments; and third, these agreements may be international agreements that are not governed by the VCLT.

The first possibility is that peace agreements signed by both States and non-State armed groups form an independent category of law, neither purely domestic nor international. Thus, Christine Bell has persuasively argued that contemporary peace agreements belong to a third category of law that she calls "lex pacificatoria," a concept analogous to lex mercatoria (the international law regulating the practice of

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[196] Dinstein, *supra* note 190, at 258 (a modern armistice is best understood as a treaty, i.e. as a "formal inter-governmental agreement"); DINSTEIN, *supra* note 189, at 49 (when cease-fires are written down and general in scope, they can be understood to have the international legal status of treaties); Bell, *supra* note 4, at 380 (arguing that so long as peace agreements are concluded solely between States, they can be considered treaties).

[197] Vienna Convention on the Law of Treaties, *supra* note 188, at art. 2(1)(a); *see also id.*, at art. 1 ("The present Convention applies to treaties between States."); *see also* Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004), ¶¶ 41, 45, & 48 (holding that RUF rebel group lacked treaty-making capacity because it was not a State).

merchants).[198] In essence, this new category avoids the rigid categories of international law and domestic law, so as to "consider peace agreements on their own terms."[199] Bell concludes that peace agreements are "best thought of as transitional internationalized constitutions," combining treaty-like commitments with both international and domestic implementation mechanisms.[200]

The primary problem with the lex pacificatoria approach is that it fails to clarify the uncertain legal status of contemporary peace agreements, leaving unresolved the issue of their legal force and the consequences that follow when they are breached.[201] For my purposes, therefore, the lex pacificatoria theory does not clarify the issue of whether signing a peace agreement affects the international legal status of the armed group signatories.

Focusing instead on more established legal categories, it is possible to conclude that because the VCLT does not apply, the peace agreements in question are not international agreements at all. Instead, as the Special Court for Sierra Leone reasoned:

> An agreement such as the Lomé Agreement [between the government of Sierra Leone and the rebel group RUF] which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may

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[198] Bell, *supra* note 4, at 407 (arguing that lex pacificatoria addresses the particular features of contemporary peace agreements, which Bell identifies as self-determination (both external and internal challenges to the State); a mix of State and non-State signatories; a mix of commitments, some more treaty-like and some constitutional-like; and a "hybrid legal pluralism" in the way they use both legal and political mechanisms to achieve their implementation.).

[199] *Id.*

[200] *Id.* (arguing that peace agreements

> provide a power map and framework for governance, but it is often only partial and transitional, requiring further development. Contractual, treatylike commitments, backed up by delegation to mechanisms that are typically internationalized, are aimed at ensuring short-term implementation. However, domestic legal and political processes are contemplated to form the long-term vehicle for conflict transformation, and a transition to these must take place.).

[201] *See* Lang, *supra* note 195, at 149-50 (criticizing lex pacificatoria for downgrading the legal status of peace agreements: "Bell effectively suggests that peace agreements are a category of law widely insulated from the international legal system and the compliance pull of the pacta sunt servanda principle.").

> take note of. That, however, will not convert it to an international agreement which creates an obligation enforceable in international, as distinguished from municipal, law.[202]

Under this reasoning, peace agreements that are signed by non-State parties to end an internal armed conflict are simply instruments of domestic law: they have no legal status under international law, the agreement confers upon the parties neither rights nor obligations under international law, and their breach entails no consequences as a matter of international law.

There several reasons, however, why it does not seem satisfactory to conclude that all peace agreements signed by non-State armed groups are purely a matter of domestic law. First, both factually and legally, non-international armed conflicts and the peace processes used to resolve them are no longer considered to be purely a matter of domestic concern. As a matter of fact, internal armed conflicts tend to have cross-border effects, whether it is because the root causes of the conflict are themselves transnational in nature (e.g. the DRC)[203] or because the conflict causes massive displacement of civilians into neighboring countries (e.g. Darfur-Chad).[204] Armed groups themselves often operate transnationally, whether they use one State as a safe haven to attack

[202] *Kallon & Kamara*, at ¶ 42.
[203] *See generally Africa's Seven-Nation War*, *supra* note 58 (describing the Congolese conflict's transnational dimensions).
[204] *See* Int'l Crisis Group, *Tchad: Vers le Retour de la Guerre?*, Report Afrique No. 111 (1 Juin 2006), at 11 (describing the effect of the Darfur conflict on the deteriorating security situation in Chad).

another, act as proxies on behalf of one State against another,[205] or finance their operations through the world-wide collection of donations.[206]

As a matter of law, these facts have led to a reinterpretation of the legal status of internal armed conflicts, bringing them squarely within the realm of international law. The development of international human rights law has meant that matters previously considered to be purely a matter of domestic concern are now governed by international law, justifying international involvement.[207] Internal armed conflicts are no longer conceived of as purely a domestic affair, barring intervention of the United Nations.[208] Instead, the United Nations is increasingly intervening in internal armed conflicts that the Security Council characterizes, as a matter of international law, as a threat to *international* peace and security triggering the Council's ability to act under the Charter.[209] In addition, the UN often assists in the mediation and negotiation of these peace agreements and is almost always a signatory (as a "witness") to peace agreements between governments and armed groups,[210] which may in itself give these agreements an

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[205] *Scramble for the Congo*, *supra* note 61, at 1 (observing that the DRC has become the battlefield for a number of different national civil wars, including those of Rwanda, Angola, Uganda, and Burundi.); *id.* at 23 (noting that Rwanda created the RCD rebel group to act as its proxy in the DRC); *see also Disarmament in the Congo*, *supra* note 110, at 1 (arguing that the presence of foreign sponsored rebel groups is a destabilizing factor that provides the basis for additional foreign incursion into the DRC, which is further destabilizing).

[206] *See* Sivakumaran, *supra* note 148, at 386-87 (describing the LTTE's U.K. office used to collect funds from sympathizers living abroad).

[207] *See* BELL, *supra* note 8, at 3 (noting that "international provision for human rights provides a basis for international involvement in internal arrangements.").

[208] *See* U.N. Charter art. 2(7) (restricting the UN from intervening in a State's domestic affairs).

[209] U.N. Charter art. 39; *see* Kooijmans, *supra* note 5, at 335 (noting that, following the end of the Cold War, the Security Council's involvement in internal armed conflicts greatly increased – although the resolutions were always careful to frame the issues as threats to international peace and security).

[210] *See* Bell, *supra* note 4, at 400 (noting that

> the majority of peace agreements employ third-party states and international organizations as signatories to agreements, either through direct signature or the signature in the capacity of 'witnesses,' 'guarantors,' or 'observers.' What this practice means, or whether the terms in which the organization signs have any technical legal implication, is unclear . . . little discussion has been devoted to whether or how their involvement is

"internationalized character."[211] If the underlying armed conflict is itself governed by international law, both in terms of the obligations upon the parties to respect international humanitarian law and in terms of the UN's ability to intervene to restore peace, then it seems artificial to maintain that peace agreements are domestic instruments solely because they do not appear to be governed by the VCLT.

Second, as discussed above, the intent of the parties is crucial when evaluating the legal status of the agreement that they have signed.[212] Both State and non-State parties to non-international armed conflicts appear to have a strong incentive to construe the agreement between them as binding under international law. As will be discussed in more depth below, non-State armed groups are likely to seek the level of international recognition that flows from their ability to sign an international agreement with a State.[213] States may also have an interest in conceiving of the agreement as internationally binding because international law might generate greater "compliance pull."[214] Although armed groups may have non-legal, practical reasons (e.g. war fatigue) to respect a domestic peace agreement, they have already indicated by their willingness to take up arms against the government that they do not consider the domestic law of the State binding upon them. International law, on the other hand, is often viewed as more legitimate by armed groups, suggesting that an armed group may feel more bound by an

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shaped by their signature and the particular label by which they are described as a third party to the agreement.).

[211] Kooijmans, *supra* note 5, at 337.

[212] *See* Antonio Cassese, *The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty*, 2 J. INT'L CRIM. JUSTICE 1130 (2004); *see also* Dinstein, *supra* note 190, at 257; Greenwood, *supra* note 192, at 58.

[213] *See infra*, section (b).

[214] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 43 (1990) (tying the "compliance-pull" of a rule to its legitimacy).

international legal obligation than by a domestic legal obligation.[215] In addition, an internationally binding legal obligation can bring the full weight of the international community behind the State to ensure that the armed groups respect their peace agreement obligations. This can be seen in the way the Security Council can only *call upon* or *urge* "all parties to the conflict" in an internal conflict to work towards a cease-fire and to respect human rights and international humanitarian law, but cannot *demand* that they cease the use of force because it violates the Charter, in the way that it can in an inter-State conflict.[216] Once the parties have signed a peace agreement, however, the Council is able to *demand* that all parties, including the non-State armed group parties, comply with their obligations under the agreement.[217] The Security Council's language suggests the Council's willingness to support and enforce the peace agreement—support which may be crucial to uphold the agreement going forward.[218] Thus, it is not

[215] *See Ends and Means*, *supra* note 1, at 59 (arguing that although armed groups generally perceive international law as more legitimate, some armed groups still challenge its legitimacy since it was developed by States).

[216] *Compare* S.C. Res. 1234 (9 April 1999), at ¶ 6 (calling upon "all parties to the conflict" to respect human rights and international humanitarian law) & ¶ 12 (urging all parties to the conflict to work towards a ceasefire), *with* S.C. Res. 1304, U.N. Doc S/Res/1304 (2000) (16 June 2000), at ¶ 2 ("*Reiterates* its unreserved condemnation of the fighting between Ugandan and Rwandan forces in Kisangani in violation of the sovereignty and territorial integrity of the [DRC], and *demands* that these forces and those allied to them desist from further fighting"). It is important to note that the Security Council may react differently to the use of force by non-State armed groups to overthrow a democratically elected government—which was not the case in the DRC. In Sierra Leone, on the other hand, where the RUF challenged the democratically elected government, the Security Council early on *condemned* the RUF's challenge to "legitimate government." S.C. Res. 1181 (13 July 1998). While a detailed survey of this practice is beyond the scope of this paper, it may suggest some interesting empirical support for Franck's claim that there is an emerging "right to democracy." *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

[217] *See, e.g.*, S.C. Res. 1273 (5 Nov. 1999), at ¶ 3 (calling on "parties to the Ceasefire Agreement to continue to abide by its provisions"); S.C. Res. 1279 (30 Nov. 1999), at pmbl. ("Stressing the responsibilities of the signatories for the implementation of the Ceasefire Agreement"); S.C. Res. 1291 (24 Feb. 2000), at ¶ 1 (calling on "all parties to fulfill their obligations under the Ceasefire Agreement.").

[218] For example, the parties to the Lusaka Ceasefire Agreement requested that the Security Council, acting under Chapter VII, deploy a peacekeeping force to the DRC to ensure implementation of the Agreement). Lusaka Agreement, ¶ 11(a).

inconceivable that both State and non-State parties to a peace agreement might intend for it to be binding at the international level.[219]

As a result, I conclude that contemporary peace agreements can be understood as international agreements that are not regulated by the VCLT. The notion that there might be international agreements that do not qualify as treaties covered by the VCLT, because they are "concluded between States and *other subjects* of international law" is explicitly flagged in the VCLT.[220] While the VCLT does not address the legal status of such agreements, because they are beyond the Convention's scope,[221] it does note that the Convention does not affect

> the legal force of such agreements; the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.[222]

This proviso appears to recognize the potential validity of agreements concluded by other subjects of international law.[223] While the VCLT does not define the concept of "other subjects of international law," leaving it to be determined by the development of customary international law,[224] I have already argued above that armed groups appear to

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[219] Cassese, *supra* note 212, at 1135 (arguing that the parties to the Lomé Agreement intended it to be an internationally legal binding agreement and that when the parties "intend to confer on a set of mutual undertakings the nature of an internationally legal binding agreement, then that set of undertakings will have such character; if not, it will have the nature of a political commitment.").
[220] Vienna Convention on the Law of Treaties, *supra* note 188, at art. 3 (titled "International agreements not within the scope of the present Convention") (emphasis added).
[221] *See id.*, at art. 1 ("The present Convention applies to treaties between States."). Thus, these international agreements may even be treaties, but treaties outside the scope of this particular Convention, which applies only to treaties between States.
[222] *Id.*, at art. 2.
[223] Quigley, *supra* note 187, at 730; *see also* Bell, *supra* note 4, at 380 (interpreting VCLT art. 3 as indicating "that agreements between state and nonstate parties that are subjects of international law, or indeed between such nonstate parties alone, can be legally binding international agreements.").
[224] Quigley, *supra* note 187, at 730.

have international law subject status, at least as addressees of international humanitarian law and perhaps even human rights law.[225]

Nevertheless, even if one accepts that armed groups have gained the limited amount of subjectivity required for them to be subject to certain minimum humanitarian obligations in internal armed conflicts, it does not necessarily follow that armed groups also have the capacity to *make* international law by signing international agreements, such as peace agreements. In the *Kallon* case, for example, the Special Court for Sierra Leone conceded that the RUF rebel group was bound by Common Article 3, but held that the RUF nevertheless lacked treaty-making capacity because it was not a State, but merely a "faction" within a State and therefore lacked the international legal personality required to sign a treaty.[226]

It would certainly be overly broad to conclude that armed groups have full treaty-making capacity simply because they are treated as bearers of humanitarian obligations in situations of armed conflict.[227] Nevertheless, it does seem possible to conclude that armed groups have the legal status necessary to conclude international peace agreements,

[225] *See* Bell, *supra* note 4, at 380-81 (arguing that non-state peace agreement signatories should be considered "other subjects" because of the recognition already afforded to them by other fields of international law, such as international humanitarian law).
[226] Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004), ¶¶ 41, 45, & 48. *But see* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 613 (2005) (arguing that this sort of formalist understanding of subjects of international law is no longer correct as "public international lawyers are no longer as certain as they once were that the ability to act on international law required actors to be formally accepted as 'international legal persons . . . We now have so many plausible 'international legal persons' that we are no longer sure what the term implies.").
[227] *See Kallon & Kamara*, at ¶¶ 45 & 48 (concluding that the mere fact that Common Article 3 bound the RUF as a matter of customary international law did not "by itself invest the RUF with international personality under international law" and, in fact, the RUF, as a rebel group, lacked the international legal personality necessary to sign treaties).

given the direct connection between peace agreements and armed conflicts.[228] Indeed, armed groups' status as "subjects" of international law appears to flow directly from their status as parties to an armed conflict.[229] It seems impossible to deny, therefore, that they have the capacity to sign an agreement to end the conflict that is the very source of their ability to violate their international obligations in the first place. In other words, because their participation in the conflicts propels the groups into the international forum, they remain international subjects until the conflict has been fully resolved through the implementation of a final peace agreement. The international subject status of armed groups is thus "transitional" in nature, tied as it is to the armed conflict;

> Their legal personality, therefore, is a peculiar one: it is by its very essence a temporary and transitional one. Once the peace-arrangement has been implemented they acquire, at best, the status of a political party and thereby lose their international personality. During the implementation phase, however, they have rights and obligations under international law and can be held accountable under international law in instances of non-compliance.[230]

Under this understanding, armed groups clearly retain some international agreement-making capacity at the moment of signing the peace agreement.[231]

The travaux préparatoires of the Vienna Convention strongly support my claim that armed groups are "other subjects" of international law, capable of signing an international agreement not covered by the VCLT. The 1962 ILC Draft Articles that

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[228] *See* Cassese, *supra* note 212, at 1134 (arguing that "[i]nsurgents in a civil war may acquire international standing and the capacity to enter into international agreements if they show effective control over some part of the territory and the armed conflict is large-scale and protracted.").
[229] *See* ZEGVELD, *supra* note 131, at 152 ("The legal personality of armed opposition groups is based on their position as parties to an internal armed conflict. It would be unrealistic and would have no functional purpose to deny such personality for the reason that armed opposition groups have no legal personality in the traditional sense.").
[230] Kooijmans, *supra* note 5, at 339.
[231] *See* Bell, *supra* note 4, at 383 ("In the course of the peace process, both the legal regime and the humanitarian law status of nonstate groups change, as the group moves from armed opposition to inclusion in the government and the level of conflict subsides.").

provided the basis for the VCLT originally defined treaties as international agreements "concluded between two or more States or other subjects of international law."[232] Ultimately, the drafters decided to restrict the final Convention to agreements between States alone, but they inserted article 3 to make it clear that "other subjects of international law, such as international organizations and insurgent communities, may conclude treaties,"[233] just treaties that are not regulated by the VCLT.

