



INTERNATIONAL
COUNCIL
ON **HUMAN RIGHTS** POLICY

Negotiating Justice? Human Rights and Peace Agreements

International Council on Human Rights Policy

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PREFACE

One of the priorities of Norwegian and Swiss foreign policy is to support peace processes. In the past, both countries have hosted a number of peace talks, and each of them has a tradition to act as a facilitator or mediator in peace processes. In this function one must take into account a number of issues in order to secure the foundations for stable and peaceful development. Security, disarmament, trust-building measures, conflict resolution mechanisms, programs for reintegration of combatants, promotion of economic development and many other aspects of a peace process have to be addressed in such negotiations.

'Peace versus justice' can be a real dilemma and the nature of the dilemma is clear: insistence on punishment for flagrant violations of human rights undoubtedly complicates the negotiation process intended to bring a conflict to an end. Conversely, a peace process that concentrates solely on silencing the guns as soon as possible and regardless of the concessions made, almost always creates obstacles for the redress of massive, systematic atrocities. This dilemma becomes in fact a question of offering at the right moment the right combination of incentives (including amnesty for those who are innocent of crimes) to achieve demobilization, disarmament and rehabilitation, without ignoring the legitimate interests and expectations of justice of the victims and society at large. Refusing to consider immoral forms of impunity may also encourage a more responsible approach to peace-making, and eventually lead to a more fair and lasting peace. Insistence on prosecuting abuses can certainly make peace-making difficult. But to achieve a lasting peace it is important to create the favourable conditions at the time of solving the conflict. The peace agreement must allow for the creation of a robust, independent judiciary and institutions that protect the citizens and that are transparent and. their ability to deal with the past is a major test of this credibility and reliability.

We greatly appreciate the fact that the International Council on Human Rights Policy – one of the most competent international think tanks for the development of human rights – took the initiative to analyse the role of human rights in peace processes. We are sure that many state or non-state actors who try to mediate between parties involved in a conflict will find guidance in this report. Every conflict has its specific characteristics. It is not possible to give one simple answer to the question of how peace agreements can be reached. But this report will become a reference work for peace negotiators and others involved in peace processes, because it reflects the different elements, the problems and the opportunities linked to human rights in peace processes, and will therefore contribute to the resolution of conflicts. The Swiss and the Norwegian Foreign Ministries are pleased to support this study.

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Several papers were commissioned to provide background analysis and information for this report.

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INTRODUCTION

Since 1990, peace processes culminating in peace agreements have proliferated mainly in response to internal conflicts. The post cold-war 1990s could be described as the decade of the peace agreement. In that period, over half of all civil wars have terminated in peace accords – more than in the previous two centuries put together. Some are famous, some are less well known. Some appear to have been surprisingly successful: the agreement in South Africa has led to a multiracial democracy and the end of apartheid. Others have been spectacularly unsuccessful: the Israeli-Palestinian accords were not implemented as contemplated, final status negotiations were postponed, and after seven years of reduced conflict the latent conflict broke out with a second intifada in September 2000.

The optimism of the early 1990s, which appeared to herald a new international order and a greater role for international law and co-operation, has given way to pessimism often presented as 'realism'. This is largely because the experience of the last fifteen years has taught the international community, and those who live in conflict situations, that reaching a peace agreement is a beginning and not an end: it is very hard to deliver a peace that lasts beyond a cease-fire, and delivers democracy and tangible benefits to local communities. However, peace agreements continue to be signed and remain one of the main ways of trying to move societies away from violent conflict.

A central feature of many recent peace agreements is their extensive references to human rights: from ratification of international instruments, to the establishment of truth and reconciliation commissions and/or other justice mechanisms, to detailed principles to be respected in holding democratic elections, often believed to be the ultimate step in the transition period.

For many human rights advocates this is a positive trend, not just because they think human rights are important, but because they consider human rights protections as vital to peace-making. At its strongest, the argument for human rights in peace negotiations is an argument for peace to have some content. What is peace if it is not having fair and accountable government, and, when things go wrong, access to a judiciary that does not discriminate or treat people cruelly? Ignoring human rights in the short-term, it is argued, cannot lead to peace in the long-term.

However, peace mediators sometimes believe that the introduction of human rights can be an obstacle to successful negotiations. They argue that human rights can restrict their ability to bring all parties to the table, and to explore all options that might lead to a cease-fire, peace process, and peace. They may view a cease-fire and peace as necessary pre-requisites for better protection of rights, and therefore worth reaching even at the cost of prior principled positions. If the choice is between an imperfect peace and a perfect war,

imperfect peace may be worth a gamble. The process-oriented approach of mediators may make them more complacent as regards compromising 'justice' for 'peace' because they consider that, over time, an initial agreement can change the political climate even so as to enable justice to be delivered.

PEACE AGREEMENTS: A USEFUL FOCUS

The report examines human rights provisions in peace agreements, to shed some light on the role that they have in peace processes more generally. While the focus on peace agreements is somewhat artificial, it provides a clear basis for comparisons between countries. Peace agreements, even if unsuccessful, form at least 'snap-shots' of possible frameworks for moving away from violent conflict. They therefore illustrate the types of 'trade-offs' between the parties to a conflict, as well as (often) the international community, and so illustrate what the ingredients of a possible 'solution' to the conflict might be.

Given that peace agreements are the prevalent focus of negotiations, it is useful to examine how important it is for human rights protections to be in an agreement. Inevitably agreements do not deal with all issues in a conflict. Rather, they deal with some key issues (aimed at achieving or sustaining a cease-fire) and set out a 'road-map' for how further issues can be addressed and resolved, ideally transforming the conflict away from violence and towards other mechanisms of conflict resolution. A useful starting point in considering the role of human rights in peace processes is to look at what is put into agreements, what is left out, and to see whether this matters in terms of what is actually achieved in securing either 'peace' or 'human rights protections'.

HUMAN RIGHTS: A BROAD FIELD

Human rights provisions are found in international and regional human rights conventions, which aim to ensure national protection of human rights, and provide for international supervision. They include civil and political rights, social, economic and cultural rights, and also a right to self-determination (often said to be a 'group' right). They also impose binding legal obligations (sometimes called 'hard law'). They acknowledge that protection of rights is more difficult in a situation of war or "public emergency which threatens the life of the nation"¹ by allowing states to 'derogate' from, or suspend, some human rights commitments during such situations. However, some rights, such as the right to life and the right not to be tortured, are considered so fundamental that they cannot be derogated from under any circumstances. Situations of conflict also call the actions of non-state actors into question, even though the latter are not covered by human rights conventions – unless these actors have some of the forms and functions of governments. While this remains somewhat of a 'grey' area in international law, the actions of non-state groups and state actors in internal conflict are regulated by aspects of international humanitarian law,

which contains basic rights that apply in conflict situations, and establish the state, and in some circumstances individuals, as responsible for violations.²

In addition, 'soft law' standards such as guidelines – while not always legally binding or having the same 'enforcement' mechanisms as human rights conventions – also suggest good practice. An increasing number of these standards exist in the area of impunity, victims of conflict, and institution-building (relating to policing, criminal justice, prosecution standards, and national human rights institutions).

One of the difficulties of discussing the 'human right component' of a peace agreement is that the notion is so broad that it potentially covers much of the agreement. Provisions which do not explicitly mention 'human rights', such as power-sharing governmental arrangements, may in fact address rights issues such as equality. Throughout the report, the term 'human rights' will be used with reference to the rights contained in international instruments, but will exclude detailed discussion of the right to self-determination (because the content of the right is unclear and raises complex legal issues that are beyond the scope of this report).

THE REPORT

Methodology

This report addresses arguments relating to the relationship between human rights and sustainable peace, examining whether human rights provisions assist or hinder the search for peace. It draws on recent peace agreements and identifies which human rights provisions they have included, with some background as to how and why these provisions were included. In considering these arguments, it focuses on three main areas:

Human Rights Frameworks. What human rights frameworks did the agreements provide, and what mechanisms for implementation did they include? To what extent were these provisions important to achieving peace? To what extent were there tensions between establishing human rights frameworks and what was viewed as important during negotiations?

Repairing the Past? Refugees, Other Forcibly Displaced Persons and Land Rights. What does international law provide for? To what extent did peace agreements provide measures aimed at refugees and other displaced persons? To what extent did they provide for land rights? To what extent did these provisions comply with international law? To what extent were they important to achieving peace? To what extent were there tensions between the requirements of international law and what was viewed as possible in negotiations?

Dealing with the Past? Amnesties and Accountability. What does international law provide for? To what extent did peace agreements provide measures aimed at dealing with the past? To what extent did this comply with international law? To what extent were these provisions viewed as important to achieving peace? To what extent were there tensions between the requirements of international law and what was viewed as possible during negotiations?

These three areas were chosen to provide an overview of the types of human rights measures provided for in peace agreements, and also to focus on areas where it is most often argued that there is a tension between 'human rights' and 'conflict resolution'.

The report draws specifically on the following eight case studies, for which background papers were commissioned:³ Bosnia-Herzegovina, Burundi, Cambodia, El Salvador, Guatemala, Mozambique, Northern Ireland and Sierra Leone. The case studies were chosen to provide (a) a geographical spread, (b) examples drawn from a range of types of conflict, and (c) examples that had used different degrees and types of international mediation and different approaches.

These case studies addressed the following questions:

- i. What *references* to human rights principles are made in the peace agreements in question?
- ii. What *substantive protection issues* and which *categories of rights-holders/duty-bearers* are addressed in the peace agreements? What *mechanisms* for protecting human rights are established, in particular with respect to forcible displacement-related issues?
- iii. What human rights based *reform of the justice system* is provided for in the peace agreements? What other measures, such as the establishment of a *national human rights institution*, are contemplated?
- iv. What *monitoring mechanisms* did the agreements establish for the protection of human rights principles?
- v. How were issues of *accountability for the past* dealt with in the peace agreements? What judicial and non-judicial responses were given in the agreements to address human rights abuses?
- vi. To what extent were *human rights deficits* in the agreements subsequently addressed, and to what extent did the agreements' limitations circumscribe the promotion and protection of human rights?
- vii. What were the *arguments for and against* the inclusion of human rights measures in peace agreements, and to what extent can human rights measures be argued to have been necessary to promoting and sustaining the peace process in the long-term?

In addition, four thematic papers⁴ were commissioned on: forcible displacement, national human rights institutions, reform of the judiciary and transitional justice. These aimed to provide information on law and practice in relation to some of the most difficult human rights areas addressed in peace agreements.

Terminology

Peace process. In most conflicts, at any point in time, there are usually on-going efforts to resolve the conflict. However, the term 'peace process' is used here to mean an attempt to resolve the conflict through negotiations between those involved in the violence. It aims at reaching agreement on a cease-fire and framework for resolving the conflict.

Peace agreement. Agreements reached in violent conflicts, or conflicts with potential for violence, which document the main areas of agreement between the military and political protagonists to a conflict, and/or third party international actors.

Human rights. They are the rights found in international and regional instruments, including civil, cultural, economic, political and social rights.

Peace. The report does not use a definitive notion of the term 'peace'. However, two different types of peace are referred to in different places: short-term (negative) peace involving the absence of direct military violence, and long-term (positive) peace involving political, legal, and social structures as an on-going vehicle for conflict resolution, and delivering opportunities to individuals and groups to live their lives to the full. Taken as a whole, the report questions how the term 'peace' might be given some substance.

Purpose of the report

The purpose of the report is to:

- Assess the role of human rights in peace agreements and in sustaining peace.
- Identify particular areas that might be contentious or difficult and clarify the standards that have evolved in relation thereto.
- Lay out the issues and options for consideration by those involved in negotiations, and provide practical examples that could be of assistance to negotiators and/or human rights advocates.
- Assess the advantages and risks of including human rights provisions in peace agreements, and in particular to examine what are often suggested to be clashes between 'principle' (including human rights measures, even if divisive) and 'pragmatism' (reaching agreement without any normative constraints).

The report is addressed primarily to human rights advocates, mediators in conflicts, parties to conflicts, those who work for international organisations, or

Departments of Foreign Affairs, in situations of conflict, and all those who work to prevent or transform violent conflict.

Structure of the report

Part One examines human rights frameworks. Chapter I explains why peace agreements appear to raise particular tensions between requirements of justice and requirements of conflict resolution. The following chapters develop the assessment of the complementarity or tensions between human rights measures and conflict resolution. They conclude by providing guiding questions for a range of actors involved in peace processes, intended to help them frame the key issues at stake, and recommendations intended to inform the drafting of peace agreements. Chapter II examines how different human rights frameworks and mechanisms for implementation were provided in different peace agreements. It explores the reasons why human rights frameworks came to be negotiated in the agreements. Chapter III draws general lessons out of this experience.

Part Two examines two thematic issues. Chapter IV examines the issues of forcible displacement and land rights. Chapter V examines the issue of accountability for past human rights abuses, including the use of amnesty.

Part Three uses insights from the previous chapters to draw conclusions on the role of human rights in peace agreements. Chapter VI briefly examines some general implementation difficulties, with a particular focus on institutional reform. The concluding Chapter VII summarises the report and further discusses the role of human rights in peace agreements, offering some general guidelines and recommendations aimed at further developing this role.

Appendices provide for: An Outline of the case studies (One); Useful web sites (Two); Standards for peace agreements (Three); Further reading (Four).

PART ONE

HUMAN RIGHTS AND PEACE AGREEMENTS

I. COMPLEMENTARITY AND TENSIONS

This chapter sets out the arguments that human rights are either complementary to, or in tension with, the practical imperatives of peace-making. It suggests that this relationship has to be understood within the specific context in which peace agreements have emerged as a conflict resolution tool.

HUMAN RIGHTS AND CONFLICT RESOLUTION

Complementarity

The claim that human rights protections are a vital part of a peaceful society is not a new one. The experience of the Second World War grounded the birth of international human rights law in the assumption that there is a link between human rights abuses occurring within established state borders, and international conflict. The United Nations (UN) Charter, whose objective is to avoid war, refers to the concept of human rights. The Universal Declaration of Human Rights makes a 'just peace' thesis more explicit. Its Preamble claims that "it is essential, if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law".

Tensions

However, the assumption that human rights are vital to peace has recently been challenged. It is argued that the clear normative demands of international human rights law at times run counter to the practical imperatives of peace-making. Thus, the international human rights community was publicly criticised for prolonging the war in the former Yugoslavia by insisting that proposed settlements include requirements of justice.⁵ It was bluntly argued that as a result, "thousands of people are dead who should have been alive – because moralists were in the quest of the perfect peace".⁶ Human rights 'pundits' and negotiators were accused of rejecting pragmatic deals which, with hindsight, were as good as or better than the eventual settlement, because they had judged every peace blueprint in terms of whether it rewarded aggression and ethnic cleansing.

This attack on human rights grew out of the most difficult debate about the connection between justice and peace: how to deal with serious human rights abusers during negotiations and post-agreement? The use of negotiated agreements creates clear tensions between the need to keep all those involved in waging the war involved, and the need to affirm the rule of law in ways that will sustain both it as well as peace in the future.

Moreover, it is argued that human rights and conflict resolution actors use different approaches to the problems of conflict. It is suggested that human rights actors use adversarial approaches, while conflict resolution actors use cooperative approaches; the former prioritise justice while the latter prioritise reconciliation. The clash has also been presented as one between 'conflict managers' and 'democratisers' as summarised in the table reproduced below.⁷

Conflict Managers	Democratisers
Inclusive approach	Exclusive approach
Goal is reconciliation	Goal is justice
Pragmatic focus	Principled focus
Emphasis on the process	Emphasis on outcome
Particular norms and cultures of the societies in conflict	Universal norms endorsed by the international community
Assume moral equivalence	Insist on moral accountability
Conflict resolution is negotiable	Justice is not negotiable
Outside actors should be politically neutral	Outside actors cannot be morally neutral

Conflict managers, it is argued, tend to concentrate on short-term solutions that address the precipitous events that sparked the conflict; they primarily seek a swift and expedient end to the violence. Democratisers tend to concentrate on the longer-term solutions that address the root causes of the conflict; they emphasise for the need for enduring democratic stability. The former see peace as a precondition for democracy, the latter see democracy as a precondition for peace.⁸

Differences in approach of course affect substance, as the question of who to include in negotiations and when to insist on accountability illustrates. Should negotiations with serious human rights violators even take place? Human rights actors, it is suggested, are more likely to push for labelling and accountability as necessary to building a long-term solution. Conflict resolvers are more likely to try to avoid these labels as they may potentially escalate conflict, or limit negotiations. They highlight the importance of including actors that are capable of 'spoiling' a peace process, even if this means including people responsible for gross human rights violations. Peace negotiation practice varies: in Bosnia the negotiations excluded Serbian leaders accused of serious violations, Karadžić and Mladić (but Milošević and Tudjman were included); in Sierra Leone and South Africa, such violators were included. At the stage of drafting a peace agreement, debate often centres around what accountability mechanisms should be contemplated. Parties are unlikely to stop fighting and hand over power if they think that it will lead to their immediate arrest and detention.

UNDERSTANDING THE CONTEXT

It is worth considering the context in which negotiated peace agreements have become more common, as this context has influenced their form. The most obvious structural explanation for the rise of peace agreements is the end of the Cold War. This led to an increase in negotiated settlements for several related reasons.

First, the geopolitical shifts caused by the end of the Cold War enabled solutions to some long-standing conflicts. Resolution of conflicts in such diverse contexts as Central America, South Africa, and even Northern Ireland, have all been linked to the end of the cold war, and the lifting of geopolitical constraints which underwrote many inter-state conflicts. However, the reconfiguration of Cold War geopolitical forces also increased peace agreements by increasing the number of internal conflicts needing resolution. Thus, it created new inter-communal conflicts as borders were re-written, and/or enabled buried or suppressed national conflicts to re-emerge, as some argue the former Yugoslavia illustrates. The 1990s seemed to herald 'internal conflict' as the permanent replacement of international conflict on the world agenda.

Second, the end of the Cold War saw a period where it seemed that there were increased possibilities for international co-operation in resolving conflicts – 'new world order' without the irony. Thus, the UN Charter appeared to be freed up to work as originally intended, as reflected in changes to UN Security Council modalities and peace keeping patterns, and the emergence of new alliances and structures such as regional organisations. The absence of Cold War inter-state tensions focused the international community's attention on conflicts taking place primarily *within* existing state borders. These conflicts accounted for the majority of conflicts in the world, and had some common features: deliberate targeting of civilians as a key tactic; involvement of armed groups operating as loose factions, often without much formal command; mass movements of people; and transnational and regional dimensions.

Third, the end of the Cold War appeared to solidify the 'end of history' and liberal democracy as the 'one-size-fits-all' solution to internal conflicts. This was significant not just to the emergence of peace processes, but to the establishment of common elements to conflict resolution and therefore, peace agreements. 'Internal conflicts' are clearly diverse. They can be defined in three overlapping categories: 'centralist/revolutionary', 'regional/identity' and 'economic/criminal'.⁹ To these varied conflicts a common approach began to emerge. Firstly, a 'big constitutional fix' would be found which would accommodate those who sought power by violent means. In left/right disputes, such as those of Central and South America, this involved moving to democratic elections and the constitutionalisation of power to prevent its abuse. In ethnically divided societies, democracy took on a group rights spin, with the 'constitutional fix' involving ethnically-based territorial divisions (usually falling short of statehood) or power-sharing and cultural autonomy within

unitary states, or indeed a mix of both. Added to these, a raft of human rights measures, and the reconstruction of the key legal institutions needed to deliver them, aimed to provide for accountability through legal checks and balances. These were intended to provide safeguards against abuse of power, which would solidify newly elected democracies as legitimate in a deep sense. In ethnically divided societies human rights measures aimed to ensure the equal treatment of minorities *vis-à-vis* the majority.

These inter-related factors added up to a 'peace escalation' dynamic, wherein peace processes in one situation influenced and added momentum to peace processes in another, with multiple borrowings across processes. For example, the success of the peace process in South Africa led to possibilities elsewhere. The African National Congress supported the peace process in Northern Ireland, influencing the Irish Republican Army and Sinn Féin. Sinn Féin in turn encouraged a peace process in the Basque Country. Similarly, Nelson Mandela became a key mediator in Burundi, and his influence can be seen in the text of the Arusha Peace and Reconciliation Agreement (2000) which stresses human rights. To some extent, the expertise built up within the international community, especially at the United Nations, may have contributed to a common approach to peace-making. Countries developed peace initiatives as key foreign policy objectives. Norway and later Switzerland, for example, as small countries with no colonial past developed profiles as mediators, with Norway having key roles in the Oslo Accords of the Israel/Palestine conflict and the Sri Lankan peace process.

The term 'peace escalation' is, of course, somewhat ironic: as noted, peace processes also proliferated as conflict did. Peace agreements were often associated with population shifts which then created a need for peace processes in neighbouring countries. In the Solomon Islands, for example, a peace agreement in 1999 in the main island of Guadalcanal caused an exodus of Malaitans to the neighbouring island of Malaita which in turn raised tensions between the returning Malaitans and the Malaitans already resident on the island, in a conflict which suggested regional connections to Bougainville and Fiji. The term 'peace escalation' is also ironic given that nearly half of all peace agreements broke down within five years, and up to 90% of the rest entered a limbo of no war no peace, whose evaluation is difficult.¹⁰ Even in those ostensibly successful processes such as South Africa and El Salvador, numbers of deaths in violent crime rival or exceed those of the conflict years, calling for a re-evaluation of what is meant by 'conflict' or 'political violence'.

The current context has radically changed from the early 1990s. In particular, the international community's focus on 'internal' conflicts, and the influence of human rights, may both be weakening. The international community is all too aware of the costs of 'getting it wrong' exposed in Bosnia, Rwanda, and the Middle East, to name a few. Secondly, post 11th September 2001, the force of international law, including human rights law, has come under challenge. Inter-state conflict and the 'war against terrorism' now occupy the central

place in public and legal discourse occupied by 'internal conflict' a decade ago. What impact the 'war against terrorism' will have on local peace-making is still unknown. However, the conditionality of the United States (US) aid to emergency law regimes; the negative effect on face-to-face negotiations of an increased use of 'proscription' of terrorists; and a stronger assumption that state legitimacy always exceeds that of the non-state armed groups, all would seem to militate against compromise peace agreements being negotiated.

