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# Perpetuating Democratic Peace: Procedural Justice in Peace Negotiations

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## Abstract

*Peace agreements often harm disempowered groups such as women, ethnic minorities and the poor, who bear the main burden of compromise. This article argues that international law can and should promote a more equitable allocation of the burden of peace by applying the procedural justice requirements of participation, transparency and reason giving to peace negotiations. Drawing on insights from negotiation literature, public choice analysis, deliberative democracy theory and social psychology, the article explains that such procedural regulation can enhance the democratic quality of peace agreements and, at the same time, also improve peace prospects. It also notes, however, that procedural justice may entail serious costs, including delays and the loss of manoeuvring space for negotiators. The article argues that a careful design of procedural justice methods and mechanisms can significantly reduce these costs, and it makes some concrete proposals to that effect. Finally, the article examines existing international instruments that may introduce procedural justice principles into peace negotiations and assesses their potential and limitations. All in all, this article shows that despite, and also because of, its exceptional nature, peace making should not be left to the exclusive discretion of unaccountable negotiators.*

## 1 Introduction

Peace negotiations represent a unique juncture of national and transnational decision making. Most contemporary peace negotiations are intra-statist, taking place between an incumbent government and a domestic opposition group or between several such groups. However, the outcomes of these essentially domestic processes

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are considerably influenced by external pressures presented to the negotiating parties by third-party governments and international organizations that are involved in the peace process as mediators, donors or peacekeepers ('third party facilitators'). Another transnational element of intra-state peace negotiations is that they often yield consequences for neighbouring and even distant countries and populations that are not involved in the process. Peace negotiations that are not intra-statist are either inter-statist, conducted between two or more governments, or hybrid, positing an independent government *vis-à-vis* a national liberation movement. Like intra-state negotiations, inter-state and hybrid negotiations are often influenced by third party facilitators and may also bear implications for uninvolved foreign stakeholders. At the same time, these negotiations also have an important national dimension in that they implicate the fundamental interests of domestic constituencies and instigate 'level 2' negotiations among them.<sup>1</sup>

Peace negotiations are thus influenced by, and have an influence on, a range of domestic and foreign actors, without there being necessarily a match between those who take the decisions and those who are affected by them. Hence, peace negotiations are susceptible to a double – internal and external – representation deficit. Internally, vulnerable domestic groups may find themselves sacrificing their essential interests in the name of peace because their government has deferred to the demands of more powerful domestic groups or because it yielded to pressures exerted by its counterpart or by third party facilitators. Externally, non-citizens may be required to bear economic, environmental, demographic or other externalities imposed by a peace agreement without having had any influence on its terms. This suggests that compromises that are presented as the 'necessary price of peace' might reflect, in fact, easy rather than indispensable compromises because they come at the expense of under-represented groups that lack opportunities to effectively monitor and react to negotiator choices.

A few examples may help to illustrate this problem. The 1995 Dayton Peace Agreement put forward a new constitution for Bosnia and Herzegovina (Bosnia), which provided for political power sharing between the three major ethnic groups in the country – Bosniaks, Serbs and Croats – which are defined in the Constitution as the 'constituent peoples' of Bosnia.<sup>2</sup> Under this arrangement, Bosnian citizens who did not belong to one of the constituent peoples, referred to in the Constitution as 'Others' (for example, Roma and Jews), were barred from being elected to the presidency and the House of Peoples (the veto chamber of the Bosnian Parliament). When this arrangement was challenged before the European Court of Human Rights, the Bosnian government contended that the exclusion of Others was a regretful but unavoidable consequence of the need to keep Bosnia united while also appeasing local ethno-nationalists. However, the Court opined that the government could devise an

<sup>1</sup> On the two-level game model of negotiations, see Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *International Organization* (1988) 427.

<sup>2</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, UN Doc. S/1995/999, 21 November 1995, Annex 4, preamble, arts IV(1)(a) and V.

alternative power-sharing formula that would guarantee the interests of the three constituent peoples without entirely excluding Others.<sup>3</sup> Arguably, the fact that such alternative options were not seriously considered by the Bosnian government points to the ease with which a government may decide to sacrifice the rights of marginalized groups in order to make peace.

To give another example, in 2001, following the overthrow of the Taliban regime, delegates from all major Afghan factions met in Bonn under UN auspices in order to establish a new government for Afghanistan. The Bonn peace talks were conspicuously under-representative of women and so was the newly established Afghan government, whose members were elected by the peace talks' participants.<sup>4</sup> The exclusion of women from the peace talks and the government was in line with the requirements of various conservative forces within Afghan society.<sup>5</sup> It is not hard to see why the Bonn delegates as well as the UN assigned considerable weight to the demands of these reactionary groups, who might have otherwise spoiled the peace process, while downplaying the interests of Afghan women, who would obviously not resort to violence in order to claim their rights. Yet, sacrificing the rights of women in this way seems to have actually been unnecessary. This may be learned from the fact that initially not even a single woman was invited to Bonn. It was only under pressure from women's organizations that the conveners of the peace talks eventually engaged in an effort to include some women, suggesting that with greater effort more women would probably have been invited.<sup>6</sup>

Moving from internal to external representation problems, the Israeli-Jordanian 1994 Peace Treaty offers a telling example of how peace negotiations can implicate the interests of third parties that take no part in the decision-making process. In this treaty, Israel and Jordan divided the waters of the Jordan River between them while ignoring the right of the would-be Palestinian state, as a riparian of the same river, to a portion of its flow.<sup>7</sup> Since the Palestinians had no status in the Israeli-Jordanian peace process and their international position was weak in general, there was little that they could do to affect the terms of the treaty and secure their future water rights.<sup>8</sup> A year later, when Palestinians and Israelis negotiated the allocation of shared

<sup>3</sup> ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Appl. nos 27996/06 and 34836/06, Judgment of 22 December 2009. The Court ultimately ruled that the exclusion of Others from the government was in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

<sup>4</sup> Only two out of the 25 delegates to the Bonn peace talks were women. Similarly, only two out of the 30-member Bonn-established government were women. See Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc. S/2001/1154, 5 December 2001, 7–8, 12 (listing the names of delegates and of government members).

<sup>5</sup> On the local opposition to the participation of Afghan women in public life, see, e.g., Kandiyoti, 'Old Dilemmas or New Challenges?: The Politics of Gender and Reconstruction in Afghanistan', 38 *Development and Change* (2007) 169.

<sup>6</sup> Neuwirth, 'Women and Peace and Security: The Implementation of UN Security Council Resolution 1325', 9 *Duke Journal of Gender Law and Policy* (2002) 253, at 254–255.

<sup>7</sup> Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan 1994, 2042 UNTS 395, Annex 2.

<sup>8</sup> See Y. Lukacs, *Israel, Jordan and the Peace Process* (1997), at 92–93.

water resources between them under the framework of the Oslo peace process, Israel refused to discuss any possible re-allocation of the Jordan River waters on the grounds that it was bound by its previous agreement with Jordan.

Finally, a hypothetical, but realistic, example can be found in the future Israeli–Palestinian permanent status negotiations, which would probably address, *inter alia*, the problem of the Palestinian refugees who fled from Israel during the 1948 war. Any agreed-upon solution to this problem, whether it is based on repatriation, resettlement or compensation, would have far-reaching implications not only for people living in Israel and Palestine but also for Palestinian refugees living in third countries such as Jordan, Lebanon and Syria as well as for these countries themselves. Yet it is doubtful that these affected parties would play any role in shaping the solution to the refugee problem.

Representation deficits of the kind described above may seriously undermine the democratic legitimacy of peace agreements. Internally, disregard of the interests of less powerful domestic groups violates the basic requirement of a democratic government to represent the collective interests of its citizens in a manner that reflects equal concern for them all.<sup>9</sup> It can also be said to undermine the right to ‘internal’ self-determination, which is understood as the right of all groups within a state to effectively participate in collective self-government.<sup>10</sup> Externally, disregard of affected interests undermines the right of those affected to ‘external’ self-determination – that is, their right to be free from foreign domination and to effectively control their lives through their own national institutions.

To be sure, internal and external representation deficits are not unique to peace negotiations; they exist to various degrees and in various forms in many other settings of national and transnational decision making. Yet this article asserts that representation problems in peace negotiations warrant special attention and treatment for several reasons. First, peace negotiations often implicate the most fundamental security, economic, cultural and religious interests of domestic stakeholders and can also have far-reaching implications for foreign stakeholders. Indeed, few other collective decision-making processes in a nation’s life can be as crucial and all encompassing as peace negotiations. Second, because they involve such high stakes, peace negotiations tend to inflame public passions and are usually considered extremely sensitive. Hence, it has become a common practice to conduct them under a veil of secrecy,<sup>11</sup> which makes it particularly hard for affected stakeholders to ensure adequate representation of their interests.