The more recent Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations also supports the claim that armed groups are subjects of international law, capable of signing an international agreement.[234] Although no similar convention has to date been developed to regulate agreements signed by armed groups, the new Convention on international organizations clearly left open this possibility by including its own proviso that it would not affect the legal status of "international agreements between subjects of international law other than States or international organizations,"[235] suggesting again that "other subjects" of international law refers to non-State armed groups.[236] It is, therefore, consistent with the terms and the intent of the VCLT, and the later Convention relating to international organizations, to conclude that peace agreements signed by armed groups are in fact binding *international* agreements—even if not treaties governed by these Conventions.

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[232] Int'l Law Commission, Commentary to the Final Draft of the Draft Articles, *reprinted in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PREPARATOIRES 70 (compiled by Ralf Günter Wetzel) (Dietrich Rauschning ed., 1978).
[233] *Id.*, at 70 & 83.
[234] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 (not yet in force).
[235] *Id.*, at art. 3 (iv).
[236] *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 7 (2d ed. 1984).

Similarly, Peter Kooijmans has argued that peace agreements have an "internationalized character"[237] when they are signed by a representative of the Secretary-General.[238] For Kooijmans, once an agreement has been internationalized in this way, there is a "contractual bond" between the armed group and the government and also to the United Nations itself.[239] This contractual bond therefore must "necessarily have an international law character since such an agreement is by definition governed by public law."[240] Thus, those peace agreements that qualify by virtue of their signature by a UN representative can be treated as international agreements.[241] My argument goes beyond Kooijmans' proposal, however, as it does not rely on the signature of a UN representative, but instead is premised on the international status of the armed groups themselves. Thus, even peace agreements not signed by a UN representative would qualify as international agreements, simply by virtue of the fact that all signatories, even non-State signatories such as armed groups, are today considered to be subjects of international law.

To sum up, I have argued that armed groups are increasingly treated as subjects of international law and, specifically, as bearers of a minimum set of humanitarian obligations drawn from international humanitarian and human rights law. Because this status is directly linked to the armed groups' involvement in conflicts that are increasingly regulated by international law (even if they are technically characterized as internal), this status also gives armed groups the capacity to sign an international peace

[237] Kooijmans, *supra* note 5, at 337.
[238] *Id.*, at 338.
[239] *Id.*
[240] *Id.*
[241] *But see* Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004), ¶ 39 (explicitly rejecting this understanding of the UN's signature, holding that the UN was not a party to the Lomé Agreement (despite having signed it), but rather only a "moral guarantor" of the parties' commitments under the Agreement.).

agreement. This peace agreement retains an international character, despite the fact that it is not regulated by the VCLT, because international law accepts that "other subjects" of international law, such as armed groups, can sign binding international agreements.

b. *Signing a Peace Agreement Enhances the Armed Group's International Legal Status*

As the previous part has illustrated, the status of both armed groups and contemporary peace agreements under international law remains extremely contested. The interaction between the two concepts is something of a chicken and an egg problem. It is unclear whether contemporary peace agreements derive their international legal status from the international legal status of the armed groups that sign them, or, whether armed groups derive their international legal status from the international legal status of the peace agreement they sign. In other words, there seems to be a circular relationship between the two concepts, whereby "[r]ecognizing peace agreements as international agreements therefore seems to require the nonstate groups and the agreement to 'bootstrap' each other into the international legal realm."[242]

It is certainly clear, however, that the international legal status of armed groups remains extremely contested. As noted above, even if one accepts the theory that armed groups are bearers of international legal obligations under international humanitarian and human rights law, it does not necessarily follow that armed groups also have a law-making function making them capable of signing international agreements. I suggest in this part, therefore, that signing a peace agreement helps to clarify and enhance the international legal status of armed groups. The very act of signing a peace agreement appears to carry with it certain "status benefits," conferring increased legitimacy and

[242] Bell, *supra* note 4, at 384.

international recognition upon the armed group signatory and altering the way in which the international community interacts with the armed group going forward.

Mediators frequently acknowledge the difficulties inherent in negotiating with armed groups because the mere act of sitting down to talk with armed groups enhances their legitimacy.[243] Actually signing a peace agreement goes even further towards building the armed group's "international profile and perceived legitimacy."[244] It can transform an armed group previously viewed as an international pariah into a legitimate partner for peace.[245] It is precisely because including armed groups in peace processes confers such a strong perception of legitimacy upon the groups that States are so frequently reluctant to openly negotiate with armed groups: "While state parties are sometimes loathe to accord full and equal status to non-state parties and armed groups, the very process of engaging across a negotiating table is itself an equalizing mechanism."[246] Armed groups, on the other hand, have a strong incentive to participate

[243] *See* Ricigliano, *supra* note 7 (arguing that a policy of more regular engagement with armed groups would diminish the legitimacy-enhancing effects currently associated with sitting down with armed groups: "Rather than erecting more barriers to even basic contact with armed groups, we should be making it easier so that making contact does not entail the cost of granting the armed group some privilege that it would otherwise not be entitled to."); *An Interview with President Jimmy Carter*, *supra* note 18, at 1 (arguing that any engagement by a strong state (e.g. U.S.) or the UN inevitably confers some "imprimatur of legitimacy" on the armed group); McCartney, *supra* note 121, at 2, *in* (including armed groups in peace processes necessarily confers upon the groups "the possibility of more legitimacy and recognition.").

[244] MARTIN, *supra* note 15, at 92 (quoting Centre for Humanitarian Dialogue mediator Martin Griffiths' analysis of the effect of signing a peace agreement for the rebel group GAM in Aceh).

[245] *See id.*, at 126

> (In becoming facilitators for the peace process in Sri Lanka, the Norwegians were taking on a pariah insurgency group with whom none of their natural political allies could even, officially at least, have tea with. Once the ceasefire was established, this protocol eased. Donors started making the long journey north in a bid to support the Norwegians in their efforts to keep the LTTE engaged in the process.).

[246] Fink Haysom, *Engaging with Armed Groups in Peace Processes: Lessons for Effective Third-Party Practice* 3, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7; *see also Ends and Means*, *supra* note 1, at 36 (noting that even attempts by organizations to deal with and monitor armed groups are often resisted by States because dealing with armed groups necessarily "afford[s] them some level of recognition, even if it is just that they are a force to be reckoned with. Where international actors are involved, in addition, armed groups acquire some international legitimacy.").

in peace processes precisely because it is likely to enhance their legitimacy and recognition.[247]

In addition to boosting their legitimacy, signing a peace agreement also gives armed groups a more defined international profile, clarifying who the participants to the conflict are and who are the players that the international community must deal with moving forward with the peace process. Peter Kooijmans has shown in his examination of post-Cold War Security Council Resolutions that once an armed group has signed a peace agreement, it becomes a legitimate addressee of the Security Council. Kooijmans observes that prior to the conclusion of a peace agreement, the Security Council simply calls upon "all parties" to the conflict to cease hostilities and human rights violations, but once an agreement has been signed, the Security Council will refer to the non-State parties by name.[248] Indeed, an examination of Security Council Resolutions referring to the DRC broadly confirms Kooijmans' theory that the Security Council is more likely to refer to an armed group by name after it has signed a peace agreement.[249] Prior to the signing of the Lusaka Agreement, the Security Council called for a ceasefire and for the disarmament of all "non-governmental armed groups" and urged "all parties to the conflict" to work towards a cease-fire and to respect human rights and international

[247] *See Ends and Means*, *supra* note 1, at 41 (an armed group is likely to be more susceptible to the pressure of naming and shaming if it needs to bolster its domestic legitimacy or "when negotiations for peace are taking place or when the group feels a need for international recognition and legitimacy.").
[248] Kooijmans, *supra* note 5, at 340.
[249] Nevertheless, this practice does not appear to be as clear-cut as Kooijmans suggests. At least in the case of the DRC, the Security Council also mentions other armed groups by name—although less frequently. For example, the ex-FAR and Interhamwe are particularly singled out by the Security Council. *See, e.g.*, S.C. Res. 1234 (9 April 1999), at ¶ 8 (condemning "ex-Rwandese Armed Forces [and] Interahamwe."); S.C. Res. 1332, ¶ 11 (also mentioning the FDD and the ADF); S.C. Res. 1341 (22 Feb. 2001), at ¶ 23; S.C. Res. 1355 (15 June 2001), at ¶ 9. This singling out may perhaps be due to the particular condemnation of groups associated with the 1994 Rwandan genocide. Other examples of the Security Council referring to non-signatory armed groups by name include S.C. Res. 1445 (4 Dec. 2002), at ¶ 15 (calling on the Union des Patriotes Congolais to cooperate with the Ituri Pacification Commission); S.C. Res. 1468, at ¶ 2 (condemning violations of human rights and international humanitarian law by the MLC and RCD "as well as the acts of violence recently perpetrated by the Union des Patriotes Congolais").

humanitarian law.[250] Immediately following the signing of the Lusaka Agreement, however, the Security Council began to refer to the signatory armed groups, the MLC and the RCD, by name.[251]

Beyond the terminology that it uses, there are other indications that the Council acts differently with respect to armed groups that have signed a peace agreement than those that have not. First, at least insofar as Resolutions pertaining to the DRC suggest, the Security Council frequently conflates the concept of "parties to the peace agreement" with the concept of "parties to the conflict."[252] This gives the (misleading) impression that, in the DRC case, all parties to the conflict were also parties to the Lusaka Agreement. This conflation seems to suggest that the other, non-signatory parties do not have the same importance or relevance for the Council.

Second, the nature of the substantive obligations the Council assigns to the armed groups changes: armed groups that have signed a peace agreement can be held responsible for violations of that agreement, whereas non-signatories cannot (notwithstanding the Council's conflation between parties to the conflict and parties to the agreement). While the Council calls upon "all parties to the conflict" to respect human rights and international humanitarian law and to allow humanitarian access, only armed groups that have signed a peace agreement are held responsible for violations of

[250] S.C. Res. 1234 (9 April 1999), at ¶¶ 4, 12 & 6.
[251] S.C. Res. 1258 (6 Aug. 1999), at ¶ 2 (welcomes the MLC's signing of the Lusaka Agreement, calling upon the RCD to sign the agreement immediately); S.C. Res. 1355 (15 June 2001), at ¶ 5; S.C. Res. 1276 (9 Nov. 2001), at ¶ 3; S.C. Res. 1399 (19 March 2002), at ¶¶ 1, 3, & 4; S.C. Res. 1417 (14 June 2002) at ¶¶ 4, 6, & 13; S.C. Res. 1468 (20 March 2003), at ¶ 2.
[252] *See, e.g.*, S.C. Res. 1279 (30 Nov. 1999), at ¶ 1("Calls upon all parties to the conflict to cease hostilities, to implement fully the provisions of the Ceasefire Agreement…"); S.C. Res. 1304 (16 June 2000), at ¶ 1 ("Calls on all parties to cease hostilities throughout the territory of the [DRC] and to fulfill their obligations under the Ceasefire Agreement").

their commitments under that agreement in the same way that States that have failed to honor their commitments under the agreement are held to account by the Council.[253]

In addition to the Security Council's interactions with armed group signatories in the DRC, the UN Panel of Experts on the Illegal Exploitation of Natural Resources that visited the DRC after the signing of the Lusaka Agreement also treated the two armed groups that had signed the Lusaka Ceasefire Agreement (the RCD and the MLC) differently from all the other, non-signatory armed groups. In fact, it appears that the Panel of Experts essentially treated the MLC and the RCD on a par with the Kabila government. For example, the Panel of Experts met with numerous government officials during its visit to the DRC, but it also met with officials from the MLC, the RCD-Goma, and the RCD-ML.[254] It did not meet with any other armed group representatives. The Panel documented how both the Congolese government and the armed groups in question (RCD-Goma, RCD-ML, and the MLC) relied on their control over the country's natural resources in specific parts of the territory to finance their war efforts,[255] concluding that the conflict "has created a 'win-win' for all belligerents."[256]

While this level of interaction with the armed groups may have been due simply to the practical realities of their control of territory, there are indications that the Panel's special treatment of these groups was also normatively grounded in a different

[253] *See, e.g.,* S.C. Res. 1304 (16 June 2000), at ¶ 3 (Demands withdrawal from Kisangani by Rwandan & Ugandan forces and by "forces of the Congolese armed opposition and other armed groups immediately … and calls on all parties to the Ceasefire Agreement to respect the demilitarization of the city…") and ¶ 15 ("Calls on all the parties to the conflict in the [DRC] to protect human rights and respect [IHL]"); *see also* S.C. Res. 1291 (24 Feb. 2000), at ¶¶ 1, 9, 12-13, & 15; S.C. Res. 1399 (19 March 2002) at ¶ 1 (condemning resumed fighting by RCD-Goma as a "major violation of the ceasefire.") and ¶ 6. The Council has also suggested that the rebel group RCD was bound by a previous Security Council Resolution. *See* S.C. Res. 1355 (15 June 2001), at ¶ 5 ("Demands that the Rassemblement Congolais pour la Démocratie demilitarize Kisangani in accordance with resolution 1304…").
[254] *Report of the Panel of Experts*, *supra* note 80, at Annex II, p. 49-50; *see also id.*, at ¶¶ 10-11 (noting vast amount of data obtained from the RCD-Goma, RCD-ML, and the MLC).
[255] *Id.*, at ¶¶ 143-55.
[256] *Id.*, at ¶ 218.

understanding of their status. For example, the Panel refused to limit the concept of "illegality" of the exploitation of resources to a definition that would have deemed illegal only that exploitation occurring "without the consent of the legitimate government."[257] This left open the possibility that the exploitation by the rebel groups, who claimed to be legitimately exploiting the natural resources under their control as the de facto governments in those areas was not illegal, or that, even if it was, so was the exploitation by the Kabila government.[258]

Finally, signing a peace agreement appears to alter, going forward, the status of the armed groups that have signed as compared to those that have not. In the case of the DRC, this can be seen in the way that the two armed groups that had signed the Lusaka Ceasefire Agreement maintained a more elevated status in the Inter-Congolese Dialogue than the three new armed groups. Thus, the Global and All-Inclusive Agreement designated the MLC and the RCD-Goma as "Composantes," while the RCD-ML, the RCD-N, and the Mai-Mai were mere "Entités."[259] This terminological differentiation was reflected in the substantive terms of the Global and All-Inclusive Agreement, which gave the RCD-Goma and the MLC a much larger slice of the pie in the power-sharing of government posts.[260]

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[257] *Id.*, at ¶ 15(a) (although lack of consent of the government was one factor that the Panel considered in its broad approach to the concept of illegality).