Interestingly, however, this changed context does not as yet appear to have caused an abatement of peace agreements which continue to be produced in a wide variety of contexts. Inter-state force has required states and international organisations to later become involved in state-building functions similar to those of peace processes. Furthermore, there are an increasing number of state-affiliated officials becoming involved in conflict mediation, such as those from non-aligned or neutral countries, as mentioned, from neighbours of the conflict country, as well as from regional organisations, such as the African Union and the Commonwealth.

HUMAN RIGHTS AND CONFLICT RESOLUTION REVISITED

The current peace process dynamic produced an approach to conflict resolution that has been perceived to create tension between the requirements of justice and those of peace. This tension is rooted in the following factors:

- Those at the heart of human rights abuses are placed at the heart of a new political dispensation;
- The balance of power at the time of negotiation and in the post-settlement phase determines, to different degrees, the scope and substance of human rights provisions included in the agreement, and affects their subsequent implementation;
- Human rights law has increasingly become the relevant normative framework, laying down specific standards and obligations at a time when compromise has become more common; and
- There has been increased international involvement in conflicts that are predominantly 'non-international'.

Examining these factors a little further is useful to understanding the particular dilemmas that arise between human rights and conflict resolution.

Negotiated agreements. This peace process dynamic has seen the establishment of negotiated agreements between political and military élites as the preferred mode of conflict resolution. Crucially, peace agreements encapsulate compromises between warring factions. This means that the agreements craft a compromise between radically different perspectives on the causes of the conflict and its solutions. By their nature, they attempt to

avoid creating 'winners' and 'losers', and to curtail conflict by offering parties to the conflict an alternative way to achieve some of their goals. In the short-term they aim to establish cease-fires and in the longer-term they aim to move parties away from militarised approaches to conflict, to political and legal avenues for resolving their disputes. As a result, political and military leaders at the heart of human rights violations are typically placed at the heart of the 'new' political dispensation. Furthermore, the human rights provisions in any agreement will be shaped by the balance of power during negotiations, as will their implementation.

Human rights law as a normative framework. As noted, peace processes have used common agreement frameworks in their attempts to resolve conflict: namely a 'constitutional-type' fix, with a 'group rights' element for ethnic conflicts, and human rights machinery as a check on the power of elected politicians. The peace agreement era coincided with an era in which human rights law increasingly came to be accepted as providing a normative framework. This impacted on the claims that parties to conflict made and, in turn, on the design of peace agreements. Human rights law also provided a basis for international concern about what are often considered 'domestic affairs'. This normative framework also touched non-state actors through international humanitarian law, which since the 1990s has increasingly been argued to form a connected framework with human rights law capable of governing situations from outright war to peace.

Together these dynamics have created a series of dilemmas around the extent to which normative standards, such as those dealing with accountability, impact on the attempt to reach compromises between those who have perpetrated violent conflict. What matters can be compromised on? Who does the compromising? Which compromises are legitimate? Human rights law excludes certain compromises, in particular in relation to amnesty, and therefore appears to exclude certain 'deals'.

AN INFORMAL TYPOLOGY OF PEACE AGREEMENTS

Peace processes produce a range of documents that can usefully be classified into four main types: pre-negotiation agreements, interim agreements, framework/substantive agreements, and implementation agreements.¹¹

Pre-negotiation agreements. The pre-negotiation stage of a peace process typically revolves around who is going to negotiate and with what status: 'talks about talks'. These talks aim to get everyone to the table, by providing assurances and guarantees as regards matters such as return of negotiators from exile, or their release from prison; safeguards as to future physical integrity and freedom from imprisonment; and limits on how the war is to be waged while negotiations take place. While ostensibly focusing on practical issues, 'talks about talks' also enable the parties to explore the parameters for resolution

of the conflict in terms of substantive issues. Such agreements often do not include all parties, but are bilateral between some of them; and often remain secret until a later date.

Human rights issues emerge at this stage of the process as confidence-building measures, and a constraint on state power which operates to sustain a broader cease-fire. The following table shows the types of human rights issues which tend to be dealt with at the pre-negotiation stage:

Human rights provisions at the pre-negotiating stage

- Provisions to limit the conflict
- Cease-fires
 - Scaling back of emergency legislation
 - Compliance with humanitarian and human rights standards
 - Monitoring of compliance
- Humanitarian relief to victims of conflict
- Ad hoc addressing of the past
 - (Partial) prisoner release
 - (Partial) amnesties
 - Independent commission to investigate alleged abuses
 - Forms of vetting
 - Measures addressed at helping 'victims'
 - Measures for reconciliation
 - Embryonic and partial truth processes, or provision for future design
- Provision for civil society to become involved in implementation

Interim agreements. In some conflicts parties specifically work to try to reach an 'interim agreement'. The parties may recognise that there is too much division on substantive issues, and may thus move to an interim staging post in an attempt to create a climate for further negotiations. Or the parties may have failed to make progress towards a framework agreement for a comprehensive solution, and therefore, may start to disaggregate the issues in a series of 'interim agreements' as a way of moving forward – as the Israeli/Palestinian interim agreements illustrate. The parties may find it attractive to deal with substantive issues under the label 'interim' so as not to appear to have 'sold out' on deeply controversial issues. This may hold a cease-fire in place and buy time to develop new negotiating positions. This type of dynamic began to move the peace process in Sri Lanka towards an 'interim agreement', although negotiations eventually broke down.

Framework or substantive agreements. Framework/substantive agreements begin to set out a framework for resolving the substantive issues of the dispute: they put in place a 'constitutional fix'. They map out the basic institutions of government, and set in place processes or blueprints for new legal and human

rights institutions. The detail of these institutions may be left to later agreement or legislation. These agreements tend to be more inclusive of the main groups involved in waging the war by military means, and usually are public. The Belfast Agreement in Northern Ireland forms a good example.

Human rights measures here often form part of a broader constitutional framework, aimed at ensuring fair governance and addressing the self-determination or democratisation demands of the peace process. The following table shows the types of human rights issues which tend to be dealt with at the framework or substantive agreement stage:

Human rights provisions at the framework or substantive agreement stage
<ul style="list-style-type: none">▪ Arrangements for access to power and territory relating to the right to self-determination<ul style="list-style-type: none">▫ Provision of a human rights agenda▫ Bills of rights▫ Human rights commissions▫ Other rights-based commissions (land, equality etc.)▫ Reform of policing▫ Reform of criminal justice▫ Reform of judiciary▪ Provision for an agenda for undoing the past<ul style="list-style-type: none">▫ Return of refugees▫ Return of land▪ Ad hoc measures addressed at the past<ul style="list-style-type: none">▫ Prisoner release▫ Amnesties▫ Measures for reconciliation▫ Measures addressed at helping 'victims'▫ Embryonic and partial truth processes or other accountability mechanisms▪ Provision for civil society to become involved in implementation.

Implementation agreements. These agreements take forward and develop aspects of the framework, fleshing out their detail. The Israeli/Palestinian Interim Agreement (Oslo II) filled out and partially implemented the framework in Oslo I; the South African Final Constitution developed and implemented the Interim Constitution. By their nature, implementation agreements involve new negotiations and in practice often see a measure of re-negotiation as parties attempt to in-effect renege on their commitments while asserting that they are complying with the agreement.

Human rights measures at this stage are often focused around the detail of institutional reform, as the institutional mechanisms for delivering rights previously committed to are developed and implemented. The following table

shows the types of human rights issues which tend to be dealt with at the implementation stage:

Human rights provisions at the implementation stage

- Demilitarisation, demobilisation and reintegration
 - Monitoring
 - Peace-keeping
- Taking forward of human rights commitments
 - Establishment of institutions
 - Institutions engage with society and continue to define human rights
- Increased involvement of civil society in human rights agenda (and process generally)
- More measures to deal with past human rights violations and abuses, including perhaps a unified holistic mechanism such as a Truth Commission, and provide reparations

Not all agreements, of course, fit neatly into the above classification. Pre-negotiation agreements often include an 'agenda-setting' element which begins to create the framework for how the process will continue. Agreements which were intended to be substantive, but where a key party was excluded or subsequently reneged, was ousted from power or killed, may in hindsight have played at most a 'pre-negotiation' role to the subsequent negotiations and a new framework agreement. Or an agreement may require to be re-negotiated because it has not worked, as in the case of Sierra Leone, where the 1996 Abidjan Accord was replaced with the similar Lomé Peace Agreement in 1999. New additional agreements may need to be signed as armed groups split into factions who then require inclusion if a cease-fire is to be achieved, as happened in Burundi and Liberia. In addition, some processes follow a different pattern: for example, Guatemala and to some extent El Salvador, produced 'final' agreements that incorporated and reinforced a detailed framework built up agreement by agreement or issue by issue.

Despite its limits, the classification of peace agreements provides a basis for loosely identifying appropriate comparators across the complex documentary trails of different peace processes.

INTERNATIONAL HUMAN RIGHTS LAW

It is also important to understand in general terms the extent to which international human rights law constrains peace agreement negotiations. As noted, human rights conventions do not specifically address conflict situations or peace agreements, although they provide for some special measures for derogation from some rights in a situation of public emergency or conflict. They provide for basic civil, cultural, economic, political and social rights, most of which are

routinely violated in conflict situations. States must decide how they will deliver these rights. Read in conjunction with human rights conventions, a series of soft law standards – on independence of the judiciary, for law enforcement officials and prosecutors, on national human rights institutions (see appendix three) – set out good practice in relation to the institutions that need to deliver these rights.

There have also been some initial attempts by the United Nations to provide guidance on how human rights standards should guide peace negotiations. In 1999 the United Nations Secretary-General issued some Guidelines to his Special Representatives. These have not been published, but apparently dealt with “the tensions between the urgency of stopping fighting, on the one hand, and the need to address punishable human rights violations on the other”.¹² In 2000, the Security Council recommended that peace processes and the implementation of peace agreements be inclusive of women, and address their concerns.¹³ In 2004, the Secretary-General issued a report on Transitional Justice and the Rule of Law, which made a series of recommendations in relation to peace processes.¹⁴ Furthermore, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles on Impunity), also specifically address peace processes, with comprehensive principles relating to transitional justice and institutional reform.¹⁵ In 2005 the UN Commission on Human Rights passed a resolution on Human Rights and Transitional Justice.¹⁶ These different sources provide the beginnings of the articulation of a specific set of normative standards for peace agreements.

COMPLEMENTARITY AND TENSIONS: THE PERTINENT ISSUES

This context indicates why human rights standards and concerns are both complementary to, and in tension with, pragmatic conflict resolution approaches. There are three main areas where this debate comes to the fore.

- **Human rights frameworks.** These offer a way to broker change from a situation of abuse of power, and to address root causes of the conflict. They are the key area in which arguments for the complementarity of human rights and conflict resolution would seem to predominate. However, the fact that such frameworks are to respond to past abuses of power, often means that their implementation and the accompanying institutional reform, operate in a much more politicised and challenging environment than in other settings.
- **Forcibly displaced persons.** Displacement is often a consequence of conflict. While addressing it is vital to resolving conflict, getting it wrong, either by failing to achieve return, or by return of refugees and displaced persons without adequate safeguards, can exacerbate conflict.

- ***Amnesty and accountability.*** These issues often dominate discussion about the tensions between human rights and conflict resolution. It is probably the most difficult area in which to reconcile the demands of justice and the demands of peace-making.

II. FRAMEWORKS FOR PROTECTION

Peace agreements often provide for rights frameworks in the form of bills of rights or incorporation of international conventions. As a corollary of this they often provide for a range of far-reaching institutional reforms, aimed at delivering rights in practice. Thus, law enforcement institutions are reformed in terms of key human rights requirements of independence, equality, ability to protect rights, and accountability. These issues go to the heart of conflicts, where rule of law deficits are among the root causes of conflict. Establishing the rule of law in practice often means reallocating power away from political and military élites, in particular where they have dominated and discriminated in the past.

This chapter examines the types of human rights provisions included in peace agreements, drawing on the case studies (chronologically at the time of signature of the main agreement, in order to facilitate comparisons over time). It focuses on the human rights frameworks and implementation mechanisms that aimed to provide current protection from human rights abuses.

These frameworks are set out below, using three main questions:

- **What** human rights protections were provided for in the peace agreement?
- **How** did the peace agreement provide for these to be achieved in practice? What institutional reforms were provided for?
- **Why** did the parties agree to human rights protections? What role were they to fulfil?

This last question identifies the different dynamics which led parties to agree to human rights frameworks, building a picture of their role: these frameworks address human rights violations and simultaneously provide a 'way of doing business' with regard to peace-making. If parties are to move from conflict, they must have political and legal institutions within which to resolve their disputes peacefully. Human rights standards contemplate the restraint of political power as well as fair and accountable legal institutions. Human rights frameworks can therefore help to establish structures for peace.

CAMBODIA

What? Part three of the Agreement on a Comprehensive Political Settlement on the Cambodia Conflict, one of three Accords forming the 1991 Final Act of the Paris Conference on Cambodia, is explicitly devoted to human rights.¹⁷ It states that all Cambodians shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments. It requires Cambodia to ensure respect for human rights and fundamental freedoms, to adhere to relevant international human

rights instruments, to support the right of citizens to engage in activities aimed at promoting human rights, and “to take effective measures to ensure that the policies and practices of the past shall never be allowed to return”.¹⁸ Foreign signatories meanwhile committed to “promote and encourage respect for the observance of human rights and fundamental freedoms in Cambodia (...) in order, in particular, to prevent the recurrence of human rights abuses”.¹⁹

The human rights provisions were elaborated on in the various annexes to the Agreement. Annex 5, for example, listed principles for a new constitution, including a declaration of fundamental rights and a declaration that Cambodia was to be a liberal democracy with periodic elections and universal suffrage. Annex 3 provided for detailed rights relating to the conduct of free and fair elections.

How? The Agreement gave the United Nations the power to implement it and to directly supervise elections. The United Nations was also given responsibility for fostering an environment conducive to respect for human rights during a transition period that was to last eighteen months.²⁰ The UN Commission on Human Rights was additionally tasked with monitoring the situation after the transition, if necessary through the appointment of a Special Rapporteur who would report back annually to the Commission and General Assembly.²¹ This appointment was formalised in 1993, in the shape of a Special Representative for Human Rights. The UN mission was also made responsible for human rights education, general oversight, investigation of complaints and, where appropriate, corrective action.²² There was also provision in the Principles for a New Constitution for national implementation of human rights, through an “independent judiciary...empowered to enforce the rights provided under the Constitution”.²³

Why? The inclusion of human rights measures in Cambodia indicates the importance of human rights lobbying. Prior to the Paris Accords, none of the Cambodian parties tolerated criticism of their human rights record. Human rights barely featured in the published formal correspondence between them and the UN during the first half of 1990, at a time when the Security Council permanent members were formulating the crucial framework for a comprehensive settlement. They were discussed at the very end of the process that led to the final agreement on the framework to the comprehensive settlement.²⁴ On the crucial question of accountability for past crimes, the language of the Security Council document is vague, referring only to the need to “ensure the non-return to the policies and practices of the past”.²⁵ A November 1990 appeal by Amnesty International to address more fully and more specifically human rights issues appears to have gone unheeded.²⁶

Mention of human rights in the 1991 accords appears to have been significantly influenced by a campaign by the small US-based Cambodia Documentation Commission, a non-governmental organisation comprising Cambodian survivors of the genocide. Working with the support of the US Government

and in co-operation with the State of Cambodia's Prime Minister Hun Sen, the Commission managed to have included in the Paris Accords a pledge by all signatories, including Cambodian parties, to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia, as embodied in the relevant international instruments. At Paris, the US also made a 'unilateral declaration' that it would support genocide trials if the future Cambodian Government decided to conduct them. But, the question of what to do about past crimes of the Chinese-backed Khmer Rouge, remained unaddressed in the Paris Accords.

Despite this important omission, the successful inclusion of human rights commitments and constitutional protection for rights indicate that human rights protections were viewed as important to addressing a core cause of the conflict. This is backed up by the Principles for a New Constitution for Cambodia, which provide that "Cambodia's tragic recent history requires special measures to assure the protection of human rights".²⁷

EL SALVADOR

What? The importance of human rights to the peace process in El Salvador is reflected in the fact that the first agreement signed between the Salvadorian Government and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), was the 1990 San José Agreement on Human Rights. The short Agreement acknowledged the applicability of national and international human rights commitments. The Agreement also provided for protection of life, integrity, security and freedom of the individual, and in particular the elimination of "any practice involving enforced disappearances and abductions". Legal remedies of *amparo* and *habeas corpus* were guaranteed. Rights of freedom of association, expression, and freedom of the press, rights for displaced persons and returnees, guarantees of freedom of movement in conflict areas, and enjoyment of labour rights, were also provided. The language used was accessible and specifically tailored to curbing local forms of human rights violations, rather than repeating international standards. The Agreement covered both the Government and the FMLN, aiming to immediately curtail the violent conflict, while moving to address its core causes. The second half of the Agreement provided for international verification by the United Nations, to an extent unprecedented at that time.

Later agreements focused less on rights frameworks, as these frameworks already existed on paper in national law and ratified international human rights instruments. Rather, they focused on the institutional reform necessary to implementing these frameworks and the rights bolstered in the San José Agreement. The 1991 Mexico Agreements provided for constitutional reform aimed at the army and the judiciary, a new electoral system and a Commission on the Truth. The 1991 New York Agreement further addressed the armed forces, including 'purification' and vetting. It provided that the doctrine of the armed

forces should be consistent with “the principles deriving from the concept of the legally-constituted State government by the rule of law, the primacy of the dignity of the human person and respect for human rights”.²⁸ The country’s first civilian police force was established.

How? The El Salvadorian agreements are striking for the detailed attention they paid to institutional reform aimed at rights protection in the long-term. They aimed to bring the armed forces, civilian police and judiciary under civilian control. As regards the army and police, human rights were made a key principle, and specific oversight mechanisms aimed at ensuring their accountability were provided for, such as supervision by the legislative assembly, an Armed Forces General Inspectorate, and armed forces courts. The agreements aimed at reducing the army and police, including through ‘purification’ and the end of forcible recruitment, and at ending impunity. Various measures were also included to guarantee the independence of the judiciary. In each case, full institutional detail is given in provisions that read like legislation.

Why? The inclusion of human rights as a central component of the peace process illustrates the importance of on-going monitoring during the conflict, and the key role which human rights advocates can play. Salvadorian non-governmental organisations (NGOs), in co-operation with international ones, forced human rights concerns to the centre of public debate, despite severe repression. Both the United Nations and the Inter-American Commission on Human Rights of the Organisation of American States had monitored the situation and stated their concerns. As human rights violations were seen as a key component of the conflict, human rights protections were considered necessary to end the conflict.

However, the commitment to human rights of UN mediators was crucial to ensuring that they were prioritised in the negotiations. A human rights advisor was appointed to the UN team, and human rights and legal experts were invited to a series of confidential consultations which informed the drafting of the San José Agreement. When talks reached an impasse over the most contentious issues such as military reform, human rights emerged as a ‘confidence building measure’. Surprisingly perhaps, both the Government and the FMLN accepted the draft without making major changes, therefore accepting the novel and unprecedented massive *in situ* verification by the UN that “gave the accord teeth and gave credibility to its practical utility”.²⁹

The El Salvador experience also indicates the important facilitative role that human rights measures can play in a peace process. Why did the parties agree to human rights measures when neither had prioritised these, despite the fact that the issues clearly mattered to people on the ground? The human rights agreement gave both of the parties a way to break a negotiating deadlock: neither party wanted to be seen to torpedo negotiations even though they were finding it difficult to move forward on substance. Human rights measures provided enough substance to move the process forward. The Government

may have been motivated by a need to improve its international image, given that the US Congress was threatening to cut military aid unless there was a thorough investigation of the Jesuit murders.³⁰ Some on the right may have been placated by the fact that the FMLN, which they considered the major human rights violator, would also be scrutinised. Human rights provisions enabled the parties to move forward, and to build the confidence that took the peace process towards addressing issues that lay at its heart.

MOZAMBIQUE

What? The 1992 General Peace Agreement (GPA) does not provide an overall human rights framework. However, around the time of negotiations, a new Constitution provided for a bill of rights.³¹ The GPA's main focus was to make sure that the Government and *Resistencia Nacional Moçambicana* (Renamo) maintained their cease-fire, that Renamo became a political party, and that multi-party elections would take place. In provisions dealing with political organisation, some specific associated rights are mentioned, such as: freedom of association, expression (in particular in relation to the media) and political activity, liberty of movement and freedom of residence, return and reintegration of refugees and displaced persons, and a right to vote. The relevant provisions were very detailed, having the appearance of legislation.

There are other passing references to rights. In the section on policing, the GPA specified that the police should perform their duties and functions "strictly in accordance with the spirit and the letter of internationally recognised democratic principles" and must "respect the civil and political rights of citizens, as well as the internationally recognised human rights and fundamental freedoms". A Declaration on the Guiding Principles for Humanitarian Assistance agreed between the Government, Renamo, and the International Committee of the Red Cross (ICRC), was incorporated into the GPA, and provided for immediate protections to ensure free movement of populations and assistance for Mozambicans "wherever they might be".³²

How? Given that there was no overall human rights framework, there were no provisions to enforce it, and no institutional reform was suggested. A Commission comprising the Government, Renamo, the United Nations, the then Organisation of African Unity (OAU), and other countries to be agreed by the parties, was to supervise the cease-fire and monitor respect for and implementation of the agreement. International observers were to ensure the "highest degree of impartiality in the electoral process".³³ The Declaration on Humanitarian Principles delegated co-ordination and supervision to a committee presided over by the United Nations, comprising the mediators and the ICRC.