<sup>9</sup> See, e.g., R. Dworkin, *Taking Rights Seriously* (1977), at 180; Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy’, in S. Benhabib (ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 67, at 69.

<sup>10</sup> See Salmon, ‘Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?’, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 253; Fox, ‘Self-Determination in the Post-Cold War Era: A New Internal Focus?’ 16 *Michigan Journal of International Law* (1995) 733.

<sup>11</sup> See Pruitt, ‘Back-Channel Communication in the Settlement of Conflict’, 13 *International Negotiation* (2008) 37; Wanis-St. John, ‘Back Channel Negotiations: International Bargaining in the Shadows’, 22 *Negotiation Journal* (2006) 119.

Third, peace agreements appear to be relatively immune to judicial review due to national courts' disinclination to intervene in political and foreign affairs in general,<sup>12</sup> and in peace processes in particular,<sup>13</sup> and due to the absence of a right of standing for non-state actors before most international courts. Peace agreements also tend to resist parliamentary review for they are usually brought before the Parliament (if at all) as a 'take-it-or-leave-it' package deal that is unlikely to be rejected on the grounds of disregard of disempowered interests. Fourth, peace agreements often fail to be implemented, leading to renewed bloodshed that is sometimes more widespread and devastating than the pre-agreement violence.<sup>14</sup> It is therefore significant that the same measures that may be used to mitigate representation deficits in peace negotiations can also improve compliance with negotiated agreements.

Despite – and perhaps because of – these unique characteristics, representation problems in peace negotiations have hardly drawn any scholarly attention. This oversight is especially remarkable in view of the growing concern that legal and political scholars have expressed about 'problems of disregard' in other complex national and transnational decision-making processes.<sup>15</sup> In areas as diverse as trade regulation, environmental protection, economic development, municipal administration and labour standard setting, commentators have pointed to the existence of representation deficits in core decision-making processes that undermine the democratic legitimacy of the regimes concerned.<sup>16</sup> They have also offered possible ways to mitigate these deficits. Among other suggested solutions, procedural regulation has stood out as a popular means for ensuring that policy makers give adequate consideration to affected interests.<sup>17</sup> Peace processes, however, have slipped under the radar of this scholarly interest in procedures-based democratic legitimacy. This article aims to fill this gap by examining the potential role of procedural justice (PJ) guarantees as a remedy to representation deficits in peace negotiations.

<sup>12</sup> See, e.g., T.M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs* (1992).

<sup>13</sup> See C. McCrudden and B. O'Leary, *Courts and Consociations: Human Rights Versus Power Sharing* (2013), at 45.

<sup>14</sup> See notes 43–44 in this article and accompanying text.

<sup>15</sup> Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', 108 *American Journal of International Law (AJIL)* (2014) 211, at 211 (referring to the 'unjustified disregard of, and consequent harm to, the interests and concerns of weaker groups' as the 'problem of disregard').

<sup>16</sup> See, e.g., Goldman, 'Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles', 49 *Washington and Lee Law Review* (1992) 1279; Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *AJIL* (1999) 596; Eldar, 'Reform of IMF Conditionality: A Proposal for Self-Imposed Conditionality', 8 *Journal of International Economic Law* (2005) 509, at 521–522; Shkabatur, 'Cities at Crossroads: Digital Technology and Local Democracy in America', 76 *Brooklyn Law Review* (2011) 1413, at 1415–1416; Milman-Sivan, 'The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation', 30 *Comparative Labor Law and Policy Journal* (2008) 801.

<sup>17</sup> See, e.g., Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale Law Journal* (2006) 1490; Stewart, *supra* note 15.

For the purposes of the present study, peace negotiations may be defined as a bargaining process taking place between the parties to an armed conflict, with a view to ending or significantly transforming this conflict.<sup>18</sup> The issues addressed in peace negotiations may include ceasefire, disarmament, territory allocation, resource distribution, institutional reforms, transitional justice mechanisms, and more. In most cases, negotiations are comprised of a sequence of encounters between the parties, which may be accompanied by separate discussions with third party facilitators as well as by internal consultations within each party. While it is hard to determine *a priori* whether, and to what extent, PJ requirements should apply to each of these sub-processes and to each of the topics addressed in them, the general rule should be that the more comprehensive a given encounter is, and the more decisive and permanent its expected outcomes are, the more inclusive and transparent it should be.<sup>19</sup>

It is noteworthy that in some cases the parties to a violent conflict engage in negotiations without the intention of ‘ending or significantly transforming the conflict’.<sup>20</sup> This may be the case, for example, when the conflict at stake is intractable – that is, when the parties’ positions and aspirations are so radically different that they cannot be reconciled at that point in time. In these cases, the most that can be expected from the negotiation process is not to resolve or transform the conflict but, rather, to achieve some strategic objectives such as to strike temporary security pacts or to facilitate military or civil coordination.<sup>21</sup> There may also be cases where the conflict is not necessarily intractable, but the leadership of one or more of the parties obviously enters into negotiations without a real intention to reach an agreement or to comply with it (the reason for entering negotiations in these cases may be, for example, the desire to fend off international pressure or to deviate public attention from other issues). Applying PJ demands to such negotiations – which arguably should not be defined as peace negotiations – would usually be pointless.

The article proceeds as follows. The second part explains how PJ measures can mitigate representation problems in peace negotiations and thus bolster their democratic quality. It also emphasizes the special importance of such democracy-enhancing measures in the context of political transitions. The third part asserts that in addition to its democratic value, PJ can improve peace prospects by promoting rational and cooperative bargaining and by inducing compliance with the peace agreement after it is signed. Against all these advantages, the fourth part examines the risks and problems that may result from applying PJ requirements to peace negotiations and offers some guidelines for designing PJ mechanisms that will strike an appropriate balance between the associated benefits and costs. The fifth part discusses the potential

<sup>18</sup> This definition draws on commonly used definitions of peace agreements. See, e.g., C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (2008), at 53; Yawanarajah and Ouellet, ‘Peace Agreements’, in *Beyond Intractability* (2003), available at [www.beyondintractability.org/essay/structuring-peace-agree](http://www.beyondintractability.org/essay/structuring-peace-agree) (last visited 31 May 2016).

<sup>19</sup> On the sequencing of procedural justice (PJ) measures, see further part 2.B in this article.

<sup>20</sup> See note 18 in this article and accompanying text.

<sup>21</sup> See, e.g., de Vaal, ‘Mission without End? Peacekeeping in the African Political Marketplace’, 85 *International Affairs* (2009) 99; G. Blum, *Islands of Agreement: Managing Enduring Armed Rivalries* (2007).

role of international law in regulating peace negotiation procedures. It presents the few existing international norms that directly or indirectly introduce PJ standards into peace negotiations and discusses possible ways of developing further international peace-making norms while presenting the main challenges and dilemmas that may be involved. The sixth part concludes.

## 2 Procedural Justice as a Remedy for Representation Deficits

This part argues that the incorporation of PJ guarantees into peace negotiations can offer an appropriate response to representation deficits. The core components of such procedural regulation should be participation, transparency and reason giving.<sup>22</sup> The first section briefly elaborates on the substance of each of these components in the context of peace making. The second and third sections explain how adherence to these procedural guarantees can alleviate internal and external representation deficits, respectively.

### A The Core Components

Participation refers to the inclusion of affected stakeholders in the decision-making process. In some cases, participation in peace negotiations can mean sitting at the negotiating table and having actual decision-making power. In other cases, it may merely entail the opportunity to provide input to negotiators but without exercising any decisional power.<sup>23</sup> Another distinction should be drawn between open and closed participation. Open participation means that anyone interested can take part in the decision-making process through such methods as the submission of written comments or the holding of online discussions. Closed participation, by contrast, refers to situations where particular persons or organizations that are assumed to represent the interests of identified groups are specifically invited to participate. As a general rule, closed and decisional participation will be more effective in promoting the interests of those participating than open and non-decisional participation. Yet even the latter can provide important opportunities to less powerful stakeholders to present new information and arguments to negotiators and thus improve the chances that their perspectives will be taken into account.<sup>24</sup>

Transparency requires negotiators to provide information to the general public or to potentially affected stakeholders about, *inter alia*, the demands that they present to the other party, the counter-demands that the other party presents to them

<sup>22</sup> These components are adapted from the elementary requirements for just administrative process accepted in many national legal systems. See Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?', 68 *Law and Contemporary Problems (LCP)* (2005) 63.

<sup>23</sup> Richard Stewart has defined these two types of participation as 'decisional' and 'non-decisional' participation. Stewart, *supra* note 15, at 213–214.