[258] Nevertheless, the Panel's recommendations called for Security Council to impose sanctions on the rebel groups by requiring Member States to freeze rebel assets located in their territories and by placing an arms embargo on weapons destined for the rebel groups. No similar sanctions were recommended for the Congolese State. *Id.*, at ¶¶ 222-24.

[259] Global and All-Inclusive Agreement, Preamble & art. V(1) & art. VI & Annex I.

[260] *See* Global and All-Inclusive Agreement, art. V(1)(C) (giving the government, the RCD, the MLC, and the unarmed opposition the power to each select one of the 4 Vice-Presidents); art. VI (consolidating the forces of the RCD, the MLC, and the government into a new national army, while leaving it to be determined how the forces of the RCD-ML, the RCD-N, and the Mai-Mai will be integrated into this new army); Annex I (granting the MLC and the RCD 7 Ministers and 4 Vice-Ministers, while the RCD-ML, the RCD-N, and the Mai-Mai each got 2 Ministers and 2 Vice-Ministers; granting the RCD and the MLC 94 delegates each in the National Assembly, while the RCD-ML got 15, the RCD-N got 5, and the Mai-Mai

ii. Signing a Peace Agreement Also Confers Concrete Benefits Upon Armed Groups

In addition to conferring important status benefits on armed groups by enhancing their international legal status, signing a peace agreement also confers much more concrete benefits on armed groups. Most controversially, a peace agreement's terms may grant members of the signatory armed group an amnesty for offenses they committed during the conflict.[261] More commonly, peace agreements establish the parameters for the transition from conflict to peace, frequently allocating armed group signatories certain positions of power in the transitional government,[262] granting the armed group the status of a lawful political party capable of participating in elections,[263] and integrating members of the armed group into the regular, national armed forces.[264] Signing a peace agreement can also give an armed group increased access to or control over humanitarian aid or other resources.[265] The substantive terms of the peace agreement can also provide

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got 10; granting the RCD and the MLC 22 Senators each, while the RCD-ML got 4, the RCD-N got 2, and the Mai-Mai got 4.). It is important to note that while my focus is on the armed groups, the Global and All-Inclusive Agreement also divided power among the unarmed political opposition and the "forces vives" (civil society). These two entities, which the Lusaka Agreement stipulated had to be included in the Inter-Congolese Dialogue, were also designated as "Composantes" and received a larger division of the posts allocated in the transitional government. *Id.*

[261] *See, e.g.*, Lomé Agreement, Art. IX. Since Lomé, however, the UN Secretary-General has made it clear that the UN will not recognize an amnesty in a peace agreement for "genocide, crimes against humanity, and other serious violations of international humanitarian law." *Report on the Establishment of a Special Court for Sierra Leone*, *supra* note 11, at ¶¶ 22 & 23; *see also Report on Rule of Law and Transitional Justice*, *supra* note 11, at ¶ 64 (c). Some authors conclude that, as a result of the UN's position, blanket amnesties are "no longer a bargaining option." Cryer, *supra* note 11, at 284; Orentlicher, *supra* note 8, at 2582-94 (arguing that there is a customary international legal prohibition on blanket amnesties). *But see* Scharf, *supra* note 10, at 342 (arguing that there is no customary international law prohibition on blanket amnesties).

[262] *See, e.g.*, Lomé Agreement, art. V; Lusaka Agreement, Art. III, para. 19 (providing for "an open national dialogue […leading] to a new political dispensation and national reconciliation in the DRC."). *But see* Levitt, *supra* note 5, at 506 (arguing against the use of power-sharing provisions in peace agreements).

[263] *See, e.g.*, Lomé Agreement, art. III.

[264] *See, e.g.,* Lusaka Agreement, art. III, ¶ 20 & Annex A, Ch. 10.1.

[265] *See, e.g.,* Lomé Agreement, art. V (making RUF leader Foday Sankoh the Chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction and Development); *see also* James K. Boyce, *Investing in Peace: Aid and Conditionality after Civil Wars*, Int'l Institute for Strategic Studies: Adelphi Paper 351 (2002), at 25 *et seq.* (noting that post-peace agreement "aid inexorably affects the relative influence of different parties within the recipient country."); MARTIN, *supra*

explicitly for an alteration to the legal status of the armed group. For example, the Lusaka Agreement explicitly provided that during the national dialogue to establish a transitional government, all of the participants (government and rebels alike) would "enjoy equal status."[266]

These substantive benefits may indirectly affect the international legal status of the armed group. For example, the Lusaka Agreement defined "armed groups" as: "forces other than Government forces, RCD and MLC that are not signatories to this agreement,"[267] a definition that excluded the RCD and the MLC, despite the fact that they were clearly armed groups whose stated mission was to overthrow the Congolese government.[268] The Lusaka Agreement called for the disarmament of armed groups, particularly by the requested UN peacekeeping force.[269] This distinguished the RCD and the MLC from all the other (non-signatory) armed groups in the DRC. Going forward, the Security Council would call on all the parties to the Lusaka Agreement to work towards its implementation and, in particular, to assist in the disarming of all of the proscribed armed groups. As parties to the Lusaka Agreement, the RCD and the MLC were part of the group that the Security Council called upon to enforce the Agreement, rather than the

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note 15, at 126 (noting Norwegian mediators' observation that after the LTTE signed a peace agreement, "[d]onors started making the long journey north [to LTTE-controlled territory] in a bid to support the Norwegians in their efforts to keep the LTTE engaged in the process.").

[266] Lusaka Agreement, Annex A, Ch. 5.2(ii). *See* Int'l Crisis Group, *From Kabila to Kabila: Prospects for Peace in the Congo*, Rep. No. 27 (16 Mar. 2001), at 18 ("the Lusaka ceasefire was expressly designed to unseat the regime of then President Laurent Kabila by forcing him to negotiate on an *equal status with his many opponents*." (emphasis added)).

[267] Lusaka Agreement, Annex C (Definitions).

[268] As Judge Kooijmans notes in his separate opinion in the *DRC v. Uganda* case, the Agreement "upgraded" the status of the armed group signatories—the MLC and the RCD—by recognizing them as "part of the national authority." *See* Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda), 2005 I.C.J. 1, ¶¶ 51-53 (Dec. 19) (separate opinion of Judge Kooijmans).

[269] Lusaka Agreement, Annex A, Ch. 9.1 & Ch. 8.2.2.

targets of such enforcement action (the other armed groups in the DRC).[270] Although the Lusaka Agreement did require the MLC and the RCD to cease hostilities,[271] it did not require them to disarm; in fact, they were members of the "Joint Military Commission" set up by the Agreement[272] and were to be included in the ultimate formation of a national army.[273]

B. Peace Agreements: A Missed Opportunity to Increase Armed Groups' Compliance with Their International Legal Obligations

As discussed above, there are both "status benefits" and "concrete benefits" that flow from signing a peace agreement that suggest that armed groups are likely to place a high value on their ability to sign a peace agreement. Under the current, ad hoc approach to armed group participation in peace processes, however, none of these benefits are in any way conditioned on the group's respect of its pre-existing obligations under international humanitarian and human rights law. As previously discussed, there are clearly good reasons why we might resist this sort of conditional approach.[274] But a failure to condition peace process participation on respect for pre-existing international obligations is also extremely problematic because it suggests that there are no consequences for subjects of international law that violate their international obligations and, on the contrary, that such violations might actually pave the way for an increased international legal status. This sends problematic signals to the armed groups themselves,

[270] *See* S.C. Res. 1291 (24 Feb. 2000), at pmbl. ("Noting the commitment of all the parties to the Ceasefire Agreement to locate, identify, disarm and assemble all members of all armed groups"); S.C. Res. 1304 (16 June 2000), ¶¶ 1 & 10 (acting under Chapter VII, calling on all parties to fulfill their obligations under the Lusaka Agreement and demanding "that all parties cease all forms of assistance and cooperation with the armed groups referred to in Annex A [of the Lusaka Agreement]"); S.C. Res. 1332 (14 Dec. 2000); S.C. Res. 1341 (22 Feb. 2001)).
[271] Lusaka Agreement, Art. I.
[272] *Id.*, at Annex A, Ch. 7.
[273] *Id.*, at Art. III para. 20 & Annex A, Ch. 10.
[274] For a summary of the benefits of the all-inclusive approach, *see supra*, Part 1(I)(A).

giving them little incentive to comply with their international obligations during the conflict. It also institutionalizes a lack of respect for international law in the very groups that, by virtue of signing a peace agreement, are likely to constitute the new government. Finally, it reconfirms a sense, for States and non-State actors alike (from armed groups to multi-national corporations), that in the international community, "might is right" and the law does not apply equally to all.

In addition, the current approach is problematic because it represents a missed opportunity to increase armed groups' compliance with their international obligations by using participation in the peace process as leverage (or, as a carrot) with which to entice greater compliance. Such leveraging seems possible because of the significant benefits that flow to armed groups that sign peace agreements. As a result, armed group participation in the peace process might be conditioned on compliance with their humanitarian obligations. This would provide armed groups with a powerful incentive to increase their compliance with those obligations.[275] In effect, peace process participation could be conditioned on respect for international law, modifying the parties' cost-benefit analysis during the conflict in favor of a greater respect for their international obligations.[276]

Similarly, further along the "spectrum of influence,"[277] peace process participation might be used to increase armed group compliance with international law in a much less coercive way, as articulated in Ryan Goodman's and Derek Jinks' theory of

[275] Interestingly, there is some evidence of the MLC attempting to boost its legitimacy in the run-up to the signing of the Lusaka Agreement. Although the group began operating in September 1998, it only promulgated a statute (stating that its goals included ending dictatorship and installing democracy, founded on a respect for human rights) on 30 June 1999, just days before the Lusaka Agreement was signed. *See* Bouvier & Bomboko, *supra* note 49, at 78.
[276] *See* Aaron Griffiths & Catherine Barnes, *Incentives and Sanctions in Peace Processes*, *in* POWERS OF PERSUASION, *supra* note 13.
[277] *Id*.

"acculturation."[278] Goodman and Jinks argue that acculturation, "the general process of adopting the beliefs and behavioral patterns of the surrounding culture," can induce States to change their behavior and increase their compliance with international human rights law.[279] The process of acculturation works because an actor's "identification with a reference group generates varying degrees of cognitive and social pressures—real or imagined—to conform."[280] Goodman and Jinks conclude that States do in fact identify with reference groups in this way, leading them to be susceptible to the pressures inherent in the acculturation mechanism.[281]

While Goodman and Jinks focus only on the susceptibility of *States* to acculturation, armed groups may be equally susceptible. Indeed, once armed groups are included in a peace process, the participants in the peace process may come to act as a reference group for one another, generating pressures for the participants to model their behavior in way that is likely to ensure that they remain included in the peace process going forward. While the empirical work to substantiate this argument remains to be done, my examination of the DRC peace process suggests that peace processes may in fact generate this sort of pressure on armed group participants. For example, Jean-Pierre Bemba's MLC group enacted a statute committing itself to democracy and the respect for human rights on June 30 1999. This date is significant because the group had existed since September 1998 and had apparently never before felt the need to proclaim its adherence to such goals. It did so for the first time only in the middle of the Lusaka peace process, when the MLC and the RCD were actively campaigning for support from the

[278] *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2005).
[279] *Id.*, at 638 *et seq*.
[280] *Id.*, at 626.
[281] *Id.*, at 646-47.

other peace process participants to be included in direct negotiations with Kabila and to sign the Lusaka Agreement.[282] This suggests that the peace process itself created a reference group for the MLC that had not existed before.

Peace process participation could therefore be used either as leverage to induce higher level of compliance by armed groups with their international legal obligations, or, more subtly, to induce them to alter their methods and practices in order to retain the approval of the other parties to the peace process.

Part 3: A Principled Approach to Peace Process Participation

This paper has established that the current approach to armed group participation in peace process is problematic on two grounds. First, the divorce between the theory of all-inclusiveness and the reality of ad hoc exclusion creates negative incentives for armed groups that undermine the chances of building a durable peace at the negotiating table. Second, the failure to condition the enhanced international legal status that flows from participating in a peace process on armed groups' compliance with their pre-existing international obligations is a missed opportunity to use participation as leverage for increased compliance with those obligations.

In this Part, therefore, I reflect on how mediators might re-structure their approach to peace process participation so as to address the problems identified above. I propose that the current ad hoc practice should be replaced with a principled approach to peace

[282] *See* Bouvier & Bomboko, *supra* note 49, at 78; *Rebel Leader Ngoma Says "Internal" Talks Should Precede Cease-Fire*, BBC Monitoring Africa – Political (23 April 1999); *Ilunga-Led Rebel Group Sets Conditions for Lusaka Talks*, BBC Monitoring Service: Africa (24 June 1999).

process participation that would condition armed group participation on compliance with certain fundamental standards, clearly articulated ex ante and universally applicable to all peace processes. I argue that this sort of principled approach would both increase armed groups' compliance with their humanitarian obligations in the way they wage conflict and would also build the basis for a more durable peace.