Why? Mozambique appears to challenge the assertion of a link between human rights and conflict resolution. The absence of a human rights framework in the GPA, reflects a number of factors. First, it reflects the particular circumstances

of Mozambique. The civil war had persisted almost since the inception of the state, and indeed was linked to its decolonisation struggles. Human rights abuses had become a normal part of the political tapestry, and neither of the two actors (*Frente de Libertação de Moçambique* (Frelimo) and Renamo) that came to negotiate in Rome in 1990 had any fundamental orientation to human rights. Second, the absence of a human rights framework has been linked to the cultural specificity of Mozambique. In addition, it should be noted that the claim that the Agreement did not deal with human rights can be challenged. It can be argued that the absence of substantive human rights provisions in the Agreement obscures the fact that human rights frameworks were provided, albeit in a less formal and explicit way, through the assertion of electoral politics and a constitutionalism of which rights were a clear part, as an alternative to violence. Furthermore, there are some suggestions that the past does still require to be dealt with, and indeed local traditional mechanisms have been used to this end.³⁴

BOSNIA AND HERZEGOVINA (BiH)

What? The General Framework Agreement for Peace in Bosnia and Herzegovina, known as the 1995 Dayton Peace Agreement (DPA) provided for a democratic style of government, with periodic elections,³⁵ power-sharing between ethnic groups, and human rights frameworks. Human rights were therefore interspersed throughout the DPA, as part of the democratic framework, with the main provisions found in the Annex dealing with the BiH Constitution.³⁶ This Constitution provided for a human rights framework in the form of incorporation of international standards. The rights and freedoms set forth in the European Convention for Human Rights and its protocols were to “apply directly in Bosnia and Herzegovina” and “have priority over other law”.³⁷ The DPA also incorporated into law international human rights conventions. With the minority situation in mind, the Constitution specifically provided that all rights are to be “secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as (...) religion, national or social origin, association with a national minority, or other status.”³⁸ Another set of rights was provided relating to refugees and displaced persons, which aimed to ensure a right to return home (see further chapter IV).³⁹

How? The DPA established several mechanisms capable of enforcing these rights. Firstly, it provided for a Constitutional Court with jurisdiction over constitutional disputes, including those on rights. In addition, it established a Commission of Human Rights, composed of the Office of the Ombudsperson and the Human Rights Chamber.⁴⁰ The Ombudsperson was given an investigative and screening role with respect to human rights violations, and the Chamber a more adjudicative role. The DPA also set up a Commission for Displaced Persons and Refugees (later changed to Commission for Real Property Claims of Displaced Persons and Refugees).

The Human Rights Agreement⁴¹ also provided that the parties to the DPA “shall promote and encourage the activities of non-governmental and international organisations for the protection and promotion of human rights”.⁴² The human rights bodies were to have members nominated by the Federation, the Republika Srpska, and international organisations, so as to ensuring a balance of ethnic participation and also the mediating input of international members.

Why? Human rights frameworks were given a central place in the DPA for two main reasons. Firstly, to prevent further abuses and to address their legacy. Secondly, because the division of Bosnia and Herzegovina into ethnically defined ‘entities’ was a compromise which the international community hoped would reverse somewhat as people returned home. The focus was on those who left as ‘minorities’ within each entity – hence the emphasis on non-discrimination rights. The intention was to splice the ‘constitutional fix’ by reversing the ethnic cleansing underlying the creation of the entities. While it was the international community who drove the inclusion of human rights frameworks, theoretically at least, there was a reciprocal self-interest between ethnic communities in ensuring that their kin-minorities within the ‘other’ entity were protected. However, the Agreement’s territorial and governmental structures reflected and rewarded ethnic cleansing. The charging of relatively weak human rights institutions with reversing the territorial gains of ethnic cleansing and protecting minorities, can be viewed, more cynically, as saving the face of the international community. This illustrates the point that human rights do not enter agreements as abstract principled commitments, but as part of a complex set of trade-offs between key issues in the conflict.

The link between the DPA’s ethnic territorial divisions and the underlying human rights abuses of the conflict, fuelled the justice v. peace debate outlined in the introduction. To what extent could any just future be built from a fundamentally unjust settlement? To what extent would refusing to enter an unjust settlement have perpetuated conflict? This carried into post-agreement debates over whether pushing for accountability for past abuses would destabilise the fragile peace. Even in this difficult context, however, broad human rights frameworks were not seen as destabilising conflict resolution efforts (even if this was because they were not viewed as very effective). Rather, the difficult question was whether the gap between the comprehensive framework, and the effective protection of human rights, could be bridged. The DPA’s ambiguous stance regarding ethnic cleansing – endorsing or reversing? – and the weakness of enforcement mechanisms, meant that clear difficulties existed from the outset.

The DPA indicates a tension between including the best and broadest number of international standards, and a ‘reality check’ as to whether and how these will be implemented in practice, considered further in the ‘observations’ below. Some of the deficits of the DPA are due to the fact that the negotiation process aimed to set out in one agreement the conditions for a cease-fire and the framework for the long-term future – for which it was impossible to anticipate and tie down every issue. This collapsing of short-term and long-term goals

was necessary because without a clear road-map dealing with territory and government, a cease-fire could not be reached. To be included at all, human rights had to be included at this stage. However, the elite nature of the process, and the fact that the location of negotiations (the US) made them inaccessible either directly or indirectly by civil society, meant that expertise relating to how human rights frameworks could best impinge on local needs was missing. Furthermore, the compromise and ambiguities at the heart of the Agreement and the fact that the entities were ambivalent about their commitments, led to implementation difficulties.

While national human rights institutions were established and given international participation and ethnic balance, the key issue of the judiciary was left unaddressed by the DPA. The Agreement thus incorporates international standards into domestic law, but without providing the necessary changes to the legal infrastructure. These deficits had to be dealt with in the implementation phase by a range of international actors. Some vulnerable groups, such as women, were also ignored in the DPA, and while these deficits were ultimately addressed, the Agreement's silence meant that they were not prioritised, took longer to address, and were more difficult to get funding for.⁴³

The DPA also indicates an instrumental role for human rights frameworks of giving a clear on-going role to the international community with regard to the implementation of an agreement.

GUATEMALA

What? The 1994 Comprehensive Agreement on Human Rights shared some similarities with the Agreement in El Salvador, but also used lessons learnt. Other substantive agreements, framed around the key issues in the conflict, later dealt with other human rights issues, namely: historical clarification with respect to human rights; the identity and rights of indigenous peoples; socio-economic issues; strengthening of the civilian power and the rule of the armed forces in a democratic society; and constitutional reforms and the electoral regime. These agreements provided for detailed measures on human rights and democratic accountability which aimed to extend the human rights framework found in the existing Constitution, including reform of the legal institutions themselves.

The Comprehensive Agreement on Human Rights reaffirmed the applicability of the Constitution and international human rights treaties (although Guatemala had not acceded to key treaty-monitoring mechanisms, an issue not addressed). It aimed to address particular human rights problems, such as disappearances, by providing a clear institutional framework for preventing them, coupled with international verification. It bound not just the Government, but also the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), providing that the insurgency should “respect the inherent attributes of the human being and to contribute to the effective enjoyment of human rights”.⁴⁴ The agreement

provided for specific commitments against impunity, illegal security forces and clandestine machinery; for freedom of association and movement; against military conscription; and protection for human rights defenders.

The measures included are tailor-made to the specific circumstances of Guatemala, rather than in the language of international treaties. The Agreement also provides for compensation and/or assistance to the victims of human rights violations⁴⁵ in the form of protection for the civilian population and also those wounded, captured, or who have remained out of combat.⁴⁶ The issue of reparations is dealt with in other accords.

How? International verification of the Human Rights Agreement was provided for in the form of a United Nations verification mission, whose functions were clearly set out and assented to by the parties. This mission later took over verification of all the accords under the 1996 Agreement for a Firm and Lasting Peace (AFLP). The Agreement also aimed to strengthen the human rights functions of national institutions such as the judiciary, and the Counsel for Human Rights and Public Prosecutor's Office (or Ombudsperson). Subsequent agreements also established temporary human rights mechanisms: in relation to the past, a Commission for Historical Clarification (UN and independent Guatemalan participation); and in relation to indigenous people, three joint implementation commissions on education, participation, and rights relating to land.

Why? The peace agreements indicate an overlap between the main issues in the conflict and human rights issues. However, it is worth noting that the prior Esquipulas II process (involving five Central American presidents), did not mention respect for human rights as part of the way forward. Instead, it focused on attempts to secure democratisation, an end to hostilities, and regional stability. The Esquipulas process contemplated the disarming of insurgent forces as a precondition for direct negotiations, which the governments would then be required to enter into.

However, as the process developed to address substantive issues, human rights issues emerged as important to confidence-building and to changing the situation on the ground. As the weaker party, the URNG saw human rights as addressing substantive concerns and as providing them with legitimate demands in a process which had potential to focus merely on their own unilateral disarmament. Support for including human rights issues came from the UN, elements within the Catholic Church, victims, human rights groups and other civil society organisations, as well as some political parties. The UN and the international community played a central role in shaping the contents of the peace accords.

The strongest opposition to including human rights issues came in general from powerful, hard-line forces in the military and the private sector. The Army held (and still holds) that the guerrillas had been defeated on the battlefield. They were concerned that the accords and their human rights provisions would

not provide the UNRG with a means to increase their military strength or turn military defeat into a political victory. According to the army, the insurgents were the main human rights abusers, and the solution to human rights abuses was to disarm them, declare an end to the conflict, and grant a general amnesty. Some issues were therefore particularly difficult to reach agreement on, such as civil patrols, and the application of humanitarian law.

Civil Patrols. The human rights agreement provisions of freedom of association and movement focus almost entirely on participation in 'Civil Defence Patrols' (PAC), (government-established vigilante forces involving the co-option of non-military villagers). The URNG (as well as church and civil society groups) called for their immediate elimination, while the Government and the army insisted that they could not be disbanded until a cease-fire was in place. Agreement was reached by using ambiguous language: the agreement stopped short of eliminating the paramilitary structures (this commitment occurred at the signing of the AFLP after the insurgency had declared a unilateral cease-fire as a sign of good faith). However, the Government agreed not to form new civil patrols "provided that there is no reason for it to do so",⁴⁷ and the accord tasked the Human Rights Ombudsperson to investigate whether participation was voluntary or not and to follow-up on his findings.⁴⁸ This enabled restraints on civil patrols which moved towards their elimination.

Humanitarian Law. The URNG had insisted since the start of talks on the applicability of the Geneva Conventions, while the Guatemalan Government and the army refused to recognise their applicability to the specific situation of the internal armed confrontation in the 1990s. This was a dispute not just over the status of the conflict, but also over the status of the URNG. As a compromise, the Human Rights Agreement provided for humanitarian law type provisions: an "end to the suffering of the civilian population and to respect the human rights of those wounded, captured and those who have remained out of combat".⁴⁹ However, the accord provided that "these statements by the Parties do not constitute a special agreement, in the terms of Common article 3 of the Geneva Conventions",⁵⁰ thereby recognising the Government and army's wishes not to concede the formal application of humanitarian law, or any form of status to the URNG. The UN, in verifying compliance, informed the parties that they interpreted this language to cover: any attacks against life and personal integrity; hostage taking; attacks on civilian property; summary justice; acts of terrorism; attacks against objects indispensable to the survival of the civilian population; and forced displacement of populations. In this way, the principles of humanitarian law, even though not named as such, were applied to both parties – an approach which the Government was able to accept in practice.

NORTHERN IRELAND

What? The third section of the 1998 Belfast Agreement provides for "rights, safeguards, and equality of opportunity".⁵¹ Rights were thus expected to provide

safeguards against majoritarian abuse of power. The agreement provides for overarching enforceable rights by providing for “complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR)”,⁵² with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule legislation of the local Assembly on grounds of inconsistency. This was implemented in the form of the 1998 Human Rights Act. Provision was also made to move towards a more comprehensive bill of rights, by tasking the new Human Rights Commission to advise on such a bill in the form of a set of ‘add-ons’ to the ECHR, in order to address the “particular circumstances of Northern Ireland”.⁵³ This provided some recognition of the ECHR’s limits during the conflict. In addition, there was provision for an all-Ireland charter of rights to be developed.⁵⁴ While the Agreement also singles out eight rights for affirmation, there was no provision for enforcing these rights.

The Agreement also makes some provision for socio-economic issues, through new policies, such as New Targeting Social Need. It also provided for the mainstreaming of ‘equality’ in public decision-making, through a statutory duty to be imposed on all public bodies to carry out their functions with due regard to the need to promote equality of opportunity between different groups. Finally the Agreement provides for a policy commitment relating to minority languages.⁵⁵

Interestingly, the Agreement also provided for increased human rights frameworks in the Republic of Ireland, to mirror some of those in the North.⁵⁶

How? The Agreement provides for two institutions with an enforcement role. Firstly, the Northern Ireland Human Rights Commission (NIHRC), and secondly an Equality Commission (EC). The NIHRC was given a role of keeping under review the adequacy and effectiveness of laws and practices, making recommendations to government, providing information and promoting awareness of human rights, considering draft legislation, and in appropriate cases bringing court proceedings or providing assistance to individuals to do so. The Equality Commission was given the role of enforcing anti-discrimination legislation, and of implementing the new equality mainstreaming duty. The Republic of Ireland also committed to establishing a Human Rights Commission similar to that in Northern Ireland, with the two commissions to form a Joint Committee on Human Rights.

The Agreement provided for reform of policing and criminal justice as key legal institutions, with a view to providing “a new beginning to policing in Northern Ireland and the island of Ireland with a police service capable of attracting and sustaining support from the community as a whole”.⁵⁷ The new arrangements are to be “based on principles of protection of human rights and professional integrity”.⁵⁸ Rather than laying out a blueprint for policing, the Agreement sets out key principles: professionalism, effectiveness, efficiency, impartiality, accountability, representativeness, and capability of maintaining law and order – to be developed into a blueprint for change by an independent Commission with international representation.

Similarly with criminal justice, the following principles were included: to deliver a fair and impartial system of justice; to be responsible to community concerns; to encourage community involvement; to have the confidence of all parts of the community; and to deliver justice efficiently and effectively. Again, a review with an 'independent element' was established to make recommendations as to how to take these principles forward. The review, however, was not to address emergency legislation which had been at the centre of human rights abuses. Neither was wholesale reform of the judiciary contemplated, although the review was to look at "arrangement for making appointments".⁵⁹

Why? The human rights provisions of the Belfast Agreement reflect the human rights concerns of the minority (Catholic/Nationalist) community and a compromise with the majority (Protestant/Unionist) community which could live with constitutional 'modernisation', much more easily than acknowledgement of past human rights deficits. Accordingly, the human rights matters addressed by the Belfast Agreement clearly respond to the pattern of human rights abuses during the conflict, rather than constituting a general overhaul of human rights provisions. They are presented as 'safeguards' for the new governmental structures.

Lack of agreement on the scope of institutional reform was papered over by agreeing broad principles for institutions, and charging commissions to develop them into reform blueprints. This had the advantage of phasing the peace process into blocks, meaning that not everything had to be included in the text of the Agreement, or fully agreed to at that time. The Agreement created processes for institutional reform in which civil society (who were not structurally present at the talks) could become more involved. However, it had the disadvantage that it left the delivery of reform (or not) largely in the hands of only one of the parties to the conflict – the British Government. Agreement on broad principles also disguised the fact that there was fundamental disagreement between Unionists and Nationalists on the extent to which implementation would require root and branch institutional reform and even new institutions (Nationalist position), or merely some minimal modernisation (Unionist position). Disagreements on the role of human rights were postponed rather than resolved and came to plague the implementation phase of the Agreement. Here, human rights measures were 'watered down' as institutional reform was approached as an attempt to 'modernise' and address management issues of efficiency, rather than an holistic attempt to prevent recurrence of the human rights violations of the past.

SIERRA LEONE

What? Part V of the 1999 Lomé Peace Agreement made substantive provision for humanitarian, human rights and socio-economic rights issues. "The basic civil and political liberties recognised by the Sierra Leone legal system and contained in the declarations and principles of the Human Rights adopted by

the United Nations and the OAU, especially the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights” were to be fully protected and promoted within Sierra Leonean society.⁶⁰ In particular, the right to life, liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association, and the right to take part in the governance of one’s country, were singled out.⁶¹ Provisions were also included on: release of prisoners and abductees; refugees and displaced persons; humanitarian relief; post-war rehabilitation and reconstruction; a special fund for war victims; the special needs of child combatants; compulsory education for the first nine years of schooling; and primary health care.⁶² Other human rights provisions are found in other parts of the Agreement: provisions regarding the elections;⁶³ and restructuring of the armed forces for them to be “able and willing to perform their constitutional role”.⁶⁴ The Agreement also controversially provided for amnesty (see further chapter V).

How? The Lomé Agreement provided for a number of monitoring/implementation bodies, but made no provision regarding the specific supervision of its human rights elements. There were, however, some pre-existing mechanisms. In particular, from 1996 there existed a government-established human rights body, the National Commission for Democracy and Human Rights (NCDHR). A loose coalition of NGOs, the National Forum for Human Rights, was established in 1996. In January 1999, the United Nations had institutionalised a co-ordination framework by establishing a national Human Rights Committee which brought together all NGOs to share information. The Human Rights Committee developed a forum in which to agree common advocacy positions, such as on the issue of combating impunity.

The Committee took on specific monitoring and reporting functions after Lomé. In particular, recognising the lack of dedicated human rights supervision, the Human Rights Committee established a tracking mechanism. It undertook to make periodic assessments on the status of key human rights provisions,⁶⁵ as well as to publicly document steps taken.

Implementation of the provisions relating to ‘prisoners of war and non-combatants’ was to be facilitated by a UN Committee and to involve the participation of the ICRC and NGOs.

The Agreement further made provision for a Truth and Reconciliation Commission (see further chapter V), and a Human Rights Commission (the latter yet to be established), and for human rights education and monitoring by local human rights and civil society groups.

Why? The human rights provisions of Lomé owe something to those of the previous Abidjan Accord, and in particular to the mobilisation of human rights NGOs and local mechanisms during the late 1990s. The dedication to reporting and lobbying on human rights abuses impacted on how the issues for talks came to be framed, forcing human rights onto the table. The presence of human

rights actors at the table (both in negotiation and observer roles), kept up the pressure for these issues to stay on the table.

The inclusion of human rights in the Lomé Agreement was in a large part due to the fact that human rights organisations and mechanisms effectively reported the plight of civilian victims to key decision-makers and publicly, by both the UN and NGOs. This was occasionally supported by high level appeals designed to bring pressure on the combatants.⁶⁶ The human rights community also intervened directly with the parties, although this was more easily done as regards the Government. The human rights community lobbied for any peace agreement to contain clear provisions for the protection and promotion of human rights; and for it not to provide for power-sharing with rebels prior to a general election. At the behest of the Government, the NCDHR convened a national consultative conference on the peace process. This was intended to build national consensus around broad negotiating parameters for future peace talks, and the human rights community played a key role in influencing proceedings. They inserted ideas such as the possible role of a truth and reconciliation commission, the manner in which a peace agreement should address the plight of abductees, and the possible role of a reparations fund for victims of human rights abuses. There was some disagreement about the use of amnesty, although the conference conclusions proposed that the establishment of a truth commission be accompanied by an amnesty.

The leadership of the human rights community were invited to participate at the talks process in an observer status, while the NCDHR was appointed as a government negotiator.⁶⁷ The leader of the government delegation was the Attorney General and Minister for Justice, who had a record of maintaining close and generally constructive contact with the UN human rights team, which was present throughout. The talks established a 'committee for humanitarian, human rights and socio-economic issues' – pre-figuring Part V of Lomé. Observers, such as UN officers and civil society representatives, had little difficulty in practice in engaging with Committee members. The Committee was precluded from dealing with all aspects of the amnesty discussions, which were instead assigned to a political committee. However, although a controversially broad amnesty was provided (see further chapter V), there was at least provision for a Truth and Reconciliation Commission, which kept the issue of impunity alive, to be resurrected later.

BURUNDI

What? The 2000 Arusha Peace and Reconciliation Agreement for Burundi provides a broad constitutional framework and gives human rights frameworks a key role. The package of democratic political institutions, coupled with power-sharing and strong institutionalised human rights protections, are all aimed to work together to address the causes of the conflict, that is, protect the Tutsi minority from genocide and the Hutu majority from exclusion. The 'general

principles' provide that the new order should be "founded on the values of justice, the rule of law, democracy, good governance, pluralism, respect for the fundamental rights and freedoms of the individual, unity, solidarity, equality between women and men, mutual understanding and tolerance among the various political and ethnic components of the Burundian people."⁶⁸

The main human rights framework is a Charter of Fundamental Rights,⁶⁹ which incorporates the key United Nations human rights conventions. In addition, references to specific rights are found throughout the Agreement's protocols, in particular in relation to the right to vote, minority protections, measures against exclusion relating to public administration, defence forces, education and justice, and land expropriation. Protocol III, dealing with Peace and Security for All, also provides for protection for human rights as a key to peace and security.

How? The Constitution is to provide for a full-fledged court system from Constitutional Court and Supreme Court to a *Ubushingantaha* Council (traditional justice at the local level), as well as an Ombudsperson. In addition, reform programmes for policing⁷⁰ and judiciary⁷¹ were provided for. Some of these matters were developed in the 2003 Pretoria Protocol on Political, Defence and Security Power Sharing in Burundi.