<sup>24</sup> *Ibid.*, at 262.

and the available options for meeting these counter-demands. Transparency is an essential complementary to participation for it allows affected stakeholders to make informed decisions on whether and how they wish to exercise the right of participation. However, even if some groups are not entitled, or do not wish, to participate in the decision-making process, transparency allows them to monitor negotiator performance and respond to unfavourable decisions by, *inter alia*, swaying domestic and international opinion, appealing to courts and (in the case of domestic stakeholders) choosing among candidates at the ballot box. Anticipation of such responses can influence negotiators' choices *ex ante* and make them take weaker interests more seriously into account.

Once they have considered all of the relevant interests and views, negotiators need to somehow rank them and set their negotiation agenda. In making these choices, negotiators should enjoy a considerable range of political discretion. This discretion, however, cannot be unlimited. Reason-giving procedures – which compel negotiators to articulate the considerations underlying their choices – allow affected stakeholders to ensure that negotiators have exercised their discretion in a reasonable and impartial manner. As noted above, the prospects of such *ex post* scrutiny can reduce negotiator *ex ante* motivation to prefer powerful interests.

### **B Remedying Internal Deficits: Procedural Justice and Democratic Transitions**

PJ measures that are based on the principles of participation, transparency and reason giving can reduce internal representation deficits by allowing weaker domestic groups to increase negotiator awareness of their views and by raising the costs for negotiators of ignoring these views. Put differently, they induce negotiators to assign more weight to the interests of unpopular minorities, diffuse majorities and other vulnerable groups *vis-à-vis* the interests of better organized and more influential constituents, thereby altering the level 2 power dynamics of negotiations.<sup>25</sup> At the same time, PJ improves the ability of peace negotiators to resist pressures exerted by the other party or by third party facilitators ('level 1' pressures<sup>26</sup>) to make easy compromises at the expense of weaker groups. Of course, PJ cannot instantly wipe out deeply rooted political inequalities, but it can limit the effects of these inequalities on the outcomes of a core political process that is likely to have far-reaching implications for many groups in society.

<sup>25</sup> As has been extensively discussed in public choice literature, all other things being equal, small, well-organized groups that are able to mobilize themselves to act collectively would usually have greater leverage over political decision makers than diffuse majorities, who tend to be paralyzed by free-riding problems. See M. Olson, *The Logic of Collective Action* (1965); Becker, 'A Theory of Competition among Pressure Groups for Political Influence', 98 *Quarterly Journal of Economics* (1983) 371. At the same time, unpopular minority groups, despite their small size, are usually unable to influence political decision making due to their inability to form coalitions with other groups. This point has been famously stated by the US Supreme Court in *United States v. Carolene Products Co.*, 304 US 144, 152, n. 4 (1938).

<sup>26</sup> See Putnam, *supra* note 1.



Deliberative models of democracy can provide a source of inspiration for the designers of peace negotiations. The concept of deliberative democracy asserts that in order to be legitimate, public decision making should be based on authentic deliberation among those subject to the decision in question.<sup>27</sup> Such deliberation must be governed by the principle of equality. All those affected have the right to take part, and the data, views and proposals that they present are to be treated on their merits and regardless of the power position of the speaker.<sup>28</sup> Ultimately, public deliberation can lead to the building of a consensus on the policy issue under consideration. However, if no consensus is reached, deliberation may be followed by majority vote or by a reasoned decision of an authorized instance. In the context of peace negotiations, this would mean that if level 2 deliberations do not yield consensus over certain issues, negotiators should make the decision by themselves while taking into account all relevant information and views. They may also bring some elements of the peace agreement or the agreement as a whole to a referendum.

Incorporating PJ guarantees into peace negotiations may be particularly important when those who create the new order are not democratically elected representatives but, rather, self-proclaimed or externally appointed negotiators. PJ may also have a special symbolic value when the peace agreement establishes a new democratic regime or introduces democratic reforms into existing political institutions. According to this logic, a constitutive process that includes strong democratic elements may serve as an exemplary model for future collective decision making. By contrast, an attempt to create democratic institutions through a non-democratic process may give rise to an undesirable dissonance or discord.

### C *Remedying External Deficits: Democracy beyond State Borders?*

Creating mechanisms through which all affected citizens can become involved in the shaping of peace policies does not always suffice to secure the democratic legitimacy of peace agreements. When these agreements yield detrimental consequences for foreign stakeholders, the latter should also be entitled to have a voice in peace negotiations. They should be informed about arrangements that might affect them, offered opportunities to present their views and given explanations for decisions taken. Such measures are essential for reducing the external representation gaps that arise when those deciding on the terms of peace are not electorally or otherwise accountable to affected foreigners.

In some cases, informing foreign stakeholders about possible harms and allowing them to present arguments may be required by international norms dealing with transboundary harm. This may be the case, for example, when a peace agreement provides for a development project that might cause significant harm to a neighbouring state<sup>29</sup> or, as in the above mentioned Israeli–Jordanian case, when it regulates

<sup>27</sup> Cohen, 'Deliberative Democracy and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds), *The Good Polity: Normative Analysis of the State* (1989) 17.

<sup>28</sup> Benhabib, *supra* note 9, at 70.

<sup>29</sup> International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), Arts 8–9, 13.

the utilization of a shared water resource in a manner that might be detrimental to another riparian state that is not party to the agreement.<sup>30</sup> In other cases, however, the adverse effects of peace agreements on foreign stakeholders (for example, refugees and the states that host them) may not fall within the scope of existing legal instruments. Yet ignoring foreign interests in at least some of these cases does not seem just. As some scholars have noted, in our increasingly interdependent world, states may be expected to take into account the effects of their domestic policies on foreign countries and populations even in the absence of an explicit legal duty to do so.<sup>31</sup>

In any event, the procedural rights of foreigners should generally be more limited than the procedural rights of domestic stakeholders. Such limitation is justified and even required in view of the need to award priority to internal representation and deliberation.<sup>32</sup> It is also entailed by the pragmatic difficulties that may be associated with identifying possible externalities and approaching potential victims.

### 3 Contribution to Peace Efforts

The primary justification for incorporating PJ standards into peace negotiations is that such standards can promote adequate representation of affected interests and thereby enhance the democratic quality of peace agreements. Another important benefit of procedural regulation is that it can improve peace prospects in at least two ways. First, in the short term, PJ can promote rational and cooperative bargaining, which increases the chances that the parties will reach an agreement. Second, in the long term, PJ can promote compliance with the peace agreement.

#### A Promoting Rational Bargaining

In the behavioural negotiation literature, bounded rationality has long been identified as a major obstacle to reaching agreements. This literature has shown that cognitive biases in the way negotiators interpret information, evaluate risk, experience loss and make self-judgments can manifest themselves in a range of irrational tendencies, including reactive devaluation of concessions offered by the other party,<sup>33</sup> sanctification of the status quo,<sup>34</sup> commitment to an initial course of action<sup>35</sup> and the framing of negotiation as a zero-sum game.<sup>36</sup> Such irrational tendencies may

<sup>30</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, GA Res. 51/229, 21 May 1997, Arts 11–17.

<sup>31</sup> See Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *AJIL* (2013) 295; Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrative Conception of Public Law', 20 *Indiana Journal of Global Studies* (2013) 629; Benhabib, *supra* note 9, at 70.

<sup>32</sup> Benvenisti, *supra* note 31, at 313.

<sup>33</sup> Ross, 'Reactive Devaluation in Negotiation and Conflict Resolution', in K.J. Arrow *et al.* (eds), *Barriers to Conflict Resolution* (1995) 26.

<sup>34</sup> Kahneman, 'The Endowment Effect, Loss Aversion, and the Status Quo Bias', 5 *Journal of Economic Perspectives* (1991) 193.

<sup>35</sup> M. Bazerman and M. Neale, *Negotiating Rationally* (1992), at 9–15.

<sup>36</sup> R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement without Giving In* (2nd edn, 1991).

influence negotiators to refuse to trade concessions against counter-concessions that are objectively worth more to them, hence, bringing negotiations to an impasse. Peace negotiations seem to be particularly prone to such irrational stagnation, given their high stakes and the considerable costs of potential mistakes.

In addition to cognitive biases, peace negotiations may also be hampered by prejudice and negative emotions that form part of the psychological legacies of the violent conflict. In a recently published book, Daniel Bar-Tal shows that societies involved in protracted violent conflicts develop a shared 'socio-psychological repertoire' that consists of negative judgments of, and negative emotions towards, the enemy, including devaluation, dehumanization, hatred, distrust, fear, anger and vengefulness.<sup>37</sup> This socio-psychological repertoire fuels the continuation of the conflict and reduces the parties' motivation to seek a solution. However, even if the parties do meet at the negotiating table, their negative perceptions of each other present a serious obstacle to reaching an agreement. These perceptions may exacerbate negotiator tendency to avoid risk, to frame negotiations as a zero-sum game or to become entrenched in adversarial positions,<sup>38</sup> either because they themselves experience negative emotions that bound their rationality or because they strategically choose to follow public sentiments.