This first part of this Part begins by exploring in more detail what I mean by a principled approach to peace process participation. I present foundations for the content of the standards upon which I propose to condition armed group participation, arguing that it is critical to ground such guidelines in international law, as a legalized approach is more objective, more legitimate, and ultimately more persuasive than the current approach, which is highly politicized. I also explore specifically which standards might apply, drawing on formal legal sources and the practice of armed groups themselves. I go on to examine at what point in the peace process such standards might apply, arguing for a ratcheting-up of obligations as the negotiations intensify beyond the initial cease-fire and more serious substantive proposals are on the table. Finally, I conclude this part by reflecting on the effects a failure to comply with the standards would have, proposing a range of options from the outright exclusion of the non-complying group from the peace process, to a limiting or tailoring of the procedural or the substantive options available to that group during the negotiations.

In the second half of this Part, I critically examine the policy implications of adopting a more principled approach to peace process participation. I reflect on three potential counter-arguments to my proposal, in particular, that this proposal will make peace a less attractive proposal to many armed groups, resulting in a continuation of the

conflict and all the abuses associated with it. Despite these valid concerns, I argue that the benefits of the principled approach are likely to outweigh its drawbacks. Given the problems associated with the current approach, it is clear that mediators need to seriously question and re-think their approach to peace process participation. I suggest that a principled approach could be used to change the incentives of the armed groups during the conflict itself, while also providing the basis for a more durable peace as the peace process itself would be grounded in the rule of law. While this proposal is no panacea for the many difficulties associated with resolving internal armed conflicts characterized by the involvement of multiple non-State armed groups, I believe it represents the direction that mediators must begin to pursue, given the characteristics of armed conflicts today. As the conflict resolution literature itself recognizes, there is a dire need for "a coherent yet flexible peacemaking *strategy*."[283] The current lack of such a strategy is undermining the effectiveness of tools such as sanctions, incentives, and conditionality, "[y]et the political, economic and human costs of ineffective intervention suggest that it is imperative to improve them."[284]

I. The Alternative: Clear, Ex Ante Guidelines for Armed Group Participation

As clearly illustrated in my examination of the DRC's peace process, the current approach to peace process participation is arbitrary and ad hoc, leaving it unclear why some groups are included and others are excluded. The alternative to this ad hoc approach is to ground exclusion in principles, clearly articulated in advance of the

[283] Catherine Barnes, Celia McKeon, & Aaron Griffiths, *Introduction*, *in* POWERS OF PERSUASION, *supra* note 13 (emphasis added).
[284] *Id.*; *see also* Teresa Whitfield, *Orchestrating International Action*, *in* POWERS OF PERSUASION, *supra* note 13 (emphasizing the importance of coordinating international peacemaking efforts because without such coordination, the result is "a confusing, and perhaps even contradictory basket of actions with unpredictable consequences for the peace effort as a whole.").

decision to exclude. I am proposing, therefore, the development of authoritative soft law principles that could be used by mediators to guide their approach to peace processes that involve multiple armed groups and that could be used by the armed groups themselves as instructive guidance for their conduct during the armed conflict, in order to maximize their chances of being included in the peace process.

To begin, let me clarify what I mean by a "principled" approach. My goal is to develop standards that would serve as a guide to peace process participation, not an all-inclusive list where all the boxes must be checked off in order to negotiate with an armed group. Thus, I use the term "principle" in the sense of "standard" or "guideline," rather than adopting a more rigid term such as "rule" or "criteria."[285] As I explore in more detail below, the principled approach is a proposal to use a set of standards to provide a framework within which the peace process occurs.[286] While my proposal ultimately consists of proposing minimum standards, the goal is not to use the peace process as a means of imposing the entire suite of international human rights and humanitarian obligations on armed groups, but rather to identify a minimum core of humanitarian obligations which must be respected in order for the peace process to function. In this way, my proposal seeks to identify those almost constitutional-like obligations which are

[285] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1978) (arguing that principles differ from rules in that they do not work in an "all-or-nothing fashion," but allow for a "more or less").
[286] *Cf.* Omar M. Dajani, *Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT'L L. 61, 116-17 (2007) (arguing that the law can help shape the bargaining zone, can act as a gap-filler in the ultimate agreement, can provide a standard against which to evaluate proposals, and "can provide legitimacy, a means of validating proposals (and negotiated outcomes) in the eyes of domestic constituencies and other international actors whose support is critical to the success of an agreement.").

essential to preserve the space necessary for peace negotiations to proceed and to build a durable peace.[287]

Clearly, the feasibility of such a proposal is highly dependant on its details. While I ultimately believe that these principles would have to be developed by an independent body of experts, in the rest of this part, I lay out some initial thoughts regarding what these principles might look like and how they might work. First, I argue, for the importance of standards grounded in law; second, I examine in more detail the precise content of such standards; and, third, I discuss the implementation of these standards throughout the peace process and the consequences of a failure to comply with such standards.

A. The Role of Law in Establishing the Principles

Even if one accepts the importance of grounding exclusion in principles, it by no means follows that those principles ought to be legal principles. A clear alternative to legal principles would be to simply formalize and standardize the practical criteria already used by mediators on the ground to determine which groups to include or exclude. As already discussed, these criteria focus on evaluating the armed group's capacity to implement the agreement and good faith intention to support the peace process, thus these criteria revolve around indicators such as identifiable leadership structure, chain of command and internal disciplinary system, control over territory, military means, degree of popular support, political aspirations, respect of the law, and

[287] *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 87-99 (1980) (construing the U.S. Constitution as primarily designed to protect the structures and process necessary to the continuity of democracy, rather than the "preservation of specific substantive values"). For the notion that peace agreements are best understood as "transitional constitutions," see BELL, *supra* note 8, at 304-05.

commitment to a cease-fire.[288] It is important to note that many of the practical concerns that mediators use as informal criteria for exclusion are also reflected in the applicable law. For example, where mediators look for a chain of command as an indication of the armed group's capacity to implement the agreement, international humanitarian law similarly requires a strong chain of command so that commanders can ensure that their troops respect their IHL obligations.[289]

I argue, however, that even where there is such an overlap between mediator practice and international law, it is crucial to ground the principles in law, rather than in the practice. There are two principal reasons why grounding principles in the law rather than on these practical considerations is likely to be more effective. First, international law provides a less politicized, objective standard which is likely to be more acceptable to armed groups, thus increasing the feasibility of armed groups actually complying with such standards. Second, emphasizing the rule of law early on in the peace process may transform the peace process itself into a mechanism for norm diffusion, building support for the transition from war to peace gradually rather than simply expecting it to materialize once the parties sign a peace agreement.

One of the principal problems with the current approach to armed group exclusion from peace processes is that it is likely to be viewed by armed groups as a politicized

[288] For examples of this sort of practical criteria, see, e.g., *An Interview with President Jimmy Carter*, *supra* note 18, at 2 (his criteria include: approval from the White House, an identifiable leadership structure capable of speaking on behalf of the group, and a demonstrated willingness to work towards a peaceful settlement); Williams & Ricigliano, *supra* note 45 (arguing that important factors to consider when deciding whether or not to engage with an armed group include assessing the group's respect for the rule of law, political institutions, control over territory, level of support from a public constituency, and means of using military force); MARTIN, *supra* note 15, at 144 (citing General Lazaro Sumbeiywo's (mediator in the Sudan peace process) conclusion that a ceasefire agreement is a necessary pre-condition to peace talks); *Assessing Groups and Opportunities: a Former Government Minister's Perspective*, *supra* note 45 (similar emphasis on need for commitment to a ceasefire as a condition for participation in peace talks).
[289] *See infra*, section (B).

decision based on a condemnation of their cause, rather than of their methods. Discussions with armed groups designated as terrorists, for example, reveal that this sanction is often perceived by the targeted group "as an attempt to de-legitimize their goals rather than their methods."[290] This has the effect of reducing the socializing effect that sanctions can otherwise have, by providing support to the hard-line factions within the groups who are able to legitimize their opposition to peace and engagement strategies by arguing that adherence to such strategies amounts to a repudiation of the group's cause.[291] Armed groups are not likely to perceive principles based on the practical criteria developed by mediators as any more legitimate than the current ad hoc approach because such criteria would retain a politicized appearance.[292]

A principled approach grounded in international law, on the other hand, is less politicized.[293] The law can serve a line-drawing function which is depoliticized because the law itself sets the limits.[294] Grounding the principles in law suggests impartiality and even-handedness, in a way in which simply adopting the criteria that mediators find most useful does not.[295] The legalizing, normative effect of *legal* criteria is therefore crucial.

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[290] Griffiths & Barnes, *supra* note 276.
[291] *Id.*
[292] *See* Orentlicher, *supra* note 8, at 2547 (arguing that "[t]he alternative—leaving the decision about prosecutions to the unbridled discretion of governments—does nothing to assure the *bone fides* of their choice.").
[293] *See id.*, at 2540, 2550 (arguing that international law de-politicizes the issue of whether to prosecute those who have perpetrated atrocities by drawing "a bright line" where amnesty is permissible and where it is not.).
[294] *See id.*, at 2550, 2598 (arguing that the contrasting examples of Argentina and Greece "suggest that the demands of justice and political stability are best reconciled through a program of prosecutions that has defined limits.").
[295] *Cf.* Nathalie Tocci, *EU Incentives for Promoting Peace*, *in* POWERS OF PERSUASION, *supra* note 13 (defending a mechanism of "passive enforcement" under which under which "[o]bligations constitute the necessary rules which make mutually beneficial cooperation with the EU possible." For this system to work, "there must be a clear set of *legally* defined and definable rules embedded in EU contracts rather than a series of conditions the EU simply considers politically desirable. Furthermore, this system of rules must be considered as a necessary price that comes with EU engagement.") (emphasis added).

In fact, there are indications that the law is a successful conflict resolution tool when it is used to establish an objective framework within which peace negotiations take place.[296] The externality and objectivity of international legal standards, in particular, can actually tie mediators' hands in a useful way: instead of having to take a normative position themselves, with potentially alienating effects towards some parties in the process, the mediators can simply point to the existing law as the parameters within which they, and the parties, must operate.[297] In addition, an emphasis on legal principles focuses on the parameters of the *process* of reaching an agreement, rather than prioritizing pre-determined substantive outcomes, which are likely to be viewed as extremely politicized.[298] Moreover, as will be demonstrated in the next section (B), a focus on the law necessarily entails a shift in the focus to the armed group's *methods* rather than their goals or their cause. This both makes the principles inherently more appealing to the groups and also opens up space to focus on armed groups abuses of IHL and human rights, rather than becoming embroiled in evaluating the legitimacy of their cause.

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[296] *See* Parlevliet, supra note 14, at 21 (arguing that "[c]onflict management must take place within a framework in which human rights are non-negotiable."); Stedman, *supra* note 17, at 52 (arguing that his study demonstrates that the "successful management of internal conflict has resulted from the willingness of external actors to take sides as to which demands and grievances are legitimate and which are not . . . the setting of a normative standard can be an effective tool for conflict management.").

[297] *See* William G. O'Neill, *Mediation and Human Rights*, Background Paper 4e: Centre for Humanitarian Dialogue, at 1 (arguing that human rights law provides "many more avenues of action and leverage to mediators which create fresh opportunities to engage the belligerents and tie them into the peace process."); MARTIN, *supra* note 15, at 67 (describing Griffiths' regret that he accepted the parties' decision to delete all human rights provisions from the agreement because of the importance of "a normative framework" that conforms to international legal standards.); Haysom, *supra* note 246, at 3 (suggesting that "[w]ith issues of amnesty in particular, the mediator may simply point out that such provisions will have limited applicability outside their territories and may serve to undermine [the armed group's] status and international support.").

[298] *See* Peiris, *supra* note 13 (arguing for a "value-based process" which focuses on the process rather than the substantive goals).

Fundamentally, the use of participation criteria grounded in law challenges the idea that there is no place for law in war (*inter armes silent leges*) and that "might is right." This is not simply an idealistic view of the law. In countries destabilized by long years of civil war, where the statistics show that many peace agreements relapse quickly into armed conflict, there is a real need for an entrenchment of the rule of law.[299] By applying the rule of law to select participants to the peace process, peacemakers can signal a break from the state of war and a transition to a state of peace. Criteria based on the rule of law provide an objective standard which de-politicizes the peace process, building the foundation for a more stable peace that is not simply the dominance of "might is right."[300] Thus, rather than simply assuming that warlords and rebels will instantaneously transform into "democrats once sanctioned with state authority,"[301] a principled approach to the peace process begins a process of norm diffusion much earlier, inculcating these principles throughout the peace process rather than simply assuming they will appear after the peace agreement has been signed.

B. The Content of the Principles

If one accepts the general notion that there is reason to ground principles in the law, then the next, related question is: what law? My goal in this section is not to provide an exhaustive list of principles but rather to suggest the direction that the development of such principles might take. I have chosen deliberately not to propose a list of specific

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[299] *See* Stromseth, *supra* note 8, at 251-52; *see also* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2334 (2003) (criticizing contemporary rule of law promotion efforts and arguing that in order to be more effective, they must be consistent because "when the norms they wish to create are those associated with 'the rule of law,' lack of consistency can be fatal.").

[300] *See* Levitt, *supra* note 5, at 575 (arguing that the lack of respect for the rule of law makes the agreements less politically feasible, whereas "[w]hen parties give law and politics equal consideration in peace negotiations, peace becomes more durable because the rule of law remains unscathed by political approaches."); *see also* Orentlicher, *supra* note 8, at 2540-48.

[301] Levitt, *supra* note 5, at 499.

principles for two reasons. First, because I believe that the content of such a list must necessarily evolve to track the development of non-State armed groups' customary international legal obligations.[302] Second, because my focus in this paper has been primarily to emphasize the need for greater attention to the *process* in which peace agreements are concluded, rather than their content, I choose to spend less time developing the substance of the principled approach and more on how it would work and what effect it would have on the peace process.

At a general level, clearly international humanitarian law is relevant, given the armed conflict context and the fact that certain provisions of IHL (especially Common Article 3 and the Second Additional Protocol of the Geneva Conventions) explicitly bind armed groups. In addition, it is now generally accepted that international human rights law applies in situations of armed conflict,[303] although (as discussed in Part 2) it remains controversial, at least in theory, whether armed groups can have human rights obligations.[304] Even if one accepts that armed groups can, in theory, bear human rights obligations, it is simply not possible to hold *all* armed groups to *all* of the human rights and humanitarian obligations imposed on States. The fact of the matter is that many armed groups lack the capacity to comply with many human rights protections.[305] Armed groups vary in size, power, and degrees of success. It may not be possible to hold "small

[302] For example, an increased focus on the issue of child soldier recruitment by armed groups may suggest that this prohibition is developing into a norm of customary international law, more widely applicable than the prohibition in Additional Protocol II. *See* Report of the Special Representative of the Secretary-General for Children and Armed Conflict, *supra* note 154, at ¶ 79.