Why? The Arusha Accords aimed to address the causes and solutions to the conflict in a comprehensive way through a broad constitutional framework. This resulted from a proactive commitment to human rights mechanisms by the international community. Most Tutsi- and Hutu-dominated parties in Burundi had been both victims and perpetrators of human rights abuses since the 1960s. No party had a principled opposition to the inclusion of human rights in the peace agreement, provided the agreement focused principally on their own rights, essentially the right to representation for the Hutus and the right to security for the Tutsis. This enabled mediators to push the parties to set up human rights mechanisms that would address these matters. By framing these in general terms, they were acceptable to the parties as addressing the other side's wrongdoing but provided a basis from which to require the parties to face their own responsibilities at a later stage. The Burundi process also was interesting in how it involved women. The United Nations Development Fund for Women (UNIFEM) trained and assisted women to act as observers to the peace process.⁷² Each of the nineteen negotiating parties then appointed two women representatives to attend the All-party Burundi Women's Peace Conference, which provided the main peace facilitator, Nelson Mandela, with their recommendations. The resulting Arusha Accord thus contains specific provisions relating to women and gender equality.

III. LESSONS LEARNT FROM PEACE AGREEMENTS

The previous chapter illustrated how parties with polarised positions on human rights reach agreements which include human rights frameworks as a centrally important plank. This chapter examines what this discussion teaches us about the role of human rights in peace agreements, revisiting the question of whether human rights measures facilitate and complement, or are in tension with, conflict resolution. The chapter ends with a set of guideline questions, aimed at framing the key issues for negotiators, human rights advocates, and parties to negotiations.

PEACE AGREEMENTS AND HUMAN RIGHTS: RELEVANT FACTORS

Case studies exhibit key differences which affect how human rights matters were dealt with by the peace agreements, namely:

Differences in human rights abuses. What were the key human rights matters to be addressed? What mechanisms were deemed necessary to address them? What were the respective stances of parties to the conflict with regard to human rights violations?

Differences in international interventions on human rights during the conflict. How good had monitoring been? Had all abuses been reported? How developed was thinking around what it would take to stop them?

Different degrees of internationalisation. What role did the international community have with regard to the conflict? How internationalised was the peace process? How proactive was the international community on human rights issues?

Different internal dynamics as regards the role of human rights. How strong were the internal dynamics for peace? How were human rights viewed during the conflict? Were they particularly argued for by 'one side' more than another, and was there any common ground? How strong was civil society, and what was its position as regards human rights protections? What was the legal cultural background of the country, and to what extent was there faith in 'rule of law-based' solutions?

Different 'solutions' to the conflict. In what ways did the peace agreement give the protagonists to the conflict access to power? What role were human rights to play with respect to restraint of power? To what extent did human rights mechanisms in-effect reallocate power?

OBSERVATIONS AND ANALYSIS

Human rights frameworks and mechanisms to implement them are very often included in peace agreements. This indicates a strong complementarity between human rights and conflict resolution. Human rights frameworks are often included as a constraint on power as part of a package providing for constitutionalism and government by law. These frameworks are viewed as important by at least one party to the conflict or the international community, because they aim to prevent the types of violations and abuses that characterised the conflict, and also because they provide vehicles for non-violent conflict resolution which will sustain cease-fires and build peace. Virtually all the framework peace agreements studied here incorporated human rights frameworks. With respect to those which did not, there were pre-existing human rights frameworks technically still in force. Here agreements often asserted aspects of those frameworks as important to the peace process, or focused on the institutional reforms necessary to enforcing them.

Human rights frameworks emerge as an attempt to curtail or limit the manifestations of violent conflict, and also because they address core causes of conflict. They offer a 'way of doing business' between parties trying to achieve compromise on structures of governance by providing safeguards against abuse of power, and assurances that all parties will be treated fairly.

Different actors and factors can drive the inclusion of human rights in a peace agreement. While human rights may be important in ending conflict, this does not automatically lead to human rights issues being addressed in negotiations, as their absence in the early Esquipulas process in Central America illustrates. Nevertheless, case studies indicate the following ways in which human rights come to be included in peace agreements.

One party being concerned with human rights protections. Human rights became important to reaching agreement in Northern Ireland because they were important to the Catholic/Nationalist population. In Guatemala, the URNG's insistence that human rights violations were central to the conflict meant that any inclusive peace process had to address human rights. In these cases, the *internal* dynamics to the conflict meant that one of the parties brought them to the table and insisted on them being addressed as part of any settlement. South Africa illustrates how both parties may be concerned about human rights, but for quite different reasons: the apartheid government sought human rights protections in view of their minority status once their political superiority had gone, while the liberation movements sought human rights institutions as part of multi-racial democracy which would dismantle and redress the systemic discrimination of apartheid.

The role of human rights advocates during the conflict and the negotiations. Case studies reveal the importance of local and international human rights advocates, from both NGOs (as exemplified by El Salvador and Guatemala)

and inter-governmental organisations, to ensuring that human rights issues are on the peace process agenda. Sierra Leone illustrates the importance of on-going monitoring of abuses and on-going insistence on redress, to the shape of the settlement and its on-going development and implementation.

The role of mediators. Because many negotiation processes only involve military and political élites, it is often up to international mediators to directly place human rights issues on the table – especially when civil society does not have a strong voice or has few avenues for inputting in the talks processes. This was the case in Burundi and Cambodia. However, the role of the mediator remains crucial to the inclusion of human rights even when human rights issues are being pushed by civil society or one party, as in El Salvador and Guatemala, especially where power imbalances exist between the parties. International negotiators can be assisted by good relationships with local and international NGOs. The example of Sierra Leone indicates the value of developing such relationships throughout both conflict and negotiations, and of having human rights advocates actually at the table (here as ‘observers’).

There are strong examples of the role of human rights frameworks in de-escalating conflict and providing a context for negotiations at the pre-negotiation stage. The assertion of human rights frameworks together with monitoring can play an important ‘pre-negotiation role’ in limiting the conflict and building confidence in the peace process. The cases of El Salvador and Guatemala indicate how a tailor-made human rights agreement at an early stage of a process, coupled with a strong international monitoring and enforcement mechanism, can help to create a context for further peace negotiations. In Northern Ireland, addressing discrete human rights matters, for example a Tribunal to examine ‘Bloody Sunday’, helped to build the confidence of the Catholic/Nationalist community in the process.

The role and acceptance of human rights is understood differently by parties to the conflict. Where agreement is reached under international pressure, it is often required that negotiated solutions move in a ‘liberal democratic’ direction as typified by elected legislatures and a bill of rights. National institutions for protecting rights, reform of the justice apparatus, and incorporation of international standards, flag a move towards democratic legitimacy. While motivated by an understanding of human rights as capable of addressing some of the causes of the conflict, this may in practice amount to the imposition of a ‘one-size-fits-all’ solution to human rights, which results in a gap between peace agreement provisions and practice. The case of Cambodia illustrates this to some extent.

Where the internal dynamics of the conflict drive the peace process, as in Northern Ireland, human rights protections come to be written into an agreement as responsive to the substantive issues in the conflict, and in particular the demands of the party in opposition to the state. However, human rights provisions only come to be incorporated in the text of the agreement if both

parties agree to their inclusion. This may lead to different interpretations of what 'implementation' requires which again means that difficulties in making these provisions effective will arise.

There is surprisingly little controversy over either the inclusion of human rights, or what rights to include. General rights frameworks often do not threaten the interests of the parties. Thus, in Burundi and Cambodia, the international community had little difficulty in getting the parties to agree to broad human rights frameworks. Where human rights are included due to the particular concerns of one party to an agreement, acceptance by an opposing party is often secured by using the general language of human rights instruments or previous national provisions. In Guatemala, the human rights agreement included the language of humanitarian law, even though its formal application was not agreed upon as the government feared that this might concede status to the URNG. This enabled international monitoring of what were in essence humanitarian law commitments.

However, to some extent, the absence of controversy over the inclusion of human rights may reflect differences in how the parties anticipate human rights will be implemented. Agreement on basic human rights principles framed in general terms can mask and postpone disagreement in the application of human rights in practice. In Northern Ireland, opposing parties' consent on general rights language, including for institutional reform, masked disagreement about implementation, and the extent of reforms required. As human rights mechanisms operate to constrain power, they may be resisted by those whose power is to be constrained. This needs to be anticipated as a feature of the post-agreement landscape.

Peace agreements are often much weaker in their human rights enforcement mechanisms. Without mechanisms to enforce them, human rights frameworks can remain paper commitments. Many agreements do establish some mechanisms for implementation. Typically these include new institutions, in particular national human rights institutions. However, there is often little specification regarding how these should operate, and what responsibility the government has for enabling them to function. The broader reform of a judiciary is often not addressed. This not only weakens human rights provisions, but can leave a core cause of the conflict (rule of law deficits) unaddressed. Some agreements have however focused particularly on key institutions, for example those of Central America. Human rights agreements in El Salvador and Guatemala, for example, focused on detailed reform of military and policing structures.

Violations by state and non-state entities may engage different legal standards, and peace agreement provisions may need to be tailored to address both. Human rights conventions can be used to address state accountability. However, their application to non-state groups may be less clear: they may simply not apply, or their application may be highly contestable.

States will often have been reluctant to concede that international humanitarian law applies. This means that to address non-state groups peace agreements will often have to use specially designed standards and mechanisms.

The cases of El Salvador and Guatemala provide examples of human rights agreements designed to address both state and non-state violations and abuses. While in both instances the state was the main perpetrator of human rights violations, by also addressing abuses committed by non-state actors it was possible to secure the agreement of state forces who had resented the international community's focus on their own human rights compliance. As a practical matter the agreement then enabled both sides to be monitored. In many cases, however, addressing non-state groups often raises issues around their status (states often being concerned that applying accountability standards to non-state groups can give them a 'government-like' legitimacy).

CHOICES FOR NEGOTIATORS

The difficulty for mediators with regard to designing human rights frameworks lies less in a tension between human rights and conflict resolution, than in how best to achieve effective frameworks:

- To what extent should human rights provisions aim to address a broad range of institutional reforms, or sketch out broad principles?
- To what extent should mediators push for the inclusion of a broad human rights agenda aimed at wholesale institutional reforms?
- To what extent should this be left to the future and more locally-owned processes?

The following discussion sets out five related choices for mediators, which all raise the same central question: **how far should an agreement go in its institutional provision, and what should it leave for the future?**

On one hand, a peace agreement forms a unique opportunity to establish a broad human rights framework. Matters which are left out of an agreement, such as reform of the judiciary, may be left out of the post-agreement political landscape. A failure to specify detail, including timetables and mechanisms, may result in parties being able to evade implementation.

On the other hand, it is impossible to deal with all human rights matters in a peace agreement. Indeed, given the exclusive nature of many processes, it is often undesirable to deal with institutional detail in the absence of the full range of relevant input, including that of civil society and human rights NGOs. Attempting to negotiate the detail of institutional reforms may result in key issues being held hostage to the correlation of forces at the negotiating table. This may make a degree of open-endedness desirable in agreement texts.

The central choice between comprehensive provisions, and provisions which can be later developed, is not entirely an open one. Parties to the conflict will often have to find a balance between what can be agreed with opposing parties as well as an attempt at relationship building, however tentative, and what compromises can be 'sold' to their own constituency and will achieve their goals in practice. As regards third party mediators, there is often limited space to manoeuvre between positions of the parties and the mediator's own goals and opinions.

The following suggests some strategic choices to be made in the search for creative ways to incorporate a human rights agenda in a peace agreement.

1. Aspirational or judiciable. To what extent should human rights frameworks be aspirational (setting down broad principles to be developed) and to what extent should they be judiciable (enforceable in courts)? While human rights provisions are often both aspirational and judiciable, frequently in negotiating a substantive peace agreement there is a balance to be struck between including a relatively detailed framework for human rights protections – the best possible set of standards – and ensuring that the framework is realistic enough to have some clear enforcement prospect.

2. International or tailor-made standards. To what extent should negotiators incorporate international standards wholesale, and tailor-made human rights provisions aimed at particular problems? There are advantages to both approaches. International standards have a ready-made legitimacy: they are internationally accepted, they use a language that is neutral as between the parties to a conflict, and the state may already be bound by many of them. Furthermore, in providing already-drafted standards, they can be brought into a peace agreement without the need for drawn-out processes of negotiated development. Incorporating international standards can create a strong framework which can be developed and enforced domestically over time.

However, incorporating a wide range of standards without any reference to how they will affect existing law and practice, is unlikely to have much practical effect. The language of rights without the practice of rights can foster a cynicism in the longer-term. Rights should not remain an internationally-imposed framework. Rather, they should be a practical part of the local legal and political culture. In situations where one party has antipathy to the 'internationalisation' of a peace process, this can assist them in popularising their resistance to implementing rights. Furthermore, in cases where broad human rights frameworks have existed throughout the conflict, but not been implemented, human rights provisions can often usefully focus on 'bringing some rights home' through detailed tailor-made provisions. The cases of El Salvador, Guatemala, and to a lesser extent Mozambique, were all cases where national and international human rights frameworks technically existed, but where more detailed provisions were needed to address particular problems, such as disappearances (El Salvador and Guatemala), and political organising and elections (Mozambique).

These examples indicate that often there is not a direct 'either-or' choice between aspirational and judiciable rights. Detailed tailor-made provisions can be designed for particular problems, and in particular aim to stop abusive practices in the short-term. Long-term needs can begin to be sketched out by providing a framework which is initially aspirational, and establishing processes of institutional reforms aimed at moving towards the protection of rights in practice. These long-term frameworks can be established either by listing the relevant standards and 'incorporating' them domestically, or by affirming the role of international human rights law more generally as a framework.

3. International or domestic enforcement. Related to this is the question of who should enforce human rights? Ratification of international conventions brings traditional international forms of enforcement. However, many peace agreements also provide for more detailed international enforcement (see further in chapter VI). This can include specific tasks for particular international organisations, such as the ICRC's involvement in prisoner release in Mozambique; or international participation in domestic justice systems, such as 'hybrid' courts or commissions in Sierra Leone.

The role of the international community can be short-term and 'once-off', or longer-term and more developmental. Peace agreements often provide for broad principles to be fleshed out by international commissions.

International enforcement will often be crucial to implementing a peace agreement, including its human rights provisions, particularly in the short-term before the peace is 'won'. However, in the longer-term the international community is unlikely to sustain its energy, will and resources, and enforcement will require strong national processes and infrastructure. This choice points to a need for international enforcement to build local capacity. This has often proved very difficult. In Guatemala, El Salvador and Sierra Leone issues of lack of co-operation, or even competition, emerged between international and national institutions. International actors need to have clear strategies as to how their intervention is to build national capacity.

Another clear limitation to international enforcement is the difficulty it poses for an agreement's domestic legitimacy. This difficulty can become very acute where international enforcement lasts for long periods of time, with little emerging domestic capacity, and where there is a gap between international and local human rights priorities. Domestic enforcement is often a clear goal of peace agreements. It can sometimes also be surprisingly effective in the immediate short-term, even in difficult circumstances. The National Human Rights Commission in Sri Lanka produced some very useful human rights monitoring reports in a difficult cease-fire period where they had limited leverage or legitimacy, particularly with regard to the Liberation Tigers of Tamil Eelam (LTTE) (although they made it clear that they could not make substantial inroads in addressing the problems and that international monitoring was required). In Afghanistan, the National Human Rights Commission has made

important interventions, especially with regard to transitional justice which the international community has largely feared to touch.

4. Outline or detail. A related dilemma concerns whether institutional reform should be provided for by broad principles for reform, or whether negotiators should make more detailed institutional provisions.

Outlines and processes of development are often provided because:

- They are easy to agree on as a political matter – the generality of their language makes disagreement more difficult;
- They are easy to agree on as a practical matter – full institutional development may not be possible in negotiations where a clear timeline for reaching an agreement package is important;
- The development of principles and outlines enables a broader spectrum of civil and human rights NGO participation;
- Full detail is undesirable, where negotiations do not involve civil society and would result in political ‘horse-trading’ rather than coherent and principled design; and
- Principles and outlines leave room for change and evolution.

Belfast Agreement, Northern Ireland (broad principles and outlines)

The participants believe it essential that policing structures and arrangements are such that the police service is professional; effective and efficient; fair and impartial; free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices; and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms. The participants also believe that those structures and arrangements must be capable of maintaining law and order including responding effectively to crime, to any terrorist threat and to public order problems. A police service which cannot do so will fail to win public confidence and acceptance. They believe that any such structures and arrangements should be capable of delivering a policing service, in constructive and inclusive partnerships with the community at all levels, and with the maximum delegation of authority and responsibility, consistent with the foregoing principles. These arrangements should be based on principles of protection of human rights and professional integrity, and should be unambiguously accepted and actively supported by the entire community.

An Independent Commission will be established to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed framework of principles reflected in the paragraphs above and in accordance with the terms of reference at Annex A. The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than summer 1999.

Detail can usefully be provided for, where:

- The detail is necessary to reaching agreement – without the security of having pinned matters down in detail, parties will not agree.
- The detail is necessary to changing a practice which needs change in order to move the process forward.
- The past experience of an institution's functioning has pointed to particular areas of reform which can usefully be spelt out.

San José Agreement on Human Rights, El Salvador (detailed provisions)

The full guarantee of the freedom and the integrity of the person requires that certain immediate measures be taken in order to ensure the following:

- No one may be arrested for the lawful exercise of his political rights;
- An arrest may be made only if ordered by the competent authority in writing and in accordance with the law, and the arrest must be carried out by officers who are properly identified as such;
- Anyone arrested must be informed while the arrest is being made of the reasons for the arrest and must be apprised without delay of the charge or charges against him;
- No one shall be placed under arrest as a means of intimidation. In particular, arrests shall not be made at night, except in the case of individuals caught *in flagrante delicto*;
- No one in custody shall be held incommunicado. Any person who has been arrested shall have the right to be assisted without delay by legal counsel of his own choosing and the right to communicate freely and privately with such counsel;
- No one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

5. Final or open to revision. Mediators face clear choices as to how far to pin down reform in an agreement, and how far to leave human rights matters open to further revision. This choice may be more critical than it first appears. As noted, agreement on broad principles and outlines may mask more fundamental disagreement over the role and place of human rights. Implementation of peace agreements nearly always involves attempts by the parties to renegotiate the framework agreement, or at least to skew it in their preferred direction. Human rights measures, such as those aimed at accountability of military structures, in essence often reallocate power in a deep and real way. They will often, therefore, be at the centre of on-going disputes over a peace agreement's implementation. General outlines and principles are likely to be more susceptible to the 'stop and start' political uncertainties of the post-agreement landscape than clear mandatory clauses.

However, clear mandatory clauses may limit further institutional development, giving rise to arguments that any matters not included in the text of an agreement cannot be addressed. It can be useful to include a clause stating that provision for specific human rights commitments does not preclude further development of human rights frameworks consistent with international law.

'Sunrise' Clause – a strategy to manage the tension between specific and categorical standards and the need for future development.

In El Salvador, the detail of the early human rights agreement explicitly acknowledged its own limitations in the following 'sunrise' clause:

It is the understanding of the Parties that this Agreement does not exhaust the consideration of the item on human rights and that it is, accordingly, a partial agreement. With the exception of points that are immediately applicable the Agreement is subject to the package of political agreements to be negotiated for the achievement of the initial objective envisaged in the Geneva Agreement.

GUIDELINES

The following questions are set out as useful to considering the potential role of human rights in peace agreements.

1. What have been the human rights violations and abuses of the past: both the systemic abuses at the heart of the conflict, and those which have grown up around the patterns of conflict?
2. To what extent are these on-going?
3. What are the patterns of human rights violations and abuses, with respect to different groups? How have women been affected?
4. What human rights protections are required in the short-run?
 - a. What immediate action is required (monitoring, verification, intervention)? Who can do this?
 - b. How could parties be moved towards limiting human rights and humanitarian law violations?
 - c. What temporary mechanisms might be useful for enforcement of human rights frameworks?
 - d. Could an initial human rights agreement be useful?
 - e. What practical matters would help prevent further abuses?
 - f. What kind of international intervention is required?
5. What human rights protections and institutional reforms are required in the long-run?
 - a. What matters require to be pinned down in the agreement in order to ensure the possibility of long-term reform?
 - b. What longer-term institutional development will be necessary?
 - c. Can these developments be signalled in any agreement?
 - d. In what ways should existing institutions be strengthened?
 - e. Where new institutions are to be established, what safeguards are necessary to ensure their establishment?
6. To what extent is international participation necessary to ensure implementation of human rights frameworks?
 - a. What options are available?
 - b. Are the parties and civil society aware of the possible options?
 - c. How difficult will it be for parties to agree to international involvement?
7. How are local actors to be involved, and local ownership of justice institutions to be fostered?
8. How is the involvement of women to be secured?

9. What is the relationship between international enforcement and building-up of local capacity?
10. What permanent mechanisms for enforcement will have to be established?

RECOMMENDATIONS

General

Human rights measures should be considered as a potential tool for limiting the conflict and building confidence at the pre-negotiation stage of an agreement.

Human rights frameworks aimed at current and future protections should be included or reinforced in peace agreements. Basic lists of core rights can be useful, paving the way to a comprehensive national bill of rights and ratification of all major human rights treaties. These frameworks can build on any existing local and international commitments. Embryonic and basic commitments at a pre-negotiation stage can be developed in later agreements.

Human rights frameworks should take international law and best practice as their starting point.

Human rights provisions may usefully address conflict-related instances of abuse, using specifically-tailored language. The reasons for particular failings in enforcing human rights should be analysed and addressed through more specific human rights provisions and/or stronger enforcement mechanisms.

The particular needs of women and of vulnerable groups should be specifically addressed in human rights frameworks. The more detailed an agreement's human rights provisions, the more provisions for women and vulnerable groups need to be specifically detailed.

Human rights frameworks should have clear enforcement mechanisms which meet international standards. This includes national human rights institutions and where necessary reform of key legal institutions.

Where there have been difficulties with enforcing human rights frameworks, mechanisms of international enforcement should be considered, and a full range of options explored.

Where international enforcement is relied on, there needs to be a clear plan for how the latter is to build local capacity for national enforcement in the future.

To mediators

Conflict limitation at pre-negotiation or negotiation stage

Mediators should assess whether human rights abuses are on-going, which current needs and possibilities for immediate protection can be implemented, and what local and international initiatives are necessary to achieve this.

Where human rights violations are on-going, negotiators should encourage early commitment to respect both human rights and humanitarian law.