Cognitive and emotional barriers to the peaceful resolution of conflicts are not easy to overcome. Cognitive biases are assumed to be unconscious and intuitive, which makes it difficult for decision makers to detect and avoid them. Negative emotions are also difficult to suppress, especially when they are strong and deeply embedded in collective memory and identity. Nonetheless, it seems that deliberation-promoting negotiation procedures can at least to some extent mitigate the adverse effects of cognitive biases and negative emotions and promote rational bargaining even when the stakes are high and hostility is strong.<sup>39</sup>

How exactly? First, participation and transparency can bring to negotiators' awareness and consideration new information, ideas and perspectives that may help them discern the interests that are at stake and focus on them rather than on 'positions' or 'people'.<sup>40</sup> This effort can reduce the irrational tendency of negotiators to lock themselves into their initial positions even when doing so no longer serves their interests.

<sup>37</sup> D. Bar-Tal, *Intractable Conflicts: Socio-Psychological Foundations and Dynamics* (2013), at 107–111, 156–157, 226–240.

<sup>38</sup> On the contribution of negative emotions to cognitive biases, see Johnson and Tversky, 'Affect, Generalization, and the Perception of Risk', 45(1) *Journal of Personality and Social Psychology* (1983) 20; Forgas, 'Mood and Judgment: The Affect Infusion Model', 117(1) *Psychological Bulletin* (1995) 39.

<sup>39</sup> On the rationality-enhancing potential of public deliberation, see J. Habermas, *The Theory of Communicative Action: Reason and Rationalization of Society* (1981), ch. 3; J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), chs 7–8; Cohen, 'An Epistemic Conception of Democracy', 97 *Ethics* (1986) 26. It is noteworthy that for these writers, rational policy making is not a by-product, but, rather, the main virtue, of deliberation and a precondition for democratic legitimacy.

<sup>40</sup> According to Fisher and Ury, principled negotiation, in which negotiators 'separate the people from the problem' and 'focus on interests, not on positions' is the key to reaching agreement. See Fisher and Ury, *supra* note 36, chs 2 and 3.

It can also limit the effect of negative emotions towards the other party on negotiator choices. Second, public deliberation can generate creative solutions to mutual disagreements and, thus, enlarge the negotiation pie and transcend zero-sum deadlocks. Third, deliberation can redefine or reframe available options and, thus, change negotiator judgment of these options. For example, losses and risks can be associated with continuing the conflict rather than with making concessions, thereby mobilizing negotiators' loss aversion and risk aversion in favour of compromises rather than against them.<sup>41</sup> Finally, public deliberation can make way for the emergence of new collective narratives, sentiments and beliefs that favour peace over war. Exposure to these narratives can encourage negotiators to make concessions that they would otherwise be hesitant to make.

The rationality-enhancing effects of participation and transparency can be further boosted by reason-giving procedures, which compel negotiators to self-reflect on the rationales and considerations that guide them. Such self-reflection can somewhat improve negotiator ability to detect and avoid irrational behaviour. Reason giving thus adds an element of 'internal deliberation' to the public deliberation instigated by participation and transparency.<sup>42</sup> All in all, the triple package of participation, transparency and reason giving can support the consolidation of a rational approach to negotiations, under which negotiations are perceived as an opportunity to resolve the conflict in a peaceful way rather than as the continuation of war by other means.

## B Promoting Compliance

Finding an agreed-upon formula for resolving a violent conflict is an extremely difficult task, but it only marks the beginning of the road to peace. Once signed, the peace agreement has to be endorsed and respected by the various groups comprising the parties' constituencies. Statistics provide cause for concern in this respect, as they show that peace agreements are frequently honoured in their breach.<sup>43</sup> Moreover, experience shows that when a peace agreement collapses, violence may be worse than it had been before it was signed, causing unprecedented death and destruction. Rwanda and Angola are notorious examples, but there are many other cases, including Israel–Palestine, Liberia, Sierra Leone and Sri Lanka, in which new and harmful forms of violence have replaced pre-agreement warfare.<sup>44</sup>

The problem of peace agreement implementation has gained growing scholarly attention in recent years, and several commentators have attempted to identify the factors that

<sup>41</sup> See Tversky and Kahneman, 'The Framing of Decisions and the Psychology of Choice', 211 *Science* (1981) 453 (showing that the reframing of a problem can reverse decision-maker preferences).

<sup>42</sup> See R.E. Goodin, *Reflective Democracy* (2003), ch. 9; Ekeli, 'Constitutional Experiments: Representing Future Generations through Submajority Rules', 17 *Journal of Political Philosophy* (2009) 440.

<sup>43</sup> See, e.g., Downs and Stedman, 'Evaluation Issues in Peace Implementation', in S.J. Stedman *et al.*, (eds), *Ending Civil Wars: The Implementation of Peace Agreements* (2002) 43; Jarstad and Sundberg, 'Peace by Pact: Data on the Implementation of Peace Agreements', in A. Swain *et al.* (eds), *Globalization and Challenges to Building Peace* (2007) 73, at 84–85.

<sup>44</sup> See, e.g., Monica Duffy Toft, 'Ending Civil Wars: A Case for Rebel Victory?' 34(4) *International Security* (2010) 7, at 20.

can improve compliance with peace commitments. These commentators have focused on such strategies as establishing accountable post-conflict political institutions,<sup>45</sup> deepening power-sharing arrangements<sup>46</sup> and investing greater international resources in monitoring.<sup>47</sup> Within these discussions, the impact of peace negotiation procedures on compliance has hardly been explored. Although researchers have acknowledged that the inclusion of potential spoilers in negotiations may be important for peace, both 'inclusion' and 'spoilers' have been defined quite narrowly to refer to the allocation of seats at the negotiating table to parties that might use violence to undermine the agreement.<sup>48</sup> The possible contribution to peace stability of public participation in its broader sense, which includes various channels of direct and indirect deliberation with multiple groups in the society, has not received sufficient attention.<sup>49</sup>

However, such public deliberation actually seems to have serious potential for improving compliance. Studies in social psychology show that when people participate in decision-making processes that affect them and have an opportunity to express their views they tend to perceive these processes as being more fair and legitimate. This, in turn, increases the chances that they will accept the decisions taken and comply with them regardless of their specific substance.<sup>50</sup> The positive impact of PJ on legitimacy and compliance has been confirmed in various types of decision-making settings, including judicial, organizational and political fora.<sup>51</sup> These findings suggest that also in the context of peace negotiations public participation, accompanied by adequate transparency and reason-giving measures, can increase the motivation of those who are not satisfied with the specific terms of the peace agreement to nevertheless respect it. These PJ measures should be directed not only at potentially violent spoilers but also at other affected groups in order to garner the widest possible support for the peace agreement. Arguably, such public support can make the difference between effective and less effective spoiler attempts to resume large-scale violence.

## 4 Problems and Responses

In the previous parts, I have argued that PJ can promote the democratic quality of peace agreements and can also improve peace prospects. However, under a less optimistic

<sup>45</sup> Walter, 'Why Bad Governance Leads to Repeat Civil War', 58 *Journal of Conflict Resolution* (2014) (published online).

<sup>46</sup> Hartzell and Hoddie, 'Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management', 47 *American Journal of Political Science* (2003) 318.

<sup>47</sup> Downs and Stedman, *supra* note 43, at 57–58.

<sup>48</sup> Stedman, 'Spoiler Problems in Peace Processes', 22 *International Security* (1997) 5; Lanz, 'Who Gets a Seat at the Table?', 16 *International Negotiation* (2011) 275.

<sup>49</sup> Two recent exceptions are Wanis-St. John and Kew, 'Civil Society and Peace Negotiations: Confronting Exclusion', 13 *International Negotiation* (2008) 11; Albin and Druckman, 'Equality Matters: Negotiating an End to Civil Wars', 56 *Journal of Conflict Resolution* (2012) 155. Both studies find some correlation between procedural justice in negotiations and the durability of peace agreements.

<sup>50</sup> J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (1975); A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (1988); T.R. Tyler, *Why People Obey the Law* (1990); Pruitt et al., 'Goal Achievement, Procedural Justice, and the Success of Mediation', 1 *International Journal of Conflict Management* (1990) 33.

<sup>51</sup> Lind and Tyler, *supra* note 50.

scenario, PJ might be counter-productive and have exactly the opposite effects; instead of promoting equal representation of all affected interests, PJ mechanisms might be used by powerful groups to further enhance their influence over negotiators. And instead of improving peace prospects, PJ might yield ineffective bargaining and might also create opportunities for spoilers to stall negotiations. The present part discusses these risks and examines possible ways to address them.