[303] *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice (9 July 2004), at ¶ 106.

[304] *See supra* Part 2 (I)(A).

[305] This reality is acknowledged by Additional Protocol II, which applies only to armed groups that exercise control over territory and have a chain of command, such that they are able to implement their obligations under the Protocol. Additional Protocol II, *supra* note 152, at art. 1(1); *see generally* CLAPHAM, *supra* note 131, at 68-69 ("We need to admit that international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity.").

armed opposition groups lacking a clear organizational structure"[306] responsible in the same way as a State or even in the same way as a larger and more organized group.

It may be necessary, therefore, to determine "whether groups should fulfill some set of minimum objective conditions, say as to their size and power, to qualify as international legal persons" capable of incurring legal responsibility.[307] This notion is explicitly developed in Additional Protocol II of the Geneva Conventions, which applies to non-international armed conflicts between State forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[308] On the other hand, any sort of distinction along these lines is likely to be extremely difficult to implement in practice and, as a result, likely to undercut many of the benefits I ascribed to grounding principles in the rule of law.[309] As a result, my goal will instead be to focus on a minimum core of obligations that can be required of all armed groups.

While there are concerns that any focus on a minimum "core" of rights leads to a problematic weakening of the entire regime,[310] I think that this concern is not as prevalent in this case because I am seeking to extend the law to a place where it is not traditionally assumed to operate. In other words, my use of the law is to develop so-called soft law guidelines that mediators and peacemakers might use as guidelines for the

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[306] *See* ZEGVELD, *supra* note 131, at 155.
[307] *Id.*, at 134.
[308] Additional Protocol II, *supra* note 152, at art. 1(1).
[309] *See* Sassòli, *supra* note 176, at 4 (arguing against any such distinctions because it is impossible to find objective criteria to determine that some groups are "hopeless" and even if such criteria could be found, equally impossible to convince States that the armed group in question meets those criteria and should therefore be dealt with by international mechanisms.).
[310] *See e.g.*, Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L. J. 355, 376-77 (2002); *Ends and Means*, *supra* note 1, at 48 (any focus on certain abuses at the expense of others may suggest that other forms of abuse are acceptable).

participation of armed groups in peace processes. As a result, there is no pre-existing legal regime that might be weakened through a focus on a minimum core. Rather, a focus on the minimum might serve as the beginning of a diffusion of norms in the kind of armed conflict that is increasingly prevalent.[311]

So, what might some of these minimum criteria look like? A good starting place is the "hardest" of the obligations, those contained in Common Article 3—which most international lawyers agree imposes binding obligations on armed groups.[312] Common Article 3 primarily requires that "[p]ersons taking no active part in the hostilities . . . be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."[313] This obligation, at a more specific level, translates into a prohibition on: " (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[314]

Additional Protocol II reaffirms and builds upon the prohibitions in Common Article 3, explicitly limiting the means and methods of combat available to non-State armed groups. Among other things, the Protocol specifically prohibits an order denying

[311] *See Ends and Means*, *supra* note 1, at 48 (the dangers of focusing on a minimum core can be dealt with by viewing dialogue with armed groups about human rights "as a process.").
[312] *See* Special Court for Sierra Leone, Appeals Chamber, *Prosecutor v. Kallon & Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004), at ¶ 45.
[313] Common Article 3 (1).
[314] *Id.*, at (1)(a)-(d).

quarter,[315] slavery,[316] pillage,[317] the recruitment and participation of children under the age of fifteen in combat,[318] and the targeting of civilians.[319]

With respect to human rights law, as indicated above, no one argues that non-State actors ought to be subject to the full panoply of human rights obligations that bind States. Too many of these obligations assume the existence of a State apparatus to protect and ensure the rights at issue. Nevertheless, armed groups can come to represent the de facto government over a portion of the State's territory, as the RCD and the MLC did in the DRC.[320] When that happens, it seems clear that the armed groups are bound by many principles of customary international human rights law.[321] Even armed groups that are not in stable control of territory can be called upon to respect certain fundamental human rights in the way they interact with the civilian population. For example, non-State armed groups (even if not fully in control of territory) can violate the right to food by denying access for humanitarian food aid.[322] More generally, NGOs typically call upon armed groups to respect the right to life; the right to freedom of movement; the right to freedom of expression, assembly and association; the right to be free from torture and ill-treatment; the right to be free from arbitrary deprivation of liberty (entailing some right to

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[315] Additional Protocol II, *supra* note 152, at art. 4(1) ("It is prohibited to order that there shall be no survivors.").
[316] *Id.*, at art. 4(2)(f).
[317] *Id.*, at art. 4(2)(g).
[318] *Id.*, at art. 4(3)(c).
[319] *Id.*, at art. 13.
[320] *See* Report of the Special Rapporteur, U.N. Doc. A/54/361, *supra* note 50, at ¶ 13 (noting that these groups controlled over 60% of the DRC's territory).
[321] *See* Report of the Special Rapporteur, U.N. Doc. A/62/265, *supra* note 141, at ¶ 41; Hessbruegge, *supra* note 146, at 39-40.
[322] *See* Comm. on Economic, Social and Cultural Rights, General Common No. 12, *The Right to Adequate Food (Art. 11)* (12 May 1999), at ¶ 19; *see, e.g.,* S.C. Res. 1564 (18 Sept. 2004), at pmbl. & ¶ 10 (calling on rebel groups in Darfur to facilitate and cooperate with access for humanitarian relief); S.C. Res. 1332 (14 Dec. 2000), at ¶ 13 (calling on "all parties to the conflict, including all armed groups [outlawed by the Lusaka Ceasefire Agreement]" to allow humanitarian access); S.C. Res. 1291 (24 Feb. 2000), at ¶¶ 12-13 (calling on "all parties" in the DRC to ensure humanitarian access).

due process); and also emphasize armed groups' obligation to protect women and children, in particular, from abuses.[323]

In many instances, however, both the practice of NGOs[324] and of international bodies such as the Security Council[325] suggests a tendency to hold all armed groups to account under a set of mixed human rights and humanitarian obligations. This practice suggests that the trend may be towards propounding a set of baseline obligations for all participants (State and non-State alike) in all armed conflicts.[326] This concept of a baseline set of obligations for all parties to a conflict was developed in the Turku Declaration of Minimum Humanitarian Standards, which sought to address violations of

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[323] *See Ends and Means*, *supra* note 1, at 10.

[324] Examples drawn from the DRC include requiring armed groups to: instruct combatants in basic principles of international humanitarian law and instruct them that human rights abuses will be punished (in particular, no deliberate attacks on civilians); set up some internal mechanisms to investigate reports of abuse by combatants; allow free access to territory under their control for independent human rights investigators and humanitarian relief; instruct commanders not to recruit children as combatants; prohibit arbitrary arrests and detention; hold detainees in designated detention centers, maintain a list of prisoners in each center, and allow the ICRC to have access to the detainees; and guarantee freedom of expression and association in rebel-controlled territory. *See, e.g.*, Amnesty International, *Democratic Republic of Congo: War against unarmed civilians*, AFR 62/36/98, at 23-24; *Casualties of* War, *supra* note 93, at Recommendations; *Eastern Congo Ravaged*, *supra* note 74, at Recommendations. More generally, "[C]ommon human rights abuses attributed to armed groups [include:] arbitrary deprivation of the right to life [. . .]; disregard for the protection owed to civilians caught up in the conflict [. . .]; interference with freedom of movement [. . .]; interference with freedom of expression, assembly and association [. . .]; torture, ill-treatment [. . .]; abuses against children [. . .]; abuses against women [. . .]; arbitrary deprivation of liberty and due process [. . .]." *Ends and Means*, *supra* note 1, at 10.

[325] For some recent examples, see, e.g., S.C. Res. 1778 (25 Sept. 2007), U.N. Doc. S/Res/1778 (2007) (expressing concern that armed groups in Chad, Central African Republic, and Sudan are committing "serious violations of human rights and international humanitarian law"); S.C. Res. 1772 (20 Aug. 2007), U.N. Doc. S/Res/1772 (2007), at ¶ 19 ("*stresses* the responsibility of all parties and armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian, human rights and refugee law, in particular by avoiding any indiscriminate attacks on populated areas."); S.C. Res. 1756 (15 May 2007), U.N. Doc. S/Res/1756 (2007) ("*Deploring again* the persistence of violations of human rights and international humanitarian law in the Democratic Republic of Congo, in particular those carried out by these militias and armed groups").

[326] *See* Theodor Meron, *Contemporary Conflicts and Minimum Humanitarian Standards*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE: *supra* note 5, at 623, 625 (arguing in favor of "a set of minimum humanitarian standards from which there can be no derogation . . . to be recognized as a normative floor for all situations, and particularly conflict situations."); *see also id.*, at 626 (noting that the Turku Declaration "draws on major norms of both humanitarian and human rights instruments"); *cf.* Teitel, *supra* note 310, at 362 & 377 (developing the notion of "humanity's law," where a "merger between humanitarian law and human rights law" is designed to address "the minimum personal security rights associated with the rule of law.").

international human rights and humanitarian law in internal armed conflicts by developing a set of "minimum humanitarian standards . . . applicable in all situations . . . and which cannot be derogated from under any circumstances."[327] The Declaration explicitly requires that these minimum standards be respected by "all persons, groups and authorities, irrespective of their legal status."[328] The Declaration builds on the protections of Common Article 3, requiring, for example, that detained persons "be held in recognized places of detention," that information about their whereabouts be made available, and that they be entitled to communicate with counsel and challenge their detention through a remedy such as habeas corpus.[329] A revitalized and updated version of the Declaration might provide an interesting basis for the principles I propose.

Despite the benefits of relying on principles grounded in law, however, armed groups may object to the binding nature of Common Article 3 and Additional Protocol II. After all, these laws were developed exclusively by States; as a result, relying solely on such laws would open up the principled approach to the critique that it is a top-down and State-centric approach that will alienate many armed groups.[330] It seems important, therefore, to increase armed group "ownership" of the principles, both because this reflects the importance of armed groups in armed conflicts today and because it makes it

[327] Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku (2 Dec. 1990)), at art. 1.
[328] *Id.*, art. 2.
[329] *Id.*, art. 4.
[330] *Cf.* Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & SOC. 411, 419 (2007) (critiquing a legalistic approach to transitional justice on these grounds).

more likely that the armed groups will actually respect principles that they themselves helped to create.[331]

While it is likely to be politically difficult (if not impossible) to include armed groups in the actual process of developing these principles,[332] it is still possible to take their perspective into account. That perspective can be gleaned from armed group codes of conduct, unilateral declarations to respect certain humanitarian norms, and special agreements negotiated between armed groups and governments.[333] In particular, armed groups are increasingly promulgating their own codes of conduct.[334] Preliminary research suggests that these codes of conduct do help to reduce humanitarian abuses by armed groups.[335] While such codes are generally not widely available, one example is the UC-ELN's Guerilla Code which prohibits using civilians as shields, harming civilians used as shields by the enemy, carrying out indiscriminate attacks, failing to warn civilians of the location of landmines, terrorizing civilians, recruiting and arming children under sixteen,

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[331] *See* Sassòli, *supra* note 176, at 6 (arguing that armed groups need to feel that the law addresses their "needs, difficulties and aspirations" and also that they participated in its development).
[332] *See id.*, at 8 (noting the difficulty in including illegal armed groups in the development of new soft law standards and pointing out that such groups were not included in the development of the Turku Declaration).
[333] *See generally id.*, at 9-10.
[334] CLAPHAM, *supra* note 131, at 288-89 (noting that armed groups in Burundi, Liberia, Somalia, Sierra Leone, Afghanistan, Sudan, the DRC, Angola, East Timor, Democratic People's Republic of Korea, and the Russian Federation have all developed such codes.); *Ends and Means*, *supra* note 1, at 52.
[335] *Ends and Means*, *supra* note 1, at 52 (concluding, as a result, that codes of conduct "are a first step towards eroding the arbitrariness that is a hallmark of many armed groups. Additionally, a 'legal' approach is important to counter-balance tendencies to adopt 'revolutionary' forms of justice in a number of armed groups."). This provides interesting support for the theory that, when it comes to compliance, the distinction between hard and soft law is generally irrelevant. *See* ALVAREZ, *supra* note, at 599 ("The distinction between hard treaty and soft law obligations is no longer as clear cut as it was, and it is no longer as easy to tell whether states are complying because of a treaty or a customary law obligation."); Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591, 659-68 (2000) (arguing that the influence of soft law, particularly in the context of ethnic conflicts, has been overlooked; decision-makers often do not seem to care whether the norm invoked is hard or soft). *But see* Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law* 164-65 (1998) [hereinafter *War Without Quarter*] (calling into question how effective non-State armed group codes of conduct are by documenting the numerous violations of the Guerilla Code by the UC-ELN and concluding that there is an "enormous gulf between what the UC-ELN says and its behavior in the field.").

severely damaging the environment in attacks, looting, attacking vehicles and structures marked with the red cross, and executing prisoners who are hors de combat.[336] The NGO Geneva Call has also persuaded some armed groups to sign on to its "Deed of Commitment" prohibiting the use, production, acquisition, transfer, and stockpiling of anti-personnel landmines.[337]

Based on a combination of hard legal principles, included in Common Article 3 and Additional Protocol II, in addition to some norms of customary international human rights law, and the practice of armed groups themselves, it is possible to develop a body of soft law principles that would serve as a guide for armed group participation in peace processes. These principles could be developed by a body of experts, much in the same way as the Turku Declaration of Minimum Humanitarian Standards, or could be promulgated by the UN, similar to the Code of Conduct for Law Enforcement

[336] *War Without Quarter*, *supra* note 335, at 162 (citing Letter from Manuel Pérez, released to the press on July 15, 1995) (original Spanish version reprinted in full in Geneva Call (NSA Database), *Statements by Non-State Armed Actors-NSAs Under International Humanitarian Law-IHL* (2000)). Other examples include the 1947 Maoist Three Main Rules of Discipline and the Eight Points for Attention, adopted by the National Democratic Front of the Philippines (NDFP), *available at* http://english.peopledaily.com.cn/dengxp/vol2/note/B0060.html (including principles such as "Do not take a single needle or piece of thread from the masses," "Do not take liberties with women," and "Do not ill-treat captives.") and *at* http://www.philippinerevolution.net/npa/tun.shtml (for NDFP adoption of these principles); African National Congress, *supra* note 79, at ¶ 5 (including refrain from molesting people and assist them in solving their problems); Ogaden National Liberation Front (ONLF), Political Programme, *available at* http://www.onlf.org/POLITICAL.htm ("we shall adhere to all relevant international agreements on human rights . . . the ONLF as a matter of policy shall not engage non-combatants or civilian targets . . . shall not indefinitely detain innocent civilians . . . [and] shall offer clemency to all combatants who surrender"); *see also* Michelle Staggs, Special Court Monitoring Program Update # 23 Trial Chamber 1 – CDF Trial, U.C. Berkeley War Crimes Studies Center: Sierra Leone Trial Monitoring Program Weekly Report (25 Feb. 2005), *available at* http://socrates.berkeley.edu/~warcrime/SL-Reports/023.pdf (discussing cross-examination of Witness TF2-013, who claimed that the Kamajors in Sierra Leone were bound by an unwritten code of conduct, which prohibited killing of civilians, looting civilian property, and raping women).