Mediators should consider the possibility to secure these commitments and include some practical measures in an early agreement to operate as a conflict-limiting and confidence-building tool. This can be useful to limiting the conflict, and enabling a climate in which talks can take place.

Mediators should consider whether human rights and humanitarian law training for local actors at the official and/or non-official level is necessary or useful.

Process

Mediators should consider how to take a proactive role in securing human rights frameworks. This is particularly important where the negotiations are isolated from NGO or civil input.

Negotiating teams should have high level human rights and gender advice, and set an example with regard to gender balance in their staff composition.

Any initiative by mediators needs to be based on extensive local knowledge and consultation, and addressed to the human rights abuses and difficulties of implementation which occur locally. Local consultation may require the pro-active enabling of local processes and organisations, including specific pro-active initiatives to involve women.

Mediators should in particular consider whether there are vulnerable groups who are not represented at the table but who nevertheless have clear human needs relating to the peace process.

Mediators should consider whether it is possible to open-up negotiations processes to civil society participants, either through direct participation at talks, or through parallel processes with clear points of contact with official processes.

Substance

Human rights frameworks should be consistent with human rights, humanitarian and refugee law standards.

Mediators should have knowledge of international and regional human rights, including soft law standards, and be aware that the language of international instruments can be useful to forging agreement.

Attention should be paid to the implementation of human rights commitments at an early stage of the negotiations. In particular, an audit should take place of the capacity of the domestic institutions which will be needed to deliver human rights protections in practice.

Mediators can usefully alert local parties to the support and resources available within international and regional organisations with a human rights remit, and help form points of contact between international and regional organisations and local actors.

To human rights advocates

Human rights advocates should continue to push for domestic and international monitoring and recording of human rights violations during conflicts and transitions. These are a vital tool in asserting a human rights agenda in peace negotiations.

Human rights advocates can usefully consider, research, and disseminate ideas relating to the institutional reforms necessary to preventing these abuses in the future.

Human rights advocates can usefully use a peace process to articulate the importance of human rights frameworks as a possible point of ‘common ground’ between the parties through which to move towards peace.

Human rights advocates should use peace process opportunities to engage in the process creatively, with a view to creating a human rights agenda within formal processes. Creative and researched ideas as to human rights-focused institutional reforms are useful to this end.

Where human rights advocates have few avenues of inputting ideas into formal talks processes, they should consider parallel processes as awareness-raising and agenda-setting forums.

To parties to the conflict

Parties should consider unilateral commitments to human rights standards and to their obligations under international humanitarian law, as a useful confidence-building measure, both with regard to the 'other side' and to international actors. States can reaffirm any pre-existing commitments, or set up processes of review. Non-state groups can commit to obligations drawn from humanitarian law even if there are debates as to whether these technically apply. Both state and non-state groups can usefully establish open and transparent formal and informal processes of accountability as regards their own actions.

Where parties view themselves as acting within the framework of international law, they can usefully make clear statements as to their acceptance of this framework, and detailing how they comply. Consent to international monitoring could be a further sign of good-faith.

Parties can usefully seek human rights and humanitarian law training. This will not only help parties to fulfil their human rights commitments, but also to engage with the perspectives of mediators and the international community. Parties involved with a peace process may also find this instrumentally useful in the connections they build up.

Where parties do not trust in domestic processes as regards the delivery of human rights, they should be aware of the many international processes and possible sources of resources internationally. They should also raise these difficulties with mediators as a means of getting them addressed in negotiations.

Parties can usefully engage with their counterparts in other conflicts, to understand how they achieved (or came to accept) human rights frameworks, and the ways in which this benefited them.

Parties should examine the human rights agreements of other conflicts, international human rights standards, and domestic bills of rights, to see how they address their concerns of domination, discrimination and accountability.

Parties should seek to widen their negotiating teams to include constituents from vulnerable and traditionally excluded groups, such as women and indigenous peoples. Parties should also consult with these groups as to their peace process needs.

PART TWO

THEMATIC ISSUES

IV. REPAIRING THE PAST? REFUGEES, DISPLACED PERSONS, LAND AND PROPERTY

Forcible displacement land dispossession is often a direct product of conflict, illustrating both complementarity and tensions between human rights and conflict resolution. After examining this dilemma, the chapter considers what international law provides for with regard to forcibly displaced persons and land rights. Finally, it examines how peace agreements have dealt with the issue, and concludes by providing a set of guiding questions and recommendations.

REFUGEES AND DISPLACED PERSONS

In many conflicts, refugees and displaced persons will be a direct result of conflict as people flee areas that are unsafe, often across borders. Moreover, in some of these conflicts, particularly those with ethnic or identity dimensions, forcible displacement is a key tool of war. The term 'ethnic cleansing' in Bosnia Herzegovina and Burundi, to name two, has been used to characterise the use of forcible displacement effected through egregious human rights violations aimed at consolidating political control over territories.⁷³ In these contexts, return poses severe difficulties, and is a key signifier of whether a long-term peace is being achieved.

Three key durable solutions to forcible displacement exist: voluntary repatriation in safety and with dignity (stated by the United Nations High Commissioner for Refugees (UNHCR) as the preferable option), local integration in the host country, and resettlement to a third country.

LAND AND PROPERTY

In conflicts with large population shifts, land and property redistribution often occurs either by design as new populations are encouraged and enabled to move into dispossessed lands and houses as part of a 'land grab'; or because over time this happens anyway as populations shift. As a consequence, enabling displaced persons to return home often requires dealing with the complicated clashing entitlements to land and property of pre-war and post-agreement populations. This may require specific transitional mechanisms, and the creation or reform of property laws.

Land-related issues may also arise as a socio-economic rights issue. Long-term unfairness in land distribution may lie at the heart of socio-economic imbalances and require to be addressed if socio-economic benefits are to be delivered as a result of the peace process. In South Africa, land reform was seen as a matter which the peace process had to address, while neighbouring Zimbabwe illustrates how unresolved land rights issues can remain a source of

conflict even years after apparent settlement. Guatemala provides an example of land reform being addressed both as a resettlement issue and as a broader socio-economic rights issue. Often, the land issue is significant not just to restoring pre-war claims to property, but also to ensuring that people have a livelihood for the future, so that a degree of social stability can emerge.

Terminology

Refugee. The term is defined in the 1951 Convention Relating to the Status of Refugees (Refugee Convention), and its 1967 Protocol, as people who have fled across an international border as a result of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Those who have committed some serious crimes, such as crimes against humanity or war crimes, are excluded from protection as 'refugees' but nevertheless remain protected under human rights law. In recent years, specific regional conventions and other state practice have expanded the notion of 'refugees' to include those who have fled war and generalised violence.

Displaced persons. The term is used to describe both those who have crossed borders but do not technically satisfy either the 1951 Convention or regional legal frameworks definitions, or those who have been displaced internally – that is, within existing state borders. As regards internally displaced persons, the United Nations Guiding Principles on Internal Displacement (1998) define them as: “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”.⁷⁴

Temporary protection regimes. A de facto exception? War often causes a mass exodus of populations not contemplated by the 1951 regime, thereby making difficult the individual assessment of asylum claims by receiving states. In response to the conflict in the former Yugoslavia, a concept of 'temporary protection' emerged as “a flexible and pragmatic means of affording needed protection to large numbers of people fleeing human rights abuses and armed conflict in their country of origin, who might otherwise have overwhelmed asylum procedures”.⁷⁵ Temporary regimes effectively offered temporary sanctuary by bypassing formal evaluation of the refugee status of individuals. The focus of such regimes is on return, and when they end those persons they protect are returned. This has led to allegations that without the formal protection of refugee status, returns were made prematurely and denied those who might have been able to assert refugee status their full rights to *non-refoulement*.

HUMAN RIGHTS AND CONFLICT RESOLUTION

Complementarity

Many peace agreements have included provisions for the return of refugees and displaced persons, underlining the importance of this issue. Return of refugees and displaced persons can contribute to peace-making in five ways.⁷⁶

Return of refugees is an important signifier of peace and the end of conflict. There is no better testament to peace than refugees and displaced persons returning home. It is also important to consolidating peace and has a key confidence-building role. The importance of return to signalling 'normality' can be seen in the Guatemalan government's attempts from 1986 onwards to encourage some return, albeit often without the necessary protections in communities to which they returned. In Mozambique the return of refugees prior even to democratic elections in 1994 constituted what was seen as a vote of confidence in the peace process, although it was to create severe and persistent land disputes.

Repatriation can play an important part in validating the post-conflict political order, for example, by legitimising elections. Most obviously, repatriation can legitimise any elections established by the peace agreement. This is why it was considered so important that refugees should repatriate before the elections in Namibia, Cambodia and Mozambique. However, return of refugees and displaced persons can also validate the post-conflict political order in more subtle ways. In Bosnia and Herzegovina, the notion of a 'right to return' in effect formed the international community's 'price' for allowing the establishment of two entities whose ethnic make-up and territorial divisions reflected the 'gains' of ethnic cleansing. Without a right to return aimed at undoing ethnic cleansing over time, conceding power to the entities would have looked more like victory for those involved in ethnic cleansing. Repatriation of refugees was therefore key to the international community's validation of the peace agreement power divisions. For the same reason, the test of the agreement's capacity to deliver anything beyond ethnic segregation became inextricably linked to its capacity to implement returns, in particular 'minority' returns (i.e., returns of people to home areas where they would now be in a minority).

Return of refugees may be a pre-condition for peace if the refugees are politically and militarily active. Often refugees and displaced persons disproportionately include one side in a conflict. They may exercise significant leverage on how their political leaders conduct negotiations. Furthermore, they may fund conflict in the home country or provide soldiers. A 'solution' that does not deliver return, or otherwise accommodate the wishes of refugees and displaced persons, is likely to be one that does not hold. Political leaders negotiating back 'at home' may find themselves unable to deliver a compromise on this issue. The claims of Palestinian refugees as regards their right to return indicates a strong example of how integral this issue can be to any political solution to the conflict.

In regionalised conflicts there is a further important dynamic. The capacity of the presence of refugees to destabilise neighbouring countries should not be underestimated – especially in terms of continuing political disputes. In this sense, ‘undoing’ the refugee consequences of a conflict can be important in preventing the escalation and spreading of conflict. In Burundi, for example, after the 1994 Convention of Government Agreement, the (Hutu) National Council for the Defence of Democracy (CNDD) based in Eastern Congo was able to find support in the post-genocide Rwandan Hutu refugee camps, and increase its military capacity dramatically between 1994 and 1996, in a cycle of escalating violence.

Return of displaced populations can make an important contribution to the economic recovery of war-torn states, or even be ‘a pre-requisite for that objective to be achieved.’⁷⁷ Often those most able to flee and integrate locally are those with skills and resources. Returning these skills and resources may be vital to the post-conflict landscape.

To these four issues, the question of land rights can be added.

Dealing with land disputes may be vital to avoiding future conflict. Where refugee and displaced persons return and land issues are not adequately addressed, conflict can easily erupt. Both failure to return disposed land, and equally, ignoring the entitlements of those who have settled there, can fuel violent conflict. Furthermore, as already mentioned, often land will be a key to self-sustenance and socio-economic survival. In Cambodia, even though land claims were dealt with in the short-term through large-scale compensation for loss of land, this deprived people of associated socio-economic benefits in the longer-term. In Guatemala, the agreements dealing with resettlement of refugees, indigenous peoples, and socio-economic rights, dealt with a broad range of rights relating to land, such as communal ownership, agrarian reform, and return of land.

Tensions

It can be argued that ‘undoing’ a conflict’s effects by returning displaced persons and refugees home can be counter-productive to the search for stability.

Return of refugees and land justice can begin to rewrite the territorial compromises at the heart of the deal. The issue of forcible displacement and land ownership, while often framed in terms of individual rights, goes to the heart of conflicting communal claims to territory and power. The importance of the refugee issue to both Israelis and Palestinians, for example, can only be understood in the context of its demographic and territorial implications. Similarly, the international community’s insistence of ‘return’ in the Bosnian conflict has to be understood in terms of an attempt to reverse ethnic cleansing. Mass return to an area can significantly affect the ‘numbers game’, that is the ethnic balance of a region,

and even its sovereignty. Return can undo one side's territorial conflict gains. If returnees are further entitled to repossess land, their return may displace those who came to occupy the land during the conflict (who are often themselves people who have been displaced), further undermining an (ethnic) territorial gain, and laying the foundation for renewed conflict.

In Burundi, for example, the different waves of the conflict over time created several different refugee populations, and it has been suggested that refugee return exacerbated conflict. In June 1993, after the Hutu party FRODEBU won the elections, some 500,000 (Hutu) refugees from 1972 returned spontaneously from Tanzania. The newly installed government was trapped between the need to give them back what the former regime had stolen from them, and Tutsis' fears that they would be the losers. The frustrations of expropriated Tutsi families was one factor in the run up to the *coup d'état* and the assassination of President Ndadaye on 21 October 1993, triggering a repeat of the 1972 events.

Returning refugees and displaced persons can lead to instability. Return without the infrastructure to assist return and deal with matters such as land disputes between current and former owners, can destabilise cease-fires and longer-term peace-building efforts. Particularly when return has a significance in terms of ethnic control of power and territory to 'undo' territorial gains that a party believes itself to have achieved through conflict, return is likely to be resisted and the rhetoric of return will have to be matched by the will and the capacity to enforce it, and a willingness to deal with further implementation problems.

Refugees who do not return may assist economic recovery in the home country as Diaspora populations send economic support to families at home. The El Salvador peace process facilitated the repatriation and reintegration of a relatively small number of refugees, but those who did not return provided money which helped to rebuild the economy.⁷⁸ While the status quo may seem far removed from a 'positive peace', it may have something to contribute to a 'negative' peace. It is also worth noting that peace agreements may themselves create population flows as majority and minority populations change and newly created minorities flee in fear of discrimination.

HUMAN RIGHTS AND CONFLICT RESOLUTION REVISITED

The supposed tensions between human rights and conflict resolution may be better viewed as reflecting the short-term peace demands of halting violence and sustaining a cease-fire, and the needs to be addressed in the longer-term if a stable democratic, rights-based, peaceful society is to be achieved. In the short-term, a disorganised influx of refugees and displaced persons may destabilise a fragile peace, and ignite inter-communal disputes at the local level. In the long-term, return is a signifier of 'normalisation' and a test of the capacity of political and legal institutions to deliver to communities viable alternatives to violent conflict.

The above discussion indicates that these tensions require to be understood, anticipated and, ideally, provided for in a peace agreement's design and implementation. There will be four main elements to this:

1. Ensuring that there is adequate provision for the modalities of return;
2. Where return cannot be safely effected, ensuring that clear alternatives for refugees and displaced persons, such as local integration or resettlement, are provided for;
3. Setting up a strong human rights regime that addresses the needs of returnees, to ensure that neither returning refugees nor *in situ* populations become human rights victims, thereby reigniting conflict; and
4. Anticipating land redistribution issues and making provision for resolving land disputes in a constructive and timely manner.

INTERNATIONAL LAW: WHAT DOES IT REQUIRE, RECOMMEND, PERMIT OR PREVENT?

International law was not designed with either internal conflict nor peace processes in mind, and so has little to say directly on some of the key issues. What follows is a broad brush consideration of international law's relevance to peace agreements.

A right to return to one's own country?

A right not to be prevented from returning to one's own country of nationality or of origin? International treaties, in particular the 1951 Refugee Convention, do not explicitly mention a 'right to return'. However, a right to return in-effect exists in a number of international human rights instruments.

The Universal Declaration of Human Rights provides: "Everyone has the right to leave any country, including his own, and to return to his country".⁷⁹ The International Covenant on Civil and Political Rights (ICCPR) provides that "no one shall be arbitrarily deprived of the right to enter his own country".⁸⁰ This right is similarly included in several regional conventions. The International Convention on the Elimination of Racial Discrimination forbids states to deny entry to a national on racial or ethnic grounds, implying a right to return.⁸¹

In addition, a right to return has been reaffirmed by both the General Assembly and the Security Council in relation to conflicts, and by United Nations human rights bodies.⁸²

It therefore seems fairly clear that there is at least a 'negative' right to return home, in the sense that states should not prevent people from returning to their country of origin. Peace agreements should therefore take this into account.

A right to return home? Does this right include a right to return to the actual place of home? Or does it just amount to a right to get back to some part of the country of origin? This is important not only to refugees, but also to internally displaced persons, who by definition are already in their own country. Civilians displaced within their own countries often far outnumber refugees who secured a measure of protection abroad. Again, international law does not make direct provision for a right to return to former homes or home areas. It can be argued, however, that such a right can be inferred from the right to liberty of movement and the right to enter one's 'own country' (found for example in article 12(1) of the ICCPR). But this right can be subjected to restrictions.⁸³ The drafters of the Guiding Principles on Internal Displacement indicate that "there is no general rule in present international law that affirms the right of internally displaced persons (IDPs) to return to their original place of residence or to move to another safe place of their choice within their country" but that "[a]t least a duty of the competent authorities to allow for the return of internationally displaced persons can, however, be based on freedom of movement and the right to choose one's residence".⁸⁴ There is, therefore, increasing recognition that a right to return should include a right to return to one's own home, and this has been recognised by the General Assembly, Security Council and human rights bodies in specific situations.⁸⁵ Peace agreements themselves, as will be seen below, provide evidence of state practice in this regard.

A right to the conditions required to voluntarily return safely to one's country or home? In many cases, state policy will not directly prevent people from returning home. The main obstacle will be a lack of physical, social, legal, and economic security that make return unsafe. In practice, failure to address the conditions of return can mean that refugees are returned to a situation of on-going internal displacement. If not voluntary and safe, return of refugees and displaced persons may amount to *refoulement* (see below). However, the only international legal provision putting a direct positive duty on state with reference to return is article 5 of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa. It provides that the country of asylum must "make adequate arrangements for the safe return of refugees who request repatriation", while the country of origin must "facilitate their resettlement and grant them the full rights and privileges of the nationals of the country." It further provides that refugees should not be penalised for having left and should receive assistance to facilitate their return. Given that many refugees and IDPs are women, positive conditions to enable return should include particular provisions for women. Children, especially when unaccompanied, the elderly, the sick and the disabled, also need special provision. Return should take place "voluntarily, in safety and with dignity". The UNHCR advocates that safety encompasses physical aspects, including protection from violence and intimidation (in particular, absence of persecution or punishment upon return) armed attacks and mines; material safety, including access to land or livelihood; and also legal safety, such as amnesties, non-discrimination, as well as legislation to ensure citizenship, civil status – and property. Dignity includes the principle of family unity, and the

full restoration of one's rights, including freedom of movement. Finally, it calls for the establishment of mechanisms to promote confidence building and co-existence, as well as equity between displaced persons and local residents.⁸⁶

Apart from this, there is no direct provision providing for the conditions for refugee return, but relevant human rights measures often do require positive state action for delivery. If implemented, these would go a long way to providing the necessary conditions for return. Basic human rights law protections can therefore be vital for refugees and displaced persons. At a minimum it can be stated that states have an overall duty to ensure respect for human rights and that such duties are owed to all returnees, as well as others. Special protection regimes may be useful to addressing the particular needs of returnees.

A right not to return to one's own country?

Do refugees and displaced persons have a right *not* to return, and in what circumstances? The right not to return arguably has a stronger basis in international law. The 1951 Refugee Convention explicitly states that no refugee should be returned to a state where he would be at risk of persecution – the prohibition against *refoulement*. The scope of the prohibition against *refoulement* has been clarified in several international human rights instruments. Article 3 of the Convention Against Torture contains an explicit provision prohibiting states from returning people to situations where they may be at risk of being tortured or ill-treated. Article 7 of the ICCPR has been interpreted similarly by the Human Rights Committee. These provisions have been supplemented by regional instruments. It is now established that the principle of *non-refoulement* is embedded in international customary law and applies to all states even if they have not signed these international instruments. This has most recently been reaffirmed by the Updated Principles on Impunity.⁸⁷

How these provisions affect internally displaced persons is less clear. The human rights standards discussed above would seem to prohibit states from forcibly moving people to situations where their rights would be violated. This includes movement to situations where the violators would be other state as well as non-state actors. Similarly, practices of forcibly moving internally displaced persons against their will would be difficult for a state to implement without abusing rights, as a matter of practice. Principle 15 of the Guiding Principles on Internal Displacement provides for the “right to be protected against forcible return to or resettlement in any place where their life, safety, and/or health would be at risk”. The drafters note, however, that “this is a novel principle with no direct antecedent in existing instruments”.⁸⁸ Nevertheless, read in conjunction with existing human rights law, it is an important statement of good practice.

A right to local integration? If refugees and displaced persons have a right not to be returned, do they then have a right to be integrated in the country where they have first found refuge, and what would this entitle them to? International

law, while prohibiting *refoulement*, is somewhat unclear when a right to local integration arises. There is some basis in law (often domestic) and practice, for viewing refugees as acquiring increasing rights in the place of refuge over time. When local integration is not a viable option, there remains the possibility of resettling those in continuing need of protection in a third country.

A right to compensation?

The right to a remedy for human rights violations should include a right to reparation or compensation for forcible displacement. This right has been discussed on many occasions, mainly in the context of population transfers. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities, recommended in 1997 that compensation be paid to the victims and survivors of population transfers.⁸⁹ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that the obligation to enforce human rights and humanitarian law includes provision for, or facilitation of, reparation for victims, and that restitution should include “return to one’s place of residence; and ... return of property”.⁹⁰ They also provide that compensation should cover, among other things, ‘material damages’ (which would include property).⁹¹

Property rights?

As a result of being displaced, refugees and displaced persons often lose their property. When they attempt to return to their homes they may find that their property has been destroyed, or that it is occupied by new families. Where the conflict has been a long one, these families may have lived there for several years. Indeed, in long conflicts there may have built up a chain of owners with property titles having been passed to successive owners at many steps removed from the first occupation of the property. More recent owners may have bought the property, and view their title as lawful and valid. The legal and justice issues can be extremely complex as often there is a clash of rights.