### *A Reinforcing Representation Deficits*

PJ mechanisms reduce the costs of monitoring and influencing peace negotiator choices. However, making effective use of these mechanisms is not costless. Engaging in peace negotiations, submitting written comments, analysing available information and using external mechanisms such as international pressure to remedy representation deficits once they are detected – all of these activities require at least some level of political orientation as well as the investment of time and resources. This suggests that members of the most vulnerable and least organized groups in society may lack the ability or the will to make meaningful use of PJ mechanisms. At the same time, well-organized and well-resourced groups might make extensive use of the same mechanisms to further enhance their leverage over negotiators. The result may be that PJ measures aggravate rather than ameliorate representation gaps.

A related concern is that granting procedural rights to foreign stakeholders would come at the expense of domestic stakeholders. Dedicating time to providing information to foreign stakeholders and to receiving input from them leaves less deliberation time for domestic stakeholders, and investing bargaining power in securing foreign interests leaves negotiators with less manoeuvring space to promote domestic interests. These concerns are especially salient when many foreigners can be identified as affected stakeholders or when the foreigners concerned are relatively powerful and well-resourced, as is often the case, for example, with Diaspora groups.

The problem of securing the effective use of PJ opportunities by weaker groups has surfaced in various areas of public decision making, including environmental policy making, urban planning and international development aid, where principles of participation and transparency are relatively widely implemented. Critics have argued that these principles or the ways in which they are translated into practice often create an ‘illusion of inclusion’, whereby PJ serves to mask or even facilitate power abuses rather than eradicating them.<sup>52</sup> Some critics have gone further to offer guidelines and advice on how to work out PJ mechanisms that would be truly empowering. They have mostly focused on PJ strategies or ‘technologies’, suggesting, for example, that decision makers should provide information to the public in an understandable and accessible manner and that they should adopt clear criteria for identifying affected groups.<sup>53</sup>

<sup>52</sup> See, e.g., Few *et al.*, ‘Public Participation and Climate Change Adaptation: Avoiding the Illusion of Inclusion’, 7 *Climate Policy* (2007) 46, at 53; Kothari and Cooke, ‘The Case for Participation as Tyranny’, in Kothari and Cooke (eds), *Participation: The New Tyranny?* (2001) 1; Innes and Booher, ‘Reframing Public Participation: Strategies for the 21st Century’, 5 *Planning Theory and Practice* (2004) 419.

<sup>53</sup> Suiseeya and Caplow, ‘In Pursuit of Procedural Justice: Lessons from an Analysis of 56 Forest Carbon Project Designs’, 23 *Global Environmental Change* (2013) 968, at 975.

Inspired by this architectonic approach to solving PJ deficiencies, peacemakers, peace scholars and international lawyers involved in the regulation of peace processes may begin to develop their own rules and guidelines for the design and implementation of PJ measures in peace negotiations. As a very initial effort towards this end, the following paragraphs mention some considerations that are worth taking into account and offer possible directions for thought and action.

First, in order to ensure adequate representation of all affected interests, it may be desirable to employ in the same peace process both open and closed participation methods. As noted above, open participation methods allow all those potentially affected by a peace agreement to submit written arguments, to participate in online debates or to otherwise offer their input without having been individually solicited to do so. Closed methods, by contrast, target only selected individuals or entities and assign them a seat at the negotiating table or create for them another closed forum for participation. Combining open and closed participation methods in the same peace negotiations can strike an appropriate balance between, on the one hand, the need to offer some opportunity to the many stakeholders that may be affected by the peace agreement to be involved to some degree in the decision-making process and, on the other hand, the need to ensure that the voices of those likely to be most seriously affected are not lost among all of the other voices and are not trumped by the voices of powerful groups who make extensive use of PJ mechanisms. Of course, the choice whether to employ in a certain phase in the peace process closed or open participation methods, or both, should be affected not only by considerations relating to the balance of power between various affected groups but also by pragmatic constraints, as discussed in the following section, such as the need to conduct some discussions (for example, ceasefire negotiations) with greater secrecy and efficiency.

Second, as far as closed participation is concerned, special efforts should be made to include among the participants authentic and accountable representatives of the most vulnerable groups and sub-groups that may be affected by the peace agreement. The process of selecting participants may thus be comprised of three phases. In the first phase, peace negotiation architects should identify the stakeholders that might be adversely affected by the peace agreement and classify them into some groups. In the second phase, negotiators should decide which groups shall be given priority in the assignment of participation rights in each stage of the negotiations (assuming that more affected groups have been identified than can be effectively included in closed discussions). This decision should involve at least two types of considerations, which may need to be balanced. The first type refers to the scope and probability of expected harms and to the size of the affected groups. The greater the expected harm and the higher the number of potentially affected people, the stronger the case for closed participation would usually be. The second type of considerations has to do with the relative political power of the affected groups. As a general rule, disempowered groups and diffuse interests should be given priority over powerful and well-organized groups whose interests may be assumed to be effectively represented already.

In the third phase, negotiators should determine which persons or organizations can appropriately represent the interests of each group entitled to closed participation.

Candidates may include, *inter alia*, community leaders, clerics, and non-governmental organizations (NGOs). The latter can be particularly appropriate representatives of diffuse environmental, economic or security interests, which sometimes have no one else to speak on their behalf. Where possible, group members should be able to choose their representatives by themselves. In any event, the selection of representatives must follow from the recognition that each stakeholder group is comprised of multiple sub-groups with multiple interests. This heterogeneity should be reflected in the selection of representatives, and special attention should be devoted to the proper representation of the most vulnerable interests within each group.

Third, peacemakers should make efforts to remove security, cultural, economic, technological and professional barriers to access to PJ mechanisms. Depending on the particular circumstances of their country and on the particular situation of the various groups within it, peace negotiation designers may have to take special steps to ensure that participation (both open and closed), transparency and reasoning mechanisms are accessible to disadvantaged groups. For example, if security conditions remain unstable by the time negotiations have begun, special protection measures may be required to allow for the safe participation in the peace process of persecuted minorities. The same is true for women in non-liberal societies who might be intimidated for deciding to engage in politics. In Afghanistan, for instance, such protection measures were conspicuously absent, and attacks and threats against women presented a major obstacle to the participation of women in the peace process.<sup>54</sup>

To take another example, when PJ strategies rely heavily on digital platforms, technological assistance or alternative procedures should be made available to those who lack the knowledge or means of using these platforms. It is also important that participating and receiving information will involve minimal or no costs and that information be provided in an understandable and accessible manner. Accumulated experience in other areas such as development and environmental conservation has shown that such measures can be crucial for the effective participation of indigenous peoples and other socio-economically disadvantaged groups.<sup>55</sup>

Fourth, the procedural entitlements of foreign stakeholders should be appropriately delineated so as to award priority to domestic interests. As already noted, foreign stakeholders should generally be granted more limited procedural rights than domestic stakeholders. This means, first, that in terms of the scope and probability of adverse effects the threshold for foreign stakeholder engagement in negotiations may be higher than the threshold for domestic engagement. Second, in the absence of evidence to the contrary, negotiators may assume that the interests of foreign stakeholders are adequately represented by their respective governments. Hence, procedural

<sup>54</sup> See Human Rights Watch, *Between Hope and Fear: Intimidation and Attacks against Women in Public Life in Afghanistan* (2004), available at <http://www.hrw.org/legacy/backgrounders/asia/afghanistan1004/afghanistan1004.pdf> (last visited 30 May 2016).

<sup>55</sup> See, e.g., Minter *et al.*, 'Limits to Indigenous Participation: The Agta and the Northern Sierra Madre Natural Park, the Philippines', 42 *Human Ecology* (2014) 769, at 774–776; Suiseeya and Caplow, *supra* note 53.



rights should usually be extended only to foreign governments and not to their various constituents. In this way, the minimal procedural rights of foreign stakeholders can be given adequate protection without posing a serious threat to the domestic democratic process.

## B Undermining Peace Prospects

PJ measures may arguably be counter-productive not only in achieving their main goal of securing democratic representation but also in realizing their ancillary potential as peace promoters. Thus, instead of facilitating agreement between the parties, participation, transparency and reason giving may further complicate the difficult task facing negotiators and deny them the manoeuvring space that they need in order to find a viable solution to the conflict. Four main concerns arise in this context. The first concern is that PJ measures may be very time-consuming and cause serious delays in negotiations. This prolongation may result in growing domestic scepticism and declining international attention, even to the point of losing the momentum for peace. Moreover, if no effective ceasefire is in place, any further delay in reaching a peace agreement may cost the lives of many people outside the negotiating room.