[337] *See* http://www.genevacall.org/signatory-groups/signatory-groups.htm (35 armed groups have signed deeds of commitment). For examples of armed group statements in reference to landmines, see Geneva Call (NSA Database), *Statements by Non-State Armed Actors-NSAs Under International Humanitarian Law-IHL* (2000).

Officials.[338] While there is no inherent advantage to either approach, the State-centric nature of the UN makes it unlikely that such a code of principles could emerge from that body given States' likely concerns that armed groups would use such principles to increase their demands for recognition and claims of legitimacy. As a result, a body of independent experts may be more feasible and may also be more likely to consider the views of armed groups, which would bolster the principles' legitimacy and increase armed groups' respect of them.

C. Implementation of the Principles

Once the substance of the principles is agreed upon, the next issue is how and when these principles might be implemented and, more specifically, what the consequences of a failure to comply with these principles would be for an armed group that still wished to be included in a peace process.

The first issue is when such principles would apply. If applied too early, there is a great danger that no armed group would ever qualify as a legitimate peace process participant, as none of the parties to internal armed conflicts ever have completely clean hands.[339] Indeed, as the earlier discussion in Part 2 indicated, mediators highly value their ability to talk to any group, regardless of its poor human rights record.[340] While I have questioned whether mediators actually practice what they preach, I believe that it would

[338] U.N. Code of Conduct for Law Enforcement Officials, adopted by G.A. Resolution 34/169 (17 Dec. 1979).
[339] Parlevliet, *supra* note 14, at 5 ("After all, it is in the nature of civil wars that no one party can be absolved from responsibility for human rights violations.").
[340] *A Guide to Mediation*, *supra* note 15, at 10 ("Talking with individuals responsible for particularly gross human rights violations or those who hold to widely unacceptable ideologies can be very controversial." Nevertheless, mediators need to reach out to these groups because their involvement is key to initiating the peace process and such groups generally "prove to be part of the solution."); Potter, *supra* note 15, at 164 (arguing that the textbook mediator must live with a "moral ambiguity. They must be prepared to talk to and even befriend those whose hands may be stained with blood."); MARTIN, *supra* note 15, at 25-26 (quoting Lakhdar Brahimi's justification for why he is prepared to talk to all parties).

be dangerous to apply these principles too early in the process and thereby cut off even the possibility of dialogue with certain groups. Instead, the principled approach would leave mediators free to talk to all armed groups in the initial, pre-negotiation phase of the peace process, the "talks about the talks" phase when the decision is made to contemplate resolving the conflict through a negotiated settlement (rather than military victory) and when it is typically decided which parties will participate in the formal negotiations.[341] Because the issues on the negotiating table at this phase in the talks are less consequential, the threshold for participation can be similarly low.[342]

There are significant benefits to allowing *all* groups to participate in this exploratory, initial phase of the peace process. Keeping the entry threshold low reduces the risk that some groups will feel excluded to the point where peace is no longer perceived as a viable option for them to ever consider.[343] It would also allow mediators to make contact with the leadership of the armed groups (frequently very difficult to do, especially if the group is extremely clandestine). Such contacts open a door of communication between the mediator and the armed group, which allows the armed

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[341] I. William Zartman, *Prenegotiation: Phases and Functions*, *in* GETTING TO THE TABLE: THE PROCESS OF INTERNATIONAL PRENEGOTIATION 1, 4 & 12 (Janice Gross Stein ed., 1989); Bell, *supra* note 4, at 376; *A Guide to Mediation*, *supra* note 15, at 4-5 (the "pre-talks" phase is useful for confidence-building).

[342] *See* Bell, *supra* note 4, at 376-77 (describing pre-negotiation agreements as "political pacts rather than binding legal documents"); BELL, *supra* note 8, at 21 (describing the typical contents of a pre-negotiation agreement as release from detention and/or amnesties for negotiators, temporary ceasefires, monitoring of ceasefires, and basic human rights protections); *A Guide to Mediation*, *supra* note 15, at 3-4 (describing the "agreement to talk" and the more formal "pre-negotiation agreement" which actually sets the parameters for the talks to come).

[343] There is evidence, for example, that terrorist listings (and their over-use by some governments) have significantly impeded the process of peace in several conflict situations. *See Charting the roads to peace*, *supra* note 2, at 21. This may be because "[l]isting an organization as 'terrorist' potentially lengthens the path to non-violent politics for that group as negative perceptions of the group are encouraged, and the group's own perceptions about whether they can or should have a place in non-violent politics may also be negatively affected." Philipson, *supra* note 30, at 2. On the other hand, engaging with an armed group can confer upon the group much desired legitimacy, thereby providing the group with a powerful incentive to use violence less, or at least more discriminately, because it otherwise stands to lose its hard-earned legitimacy. Villalobos, *supra* note 31; *see also* Stedman, *supra* note 17, at 41 (noting that in Mozambique, UN mediators successfully leveraged RENAMO's desire for legitimacy by making legitimacy contingent upon RENAMO's commitment to the peace process.).

group to reach out to the mediator if it initially rejects the peace process but later seeks to be included.[344] It also allows all armed groups to sign a ceasefire and make some basic commitments to respect human rights and IHL going forward, thus reducing the likelihood that a principled approach, the "quest [for] the perfect peace," would prioritize principles even at the risk of prolonging the armed conflict.[345] Moreover, from a practical perspective, since pre-negotiations are often conducted in secret, it would be difficult if not impossible to monitor an armed group's compliance with the minimum principles during this period.[346]

In order to transition from pre-negotiations to formal, substantive negotiations, armed groups would have to commit themselves to the minimum principles and show increased compliance with those principles going forward. Thus, the entry threshold to participate in the peace process would remain low, allowing all armed groups to sign on to the low-level agreements typically reached in the pre-negotiation phase, such as a cease-fire agreement.[347] But, once the pre-negotiation period ends[348] and the parties

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[344] *See* Michael Ancram, *The Middle East Peace Process: The Case for Jaw-Jaw not War-War*, *in* POWERS OF PERSUASION, *supra* note 13 (noting that the first difficulty faced in negotiating with the IRA was establishing some means of communication with them and also discussing the value of "exploratory dialogue" with the IRA to begin to understand their position before any formal talks were held); *see also* Zartman, *supra* note 341, at 13 (noting that "[t]he principal function of prenegotiation is to build bridges from conflict to conciliation . . .").

[345] *See* Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 258 (1996) (indicting human rights advocates for dragging out the peace process in the former Yugoslavia by holding it to unobtainable standards, resulting in thousands of unnecessary deaths, arguing "[t]he quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow."); *see also* Lutz et al., *supra* note 8, at 173 (noting that such a result frustrates the goals of human rights advocates and conflict resolution managers alike).

[346] *See* Janice Gross Stein, *Getting to the Table: The Triggers, Stages, Functions, and Consequences of Prenegotiation*, *in* GETTING TO THE TABLE, *supra* note 341 (praising the lack of publicity in the prenegotiation phase because it allows the parties to exchange information and discuss their positions more openly).

[347] *See* BELL, *supra* note 8, at 21 (a cease-fire is often included in a pre-negotiation agreement). Indeed, many mediators believe that commitment to a cease-fire is an essential pre-condition for moving forward with more substantive negotiations. *See* MARTIN, *supra* note 15, at 144 (General Lazaro Sumbeiywo concluded that a ceasefire agreement was a necessary pre-condition to peace talks in the Sudan); *Assessing*

begin formal negotiations aimed at reaching a substantive peace agreement, then the conditions to continue to participate in the process would increase. This ratcheting-up of the conditions to participate in the process parallels the ratcheting-up of the options on the negotiating table in formal peace talks; while pre-negotiation talks revolve around issues such as a preliminary cease-fire, formal negotiations reach the substantive issues at the heart of the conflict, with the parties agreeing on important issues such as power-sharing in the transitional government, amnesty for crimes committed during the conflict, changes in legislation (e.g. to address root causes of the conflict), and changes in the status of the parties to the conflict (e.g. from rebel group to political party).[349]

This gradual ratcheting up of the obligations throughout the negotiation process tracks the natural evolution of armed groups to recognized political parties and members of the government. In other words, the principles will provide instructive guidance to armed groups that are already seeking to alter their behavior because the temptation for them to operate in ways that might violate IHL or human rights diminishes as the peace solidifies and as they seek to build the domestic and international support necessary to win elections and participate successfully in the transitional government.[350]

Moreover, retaining a low entry threshold and gradually ratcheting up the obligations imposed on armed groups is likely to increase the norm diffusion potential of

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Groups and Opportunities: a Former Government Minister's Perspective, *supra* note 45 (similar emphasis on need for commitment to a ceasefire as a condition for participation peace talks).

[348] *See* Zartman, *supra* note 341, at 4 (noting that the pre-negotiation period ends when the parties "agree to formal negotiations . . . or when one party abandons the consideration of negotiation as an option."). This demonstrates that the transition from prenegotiation to negotiation is not always clearly demarcated by a pre-negotiation agreement, such as a cease-fire agreement.

[349] *See* BELL, *supra* note 8, at 25-29. While Bell differentiates between "framework or substantive agreements" and "implementation agreements," my theory does not require this level of precision; rather, the moment serious, substantive issues are on the negotiating table, the possibility of remaining at the table becomes conditioned on commitment to the minimum principles.

[350] For example, the MLC's promulgation of a statute advocating democracy and human rights during the Lusaka Agreement negotiations. *See* Bouvier & Bomboko, *supra* note 49, at 78.

the peace process. As Goodman and Jinks argue, acculturation is likely to work most effectively "by demanding modest initial commitments and ratcheting up obligations over time."[351] The low entry threshold ensures that more armed groups are included in the peace process, making them more susceptible to the pressures generated by participation therein.[352] Indeed, if the peace process becomes "the only show in town,"[353] armed groups are likely to be extremely reluctant to find themselves excluded from it, at precisely the moment when the most attractive bargaining options are placed on the table. Goodman and Jinks conclude: "On balance, the features of acculturation support inclusive membership. However, if a restrictive rule were adopted, the principles of acculturation would favor particular criteria in applying the rule." [354]

The next issue, therefore, is to contemplate what the consequences would be for an armed group that failed to respect the minimum principles going forward, once formal negotiations began. There are several possible consequences, ranging from complete exclusion of the non-complying group (and, as a corollary, the inclusion of previously excluded groups as a reward for compliance), to temporary exclusion, and, finally, to more targeted and tailored limitations on the nature of the group's continued participation.

At one extreme, armed groups who fail to comply with these minimum principles (or, perhaps, who fail to demonstrate an increased level of compliance or a good faith effort to comply), could be excluded from the peace process altogether. Nevertheless, the

[351] Goodman & Jinks, *supra* note 278, at 702.
[352] *See id.*, at 654 (concluding that "a state's degree of integration in world society is a strong predictor of whether that state will adopt global cultural scripts.").
[353] *See* David Mitchell, *Room for Accommodation: Incentives, Sanctions and Conditionality in Northern Ireland*, *in* POWERS OF PERSUASION, *supra* note 13 (noting that because of a strong degree of coordination, the British were able to ensure that "the peace process was 'the only show in town.'").
[354] Goodman and Jinks, *supra* note 278, at 672.

decision to completely exclude an armed group from the peace process necessarily involves a decision to impose the peace on that group, often by force. Complete exclusion assumes, therefore, that the remaining parties to the peace agreement are strong enough (and the excluded party is weak enough) that exclusion will not result in the failure of the peace agreement before the ink on the signatures is dry. In other words, complete exclusion is unlikely to be a feasible option with any group that constitutes a veto-player and is capable of unilaterally continuing the conflict.[355] As a result, complete exclusion will not be feasible in many peace processes, with respect to many armed groups.

A less extreme option, therefore, is temporary exclusion, where a violation of the minimum principles would entail a temporary exclusion from the talks as a sort of punishment.[356] For temporary exclusion to be effective, however, the armed group would have to demonstrate its renewed commitment to the minimum principles before it could re-join the process, otherwise the exclusion would appear as a mere token gesture,[357] with a corresponding lower degree of pressure to comply. The ability to enforce a meaningful temporary exclusion will, like complete exclusion, depend on the particular armed group and on the general circumstances of the peace process. Because both complete and temporary exclusion are only possible if the armed group concerned can be militarily defeated by the other parties to the peace agreement (perhaps with the assistance of the UN or a regional organization), in most peace processes, the principled approach will be used to limit the non-complying group's substantive and procedural negotiating options.

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[355] *Cf.* Cunningham, *supra* note 34, at 879, 891.
[356] *See* Mitchell, *supra* note 353(describing how when the IRA broke the ceasefire in February 1996, Sinn Fein was excluded from the peace talks in June 1996 "but the governments continued to assure republicans that they could participate if violence stopped once again.").
[357] *See id.* (noting that the 6 day exclusion of Sinn Fein was merely a "token gesture").

Instead of focusing on exclusion as a penalty for failure to comply with the minimum principles, another possible use of the principled approach is to *include* armed groups as a reward for compliance with the minimum principles. In other words, an armed group might be able to win itself a seat at the negotiating table because of its compliance with the minimum principles. This sort of incentive might prove particularly attractive to those groups that were less certain of having a seat at the table as a result of their comparatively lower military strength or control of territory. This approach ties in well with the rationale that all the parties to the conflict should be included in the process—in other words, it would provide a means of putting the all-inclusive theory into practice and accessing the benefits ascribed to that theory.[358] It also provides a means of rewarding armed groups for their moderation, an important means of inducing greater levels of armed group compliance with international humanitarian standards that is often over-looked in favor of a focus on sanctions for failure to respect those standards.[359]

In addition to the exclusion (permanent or temporary) of non-complying groups and the inclusion of complying groups, the principled approach could also be used to limit the nature of the group's continued participation in the peace process. These limitations could be both substantive and procedural.