The right to property restitution is not mentioned explicitly in any international legal instruments. The Universal Declaration of Human Rights recognises a right to one’s own property (article 17(1)) and to be protected against arbitrary deprivation of property (article 17(2)). The latter may have implications for both previous and present occupants, but says little about how to resolve any clash of rights between them. The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not contain similar provisions. Expressions of a right to property are mainly found in regional human rights conventions.

The UNHCR has stated that depending on the circumstances, effective restitution of property rights means:

- repeal of any laws and regulations which are inconsistent with international legal standards relating to the rights to adequate housing and property;
- non-application of laws which are designed to, or result in, the loss or removal of tenancy, use, ownership or other rights connected with housing, land or property;
- removal of obstacles preventing the successful recovery of refugees' properties.⁹²

A principle of compensation for loss of property resulting from forced eviction has been developed by the European Court of Human Rights and the Inter-American Commission on Human Rights.⁹³ The Sub-Commission on the Prevention of Discrimination and Protection of Minorities has commissioned several reports on housing and property restitution in the context of the return of refugees and internally displaced persons.⁹⁴ These reports have led to the drafting of Principles on Housing and Property Restitution for Refugees and Displaced Persons.⁹⁵

Summary of law for negotiators

- **Refugees have a right to return to their country of origin.**
- **Human Rights Conventions require states to positively prevent human rights abuses which could face returning refugees, or prevent them from returning.**
- **Return of both refugees and displaced persons to their actual place of home constitutes good practice with some support in international law.**
- **Refugees have a right not to return home when conditions are unsafe. While less clearly articulated as such, internally displaced persons may have the same right in practice, by virtue of general human rights protections. A right to be protected against forcible return to or resettlement in any place where their life safety, liberty and/or health would be at risk, should be protected as a matter of good practice.**
- **Whilst return is often the preferred solution for both refugees and the states concerned, local integration and resettlement should be considered.**
- **International law provides for property rights, but does not provide much help on how clashes of property rights are to be resolved in practice.**
- **Increasingly, there is arguably a right to compensation both for forcible displacement, and for loss of property in violation of property rights. This is at least good practice, although often difficult to fund.**
- **With regard to property, compensation should be a second alternative to the preferred option of restitution, and not an automatic substitute.**

PEACE AGREEMENT PROVISIONS

What other lessons can be learnt from peace agreements regarding the return of refugees and displaced persons? Do peace agreements go further than the current framework of international law and illustrate good practice?

The right to return

Most armed conflicts produce forcible displacement and many peace agreements provide for issues of return and land restitution. Many build on international law, but also go further than what is strictly required.

A right to return. Recent peace agreements, sometimes in separate side-agreements, have reaffirmed the right of persons displaced by conflict to return to their homes. Where this right is not addressed, despite a situation of massive displacement, this is often because the issue has largely been dealt with in practice prior to the agreement being signed. In El Salvador for example, return was barely mentioned as most of those intending to return had already done so. Refugee issues were addressed at the regional level under the International Conference on Central American Refugees (known as the CIREFCA process).

Practice varies on the question of provision for return to country of origin, or specifically to former homes or home areas. The 1991 Paris Agreement provided that refugees and displaced persons located outside Cambodia had a right to return to their country, but did not go further. The Mozambique 1992 General Peace Agreement provided for a specific right to return to the country and "to choose to reside anywhere".⁹⁶ It specified that refugees should return preferably to their "original places of residence",⁹⁷ but did not provide them with a guarantee to do so.

Cambodia: Agreement on a Comprehensive Political Settlement of the Cambodia Conflict

Upon entry into force of this Agreement, every effort will be made to create in Cambodia political, economic and social conditions conducive to the voluntary return and harmonious integration of Cambodian refugees and displaced persons.

19. (1) Cambodian refugees and displaced persons, located outside Cambodia, shall have the right to return to Cambodia and to live in safety, security and dignity, free from intimidation or coercion of any kind.
- (2) The Signatories request the Secretary-General of the United Nations to facilitate the repatriation and safety and dignity of Cambodian refugees and displaced persons...

More recent peace agreements, however, have reaffirmed the right of refugees and displaced persons to return specifically to their former homes, particularly where 'ethnic cleansing' has been a tool of forcible displacement. Most famously, the Dayton Peace Agreement for Bosnia and Herzegovina guaranteed the right of refugees and displaced persons "to return to their homes of origin".⁹⁸ The 1995 Erdut Agreement for Croatia contains a similar guarantee (article 7). This may reflect both the fact that ethnic cleansing has been a tool of war and that these agreements were signed with the experience of previous practice.

As with broader institutional provision for human rights, sometimes peace agreements deal with the issue as a commitment of principle, establishing a process with a clear international element to take the principle forward. In Sierra Leone for example, article XXIII of the peace agreement provides for the security of displaced persons and refugees, but does not explicitly guarantee a right to return. The agreement does, however, create a National Commission for Resettlement, Rehabilitation and Reconstruction which is to further organise the repatriation and reintegration of refugees and internally displaced persons.⁹⁹

Positive conditions for return. Many agreements go further than simply affirming the right to return, by putting emphasis on the voluntary character of return, under conditions of safety and security.

Guatemala: "Uprooted population groups have the right to reside and live freely in Guatemalan territory. Accordingly, the Government of the Republic undertakes to ensure that conditions exist which permit and guarantee the voluntary return of uprooted persons to their places of origin or to the place of their choice, in conditions of dignity and security."¹⁰⁰

Sierra Leone: "The Parties (...) seek funding (...) in order to design and implement a plan for voluntary repatriation and reintegration of Sierra Leonean refugees and internally displaced persons."¹⁰¹

Bosnia: "All refugees and displaced persons have the right freely to return to their homes of origin."¹⁰² "The parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons."¹⁰³

Liberia: "The Parties hereby commit themselves to immediately and permanently bring to an end any further external or internal displacement of Liberians and to create the conditions that will allow all refugees and displaced persons to, respectively, voluntarily repatriate and return to Liberia to their places of origin or habitual residence under conditions of safety and dignity."¹⁰⁴

Burundi: "Return must be voluntary and must take place in dignity with guaranteed security, and taking into account the particular vulnerabilities of women and children."¹⁰⁵

The DPA defines safety in the context of refugee return as follows: “refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.”¹⁰⁶ Peace agreements, particularly those from the mid 1990s onwards, have also gone further in setting out specific human rights protections and mechanisms designed to protect returnees. In Guatemala for example, the 1994 Agreement on Resettlement of Population Groups Uprooted by the Armed Conflict, provided for a detailed agreement and a list of rights.

Information. Several peace agreements have focused on ensuring the safety of the repatriation process itself, and thus, on the issue of information as crucial to decisions about whether to return and the sustainability thereof. In that respect, the UNHCR has also recommended that countries of refuge adopt innovative measures aimed at information, such as “go and see visits”.¹⁰⁷

Cambodia: “Decisions [to return] should be taken in full possession of the facts”.¹⁰⁸ (Note that there was no corresponding obligation on any party to provide such information.)

Georgia/Abkhazia: The 1994 Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons provides that “[t]he Parties agree that refugees and displaced persons will be guaranteed unimpeded access to all available information on the situation in the areas where repatriation will take place”.¹⁰⁹

Bosnia: “The Parties shall facilitate the flow of information necessary for refugees and displaced persons to make informed judgments about local conditions for return.”¹¹⁰

Burundi: A National Commission for the Rehabilitation of Sinistrés (NCRS) would be responsible for “[o]rganizing information and awareness campaigns for refugees and *sinistrés* as well as visits to their places of origin”.¹¹¹

International organisations and monitoring of repatriation. Many peace agreements identify or establish one or several international and/or national organisations with responsibility for implementing provisions relating to forcible displacement and monitoring the repatriation process. The UNHCR, unsurprisingly, is often given such responsibility.

Other social goals: political, economic and social reintegration, and reconciliation. Agreements have sometimes dealt with the longer-term political, economic and social aspects of reintegration. These are tailored to address the particular root causes of the conflicts in question. Increasingly, UNHCR has stressed the necessity to pay attention to the needs of affected, but non-displaced, local populations in its assistance programmes to refugees and internationally displaced persons. Reinsertion and reintegration programmes have to be incorporated into national and local development planning in order to be effective.

Guatemala: The 1994 Agreement on Resettlement of Population Groups Uprooted by the Armed Conflict focused on economic reintegration and contained detailed provisions on the “productive integration policy” to be pursued by the Government.¹¹²

Burundi: The Arusha Accord provided that the NCRS commits to “[u]ndertaking information and awareness campaigns on the mechanisms for peaceful coexistence and return to *collines* of origin”.¹¹³

Dealing with the past. Return of refugees and displaced persons may also raise the question of amnesties. UNHCR, for example, recommends that “returnees should not be subjected to any punitive or discriminatory action on account of their having fled their country”.¹¹⁴ They believe that amnesty may be a tool to encourage return. However, this must be meshed with international standards limiting amnesty for serious international crimes (see chapter V). Agreements have found ways around this, either by exempting serious international crimes from refugee amnesty provisions, or specifying a limited form of amnesty, as illustrated by the examples below.

Bosnia: Amnesty granted to all returning refugees and displaced persons, except to those who have committed a serious crime as defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute or a common crime unrelated to the conflict.¹¹⁵

Tajikistan: The 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan provides that the Government agrees “not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war”.¹¹⁶

Property rights

Many peace agreements provide for the restitution of property lost as a result of displacement, or for compensation for that loss. Provisions range from the simple to the extensive.

The agreement in Cambodia merely asserts that there should be full respect for refugees’ right to property. The 1992 peace agreement in Mozambique guarantees the “restitution of property owned by [returnees] which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it”.¹¹⁷ The 1994 Resettlement Agreement in Guatemala contains yet more elaborate provisions, such as for the adoption of legislation on abandoned land, the promotion of restitution and/or the search for “adequate compensatory solutions”.¹¹⁸ These provisions focus on the issue of ‘land’, rather than property, such as houses. This link to the broader issue of ‘land’ rights was also dealt with as part of the 1996 Agreement on Social and Economic Aspects and Agrarian Situation, which called for the prompt settlement of land conflicts and established a specific mechanism – the

Presidential office for legal assistance and conflict resolution in relation to land. This points to the land issue as a broader socio-economic rights issue, as identified in the introduction.

The DPA in Bosnia and Herzegovina made clear and detailed provision for refugees and displaced persons to have their property restored to them (or be compensated where restitution was not possible), and provided for a specific Commission for Refugees and Displaced Persons (later changed to the Commission of Real Property Claims of Displaced Persons and Refugees), to adjudicate on property claims. This body had a full range of powers, including authority to ignore property transactions which had taken place under duress and had access to all property records. The Human Rights Chamber, established as part of the general human rights machinery of the DPA, also dealt with cases involving property issues (as well as cases of discrimination against returnees). Similarly, peace agreements in Rwanda, Kosovo, and Burundi made extensive provision for property restitution. In practice, however, the issue of land rights has been hard to address without tensions. In Burundi, for example, there have been significant disputes and inter-communal tensions arising out of the question of land use, despite extensive international attempts to pre-empt and resolve the issue.

Compensation. Peace agreements have provided for compensation when restitution of property is not possible, reflecting the idea that compensation should not be seen as an easy alternative to restitution, but something which is available when restitution is just not possible. The DPA for example, stated that refugees and displaced persons would be “compensated for any property *that cannot be restored to them*”.¹¹⁹ Refugees and displaced persons who chose not to exercise their right to return to their homes and decided to relocate had no right to receive any compensation. Article 14 provided for the establishment of a Property Fund to be replenished “through the purchase, sale, lease and mortgage of real property which is subject of claims before the Commission and by direct payments from the parties, by states, or international and non-governmental organisations”. In reality, funds were not made available for compensation.

CHOICES FOR MEDIATORS

In many instances there seems to be little correlation between whether provision for repatriation is made in the peace agreement and whether it happens in reality.¹²⁰ Rather, repatriation depends on the broader political circumstances and levels of violence. Return may therefore happen even without any mention in the peace agreement. The early return of refugees in Mozambique, Guatemala and El Salvador, are examples of repatriation prior to peace agreement provisions. In Sierra Leone, some 178,000 refugees have returned in a relatively successful repatriation operation, with minimal provision. Conversely, inclusion of appropriate refugee-related provisions in peace agreements will not in itself

automatically ensure immediate mass return. Comprehensive measures dealing with forcible displacement need to be linked to the broader political context.

Addressing the issue in a peace agreement, while not determinative, can however, encourage the parties to the agreement to create safe conditions of return and ensure full respect for the human rights of returnees. Failure to define the conditions under which return could be deemed safe in Cambodia while linking return to an election timetable, led to refugee return that was not sustainable in the medium- to longer-term. It has been argued that provision for return of refugees and timetables are often linked more to the needs of neighbouring states to return refugees, than the peace-making imperatives for the refugees and their home country.¹²¹

As with the question of human rights frameworks, a clear dilemma often exists over whether to provide for a right to return which can only be aspirational at the point of signing an agreement, but will usefully place the issue on the implementation agenda; or whether such commitment of principle to return, without the means of implementing it, will foster cynicism? In the absence of workable mechanisms and commitments, is it better to leave a silence in which other options, such as local integration can be explored? The recommendations here favour the former option as a means of building towards provisions which could ultimately enable return.

GUIDELINES

1. Are people already returning home, and if so, what immediate protections and logistical arrangements need to be quickly established?
2. What longer-term measures will be necessary to sustain return, in safety and with dignity?
3. What process of consultation with relevant populations will be used? How will their wishes and concerns be taken into account?
4. Was forcible displacement part of the conflict?
 - a. Was it a by-product or a key tool for achieving military or political gains?
 - b. Has land been formally or informally reallocated, and over what period of time?
 - c. Has the ethnic character of particular homelands changed?
 - d. To what extent can human rights protections be made effective for groups who constitute minorities in their area? Are special provisions necessary?
5. How long has the conflict lasted, and what are the wishes of displaced populations regarding return?
6. What are the conditions in the country of return?
7. Who will provide information on home conditions to refugees and displaced persons, and how?
8. What are the pressures from states hosting refugees? To what extent will local integration be a practical option? Can it be facilitated in any way by the international community?
9. What mechanisms for return and reintegration can be used?
10. Which organisations will be necessary to ensure return in safety and with dignity?
11. Who will monitor return and treatment of returnees?
12. Which organisations will be necessary to long-term sustainability, and legal, physical and social security of returnees?
13. Does the issue need to be dealt with within the framework of the main agreement, or can it be dealt with as a side matter? Is there a need for a general statement which will enable a mechanism dealing with return to be developed?
14. Would a multi-party agreement also involving relevant international organisations and host states, be useful to coherent implementation?
15. Do property rights need to be dealt with?

- a. Are legislative changes needed?
 - b. Are special mechanisms needed?
 - c. How will clashes of property rights be dealt with?
 - d. Are there funds available for compensation?
 - e. What will be the implications of the property issue for socio-economic sustenance of local populations?
16. What are the domestic institutional arrangements for ensuring implementation of human rights in the country of return?
 17. Will general human rights frameworks assist refugees and displaced persons or do any special provisions need to be included?
 18. Do particular categories of refugees, for example women, have particular needs which should be addressed?
 19. Are provisions dealing with amnesty for returnees compatible with how the issue is dealt with elsewhere in peace agreements? Are they compatible with international law?

RECOMMENDATIONS

Where forcible displacement has occurred, peace agreements should contain a statement of principle that all refugees and displaced persons have a right of voluntary return to their former homes or any other location within the country, in safety and with dignity, especially on the basis of 'free and informed choice'.

Displaced communities should be involved as much as possible in the negotiation and implementation of provisions on forcible displacement.

Terminology such as 'refugees' and 'internally displaced persons' should be used precisely so that it is clear who the agreement addresses, bearing in mind that the term refugee has a specific meaning in international law.

Host states should not force refugees to return prematurely – that is before they will be assured an adequate level of survival and safety – and countries of origin should not prevent return when refugees want to do so.

However, where return is not possible and refugees and displaced persons wish to be locally integrated, the commitment of host states should be sought.

Consideration should be given as to whether to include provisions related to forcible displacement and land rights issues in the text of a main agreement or in a separate agreement, which may include international organisations and host states as parties.

Parties to the agreement should agree to the full respect for the human rights of refugees, other displaced persons, including internally displaced persons, and returnees.

Agreements can usefully include specific provisions dealing with:

- duties to provide information on the conditions in the country of origin (and of return);
- the legal safety of returning refugees and displaced persons (e.g., right to citizenship, identity and participation, non-discrimination and amnesties);
- their physical security (e.g. protection from attacks, mine-free routes);
- their material security (e.g., measures aimed at facilitating economic reintegration, access to land or means of livelihood, access to public services);
- the full respect of the principle of family unity;
- specific attention be paid to the vulnerabilities of women, children, the elderly and the disabled; and
- authorities to grant and facilitate to international humanitarian organisations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons and returnees.

Provisions on amnesty for returnees should be compatible with international law, and also with provisions contained elsewhere in relevant peace agreements.

Peace agreements should confirm that all refugees and displaced persons have the right to have their property and/or land restored to them and, where this is not possible, to receive compensation.

Secure access to land for female-headed households, and guarantees of non-discrimination for women with respect to property should be provided for.

Funds for adjudication processes and compensation should be made available.

Where required, the peace agreement should identify which institution is responsible for dealing with property claims. A new institution may have to be set up and new property legislation adopted, or existing legislation reviewed and amended. If this is not possible at the point of signing an agreement, a joint commitment to 'resolve the issue' may help to keep it on the agenda, and underwrite further agreement.

Voluntary repatriation agreements should include implementing provisions on the modalities of property restitution. Efforts should be made to ensure refugee participation in developing property restitution plans.

The duties of the parties should be spelt out clearly:

- who is in charge of the logistics of repatriation?
- who is to provide information on conditions of return to inform choices?
- who is responsible for ensuring the sustainability of the return?

A clear timeframe for implementing the agreement should be laid out in the agreement. This should take into account the relevant timeframes for reconstruction.

It may be useful to set up a specific institution or mechanism which will be responsible for implementing, or monitoring the implementation of, repatriation provisions. Such an institution should be separate from existing or new human rights institutions, with a more specific mandate. This can involve short-term monitoring of fulfilment of the amnesties and other guarantees on the basis of which refugees have returned, and longer-term monitoring of whether returnees are enjoying their human rights on the same footing as their fellow citizens. This latter function may later be taken up by human rights institutions.

Other social goals such as reconciliation may usefully be spelt out, as appropriate to the conflict. These can be included, at least as statements of principle to which the parties to the conflict commit. With respect to reconciliation, consideration can usefully be given to the situation of the citizens/communities residing in the areas of return. For reconciliation purposes, it is crucial that aid/development programmes be devised in a way that includes both returnees and local populations (to different degrees determined by level of need).

V. DEALING WITH THE PAST: AMNESTIES AND ACCOUNTABILITY

Dealing with the past constitutes the issue where it is most often argued that there is tension between human rights and conflict resolution. The dilemmas which emerge are often referred to as 'transitional justice' dilemmas – the dilemmas of how to confront the legacy of gross human rights violations committed during conflict during a period of political transition.

Two main reasons explain why the issue of how to deal with past human rights abuses causes difficulty. Firstly, there are clear international standards which set down normative demands aimed at ensuring accountability. International human rights and humanitarian law standards state clearly that some types of serious abuse, at least, must be subject to processes of accountability such as investigations, prosecution, trial and punishment. Secondly, peace agreements almost by definition involve compromise, as they attempt to find negotiated ends to conflict rather than military ones. This involves trying to find an accommodation with all the parties waging war militarily, many of whom by virtue of being at the heart of the conflict will have been responsible for abuses. Parties are unlikely to sign agreements that they view as handing, in essence, a military victory to the other side by requiring their own accountability leading to their eventual punishment. Tensions exist because international legal requirements of accountability appear to sit uneasily with the need to bring political and military élites to some form of compromise to end fighting. The balance of a compromise on the past will be shaped by the balance of power that produces the agreement and continues to influence its implementation. This balance of power may mean that a party whose participation is essential to peace, has insisted on amnesty.

This chapter examines the tensions and complementarity between human rights and conflict resolution, before moving on to consider what international law says with regard to dealing with the past. It then reviews peace agreements that have dealt with the issue, and concludes by providing a set of guiding questions and recommendations.

HUMAN RIGHTS AND CONFLICT RESOLUTION

Complementarity

While human rights standards provide for accountability, the push for accountability in peace processes does not arise from an unthinking demand for 'principle' to override 'pragmatism'. On the contrary, while proponents of human rights standards do value the principles they enshrine, they also view the question of accountability as pragmatically crucial to any attempt to move

towards a sustainable peace. As the preamble to the Updated Principles on Impunity states: “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied”, and forgiveness “insofar as it is a private act, [requires] that the victim or the victim’s beneficiaries know the perpetrator of the violations and that the latter has acknowledged his or her deeds.”¹²² In addition to arguments that international standards must be applied due to their legally binding nature, the following arguments flesh out ways in which accountability can be a requirement of peace as a practical matter.

Accountability is necessary to provide new political arrangements with legitimacy. Break down of the rule of law is both a cause and a consequence of conflict. Impunity undermines claims of legitimacy, while accountability and punishment will legitimise them. It is difficult to foster respect for the rule of law and move from an absence of rule of law to its promotion, even symbolically, while serious human rights violators and abusers remain unpunished. Any peace agreement that aims to establish democratic institutions which abide by the rule of law, must grapple with the issue of accountability for past abuses.