Another concern is that giving consideration to multiple interests, views and preferences will make it very difficult for negotiators to reach a peace formula that they can expect to be endorsed by their constituencies. The worry is that instead of helping people to find 'mutually acceptable ways of resolving disagreement',<sup>56</sup> deliberation among groups with competing interests or divergent moral judgments will bring differences to the surface and enhance disagreement and conflict.<sup>57</sup> This concern may be all the more salient when multiple interests are actually given a seat at the negotiating table. While there are some examples of successful peace negotiations in which multiple groups were represented at the negotiating table (for example, Afghanistan and Northern Ireland), we should caution that in different circumstances (for example, when there are deeper ideological divisions among participants) multi-participant negotiations might not be so productive.

Yet another concern is that under close public scrutiny negotiators will be very hesitant to make compromises. Until such time as they can present to their constituencies a full peace package deal, political leaders may find it implausible to publicly admit their willingness to make far-reaching concessions. Hence, contrary to the prediction that PJ will promote rational and cooperative bargaining, it may actually lead to stagnation. Moreover, greater transparency limits the ability of negotiators to make manipulative use of the two-level game structure of peace negotiations, which may be conducive to reaching an agreement.<sup>58</sup>

<sup>56</sup> A. Gutmann and D. Thompson, *Democracy and Disagreement* (1996), at 2.

<sup>57</sup> Shapiro, 'Enough of Deliberation: Politics Is about Interests and Power', in S. Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 28, at 31. See also Bell, 'Democratic Deliberation: The Problem of Implementation', in *Deliberative Politics*, at 70.

<sup>58</sup> Putnam, *supra* note 1, at 452–453.

Finally, PJ mechanisms may play into the hands of hard-liners attempting to stall peace efforts. As noted above, it is often claimed that the inclusion of potential spoilers in negotiations may improve compliance with the peace agreement once it is signed.<sup>59</sup> However, the other side of the coin is that the inclusion of spoilers may reduce the chances that an agreement to comply with will be reached in the first place.<sup>60</sup> This concern applies not only to participation but also to transparency mechanisms. Even if spoilers do not receive a seat at the table, real-time information about the progress of negotiations may induce them to resort to violence (or be used by them as a pretext for doing so).<sup>61</sup>

The main answer to these concerns is that meeting adequate standards of PJ does not mean that each and every communication between the negotiating parties or each and every decision they make has to be transparent and inclusive of all interested parties. Translating PJ ideals into real life inevitably involves pragmatic adaptations to political, budgetary, time and other constraints. This is true not only for peace negotiations but also for national policy making, global regulation and judicial processes. In all of these domains, PJ norms are subject to at least some exceptions. These exceptions commonly include security and diplomatic matters, which tend to enjoy broad immunity from transparency and participation requirements.<sup>62</sup> Applying such exceptions to peace negotiations would arguably make the whole procedural regulation project advocated here pointless. However, if we keep in mind that peace negotiations are not only about security and foreign affairs but also about constitution making, self-determination and distributive justice, we may be able to develop a more nuanced approach that allows adequate room for PJ.

Under such an approach, the general requirement from negotiators would be to adhere to basic PJ standards. However, the specific methods as well as the timing and sequencing of participation, transparency and reason giving should be determined in accordance with time, political and other constraints. For example, in order to kick-start the peace process and check each other's willingness to reconcile, the conflicting parties should be allowed to conduct 'back-channel' negotiations whereby the very fact that they talk is kept secret.<sup>63</sup> However, once they agree on the basic terms for negotiating peace and start discussing particular demands and concessions, the parties should shift from back-channel to front-channel negotiations to allow for public involvement and monitoring.

In Northern Ireland, for example, negotiations began with back-channel communications between the British government and the Irish Republican Army (IRA).<sup>64</sup> But as soon as the parties reached agreement on the preconditions for entering talks,

<sup>59</sup> See note 48 in this article and accompanying text.

<sup>60</sup> See Wanis-St. John and Kew, *supra* note 49, at 22.

<sup>61</sup> It is noteworthy that spoiler groups differ from each other in various respects, including their goals, spoiling techniques, powerbases and whether they are strategic- or tactical-level players. These factors should be taken into account when deciding whether, when and how they should be included in negotiations.

<sup>62</sup> Birkinshaw, 'Freedom of Information and Openness: Fundamental Human Rights?', 58 *Administrative Law Review* (2006) 177, at 189; Donaldson and Kingsbury, 'The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications', 9 *Annual Review of Law and Society* (2013) 119, at 123.

<sup>63</sup> Pruitt, *supra* note 11; Wanis St.-John, *supra* note 11.

<sup>64</sup> Dochartaigh, 'Together in the Middle: Back-Channel Negotiation in the Irish Peace Process', 48 *Journal of Peace Research* (2011) 767.

they launched an open and relatively inclusive dialogue that embodied the two governments and 10 local parties whose delegates to the talks were elected in a democratic process.<sup>65</sup> These negotiations, which culminated in a peace agreement approved by referendum, enjoyed considerable domestic legitimacy and established a sustainable peace in Northern Ireland. In the Israeli–Palestinian Oslo peace process, by contrast, back-channel negotiations extended well beyond the pre-negotiation phase and, in fact, continued up to the point when the parties presented to their constituencies a complete agreement.<sup>66</sup> This highly exclusionary and non-transparent process faced strong opposition on both sides and ultimately collapsed into renewed violence.

Even after the parties to a conflict have engaged in front-channel negotiation over substantive issues, they should have discretion to hold some discussions ‘behind closed doors’, meaning that the media and the public cannot enter the room or receive real-time information about the specific contents of negotiations, although they may be aware that negotiations are taking place.<sup>67</sup> However, such secrecy should be reserved for the most sensitive and explosive issues and should not extend beyond the formulation of tentative arrangements to be brought before the public for discussion before they are adopted.

## 5 The Normative Framework

In view of the fact that peace negotiations of all types (intra-state, inter-state and hybrid ones) involve a variety of domestic and international actors, interests and interactions, the task of regulating peace negotiation procedures should be entrusted to international law. While it is beyond the scope of this article to provide a comprehensive account of how exactly international law can fulfil this task, this part offers some preliminary observations on this matter. The first section reviews the few existing international instruments that apply or that may be understood to apply PJ principles to peace negotiations. It argues that although the actual impact of these instruments on peace negotiations is currently limited, they can nevertheless be a source of some optimism since they offer indication that the idea of applying procedural justice constraints to peace negotiations or to other related decision-making processes has already gained some recognition among international policy makers and lawmakers. The second section examines possible ways to further develop international peace-making norms and presents some of the main challenges that such an endeavour may involve.

### A Existing Norms

The idea advocated in this article, namely that affected stakeholders should be able to participate in peace negotiations and receive relevant information, seems to find some recognition in several rules, standards, and recommendations adopted or promoted by

<sup>65</sup> Curran *et al.*, ‘Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina’, 20 *Negotiation Journal* (2004) 513, at 514, 520–521.

<sup>66</sup> A. Wanis-St. John, *Back Channel Negotiation: Secrecy in the Middle East Peace Process* (2011).

<sup>67</sup> Gilboa, ‘Secret Diplomacy in the Television Age’, 60 *International Communication Gazette* (1998) 211, at 219–222.

international bodies. As we will see, the normative status of some of these instruments is not free from doubt, nor is it entirely clear whether and how they can be applied to the different types of actors that are involved in peace negotiations. Moreover, most of these instruments do not explicitly refer to peace negotiations and may be applicable to them only when certain issues (for example, the resettlement of displaced persons) are involved. Nonetheless, these instruments seem to provide an indication of the increasing, albeit still limited, international awareness of the need to discipline peace negotiations (or certain aspects thereof) in one way or another.

The most notable international document that applies procedural justice standards to peace negotiations, and the only one that does so explicitly, is United Nations (UN) Security Council Resolution 1325 on Women, Peace, and Security.<sup>68</sup> Adopted in October 2000, this Resolution stresses ‘the importance of [women’s] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security’.<sup>69</sup> The operative part of this resolution urges member states to ensure increased representation of women in conflict resolution processes at all decision-making levels. While there seems to have been some confusion with respect to the legal status of Resolution 1325, its language indicates quite clearly that it is merely of a hortatory nature and does not create binding obligations for states.<sup>70</sup>

Resolution 1325 has been reiterated and complemented in a series of subsequent UN Security Council resolutions, which together with Resolution 1325 form the backbone of the UN’s Women, Peace, and Security Agenda.<sup>71</sup> Some of these resolutions urge states and other relevant actors to take concrete steps to improve the participation of women in peace processes, including the allocation of earmarked funds for this purpose, the removal of security and socio-economic barriers to effective participation, the collection of relevant data and the development of indicators to track implementation.<sup>72</sup>

Whereas during the first decade after its adoption Resolution 1325 was poorly implemented, the later focus on implementation methods and indicators seems to have borne some fruit.<sup>73</sup> Since 2010, numerous countries have created national action plans to implement Resolution 1325.<sup>74</sup> Regional and international organizations have also made greater efforts to enhance the participation of women in peace

<sup>68</sup> SC Res. 1325 (2000).