Substantive limitations would limit the substantive negotiating options available to an armed group that failed to respect the minimum principles.[360] For example, a non-complying group might find itself excluded from a significant share of the power in the

[358] For benefits of including more parties, *see supra* Part 1(I)(A). *But see* Cunningham, *supra* note 34, at 875-81, 891 (arguing that more parties in the negotiations makes it more difficult to reach an agreement).
[359] *See* Alex de Waal, *Sanctions and the Political Process for Darfur: an Interview with Jan Eliasson*, *in* POWERS OF PERSUASION, *supra* note 13 (in reference to the situation in Darfur, Eliasson observes that: "Sanctions and conditionality should be based on the principle of rewards for moderation and cooperation . . . But too many times I have seen cooperation without reward, in which case the situation may get worse.").
[360] I am indebted to a very productive conversation with Christine Bell for this idea.

transitional government set up by the agreement or from specific government posts that are generally highly coveted, such as defense.[361] Alternatively, the agreement's terms might allow such a group its proportionate share of the power, but require earlier elections rather than allow that group to solidify its power-base during the transitional period.[362] So, much in the same way that the UN now refuses to recognize peace agreement provisions for a blanket amnesty for international crimes,[363] the UN or the broader international community might refuse to recognize peace agreement provisions that award certain substantive options to groups that have failed to comply with the minimum principles.

Procedural limitations, on the other hand, would limit the *nature* of the non-complying armed group's participation in the peace process, rather than taking certain substantive options off the bargaining table.[364] For example, a non-complying armed group might be restricted to talks with the mediator rather than the direct talks with the government that armed groups generally prefer.[365] Less drastically, a non-complying

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[361] *See, e.g.*, Global and All-Inclusive Agreement, at Annex 1 (A).

[362] This would address concerns that "[p]ower-sharing with warlords defeats the logic and objective of long-term peace by institutionalizing the predatory behavior of warlords into the body politic." Levitt, *supra* note 5, at 501; *see also* Gordon Peake, Cathy Gormley-Heenan, & Mari Fitzduff, *War Lords to Peace Lords: Local Leadership Capacity in Peace Processes* , INCORE Report (Dec. 2004), 34 [hereinafter *War Lords to Peace Lords*] (noting that "Rather than becoming 'peacelords', many of Afghanistan's 'warlords' have thus become 'peacemongers'- taking what benefits suit them from the process but not fully contributing to the achievement of lasting peace."); Spears, *supra* note 122, at 114 (arguing that power-sharing should be used as a transitional mechanism towards competitive elections).

[363] *See Report on Rule of Law and Transitional Justice*, *supra* note 11, at ¶ 64 (c) (to the effect that amnesty provisions in peace agreements would no longer be recognized by the UN).

[364] For example, Goodman and Jinks note how, beyond exclusion, States have developed procedural tactics to limit the participation of governments with poor human rights records in international organizations, such as "denying access to regional and preparatory meetings, rejecting credentials required for participation, limiting voting or speaking rights, and adopting extraordinary resolutions tantamount to expulsion (e.g., 'advising' a member state to withdraw)." Goodman & Jinks, *supra* note 278, at 659 (internal citations omitted).

[365] For armed groups' preference on negotiating directly with the State, see *Rebel Leader Ngoma Says "Internal" Talks Should Precede Cease-Fire*, BBC Monitoring Africa – Political (23 April 1999); *Ilunga-Led Rebel Group Sets Conditions for Lusaka Talks*, BBC Monitoring Service: Africa (24 June 1999).

armed group might see its speaking rights curtailed or its number of representatives to the peace process reduced.[366]

As this part of the paper has shown, it is possible to develop a principled approach to armed group participation in peace processes. The principled approach eliminates the arbitrary nature of armed group participation in peace processes by conditioning such participation on principles that are clearly articulated ex ante. Because it is grounded in law rather than in politics, the principled approach provides a legitimate framework within which peace processes can take place. That framework allows the peace process to serve as a vehicle for norm diffusion, initiating the transition from a state of war to a state of peace earlier than under the current approach and helping to transform warlords into democratic, rights-respecting leaders as the transition to peace unfolds, rather than assuming that this transformation will simply materialize once the peace agreement is signed. The principled approach therefore provides the basis for a more durable peace. In addition, because the principled approach will be clearly articulated ex ante, it will provide instructive guidance on how to behave for armed groups that seek to increase their chances of being included in the peace process. Thus, participation in the peace process becomes both a carrot and a stick with which to increase armed group compliance with international humanitarian law and international human rights law.

II. Addressing Concerns with Tying Mediators Hands under the Principled Approach

Nevertheless, adopting the principled approach would constitute a radical departure from the current approach and may raise concerns that this will only make a bad situation worse. As a result, in this part, I respond to three potential counter-

[366] *See* Goodman & Jinks, *supra* note 278, at 659 (noting limiting speaking rights as one possible procedural tactic).

arguments to the principled approach. First, there might be a concern that this approach would raise the barrier to peace too high and effectively undermine the chances of persuading armed groups to consider a peaceful solution to the conflict, resulting in a continuation of the conflict and all of the associated human rights abuses that that entails. Second, there could be a concern that some armed groups, perhaps particularly those involved in the sort of conflict I am focusing on, are simply not subject to this sort of incentive/sanction structure at all and, as a result, that there is little chance that this approach will change their behavior and induce a higher level of compliance with humanitarian standards. These first two concerns, therefore, would directly challenge my two justifications for a principled approach: that it will build the basis for a more durable peace and that it will reduce armed group violations and abuses during the conflict. Finally, the third concern questions whether my approach is biased in favor of States, thus increasing the likelihood that it will be rejected as illegitimate by the armed groups and undermining the chances both of reaching a durable peace and of reducing abuses.

A. The Principled Approach Will Not Make Peace Less Likely

There may be a concern that the principled approach ascribes too much weight to the benefits of participating in a peace process; in other words, that I have overvalued the benefits that accrue to armed groups when they participate in a peace process. In particular, while I argued earlier in the paper that armed groups are able to enhance their international legal status by signing an international peace agreement, it is not clear that all armed groups actually care about their international legitimacy or recognition. As a general matter, secessionist groups and groups that aim to form the new government of the State are thought to ascribe more value to their international reputation (and hence, to

their standing in the eyes of the international community)[367] than groups that have vague political objectives (such as the MLC and the RCD) or primarily emphasize other purposes such as criminal enterprises.[368] Similarly, while signing a peace agreement can bring concrete benefits to armed groups (such as increased access to humanitarian aid for the territory under their control), it can also seriously undercut and even eliminate the many concrete benefits that accrue to armed groups during armed conflicts, particularly in conflicts such as the one in the DRC where armed groups were able to secure control over valuable natural resources.[369]

At a broader level, as in the peace vs. justice debate, there is a concern that the principled approach simply sets the bar for peace too high, reducing the likelihood that the parties will be persuaded to lay down their weapons and increasing the likelihood that the conflict, and all the associated abuses, will continue.[370] Regardless of whether mediators exclude parties that fail to comply with the minimum principles or whether

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[367] Byron, *supra* note 184, 893; *Ends and Means*, *supra* note 1, at 16.

[368] *See Ends and Means*, *supra* note 1, at 17; Alston & Abresch, *supra* note 185, 21; Claude Bruderlein, *The Role of Non-state Actors in Building Human Security: the Case of Armed Groups in Intra-state Wars*, at 11 (May 2000), *available at* http://www.smallarmssurvey.org/files/portal/issueareas/perpetrators/perpet_pdf/2000_Bruderlein.pdf ("More sophisticated groups tend to be more inclined towards standards and codes of conduct, whereas groups with vaguer political objectives tend to be more reluctant to discuss standards they find counterintuitive."); *id.* at 12 (noting that in internal wars (e.g. the DRC), winning was no longer the primary objective of these groups; instead, the wars had "become lucrative enterprises in which combatants are more likely to survive and prosper than civilians.").

[369] *See Africa's Seven Nation War*, *supra* note 58, at 24 (concluding that the rebellion against Kabila, even if it was originally grounded in genuine political grievances "is slowly evolving into an excuse for personal ventures by its leaders and sponsors. Trade in natural resources and weapons takes precedence over politics, resulting in rebel leaders becoming warlords instead of genuine revolutionaries with a clear strategy for claiming leadership of the country."); *Report of the Panel of Experts*, *supra* note 80, at ¶¶ 143-47 (noting rebel control over natural resources).

[370] Mediators frequently describe their work as an effort to *persuade* the parties to the conflict of the benefits of a peaceful solution. This emphasis on the need to persuade the parties undermines my claim that conditions might be imposed on participation; it suggests instead that peace negotiations are not a suitable place to impose conditions on any of the parties to the conflict. *See, e.g.*, Interview with Alvaro de Soto, *Harnessing Incentives for Peace*, *in* POWERS OF PERSUASION, *supra* note 13 (de Soto argues that: "The whole business of a peacemaker's task is about trying to *persuade* parties that they will benefit from reaching a negotiated peace agreement.") (emphasis added).

mediators limit their participation in the peace process, there is a significant concern that the principled approach will make peace a much less attractive proposal and will succeed only in keeping parties away from the negotiating table. As Bell notes, "[t]he danger with legal approaches is that the scope of negotiated settlement and bottom-up peace processes is reduced."[371]

This objection to the principled approach is weak because it assumes that the end goal, peace, is best achieved by adopting a low entry threshold for peace process participation. A similar assumption is often made in arguments defending the necessity of including blanket amnesties in peace agreements, yet "there is equally little proof that amnesties promote reconciliation where criminal trials provoke relapse."[372] Thus, there is no reason to accept that the assumption that a low participation threshold is more conducive to peace is any more accurate than the assumption that amnesties are an essential element to securing peace.

More fundamentally, even if a low participation threshold is an important incentive to persuade warring parties to consider a negotiated settlement, there are good reasons to doubt whether allowing all parties to sit at the negotiating table, irrespective of

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[371] Christine Bell, *Peace Agreements and human rights: implications for the UN*, in THE UN, HUMAN RIGHTS AND POST-CONFLICT SITUATIONS 241, 263 (Nigel D. White & Dirk Klaasen eds., 2005).

[372] Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 999 (2006); Bell, *supra* note 371, at 254 (arguing that while both the justice and the peace positions have weaknesses, the supposed "realists are prone to overstate the downsides of prosecutions by focusing on the perspectives of self-interested ruling elites . . . [and] also tend to overstate the practical benefits of amnesties."); Orentlicher, *supra* note 8, at 2549 (arguing that "the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur."). In Haiti, for example, the military regime refused to give up power, despite the amnesty provision in the peace agreement that the regime had signed, until the regime was threatened with UN-endorsed military ouster. *See* Sadat, *supra*, at 991-92. Even in South Africa, where amnesty is generally conceded to have been successfully used to ensure a peaceful transition, it is unclear how much this is due to the amnesty itself and how much it is due to the unique circumstances of that situation. *See id.*, at 996-97 (arguing that "the unique leadership, historical circumstances, and ultimately the particularized consideration of individual cases that accompanied the truth and reconciliation commission process" had more to do with securing a lasting peace than the amnesty itself).

their respect for IHL and human rights, can actually build the basis for a lasting peace. Indeed, the current approach appears to simply assume that warring parties will become peaceful "democrats once sanctioned with state authority,"[373] ignoring the danger that the peace process will simply "institutionaliz[e] the predatory behavior of warlords into the body politic, giving them the cloak of state authority to prey on the state and its citizens--a situation that sows the seeds for future conflict."[374] The principled approach, on the other hand, can be used both to ensure that not all parties gain a seat at the table, but also to begin to diffuse the values associated with democratic leadership during the peace process—before the parties assume the reins of government. Far from idealistic and naïve, therefore, advocating adherence to certain principles of international law may actually be more conducive to establishing a durable peace. In other words, there may not be the divorce between law and policy that the justice vs. peace debate often assumes.[375] The principled approach would operate to build respect for the rule of law throughout the peace process and the transition, weakening the culture of impunity and abuse that characterized the conflict and likely fuelled it in the first place, building the basis for a more stable society and a durable peace.[376]

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[373] Levitt, *supra* note 5, at 499.
[374] *Id.*, at 501.
[375] *Cf. id.* at 508 (arguing that "power-sharing with warlords and rebels may not only be unlawful but also bad policy").
[376] *Cf.* Stromseth, *supra* note 8, at 251 (arguing that "unless leaders in war-torn societies confront the difficult issues of accountability for past atrocities, they run the risk that new structures of law will be built upon shaky foundations."); Sadat, *supra* note 372, at 966 (arguing that amnesties embolden these "warlords and political leaders" to commit future violations, rather than deterring them, thus they create "a culture of impunity in which violence becomes the norm, rather than the exception."); Stromseth, *supra* note 8, at 263-64 (pointing to the example of Afghanistan, where the lack of accountability for past crimes has meant continued impunity for current abuses, as "warlords who grew accustomed to operating with impunity in the past brazenly continue to do so in the present."); Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti*?, 31 TEX. INT'L L. J. 1, 11 (1996) (acknowledging that although he thinks the amnesty in Haiti was successful, "[w]hen the international community encourages or even merely condones an amnesty for human rights abuses, it send a signal to other rogue regimes that they have nothing to lose by instituting repressive measures; if things start going badly, they

B. The Principled Approach Will Increase Armed Groups' Compliance with Their International Obligations

Even if armed groups do attach significant value to being included in the peace process, it is not clear that my proposal will result in higher levels of armed group compliance with their international obligations. Primarily, it is not clear that armed groups are susceptible to pressures in the same way that States are.[377] Although I suggested that Goodman's and Jinks' theory of acculturation might also prove to be an effective mechanism for altering armed group behavior, it is not clear that armed groups feel linked to a clear reference group in the same way that States, as accepted members of the international community, generally do.[378] Although I have earlier argued that armed groups are increasingly treated as subjects of international law, their membership in the international community clearly remains controversial. Maintaining a dichotomy between States' and non-State armed groups' international legal status may weaken armed groups' identification and integration into the reference group that they seek to join, reducing pressures generated by that group to increase their compliance with international law.[379]

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can always bargain away their crimes by agreeing to restore peace."); *cf.* Levitt, *supra* note 5, at 499 (arguing that power-sharing with rebels "also sets a negative precedent, as it sends a dangerous message to would-be insurrectionists that violence is a legitimate means to effectuate change and obtain political power.").

[377] *See* Pablo Policzer, *Human Rights and Armed Groups: Toward a New Policy Architecture*, 2-6, (July 2002), at http://www.armedgroups.org/images/stories/pdfs/0207policzer_humanrights.pdf (despite increased attention to the issue of armed groups' human rights abuses, international organizations still lack the necessary tools to hold groups accountable for abuses in the same way as states. Primarily this is because, armed groups "are not susceptible to the same political pressures as governments" because they do not have the same political status and many "have no interest in being a state…[they] have opted to forego the benefits of statehood (such as international recognition of sovereignty) in order to avoid the costs associated with it, such as having to build and finance an administration."); *Ends and Means*, *supra* note 1, at 44 (little attention has been devoted to whether sanctions are effective against armed groups (especially in comparison to the extensive study of this issue in relation to states)). *But see* Sassòli, *supra* note 176, at 24 (arguing that armed groups can be held accountable using the same mechanisms as are used with States).