As a practical matter of ‘undoing the conflict’, prisoners need to be released, and society needs a way of coming to terms with its past. Peace processes aim to proffer a measure of ‘normalisation’ for societies in conflict. This must involve removing military structures, which include prisoners and armies. The very practical need to deal with prisoners forces some engagement with the past: are prisoners to be released and reintegrated, and if so, which prisoners? After international armed conflicts prisoners have to be released, and Protocol II to the 1949 Geneva Conventions encourages the release of those who have taken up arms in non-international armed conflict.¹²³ These decisions point to some need to consider the past and the transitional justice issues which emerge immediately on transition. At the societal level, it is often argued that societies need some common stories or common history as to the past in order to move forward. This is required both in order to acknowledge the experiences of violence during the conflict, but also in order to combat revisionism as to the rights and wrongs of the conflict by providing an authoritative record of what happened.

The UN Secretary-General recommends that:

Peace agreements and Security Council resolutions and mandates should:

- 64(c) Reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court;
- (d) Ensure that the United Nations does not establish or directly participate in any tribunal for which capital punishment is included among possible sanctions.¹²⁴

Accountability is crucial to institutional reforms aimed at establishing the rule of law. Establishing legal institutions capable of delivering on rule of law requirements requires a measure of accountability. Providing for institutional reforms to prevent future human rights abuses is difficult without a clear picture of individual and institutional involvement in former human rights abuses. Institutional reform aims for the future, but is shaped by knowledge of the past. The Paris Accords in Cambodia, for example, made no provision for dealing with the past, such as through the trial of key leaders. The issue has persisted with on-going attempts to address it. While the Accords did provide for institutional reform and this was technically implemented (under UN supervision), criticisms persist that actual practices have not changed, and that safeguards for the rule of law remain a problem and are linked to a culture of impunity. Cambodia seems to demonstrate the link between failing to deal with the past, and failing to sustain and develop institutional safeguards for the future.

Accountability is a precursor to any form of vetting. Linked to institutional reform is the issue of removing past human rights abusers from key positions in law enforcement institutions, such as the police, army or judiciary. For vetting itself not to create injustices and reignite conflict it must take place with due process and this requires clear mechanisms for establishing accountability. In El Salvador, for example, the Accord included provision of the 'purification' of the armed forces through an *Ad Hoc* Commission which reviewed the performance of the officer corps with respect to human rights and professional standards, and evaluated their capacity to serve in a peacetime Army under democratic civilian rule. The *Ad Hoc* Commission had a shorter lifespan than the Truth Commission, which placed an observer within the *Ad Hoc* Commission. In order not to undercut the Truth Commission's recommendations, it was stipulated that the results of this narrower evaluation of armed forces would "not prevent the implementation of such recommendations as the Commission on the Truth may make at the appropriate time".¹²⁵

Accountability is necessary for victims and for reconciliation. As the Updated Principles on Impunity indicate, mechanisms of accountability may be necessary to provide for individual victim's needs and indeed communal reconciliation. Individual victims cannot really forgive until they know who and what they are forgiving; and broad-scale institutional responsibility must be known in order to promote inter-communal reconciliation by substituting individual guilt in place of collective guilt. The Updated Principles on Impunity document the growing recognition of a 'right to truth' which is identified as operating at a communal level and attached to "[e]very people",¹²⁶ and a 'right to know' attached to victims and their families with respect to violations affecting them.¹²⁷

The Updated Principles on Impunity¹²⁸ in Part IV also make provision for “[t]he right to reparation/guarantees of non-recurrence”. This means that as a general principle: Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society.¹²⁹ The principles make detailed provisions for institutional reform aimed at the rule of law, including: legislative reform, civilian control of military and security forces, intelligence services and disbandment of para-statal armed forces, removal of gross human rights abusers from state institutions, and reform of judiciary.

Accountability provides a deterrent. Like in the ordinary criminal field, international criminal law, and in particular individual accountability, is argued to be important to deterring those who would commit gross human rights violations in the future. Deterrence arguments played a key role in Bosnia. The International Criminal Tribunal on the Former Yugoslavia was in fact a pre-peace agreement mechanism, established during the conflict to try to deter on-going violations of human rights and humanitarian law (however ineffectually), which then were referred to by the DPA. Its deterrence role therefore continued into a notion of post-agreement accountability. Similarly the notion of future deterrence is often used to justify both the International Criminal Court (ICC) and increasing recognition of universal jurisdiction for categories of international crime.

Tensions

Again counter-arguments exist.

Pushing accountability in the form of investigation, prosecution and punishment may prevent a deal from being signed, or undo a cease-fire and reignite conflict. Often there are two points in a peace process when this becomes a very practical issue. Firstly, at the point when a cease-fire comes to be signed, when parties will often try to condition the cease-fire on an amnesty, or at least some measures which aim to protect their position for the duration of the talks. Secondly, at the point when a substantive agreement is signed providing for a road map for a new government, parties may push for a ‘forgive and forget’ approach to past violations. In Sierra Leone, an amnesty for the Revolutionary United Front (RUF) was included in the framework Lomé Accord, in the words of the President, as ‘a prize for such peace’, thereby showing the pressures that forced the amnesty concession.¹³⁰ However, the agreement also made provision for a Truth and Reconciliation Commission in order “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation”.¹³¹ This amnesty was later overturned as is discussed below. Mozambique provides one of the most challenging examples of an agreement which seems to have provided a durable settlement despite, and some would argue even because of, the absence of provisions dealing with accountability.

The particular nature of crimes committed during conflict raise especially difficult due process issues which cannot be satisfactorily dealt with, particularly by fragile democracies. While accountability for serious international crimes is a requirement of international law, the processes by which accountability is sought must also be consistent with international standards. Trials and processes for past human rights abuses run into particularly complicated due process issues, such as: 'no crime without law', non-retroactivity, individual responsibility, the age limit for prosecution, irrelevance of official capacity, non-applicability of status of limitations, and the requisite mental element for a crime. Accountability processes which violate due process standards and implement a crude 'victor's justice' will be problematic. For example, in Sierra Leone after the signing of the 1996 Abidjan Accord, the government embarked on a large-scale process of bringing the civilian junta and military leadership before courts to be tried for the capital offence of treason (although there is no international obligation to prosecute for this crime). The military trials lacked due process, were subject to the death penalty, and were condemned by the UN and others. They seem to have played a part in sustaining and perpetuating RUF violence (although it may have continued in any case). This type of dynamic has led some to argue that trials can destabilise, rather than reinforce, fragile democracies.

The moral, legal and political ends sought to be achieved by processes linked to accountability, such as vetting, reconciliation or personal catharsis, are often not achieved. Some of the instrumental outcomes attributed to accountability processes are not easy to achieve. Often the processes established do not deliver on the goals attributed to them. Thus, vetting processes are often not easy to link to mechanisms of accountability, and even if implemented, may not be as effective in achieving rule of law transformation as human rights training and strong complaints and disciplinary mechanisms. Story-telling may not prove cathartic or capable of generating reconciliation; rather it may prove divisive and painful, leaving victims feeling co-opted into a homogenised 'national narrative' that diminishes both their personal experiences and ways of dealing with it. The conclusions of Truth Commissions may prove divisive and cause inter-group conflict rather than reconciliation, at least in the short-term.

Traditional legal forms of accountability may not always be appropriate to the conflict, culture or goals of the process. Mozambique is often cited as an example where the past was not formally dealt with but peace was nevertheless sustained. In this context, it is often argued that this was due to: first, a focus on African cultural values of forgiveness rather than confrontation; second, the nature of the conflict, which had been a way of life, and where policies of kidnapping and conscripting common citizens had blurred any clear distinction between victim and perpetrator; and third, the peace process' nature which focused on attempting to end the conflict by encouraging soldier participation in political life, and therefore focused on inclusion as the key to its success.

It can similarly be argued in many conflicts that guilt and responsibility are widely shared, with a large part of the population often recruited into active or passive

collaboration. Thus, national reconciliation may not be served by settling past scores. Rather, it may be better to aim to accept “a measure of truth-telling, and acknowledgement that violation of rights occurred while making a fresh start with all sides eligible to participate in the work ahead”.¹³²

HUMAN RIGHTS AND CONFLICT RESOLUTION REVISITED

Undoubtedly there are dilemmas for conflict resolution and human rights actors in this area. However, they may helpfully be viewed as a tension between short-term peace demands of sustaining a cease-fire, and needs that must be addressed in the longer-term, if a stable democratic, rights-based, peaceful society is to be achieved. In the short-term, some form of amnesty, or at least a ‘fudge’ on how to deal with accountability, may appear necessary to achieving a cease-fire. In the long-term, dealing with the past may prove vital in enabling the society to move on, and to underwriting the adherence to the rule of law which will in turn underwrite the reform of key legal institutions. The question is thus not so much whether and how to deal with the past, but how best to ensure that the past is dealt with in a way that is both legitimate and effective.

Terminology¹³³

Impunity: the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.

Serious crimes under international law: grave breaches of the 1949 Geneva Conventions and of 1997 Additional Protocol I thereto and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires states to penalise, such as torture, enforced disappearance, extrajudicial execution, and slavery.

Truth Commissions: official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years, with a view to establishing a comprehensive and authoritative record of what happened.

Amnesty: a formal undertaking to treat alleged crimes as though they had never happened, and not to investigate, prosecute or punish them. Distinguishable from *pardons*, which amount to decisions to forgo or reduce punishment after successful prosecution, and also from situations where investigation, prosecution and punishment do not happen because of lack of political will or legal infrastructure, even though no amnesty has formally been given. Amnesties, pardons or failure to prosecute, on their own or together, may create a culture of *impunity*.

INTERNATIONAL LAW

In this area, law is constantly evolving, through international standard-setting and the decisions of human rights treaty-monitoring bodies, particularly at the regional level. What follows is a broad brush consideration of international legal provisions as they might apply to peace agreements.

Perhaps the sharpest tensions for transitional justice arise around the question of whether and when amnesty may be granted. Here the law is clear in parts, but still has some grey areas.

IMPERMISSIBLE AMNESTY

International law outlaws blanket amnesties for 'serious crimes under international law' as defined above. The legal basis for this is found first in a number of treaties that specifically require prosecution of violations. These legal sources would seem to proscribe amnesty for at least the following sub-set of crimes: torture, genocide, and grave breaches of the Geneva Conventions.

The 1948 Convention on the Prevention and Punishment of Genocide provides that persons committing genocide are required to be punished.

The 1984 Convention Against Torture provides that alleged torture must be investigated and, if the state has jurisdiction under any of the enumerated bases, it must either extradite the offender, or "submit the case to its competent authorities for the purpose of prosecution".¹³⁴

The 1987 Inter-American Convention on Torture and the 1994 Inter-American Convention on Forced Disappearance of Persons have similar provisions.

The 1949 Geneva Conventions require that persons accused of grave breaches be sought and prosecuted, or extradited to a state that will do so. Grave breaches include the following, if committed against protected persons (such as medical and religious personnel and prisoners) and property protected by the Convention (clearly civilian property): wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

However, these only apply to international conflicts, which under Protocol I includes conflicts involving 'national liberation movements' – a term that is currently viewed as somewhat anachronistic and sees states resisting its use in internal conflicts. Where Protocol I does apply, it also adds to the list of 'grave breaches' matter such as: attacking a person who is *hors de combat*; perfidious use of the distinctive emblems of the International Committee of the Red Cross

and other signs protected by the Convention, and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

The Rome Statute of the ICC provides a useful list of serious international crimes similar to those in many of the sources above.

The 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, holds that the passage of time cannot bar prosecutions for war crimes, crimes against humanity and genocide.

Other treaty-based obligations affecting the scope of amnesty are found in general human rights treaties at the international and regional level. These treaties clearly outlaw deprivation of the right to life, including arbitrary disappearances and extra-judicial executions and torture. Neither the ICCPR, African, American, or European Conventions on Human Rights, contain any explicit references to prosecution or amnesty. They do however prohibit the underlying violations, and provide for a right to a remedy (in general terms), and to a hearing before a competent tribunal for violations of rights. Increasingly, jurisprudence relating to torture and the right to life in particular, require adequate investigation capable of leading to a determination of guilt or innocence. In some cases the treaties and international bodies talk of prosecution and/or punishment. These obligations apply to successor regimes as regards the human rights violations of the previous regime, provided that the state has been a party to the Conventions throughout. Those in relation to fundamental rights may apply in any case as a matter of customary law.

Crimes against humanity and gross human rights violations. In addition to these treaty provisions, there are strong arguments that these fundamental rights are protected as a matter of customary law and apply even where key treaties have not been ratified. These arguments have been bolstered by the notion of 'crimes against humanity' as crimes which cannot be amnestied. Crimes against humanity are defined by the statutes establishing the international criminal tribunals for both Rwanda and the former Yugoslavia, and the Rome Statute of the International Criminal Court. They include crimes such as murder, extermination, enslavement, deportation, imprisonment, torture and rape. The crimes have to be part of widespread or systematic attacks, and directed against a civilian population. As regards gross human rights violations, the violations need to be on a serious scale. While it has been recognised for a long time that states can prosecute for these crimes, a view is now beginning to emerge that there is a duty on states to prosecute crimes against humanity. Indeed, there have been increasing assertions of universal jurisdiction for these crimes – the ability of states anywhere to prosecute these offences regardless of where they occurred.

Grey areas in international law?

The definition of serious crimes under international law, as set out above, also talks of 'other violations of international humanitarian law'. Exploring what these crimes might be exposes a grey area in international law. Common article 3 of the Geneva Conventions and Protocol II apply to non-international armed conflicts and prohibit a broad list of crimes, including: violence to life, health, and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation, or any form of corporal punishment. Common article 3 does not explicitly impose an obligation to prosecute and punish. It is widely accepted that individual responsibility through prosecutions and punishment is permitted. Increasingly international law seems to be moving to a position whereby 'serious violations' *require* prosecution and punishment, and even enable universal jurisdiction. The notion of compulsory prosecution and punishment finds some support in the fact that similar crimes in question have been included in the ICTY and Rwandan Statutes, as well as in the ICC Statute. There is still some lack of clarity as to whether they require or permit prosecution and punishment: they appear to permit both prosecution and punishment while the idea that they are required is still under development. A second grey area arises over the nature of the link between these crimes and the level of conflict prevailing? What level of conflict is required to trigger these crimes; and what link is required between crime and conflict?

Permissible amnesty?

Some level of post-conflict amnesty would seem to be allowed and even required. Article 6(5) of Protocol II of the Geneva Conventions provides: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." The ICRC's view, however, is that this provision does not apply for those who have committed crimes under international law.¹³⁵ The UN Secretary-General's Recommendations¹³⁶ and the Updated Principles on Impunity¹³⁷ also seem to contemplate that use of amnesty is lawful on occasions. It is also important to note that human rights standards require the release of those imprisoned for matters such as freedom of speech or association, where prescription of such activities as a crime itself violates human rights standards. However, it is problematic to achieve this through an 'amnesty', which by its very definition suggests that a crime was still committed.¹³⁸

What then is the permissible scope of amnesty? The answer is a little unclear.

First, perhaps individual crimes that were neither grave breaches nor, in the cases of non-international conflict, violations of article 3 of the 1949 Conventions and Protocol II, might be able to be amnestied so long as they did not at the same time constitute crimes against humanity as part of a widespread and

systematic attack against a civilian population. At a minimum it is possible to amnesty crimes such as treason or rebellion committed by insurgent forces. For example, the Côte d'Ivoire peace agreement holds that "the Government of National Reconciliation will take the necessary steps to ensure the release and amnesty for all military personnel being held on charges of threatening State security and will extend this measure to soldiers living in exile".¹³⁹ To the extent that such an amnesty might include serious international crimes, a separate clause could exclude these, as the Côte d'Ivoire agreement went on to do: "The amnesty law will under no circumstances mean that those having committed serious economic violations and serious violations of human rights and international humanitarian law will go unpunished."¹⁴⁰ However, the list of possible crimes which can be amnestied seems fairly minor, short, and not particularly helpful.

Second, crimes that breach only domestic law might be amnestied. This might include minor related crimes such as mayhem, arson and the like if not committed by state-related forces, or during armed conflict, nor are widespread or systematic enough to be considered a crime against humanity. However, the current direction of jurisprudence on the right to life and torture, particularly at the regional level, seems to indicate that murder and serious assault may have to be taken out of the equation altogether – even when committed by non-state actors with no connection to conflict – as this would violate the state's positive obligation under international human rights conventions to pro-actively protect life and prevent torture and other forms of ill-treatment, through adequate criminal laws, investigative and prosecution procedures.¹⁴¹

Amnesties

Impermissible:

- Blanket amnesties that cover both minor and serious international crimes including, in particular, crimes against humanity, grave breaches of humanitarian law, war crimes, genocide, torture, enforced disappearances.

Permissible:

- Amnesties applied to insurgent forces simply for belonging to, or fighting with, the insurgency, or for related offences such as carrying arms or false identification.
- Possibly also minor crimes associated with rebellion.
- Criminalisation of basic human rights should be considered null and void rather than amnestied.

Grey areas:

- How far the list of crimes which cannot be amnestied extends beyond those serious international crimes set out above.
- Some ambiguity over what level of violation and conflict is required to trigger war crimes, or count as 'gross violations' of human rights.
- Whether only traditional notions of investigation, prosecution and punishment are required.

Possible compromises?

Grey areas in the law have been used at times to suggest possible compromises between blanket amnesty and no amnesty at all. Some peace processes use such compromise. Any search for compromise should take account of the needs and wishes of the local population, especially those who are victims.

Truth for amnesty/investigation without prosecution? One of key issues with impunity, particularly in relation to peace processes, is its denial of information or 'truth' to victims and relatives. The Updated Principles on Impunity begin with a section detailing a "right to know", that stresses the "inalienable right to truth".¹⁴² Many of the instrumental goals of accountability listed above, such as reconciliation or institutional reform or even vetting, can be delivered, in part at least, by full and accurate information about the type of abuses that occurred, what institutions or mechanisms facilitated them, which individuals perpetrated them, and what happened to victims.

Investigation short of prosecution would seem to deliver this 'right to truth'. Does investigation falling short of prosecution or punishment form a possible compromise between full accountability and blanket amnesty? Most famously, the South African Truth and Reconciliation Commission (TRC) effectively traded truth against amnesty: amnesty was exchanged for full and frank disclosure.¹⁴³ Proponents of the South African TRC did not justify this merely as a pragmatic trade-off between truth and justice. They argued that there were goals which could be accomplished by the TRC mechanism that could not be accomplished by trials. By nature, trials require high standards of proof to evaluate individual guilt or innocence. Victims are reduced to the standing of 'mere witnesses', with the state and the accused as the main parties. In contrast, a well-run commission, it is argued, can focus on overall patterns of violations, keep the focus on victims and design victim-friendly procedures, examine institutional responsibility as well as individual responsibility, and in general deal with the many 'shades of grey' in terms of guilt and accountability that conflicts tend to produce. Furthermore, in offering a clear incentive for giving information (instead of a disincentive), they might be more effective in delivering information and 'truth'. The TRC itself in the report also argued that 'justice' had not been denied, but that a concept of 'restorative justice' had in fact been delivered – that is, justice as a process between victim, perpetrator and community, rather than justice as retributive punishment.

So are there occasions in which investigation alone can satisfy international standards requiring accountability? While standards on torture and genocide, and the 1949 Geneva Conventions mention 'prosecution', the main human rights standards do not, which seems to leave the investigation-only route open. The current status of the Updated Principles on Impunity as principles rather than 'law', with their emphasis on the right to know, might also seem to suggest that 'hard law' leaves negotiators able to work with a 'spectrum of accountability' running from investigation through prosecution to punishment.

However, by and large, national and international courts and quasi-judicial bodies have adjudicated on the issue have not taken this view. Furthermore, the existence of a truth commission, or even administrative sanctions, has not been found to modify the state's obligations to investigate, and if warranted, criminally prosecute. In the particularly far-reaching words of the Inter-American Court of Human Rights in the Barrios Altos case (2001):

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and *punishment* of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.¹⁴⁴

National jurisprudence and legislation in the Americas has increasingly confirmed this view, as has the UN Human Rights Committee in addressing the requirements of the ICCPR.¹⁴⁵ Furthermore, Principle 28 of the Updated Principles on Impunity clearly assert that: “[t]he fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favourable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility”.

Forgoing punishment? What then about investigating, prosecuting, and then failing to punish, either by use of pardon or other measure? The South African invocation of restorative justice and confession as itself ‘punishment’ further opens up the possibility of defining ‘punishment’ as meaning something different from imprisonment. Vetting, for example, could also be considered punitive.

The Updated Principles on Impunity do not rule this out as an amnesty ‘compromise’. Principle 24 suggests that “even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within ... bounds”. One of these bounds is that perpetrators of serious crimes under international law may not benefit from such measures until such time as the state has met its obligations to prosecute, try and punish such offenders.¹⁴⁶ Although Principle 19 talks of ‘criminal justice’, it leaves open what constitutes ‘punishment’, and if this must mean imprisonment, what length of sentence is appropriate. Principle 28 provides that reduction of sentence at least is appropriate: “[t]he disclosure may only provide grounds for a reduction of sentence in order to encourage revelation of the truth.” However, some doubt on the appropriateness of forgoing punishment is raised by the pronouncements of international human rights bodies which seem to be moving towards the notion that accountability requires punishment in a traditional sense.¹⁴⁷ It is worth noting that restorative justice mechanisms are now a part of domestic criminal justice in many non-conflict situations, as are sentence reductions for admissions of guilt.

Northern Ireland provides an interesting example of sentence shortening as a peace agreement compromise. The Belfast Agreement established in train a

process which resulted in nearly all of the prisoners imprisoned as a result of the conflict being released. However, technically the process was one of 'sentence review' and sentence shortening, rather than amnesty or lifting of punishment altogether (life sentence prisoners remained subject to recall). This was a compromise which preserved some measure of criminal law accountability, while meeting the demands of paramilitary groups for 'normalisation', as was crucial to reaching agreement. There are, however, some limitations to the application of this example elsewhere: firstly, the level of conflict was low and the government insisted throughout the conflict that humanitarian law did not apply, refusing to ratify Protocols I and II. The crimes for which sentences were shortened were therefore not technically 'grave breaches' (under the Protocol I definition of international armed conflict), violations of Protocol II, or of Common article 3 (although the level of conflict specified in Protocol II and common article 3 can be argued to have pertained at different stages). It is also difficult to argue that the conflict saw any crimes against humanity or gross human rights violations. Secondly, and even more pertinently, the persons in prison were almost exclusively members of armed opposition groups. Given that the requirements as regards accountability came from human rights conventions, the duty with regard to these non-state actors was only an indirect and relatively loosely defined positive duty on the state to have in place criminal processes capable of providing a safeguard for the right to life and the right not to be tortured. It is therefore easier to argue that the state responsibility as regards non-state actions had been satisfied by adequate investigation, a full trial and partial punishment.