<sup>69</sup> *Ibid.*, preamble.

<sup>70</sup> The UN Charter provides that the UN Security Council (UNSC) has the power to make both binding decisions and non-binding recommendations (Art. 39). The terms used in Resolution 1325 (‘calls upon’, ‘urges’) suggest that it belongs to the second group. See True-Frost, ‘The Security Council and Norm Consumption’, 40 *NYU Journal of International Law and Politics* (2007) 115.

<sup>71</sup> SC Res. 1820 (2008); SC Res. 1888 (2009); SC Res. 1889 (2009); SC Res. 1960 (2010); SC Res. 2106 (2013); SC Res. 2122 (2013). Most of these resolutions focus on the problem of conflict-related sexual violence.

<sup>72</sup> SC Res. 1889 (2009); SC Res. 2122 (2013).

<sup>73</sup> See UN Women, *Women’s Participation in Peace Negotiations: Connections between Presence and Influence* (2010); UNSC, Report of the Secretary General on Women and Peace and Security, UN Doc. S/2011/598, 29 September 2011, 8–13.

<sup>74</sup> C. Ormhaug, *OSCE Studies on National Action Plans on the Implementation of the United Nations Security Council Resolution 1325* (2014).

processes.<sup>75</sup> According to recent reports, the representation of women in both negotiating and mediation teams is on the rise.<sup>76</sup>

As noted above, in addition to Resolution 1325, which explicitly addresses peace-negotiating procedures, there are a few other international procedural norms that do not deal directly with peace making but may nevertheless be of relevance to some peace processes. One example is the UN Guiding Principles on Internal Displacement, which provide that internally displaced persons should be able to fully participate in the planning and management of their return or resettlement and reintegration.<sup>77</sup> These Guiding Principles may be invoked when redress for the victims of conflict-induced internal displacement is sought within the framework of peace negotiations. As their name suggests, the Guiding Principles are not binding and are merely intended to provide guidance and advice to policy makers.<sup>78</sup>

PJ standards may also be introduced into peace negotiations through the internal policies of international development aid providers. Under some of these policies, states seeking development aid are required to prepare their development programmes in consultation with local populations who might be adversely affected. The World Bank's Environmental and Social Safeguard Policies, for example, require that borrowing countries submit to the bank detailed assessments of the environmental and social risks of projects proposed for bank financing, referring, among other issues, to adverse effects on indigenous peoples and on potentially displaced persons. Such assessments should be prepared after consultation with affected populations and local NGOs, prior to which the borrowing government must provide all relevant information to the groups with whom it consults.<sup>79</sup> The European Union's (EU) Consensus on Development similarly emphasizes the importance of local civil society participation in decision making relating to development projects.<sup>80</sup> Since it is not uncommon for peace agreements to provide for internationally funded reconstruction and development projects, the increasing emphasis by aid providers on local stakeholder participation in the early stages of the inception of development projects may create an incentive for peace negotiators that wish to benefit from international funding to include such stakeholders in the process.

<sup>75</sup> Swaine, 'Assessing the Potential of National Action Plans to Advance Implementation of Security Council Resolution 1325', 12 *Yearbook of International Humanitarian Law* (2009) 403, at 431.

<sup>76</sup> UNSC, Report of the Secretary General on Women and Peace and Security, UN Doc. S/2014/693 23 September 2014.

<sup>77</sup> UN Secretary General Representative, Guiding Principles on Internal Displacement (Guiding Principles), UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Principle 28.

<sup>78</sup> While some of the principles included in the Guiding Principles arguably reflect established human rights and humanitarian law duties, this does not seem to be the case with respect to the participation of internally displaced persons in relevant decision making. See American Society of International Law and Brookings Institution, *Guiding Principles on Internal Displacement: Annotations* (2008), at 130–131, available at [www.brookings.edu/~media/research/files/reports/2008/5/spring-guiding-principles/spring\\_guiding\\_principles.pdf](http://www.brookings.edu/~media/research/files/reports/2008/5/spring-guiding-principles/spring_guiding_principles.pdf) (last visited 31 May 2016).

<sup>79</sup> World Bank Operational Manual, Operational Policies 4.01 (January 1999), 4.10 (July 2005), 4.12 (December 2001), and 4.20 (March 2003). For further discussion, see Cassese, 'Global Standards for National Administrative Procedure', 68 *LCP* (2005) 109, at 113.

<sup>80</sup> European Consensus on Development, OJ 2006 C 46/01, Art. 4.3.

Moving from ‘soft’ to ‘hard’ international law, an influential instrument of possible relevance to peace negotiations is the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).<sup>81</sup> This Convention requires its contracting parties to take appropriate measures to ensure that those affected or likely to be affected by environmental decision making are able to participate in a meaningful way in the decision-making process and have access to the relevant information. The Aarhus Convention was ratified by the EU and by 46 European and Central Asian states, some of which are involved in, or emerging from, violent conflicts.<sup>82</sup> In the case that one of these states become engaged in peace negotiations that include environmental issues – for example, the allocation and management of natural resources, the amelioration of war-induced environmental harm or the construction of cross-border peace parks – it may find itself under a legal obligation to disclose information and to allow for input from potentially affected stakeholders.

Finally, it can be argued that the need to facilitate citizenry engagement in peace negotiations can be inferred from several international conventions that deal with participation in the conduct of public affairs. To begin with, Article 25(a) of the International Covenant on Civil and Political Rights (ICCPR) provides that every citizen shall have the right ‘to take part in the conduct of public affairs, directly or through freely chosen representatives’.<sup>83</sup> According to the UN Human Rights Committee (HRC), the right to take part in public affairs under Article 25(a) can be satisfied either through direct participation or through the opportunity to choose representatives in free elections. In other words, the HRC holds that Article 25(a) does not establish a self-standing right of direct political participation.<sup>84</sup> This view, however, appears to be problematic, *inter alia*, because it is at odds with Article 25(b) of the ICCPR that establishes the right of every citizen to vote and to be elected at free and equal elections.<sup>85</sup> It may therefore be expected that this position will at some point be revisited by the committee itself or by international or domestic courts that will adopt a broader interpretation of the right to take part in public affairs.

In the meantime, a relatively broad conception of participation can be found in some regional international conventions. The Council of Europe’s Framework Convention for the Protection of National Minorities, for example, provides that ‘[t]he Parties shall create the conditions necessary for the effective participation of persons belonging

<sup>81</sup> 2161 UNTS 447.

<sup>82</sup> The list of ratifying countries and organizations is available at <http://www.unece.org/env/pp/ratification.html> (last visited 31 May 2016).

<sup>83</sup> 1966, 999 UNTS 171, Art. 25.

<sup>84</sup> UN Human Rights Committee, CCPR General Comment No. 25, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 6; UN Human Rights Committee, *Marshall v. Canada*, UN Doc. CCPR/C/43/D/205/1986, 3 December 1991, paras 5.4, 5.5.

<sup>85</sup> For if Art. 25(b) establishes the right of all citizens to participate in free elections, what is the point of acknowledging the very same right in article 25(a)? For similar interpretations of Art 25(a), see Steiner, ‘Political Participation as a Human Right’, 1 *Harvard Human Rights Yearbook* (1988) 77, at 85–86; Fox, ‘The Right to Political Participation in International Law’, 17 *Yale Journal of International Law* (1992) 539, at 555.

to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them'.<sup>86</sup> The Inter-American Democratic Charter declares that '[r]epresentative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry'<sup>87</sup> and that '[p]romoting and fostering diverse forms of participation strengthens democracy'.<sup>88</sup> Unlike Article 25(a) of the ICCPR, the European and American provisions on participation do not use the language of rights and obligations. Moreover, while there is no doubt that participation under these provisions entails more than just electoral participation, the exact nature of this non-electoral participation and the situations to which it should be applied are yet to be elaborated.<sup>89</sup> Nonetheless, these provisions seem to represent an emerging regional consensus regarding the appropriate procedures for democratic decision making, which may bear implications for peace negotiations as a core element of public affairs.

### **B Possible Directions and Main Challenges for Future Development of Procedural Peace-Making Norms**

As we have seen, peace-making procedures are currently being controlled in a rather sporadic and inconclusive manner. The only instrument that explicitly applies PJ standards to peace negotiations is Security Council Resolution 1325, which is non-binding and refers only to one particular group affected by peace agreements, namely women, and only to one element of PJ, namely participation in decision making. The relevance to peace negotiations of other instruments, such as the Guiding Principles on Internal Displacement, the 'good governance' policies of some international aid providers and the Aarhus Convention on environmental matters, ultimately depends on the specific issues that are addressed in each peace process. Finally, while the conventions dealing with participation in public affairs could arguably be understood to introduce participatory requirements into peace negotiations, this interpretation has not yet been validated by any authoritative instance.