[378] *See* Goodman & Jinks, *supra* note 278, at 643 (emphasizing the importance of identification with the reference group for acculturation to be effective).

[379] *See id.*, at 654 (noting that a State's degree of integration affects its susceptibility to pressures to adopt the "global scripts."); *see also* Policzer, *supra* note 377, at 3 (arguing that maintaining a strict dichotomy

In addition, it may be that even if armed groups are susceptible to the same pressures as States and are eager to increase their compliance with their international obligations, it is simply more difficult for them to do so than it is for States. First, many armed groups lack the degree of institutionalization that characterizes most States, making it difficult for the leadership to ensure that the obligations it undertakes are actually respected by the rank and file.[380] Second, the peace process itself may weaken the leaders' control over members of the groups, as the compromises inherent in agreeing to a peaceful settlement may expose the leaders to accusations of selling out, and in extreme cases, to the splintering off of more radical factions who refuse to accept peace on the agreed-upon terms.[381] Third, it may be more difficult for armed groups to comply with some of the substantive obligations imposed upon them by the minimum principles; for example, the guerilla strategy frequently adopted by armed groups often makes it more difficult for them to comply with the requirement for attacks to distinguish between combatants and civilians.[382] Fourth, in reality, it may be extremely difficult to monitor

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between states and non-state groups impedes international organizations' ability to influence armed groups to comply with human rights standards.).

[380] *See Ends and Means*, *supra* note 1, at 21 (noting that a strong military chain of command in the armed group reduces the risk of abuses, but that in groups that operate more clandestinely, the leadership is often separate from the rank and file, making it difficult to enforce compliance with international standards. Also concluding that "[w]here an armed group is actually a disparate coalition of forces, united only in their opposition to the existing government, effective control is especially problematic."); *see also* Policzer, *supra* note 377, at 17 (noting that a high degree of internal monitoring by the group's leadership allows for more effective control, but that this level of internal monitoring is too expensive for some groups.).

[381] *See* Matthew Hoddie & Caroline Hartzell, *Civil War Settlements and the Implementation of Military Power-Sharing Arrangements*, 40 J. PEACE RESEARCH 303, 306-08 (2003) (concluding that power-sharing provisions, in particular, can result in a loss of credibility and a "breakdown of group unity"); Policzer, *supra* note 377, at 22-23 (noting that this risk is especially high in groups such as the Mai-Mai, Interhamwe, and Banyamulenge, who have a long practice of shifting alliances).

[382] *See* Bruderlein, *supra* note 368, at 10; *Ends and Means*, *supra* note 1, at 48 (noting that armed groups are more susceptible to pressures concerning certain kinds of abuses, such as the protection of innocents like women and children, than others, such as the protection of enemy soldiers who are hors de combat); Ilyas Akhmadov, *Chechen Resistance: Myth and Reality*, *in* CHOOSING TO ENGAGE: ARMED GROUPS AND PEACE PROCESSES, *supra* note 7 (noting how the Chechen resistance struggled to fight using "the strategies and tactics of a conventional army. We tried to maintain command and control, hold a front line, hold territory and hold onto the capital for as long as possible. This strategy was almost suicidal in view of the

armed groups' compliance with the minimum principles, reducing whatever pressures do exist for armed groups to comply with the principles.[383] Without serious monitoring of the degree of compliance with the principles, it would be extremely easy for armed groups to make only a symbolic commitment to the principles without making any real changes to their behavior on the ground.[384]

Despite these difficulties, however, at least one study has found that "that there is some reason to believe that adverse publicity based on the public release of critical human rights reports has influenced armed groups in some countries."[385] This study quotes a former FMLN guerilla from El Salvador reflecting that: "I think that many more violations. . . by the guerillas would have occurred if pressure from the [human rights] organisations had not been exerted to respect international rules."[386] There are also

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unequal size of the forces."); Irish Republic Army General Headquarters, Handbook for Volunteers of the Irish Republican Army: Notes on Guerilla Warfare 13 (1956), *available at* http://www.usexpatriate.us/handbookforvolunteersoftheirish.pdf ("The organisation of a guerilla force in the field must in no way duplicate that of a regular army.").

[383] *See* Policzer, *supra* note 377, at 16-19 (concluding that "most non-state armed groups likely operate without high levels of external monitoring in the areas they control" and pointing specifically to the general lack of monitoring over groups in the DRC); Bruderlein, *supra* note 368, at 14 ("Without mechanisms to follow up and monitor a group's commitments, most of the provisions of humanitarian agreements are likely to remain *letters mortes*."); Sassòli, *supra* note 176, at 14 (whatever compliance mechanisms are adopted, they need to be enforced to be effective).

[384] This problem is already well-documented. *See, e.g.*, Human Rights Watch, *DRC: Reluctant Recruits* (2001), *available at* http://www.hrw.org/reports/2001/drc3/Goma-09.htm#P410_62994 ("Apparently in reaction to [UN criticism], RCD-Goma is changing its approach to recruitment, particularly of children. In towns and other areas most accessible to outside observers, they are shifting away from actual abduction to greater reliance on the use of coercion and promises of rewards to persuade children to enroll. Distant from towns, however, RCD-Goma soldiers continue to use force to recruit unwilling children and adults."); *War Lords to Peace Lords*, *supra* note 362, at 49-50

> (And, although [Sierra Leonian] leaders now speak fluently in the language of peace processes, it is still too early to state whether this indicates any change other than changes in the language used. The question, therefore, is whether leaders have fundamentally changed or have morphed into what appears to be a new, temporary form of leadership, only to revert back to old methods and practices once the international gaze diverts elsewhere.);

see generally Meron, *supra* note 140, at 276 (concluding that the increasing emphasis on international human rights law has not been matched with an increase of respect on the battlefield, so "[h]umanization may have triumphed, but mostly rhetorically.").

[385] *Ends and Means*, *supra* note 1, at 41.

[386] *Id.*, at 39.

indications that armed groups are most susceptible to international pressure precisely "when negotiations for peace are taking place or when the group feels a need for international recognition and legitimacy."[387] This finding suggests that, despite some difficulties, the peace process may provide an important window for inducing armed groups to greater levels of respect for humanitarian standards.

More generally, although there are important differences between the capacity of armed groups and the capacity of States, this does not necessarily suggest that armed groups are any less susceptible to the same sorts of pressures than States; as Marco Sassòli reflects, "[t]hose who have accepted those mechanisms apparently thought that the latter could influence the human beings who take the decision whether an abstract entity respects or violates the law . . . Why should those human beings react in fundamentally different ways when they act for armed groups than when they act for such other corporate entities?"[388] As a result, this counter-argument suggests the need for a careful design of the principled approach so that it takes into account the different characteristics of armed groups, rather than an outright rejection of the principled theory. For example, as I argued above, the principled approach would not hold armed groups to the full panoply of humanitarian and human rights obligations that bind States, but would focus instead on fundamental, minimal obligations that all armed groups, even the smaller, less organized groups are capable of respecting.

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[387] *Id.*, at 41; Geneva Call and the Program for the Study of International Organization(s), *Armed Non-State Actors and Landmines: Vol. III: Towards a Holistic Approach to Armed Non-State Actors?*, 19 (2007) [hereinafter *Armed Non-State Actors and Landmines*] ("During the project, it was observed that NSAs [non-State actors] have a tendency to engage in negotiations on landmines more often when they are in a situation of cease-fire or negotiation with their principal opponent.").

[388] Sassòli, *supra* note 176, at 24; *Armed Non-State Actors and Landmines*, *supra* note 387, at 6 (noting that, like States, non-State armed groups generally comply with international law because of a combination of the threat of sanctions and the benefits of positive incentives).

C. The Principled Approach Is Not Biased in Favor of States

A final counter-argument might claim that the effectiveness of the principled approach may be weakened if armed groups view it as illegitimately biased in favor of States. Although armed groups generally view international law as more legitimate than domestic law (enacted and enforced by the very regime they oppose), some armed groups also view international law itself as illegitimate and inherently biased in favor of States, given the fact that it was made by States and generally constructed to reflect their needs and interests.[389] As a result, armed groups may view the minimum principles as inherently biased in favor of States because they are grounded in international law.

More specifically, the principled approach might be accused of State-centric bias because, as described in this paper, it applies to non-State armed group participation in peace processes but does not appear to apply to State participation in peace processes. I deliberately decided to focus on armed group participation (rather than State participation) for two reasons. First, the reality is that international law *is* biased in favor of States and the assumption is, even in a case such as the DRC where the government's legitimacy and human rights record are highly problematic, that the government automatically has a seat at the negotiating table.[390] Second, the international status-enhancing benefits of participating in a peace process are more relevant for armed

[389] *See Ends and Means*, *supra* note 1, at 59. *But see* Sassòli, *supra* note 176, at 6-8 (arguing that armed groups must feel that international law addresses their "needs, difficulties and aspirations," but concluding that the practice of armed groups already contributes to the formation of customary international law).
[390] Despite the fact that Laurent Kabila had come to power only two years earlier, as the leader of his own rebel movement, there was never any consideration that he (or his successor, Joseph Kabila) be excluded from the peace process. *See* UN Security Council Meeting Records, U.N. Doc. S/PV.3987 (19 Mar. 1999)(the OAU, for example, stressed that the rebels must be persuaded to lay down their arms and talk with the government, demonstrating the assumption that the government would be at the table); *see also* Suthaharan Nadarajah, *Prejudice, Asymmetry and Insecurity*, *in* POWERS OF PERSUASION, *supra* note 13 (arguing that, in Sri Lanka's peace process, the LTTE's commitment to peace was always called into question, while the State's commitment to peace was "taken as a given.").

groups, whose international legal status is more questionable.[391] As a result, armed groups are likely to value their participation in the peace process more and be more susceptible to the principled approach.[392] My focus on armed group participation in peace processes also resulted from the interesting issues raised by this participation for the international legal status of armed groups (and the peace agreements that they sign). It was also motivated by the lack of tools available to induce higher degrees of armed group compliance with their international humanitarian obligations.

Nevertheless, my approach in this paper was not meant to endorse the pre-existing State bias of international law. As a result, I am fully prepared to admit that the principled approach ought to be applied to States as well—although the details and implications of this broader application remain beyond the scope of this paper.

At first glance, there are certainly good reasons to think that applying the principled approach to all peace process participants, State and non-State alike, would result in greater legitimacy and, in turn, greater effectiveness, in addition to the likely benefits of increasing the State's own compliance with these minimum standards.[393] An even-handed approach to the principled approach to peace process participation might result in pre-negotiation agreements between the government and the armed groups, committing themselves to the minimum principles going forward, similar to the San Jose

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[391] Nevertheless, States that desire international legitimacy may also feel pressured to sign, and to respect, a peace agreement. *See* VIRGINIA PAGE FORTNA, PEACE TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE 21 (2004).

[392] *See* Nadarajah, *supra* note 390 (arguing that the LTTE was offered "few credible incentives" to remain at the table, "apart from a vague prospect of legitimacy.").

[393] *See* Kieran McEvoy, *Human Rights, Humanitarian Interventions and Paramilitary Activities in Northern Ireland*, *in* HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 215, 231 (2001) (documenting how human rights monitoring by Amnesty International was perceived as legitimate by the IRA because Amnesty International had credibility from its long-standing practice of criticizing abuses by the State); *Ends and Means*, *supra* note 1, at 35 (noting that armed groups are generally more likely to comply with their human rights obligations when the State is held accountable for its own abuses).

Agreement on Human Rights signed between the government of El Salvador and the FMLN at the beginning of their peace process.[394]

As I have demonstrated in this Part, the principled approach is likely to build the basis for achieving a more durable peace in peace negotiations and also to provide a powerful new tool for inducing higher levels of armed groups' compliance with their international obligations. These effects of the principled approach are more likely to occur if the principled approach is extended to cover States as well as non-State armed groups.

Conclusion

As natural resources become scarcer and the cost of basic food items rises, many States are likely to struggle even more than some already are to secure their territorial integrity, to guarantee their people's human rights, and to provide their people with security. Under such conditions, non-State armed groups are likely to proliferate, increasing the number of armed conflicts that are characterized by the involvement of multiple armed groups. Thus, the number of armed conflicts that resemble "a patchwork of warlords' fiefdoms"[395] is likely to grow.

Most of the groups in these conflicts will never be capable of completely defeating the governments they challenge. But so long as they are themselves capable of

[394] San José Agreement on Human Rights (26 July 1990); *see* Charles T. Call, *Assessing El Salvador's Transition from Civil War to Peace*, *in* ENDING CIVIL WARS, *supra* note 118, at 383, 383 (describing the elements of the peace process); *see also* Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack (10 March 2002), *available at* http://www.vigilsd.org/resolut/agreemsd.htm#Agreement%20between%20the%20Government%20of%20the%20Republic.

[395] *Scramble for the Congo*, *supra* note 61, at 1.

surviving military defeat by the government, the prevailing “culture of negotiation” suggests that the government is probably going to have to negotiate a peace agreement with them. As a result, the issue of which of these groups gets a seat at the peace negotiating table is likely to become ever more pressing.

Despite these pressing concerns, most of the legal scholarship has so far focused on the substance of the peace agreements and particularly on the controversy surrounding blanket amnesties. As currently framed, the peace vs. justice debate does not contribute to the building of a durable peace or to reducing the level of armed group violations of international humanitarian and human rights law. In fact, the debate appears to have polarized people in the academic field and on the battlefield.

In this paper, therefore, rather than simply taking one of the sides in this well-developed debate, I have argued instead for a principled approach to the peace process. This approach builds a bridge over the dilemma established by the justice vs. peace debate by inserting justice into the peace process itself and by focusing on the process rather than on particular substantive outcomes.

The principled approach proposed above is a radical departure from the current doctrine on peace talks with armed groups. Such a radical departure is called for, I argue, because of the high rate of failure of contemporary peace agreements, the high level of unchecked abuses perpetrated by armed groups, and the features of devastating conflicts such as the one in the DRC. These realities, and the likelihood that they will become more prevalent in the years ahead, highlight the importance of reassessing the mainstream approach to armed group participation in peace processes. Instead of a politicized understanding of the peace process, the principled approach proposed is

grounded on the notion that "[a] peace process based on a commitment to values of democracy, pluralism, human rights and dignity are crucial for the viability of the process, the sustainability of the settlement and the political legitimacy of the compromises required along the way."[396] The millions of people who have died in the DRC and other conflicts like it make it imperative to think much more carefully about how to negotiate a peace in non-international armed conflicts characterized by multiple non-State armed groups.

[396] Peiris, *supra* note 13.