Although their actual influence on peace processes has so far been limited, the existing instruments can serve as a starting point for a more robust constraining of peace negotiation procedures. Not only can these instruments be interpreted and implemented in a manner that would increase their relevance to peace negotiations, but they can also be a trigger for the creation of further procedural peace-making norms. Such an endeavour, however, involves various doctrinal challenges and dilemmas,

<sup>86</sup> Framework Convention for the Protection of National Minorities (European Convention) 1995, ETS 157, Art. 15.

<sup>87</sup> Inter-American Democratic Charter 2001 (Inter-American Charter), 40 ILM 1289 (2001), Art. 2.

<sup>88</sup> *Ibid.*, Art. 6.

<sup>89</sup> The wording of Inter-American Charter provisions clearly indicates that they refer to the need to complement electoral participation with other forms of citizenry engagement. In regard to the European Convention, see Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and In Public Affairs, ACFC/31DOC(2008)001, 27 February 2008.

which policy makers and lawmakers ought to address. While a comprehensive discussion of these dilemmas is beyond the scope of this article, it is worth mentioning some of the main questions that have arisen.

The first dilemma relates to the source and status of international peace-making norms. The classic way to develop such norms is to adopt a multilateral convention on peace negotiations. However, given that at present peace making is commonly considered to lie at the heart of sovereign discretion and given that international intervention in peace negotiation procedures is a relatively new idea, states that are likely to be engaged in peace negotiations may be reluctant to join such a convention. A possible way to mitigate or sidestep the potential reluctance of states to constrain their peace-making discretion is to adopt norms that are either non-binding (for example, a multilateral declaration), non-consensual (for example, a UN Security Council resolution)<sup>90</sup> or both (for example, inter-governmental organization- or NGO-generated guidelines, principles, codes of conduct, recommendations and so on). The question arises, however, whether such norms can form an appropriate basis for the regulation of peace negotiations.

Reliance on non-binding and non-consensual international norms has become commonplace in recent years. Some commentators view this as a necessary response to global interdependence and to the growing need for cooperation and coordination at the supra national level, which cannot be met by the slow and politically complicated process of treaty making. While most of these commentators admit that non-consensual norms may raise issues of legitimacy and that non-binding norms may lack the certainty and effectiveness of binding law, they argue that in many cases such norms are preferable to no international regulation at all<sup>91</sup> and that in some cases they may even be preferable to traditional law-making, in particular due to their flexibility and their amenability to detailed and complex standardization.<sup>92</sup>

Other commentators emphasize the role of soft norms in raising awareness of neglected problems and transforming international discourse as a first step towards

<sup>90</sup> Whereas in the past, UNSC resolutions were used to address specific conflicts or situations, in recent years the UNSC has increasingly adopted thematic resolutions addressing issues or concerns that cut across conflicts. Some of these resolutions have the status of binding decisions (for example, SC Resolutions 1373 (2001) and 1540 (2004) on anti-terrorist measures), while others, like Resolution 1325, are merely recommendatory (see note 70 in this article). Following the precedent of Resolution 1325, the UNSC could arguably adopt further resolutions that urge or oblige states to include in peace negotiations not only women but also other affected groups. It is noteworthy that the definition of UNSC resolutions as non-consensual instruments is not intended to deny that these resolutions derive their force from states' consent to confer law-making powers upon the UNSC. However, once such powers have been conferred, and given that the Council is composed of only a fraction of the UN member states, resolutions adopted by the Council can be applicable to member states without their having expressed their direct consent to them. Defined in this way, UN General Assembly (UNGA) resolutions and other inter-governmental resolutions that are adopted by a majority vote can also be described as non-consensual.

<sup>91</sup> See, e.g., Tomuschat, 'Obligations Arising for States without or against Their Will', 241-V *Recueil des Cours* (1993) 195; Helfer, 'Nonconsensual International Lawmaking', 2008 *University of Illinois Law Review* 71.

<sup>92</sup> See, e.g., A.-M. Slaughter, *A New World Order* (2004); Abbott and Snidel, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 421.



the development of hard international norms that would address these problems.<sup>93</sup> On the other hand, some scholars assert that soft norms cause more problems than they solve. They contend that non-consensual legislation poses a serious threat to the sovereign equality of states and to the pluralism of the international system<sup>94</sup> and that non-binding soft norms may undermine the international rule of law.<sup>95</sup> These considerations should be taken into account when assessing the appropriateness of different types of international norms and norm-setting processes in the context of peace negotiations.

Another question to be addressed is who can and should be the subjects of international peace-making norms. As noted above, the principal parties to peace negotiations may include governments, armed opposition groups and national liberation movements.<sup>96</sup> Whereas governments are the traditional subjects of international law, the status of opposition groups and national liberation movements under this system is more complex, and it is not entirely clear whether and how different types of international rules and standards can apply to them. For example, although national liberation movements may be invited to participate as observers in UN General Assembly discussions, General Assembly resolutions cannot be directly applied to them.<sup>97</sup> To take another example, the Vienna Convention on the Law of Treaties (VCLT) seems to acknowledge the power of non-state actors that are considered 'subjects of international law' to enter into international agreements.<sup>98</sup> Yet the VCLT itself does not apply to such agreements, which can make their interpretation and implementation more complicated. Moreover, in practice, non-state actors rarely become parties to international treaties. While it may be possible to apply treaty obligations to armed opposition groups and national liberation movements without them being a party to these treaties, this strategy seems to be prone to legitimacy and effectiveness concerns.<sup>99</sup>

<sup>93</sup> See, e.g., Higgins, 'The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System', in W.E. Butler (ed.), *International Law and the International System* (1987) 21; Palmer, 'New Ways to Make International Environmental Law', 86 *AJIL* (1992) 259, at 269.

<sup>94</sup> See, e.g., Weil, 'Towards Relative Normativity in International Law?' 77 *AJIL* (1983) 413.

<sup>95</sup> See, e.g., Klabbers, 'The Undesirability of Soft Law', 67 *Nordic Journal of International Law* (1998) 381.

<sup>96</sup> See the first part of this article.

<sup>97</sup> According to Art. 10 of the UN Charter, the UNGA can make recommendations only to member states and to the UNSC.

<sup>98</sup> 1969, 1155 UNTS 331, Art. 3.

<sup>99</sup> The Geneva Conventions and their protocols, for example, apply minimum standards of conduct during war to certain national liberation movements and armed opposition groups. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, Art. 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85, Art. 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, Art. 3; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, Art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 1(4) & 96(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609.

In addition to the principal parties, peace negotiations usually also involve third party facilitators (that is, mediators, donors and so on), which are usually foreign states, international organizations and, less commonly but not infrequently, local and transnational NGOs. Given that facilitators often have considerable influence on negotiator decisions, applying accountability-promoting norms to them can be crucial for protecting affected interests. However, doing so may require resort to different measures and instruments than the ones used to control negotiator behaviour, with further differentiation among different types of facilitators.

Of course, the development of procedural justice norms for peace negotiations may involve many other intriguing dilemmas. For example, how much discretion should be left to negotiators with respect to the choice of procedural justice methods and mechanisms? How can procedural justice norms be enforced? Should these norms be complemented by some kind of substantive peace-making norms? These and other questions relating to the incorporation of procedural justice principles into peace negotiations deserve careful consideration. Hopefully, the normative argument presented in the previous parts of this article would convince policy makers and lawmakers that engaging with this challenge would be a worthwhile effort.

## 6 Conclusion

In an era when violent conflicts are hardly ever terminated by decisive military victories, negotiated peace agreements have become the prime means of restoring security in conflict-torn societies. But there is more to peace agreements than settling conflicts. Peace agreements create new states, reform political institutions within existing states, redistribute wealth and redefine collective identities. This article has argued that the transformative nature of peace agreements entails that all groups in society, and, in particular, disempowered groups who often bear the main burden of compromise, should be able to participate in shaping their contents. At the same time, foreign stakeholders who might suffer economic, environmental, demographic or other repercussions as a result of the peace agreement should also be entitled to have a voice in the process.

In reality, however, peace negotiations are usually exclusionary and non-transparent and hardly allow for stakeholder input. This is regrettable, not only because it undermines the democratic legitimacy of peace agreements but also because public deliberation can contribute to the success of peace processes. The development of international procedural peace-making norms can help change this reality. Such an endeavour can build on existing PJ resolutions, guidelines and human rights treaty provisions while elaborating their implications for peace negotiations and further expanding them. Gradually, these legal processes can change the manner in which peace negotiations are conceptualized and conducted and, ultimately, bring us somewhat closer to the Kantian ideal of perpetual peace among democratic societies.