Full accountability for highest level of responsibility, something less for those below? The provision for the Sierra Leone Special Court to prosecute "persons who bear the greatest responsibility"¹⁴⁸ for perpetration of "crimes against humanity, war crimes and other gross abuses of international humanitarian and Sierra Leonean law",¹⁴⁹ also raises the question of whether prosecutions can be explicitly limited to 'those most responsible' or conversely, whether an amnesty law can be valid if it excludes from its terms the top leaders, while encompassing lower- and mid-level fighters. Peace processes indicate an emerging practice along these lines, even though neither treaties nor general human rights obligations make such distinctions. Indeed, humanitarian law expressly provides that being a foot soldier acting under superior orders does not remove individual responsibility, nor does lack of knowledge apparently absolve commanders of responsibility for serious crimes committed by those under their command.

This practice may be interpreted as reflecting a division of labour between national and international courts, rather than indicating scope for amnesty.¹⁵⁰ The Security Council has supported, since at least 2000, the idea that the International Criminal Tribunals for the Former Yugoslavia and Rwanda should focus on civilian, military and paramilitary leaders. They should, as part of their prosecution strategy concentrate on the prosecution and trial of "the most senior leaders suspected of being most responsible for crimes" while transferring

cases involving lesser offenders to national courts.¹⁵¹ The Prosecutor for the ICC has similarly expressed his office's intention to focus on the leaders who bear most responsibility, leaving the rest to national courts or other unspecified means.¹⁵² However, this is not an absolute bar on moving further down a chain of command if necessary for the whole case to be properly considered. The Sierra Leone Special Court declared that its mandate to prosecute those who bear the 'greatest responsibility' may include not just leaders but mid-level commanders who by their acts encouraged others. The notion of 'most responsible' can be interpreted on a rank or level of responsibility basis, or on an 'actual responsibility' basis that cuts across ranks. To a certain extent prosecutorial discretion will often focus on leaders and organisers. The nature of at least some international crimes, such as genocide, which require proof elements, such as "intent to destroy a certain type of group, in whole or in part",¹⁵³ requires a certain degree of command.

Could therefore a peace agreement legitimately amnesty all but the leaders and organisers – or those 'bearing the greatest responsibility' – while specifying prosecution for these persons to the extent that they have committed international crimes? This can be strategically useful to breaking pyramids of power, and might be permissible provided that there was a credible prosecution mechanism in place for the leaders, and an alternative form of accountability for those lower down. These alternatives might include national court prosecutions, a truth for amnesty scheme like in South Africa, a Gacaca-type process as used in Rwanda resulting in community service or some other sanction, or a new variant rooted in a country's culture and community conflict resolution traditions. However, a 'Justice and Peace Law' aimed at demobilisation and reintegration of paramilitary groups in Colombia, shows some of the dangers inherent in suggesting this as a compromise. This law contains some semblance of accountability, in what appears to be an attempt to save it from international legal challenge, by creatively reinterpreting the notion of 'punishment' to comprise shortened sentences to be served in 'agricultural colonies'. The law appears troubling given its 'self-amnesty' dimension (the groups having alleged links to government), the lack of distinction between levels of responsibility, the lack of any linkage to ending the conflict as a whole, and the lack of involvement of victims and families which might justify such a nuanced approach.¹⁵⁴

As regards the possible compromise, it is worth pointing out that leaving the leaders and organisers of conflict vulnerable to prosecution does not do much to address tensions between 'human rights' and 'conflict resolution', as these are the very people likely to be at the negotiating table.

Other international standards relevant to the design of transitional justice mechanisms

Accountability and justice do not begin and end with prosecution and punishment. Negotiators should bear in mind other matters which do not involve

a clash between human rights and conflict resolution. The Updated Principles on Impunity provide for:

- A right to truth.
- The duty to preserve memory.
- The victim's right to know.
- A right to reparations.
- Guarantees of non-recurrence, including reform of state institutions, disbandment of para-statal armed forces, demobilisation and social reintegration of children, and reform of laws and institutions contributing to impunity.

They also provide the following process-focused standards, in particular for the establishment of truth commissions:

- Guarantees of independence, impartiality and competence.
- Guarantees for persons implicated and for witnesses and victims.
- Adequate resources.
- Provision that a commission should have terms of reference which call for the inclusion in its final report of "recommendations concerning legislative and other action to combat impunity".¹⁵⁵
- Provisions aimed at ensuring that the experience of women and the most vulnerable are dealt with adequately.
- Provision for reports to be publicised.
- Measures relating to preservation and access to archives.
- Clear mechanisms for consultation, both with respect to the establishment of a truth commission, and also with regard to institutional reform intended to prevent recurrence of violations.

In addition to these, monitoring of the implementation of a truth commission's recommendations can often be usefully specified.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, contain useful definitions of victims, and reinforce the right to reparations.¹⁵⁶ They also include useful guarantees of non-repetition for victims, including: cessation of continuing violations, search for the bodies of those killed or disappeared, official declaration or judicial decision restoring the dignity, reputation and legal and social rights of the victim, commemorations and tributes to the victims, and institutional reform.

Summary of law

- **Serious violations of international law must be investigated, prosecuted and punished.**
- **Amnesty is still permissible and in some instances desirable. However, the only clear category of crimes which can be included are those which only constitute domestic crimes, such as those directly related to 'rebellion', such as treason, sedition, or being a member of an unlawful organisation.**
- **Criminalisation of exercise of human rights or punishment after trials without due process should be considered null and void.**
- **International law contemplates criminal justice as the mechanism for accountability, but does not specify exactly how it should operate in terms of process or punishment.**
- **There may be some scope for 'creative' localised and culturally appropriate concepts to operate as a compromise between blanket amnesty and full traditional legal accountability, particularly at the national level as regards those more peripherally involved, or more minor crimes. However, international legal standards appear to be moving towards ever-more restrictive areas of amnesty.**
- **Other important factors in dealing with the past require to be dealt with, in particular, measures for victims of human rights violations and abuses, such as reparations.**

CHOICES FOR MEDIATORS

Many of the tensions between the demands of conflict resolution and the demands of human rights law can be reframed away from 'blanket amnesties v. complete accountability', to a more nuanced set of choices.

Sequencing. Case studies indicate that to some extent the apparent clash of justice and peace is again an issue of sequencing. The question of whether the parties will agree to accountability may be usefully reframed to that of when and how best a process can provide for a significant measure of accountability. While accountability might be difficult at an early stage of negotiations or in early agreements, it may be accepted as necessary at a later stage. The difficulty for negotiators may be: how much to say and provide for at what stage. Some agreements have stayed silent, while others have provided only broad commitments for accountability. These approaches have had varying outcomes as regards whether they led to effective mechanisms or amnesty.

Creative wording for amnesty provision. Where amnesty is crucial to one of the parties to a conflict, negotiators should explore how the amnesty can be drafted so as to limit it, for example to permissible crimes, or as a merely temporary measure. The Lomé Accord amnesty in Sierra Leone may have indicated a failure of imagination in drafting rather than a clash between justice and

peace: it seems that possibilities such as an amnesty not including war crimes and crimes against humanity, or an amnesty conditional on implementation of the agreement, or on co-operation with a truth commission, or on such a commission having the power to recommend prosecutions, or the establishment of an international commission of inquiry, were not taken on board by the negotiators.

In Burundi, the immediate transitional issue of amnesty was dealt with through the use of a temporary immunity against prosecution for 'politically motivated crimes' prior to the signature of the agreement.¹⁵⁷ However, the agreement simultaneously also requested the establishment of an International Judicial Commission of Inquiry to "investigate acts of genocide, war crimes and other crimes against humanity"¹⁵⁸ and committed to a National Truth and Reconciliation Commission to "investigate human rights abuses, promote reconciliation and deal with claims arising out of past practices relating to the conflict in Burundi."¹⁵⁹ In this way the divisions between parties which designing detail would have exposed, were avoided by fielding the issue out to the international community to resolve.

Compromises in the strength of a peace agreement's provisions do not necessarily translate into weak outcomes. In Guatemala, the March 1994 Comprehensive Agreement on Human Rights was used to place the issue of impunity on the agenda at an early stage of the peace process. It provided for: 'firm action against impunity' and stated that, the "Government shall not sponsor the adoption of legislative or any other type of measures designed to prevent the prosecution and punishment of persons responsible for human rights violations".¹⁶⁰ A later agreement then provided for a Commission for Historical Clarification (June 1994 Agreement for the Establishment of the Commission to Clarify Past Human Rights Violations and Actors of Violence that have caused the Guatemalan Population to Suffer). While the negotiations resulted in restrictions being built into how the Commission on Historical Clarification would conduct its work, which were criticised by human rights actors at the time, the Commission nevertheless produced a strong report whose recommendations still play an important role in combating impunity.

Where pressures for impunity are exceptionally strong, perhaps staying silent on the question of accountability may be the best that can be achieved in the text of an agreement. Indeed, silence may be difficult to maintain where parties are pushing for an amnesty as the price of a deal. To some extent the development of increasingly clear international law provisions against impunity, together with the on-going role of the International Criminal Court (whose prosecutorial discretion is not fettered by peace agreement provisions) and development of universal jurisdiction, may make it easier for negotiators to resist provisions for amnesty being included in an agreement as not worth the paper they are written on. The rejection of the United Nations, and later the Sierra Leone Special Court of the Lomé amnesty, with respect to international crimes, is an illustration.

Sierra Leone also demonstrates the value in negotiators or other observers dissociating from amnesty provisions as a last resort. While this may not stop their inclusion, a dissent itself may help place impunity on the agenda at a later stage of the process. All these matters are controversial, as the Sierra Leone Truth Commission's criticism of the removal of an amnesty from the tool kit of negotiators indicates.¹⁶¹

Principles or detail. As with other areas, sequencing issues again raise a question as to what detail should be included in an accord. There is a virtue to tying both sides to commitments even though these will prove difficult to carry out, with a view to strengthening each side's resolve and allowing for international supervision and evaluation of compliance, which may pave the way for stronger measures to emerge. On the other hand, parties at the negotiating table may be the wrong people to design specific accountability mechanisms. They may have particular needs and biases which prevent the full discussion that is necessary to making transitional justice mechanisms an integral part of a national dialogue and a tool for reconciliation. The typical gender and other imbalances of combatants and political élites may mean that any resulting provision is less sensitive to the needs of women, children, indigenous peoples or minorities other than those at the centre of the conflict. This may point to a need to sketch out broad principles and a timeframe to set the agenda and to lock the parties into having a transitional justice mechanism, while leaving the details to subsequent national processes that may be more inclusive.

Importance of consultation. Increasingly, international recommendations have stressed the importance of consultation with regard to mechanisms relating to the past. This impacts on the sequencing of how issues are dealt with. If a peace agreement is to include a clear commitment to a particular type of mechanism, consultation would need to have taken place at an earlier stage of the process. However, outline commitments to particular types of mechanisms could include some provision for consultation as to the full detail of implementation.

Different mechanisms at different times for different purposes. Peace process practice indicates increasingly diverse mechanisms to deal with the past, from domestic mechanisms of courts, various types of commissions of inquiry and truth commissions, to international tribunals, and 'hybrid' tribunals that incorporate both international and domestic participation. Furthermore, more than one mechanism is now often being implemented simultaneously; how successful this has been deserves further attention.

Different mechanisms can have different functions and operate at different stages of a peace process. For example, Bosnia and Herzegovina was a situation where an international tribunal was established prior to the conflict's end, and then continued its accountability function beyond the peace agreement. In South Africa, even prior to this agreement, a Commission of Inquiry had been put in place to look at government and related non-state violence during the negotiation period, which impacted on future debate, but

also played an important role during negotiations. In 1992 the ANC had also held its own internal Commissions of Inquiry into ANC atrocities committed in ANC refugee camps in other countries. In 1993 it put into place a further commission to examine allegations of human rights abuses in its detention centres, which found that members of the ANC's security department had been involved in abuses including torture and other forms of ill-treatment, execution and arbitrary detention. These self-critical initiatives were undertaken in part to illustrate the importance of accountability and build opposition to any future government legislation for amnesty aimed at state actors.

The South African TRC which resulted was established not during the immediate period of transition, but after the first democratic elections. The negotiated provision contained in the Interim Constitution, which was eventually used to create the TRC, had merely provided that: “[i]n order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past”, and made provision for a law to be passed within a set timeframe to provide for “the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with”.¹⁶²

Had more detail been negotiated between the ANC and the National Party (the then South African government), it would in all likelihood have had much weaker accountability mechanisms than the TRC which the ANC-dominated Government of National Unity put in place after a transfer of power.

The case of Sierra Leone also demonstrates how different mechanisms can be used together to provide for different functions, with the Truth and Reconciliation Commission and the Special Court operating simultaneously.¹⁶³ The Burundi Arusha Accord also contemplated several different mechanisms being designed. Story-telling and some shared societal understanding of the causes and consequences of the conflict can usefully be provided by truth commissions even when they do not provide for individual accountability. These do not need to preclude other processes which focus on individual accountability. Indeed, the case of Northern Ireland where a ‘piece-meal’ approach to the past has been adopted, with issues such as victims, accountability, and prisoner-release all being disaggregated into quite different processes with little link between them, may have something to offer to the discussion.¹⁶⁴ While there is still probably a need for a holistic institution dealing with the past in Northern Ireland, this also illustrates how many issues can be dealt with through a range of mechanisms rather than a ‘once-off’ unitary mechanism, such as the South African TRC.

National/international tasks. As suggested above, it may also be useful to think about a division of labour between international and national mechanisms of accountability, reflecting to some extent different legal requirements, and also different spheres of legitimacy. Thus, international tribunals can deal with the most serious abuses and the most serious perpetrators, while national

processes can deal with others, perhaps interpreting 'punishment' in a less traditional way. Different mechanisms may also move at different speeds – more informal processes perhaps being more quickly implemented than those which involve the due process issues attached to deprivation of liberty. The proposed measures to demobilise and reintegrate paramilitary groups in Colombia however, indicate some of the difficulties which can emerge with this approach.

Focus on victim's needs. While the question of reparations is linked to accountability, peace agreements have sometimes also usefully made provision for victims of 'the conflict' more generally, and without any link to 'fault'. Separating some service delivery to victims from the question of reparations often makes it less contentious, enables a broad set of needs to be addressed, and can speed up delivery of resources to victims. Meeting all needs through 'reparations' ties up victims' needs to processes of accountability which may take time to set up, and only be relevant to certain categories of victims. For example, in Northern Ireland extensive provision for victims was made, with no reference to reparations or rights, but couched in 'service delivery' language. This approach does not negate the possibility of future reparations as linked to accountability – these can be added later. This approach can take the sting out of the politics of reparations when it does happen – if all victims are having their basic needs met, reparations for some categories of victims are easier to understand and accept. This clearly raises a need for resources, but as these funds are not linked to state accountability, they can be sought internationally as important to underwriting the peace agreement.

Link to national institution-building. Negotiators should be aware of the link between dealing with the past and institution-building in the future. Processes of accountability will impact on institutional reform, even if an agreement does not factor this in. Truth commission recommendations relating to non-reoccurrence will address matters such as vetting or repeal of legislation, or more wholesale reform of institutions not addressed by the agreement. The issue of dealing with the past should be borne in mind when deciding how to deal with institutional provision in the text of a peace agreement.

GUIDELINES

Pre-negotiation phase

1. Are human rights abuses continuing? How does this affect who can and should be brought to the negotiating table?
2. Is there any way to signal that the issue of accountability will have to be part of the overall framework of negotiations and peace agreements?
3. If human rights commitments are to be made in order to limit the conflict, can these include a basic commitment not to pass laws on impunity?
4. If a party intend to condition a cease-fire on a measure of impunity:
 - Can a compromise be found in strictly limiting it to enabling a talks process?
 - Can the issues of amnesty and accountability better be avoided altogether at the early stages, if absolutely necessary, because addressing them may lead to unsatisfactory and perhaps impermissible compromises?
 - Alternatively, are there good arguments to exclude perpetrators of human rights violations from the outset? If so, how will talks proceed and how fruitful will they be? If not, how will this affect any 'deal' as to future peace, governance and stability?
5. If the issue of amnesty is proving difficult, can it be 'fudged', for example by using general language based on international law which will keep open the development of accountability processes at a later stage? Or can it be delegated to the international community, or another process which might have the parties' trust? If so, what will be the process for involving local communities?
6. If all these approaches fail, are there ways to make provision in the agreement, either explicitly or implicitly, for future political developments in relation to accountability to be developed at the implementation stage?

Main agreement phase

7. How will the past be dealt with?
8. How can the most 'normalisation' be established together with the required measure of accountability?
9. What legal standards will be used? Will these apply to all sides of the conflict?
10. Can the Updated Principles on Impunity provisions on truth commission mandates be built into any provision in this area?

11. Are there specific needs that can be usefully put on the agenda which the parties may not be concerned with, for example the needs of women? How is information going to be gathered on these needs?
12. Can issues such as reparations be dealt with?
13. How do the issues of the past affect measures relating to the return of refugees and displaced persons, and are these consistent?
14. How do the issues of the past affect provision on institutional reform?
15. Does the issue of vetting need to be addressed? If so, what processes relating to the past will this require to be fair and effective? How will they affect subsequent processes for dealing with the past?
16. If parties intend to agree on an impermissible amnesty, can mediators and observers clearly and publicly dissent from any provisions?

Implementation

17. What are the processes by which any past-focused mechanism will be implemented?
18. What are the time frames for implementation of any past-focused mechanism?
19. What monitoring processes will be in place?

RECOMMENDATIONS

The Updated Principles on Impunity set out best practice in this area. They should be part of any toolkit for mediators, and distributed to parties in a conflict where possible. The guidelines should be adhered to as far as possible. Their content will not be fully re-stated here. This recommendation intends to incorporate the recommendations in the guidelines.

Issues of sequencing should be fully explored with a view to reconciling tensions between demands of accountability and of compromise. In situations where accountability is particularly difficult, consideration should be given to how best to set down markers and perhaps processes for the future, when the issue may be easier to address.

Greater attention should wherever possible be paid to practical measures to support victims of the conflict. These measures can include reparations, compensation, and restitution, as linked to accountability for the past. However, provisions for victims can also usefully be addressed outside of a 'past-focused' framework in terms of 'service delivery' and this can be useful to meeting basic needs especially in the shorter-term. This is often an area of common ground among the parties to a conflict.

Mediators and human rights activists should assist parties to the conflict in becoming familiar with international law requirements as regards accountability and encourage compliance with human rights and humanitarian law standards.

Consultation with affected communities is important at all stages of a peace process. In particular, consultation should occur over victims' needs, particular transitional mechanisms proposed and institutional reform.¹⁶⁵

The different roles of conflict resolution and human rights actors should both be acknowledged as important and legitimate. Normative articulation of human rights standards has been key to the current developments in peace agreement practice; while the compromises of peace agreements have proved useful in ending the worst excesses of violence. Human rights actors may have to accept that not all processes are perfect, and that there will be pressure to bargain over matters of accountability which cannot always be fully resisted in the text of an agreement. Peace mediators should recognise that human rights actors make an important contribution to peace in articulating and advocating accountability, and should explore the limits of the options available to them. However, both sets of actors have clear roles to play by working within their own framework. The principled articulation of human rights standards by activists may prove useful in changing what is possible in the future. Conversely, agreements with a measure of compromise may create a condition of cease-fire which enables human rights developments that would not otherwise be possible.

This said, human rights and conflict resolution actors should aim to understand the approaches of each other, and to keep their lines of communication open, with a view to finding creative solutions that meet the common goals of both. Peace mediators may have to accept that the deals they cut may come to be undone by international legal developments, and so they should understand the relevant legal obligations. Human rights activists may be able to co-operate in the creative design of institutions and mechanisms, which deliver international legal requirements of accountability, while meeting some of the demands of compromise. Human rights standards for the most part do not provide for absolute rights and obligations. Moreover, the mode of their delivery is not fully specified. This leaves room for negotiation.

Mediators should carefully consider the implications for their own role and international obligations, in being complicit in an amnesty provision which violates international law. This may affect the mediators' notion of strict 'impartiality' regarding the demands of the parties. Mediators can dissent from amnesty provisions which are not in compliance with international law.

VI. IMPLEMENTATION ISSUES

Peace agreements are difficult to implement. To be successful, the compromises fashioned therein need not only to be sustained, but developed. Internationalised processes of verification and oversight, crucial at the start, must give way to local constitutions and democratic politics, as policed through legal institutions that promote the rule of law. There is no easy way to achieve this transition.

With human rights issues at the heart of conflict and peace agreements, they also stand at the heart of implementation difficulties. This chapter briefly examines ways in which mechanisms are built into peace agreements which attempt to secure parties' compliance of parties. It then considers some of the difficulties of implementing the human rights dimension of peace agreements.

MECHANISMS FOR IMPLEMENTATION

Given that peace agreements form compromises, their immediate implementation will often depend heavily on international promotion and support. Peace agreement implementation generally takes place within a political climate that is initially constantly changing. Once-off violent events, such as dissident attacks on civilian populations, a change of leadership consequent on his or her killing or elections, or the other side's perceived breach, can all shape the commitment to the peace agreement, and rock its foundations.

Furthermore, the institutional reforms necessary to delivering human rights protection often present a grim landscape. Challenges can include: a dysfunctional, discredited, or absent judiciary; police or military force perceived as part of the problem of human rights violations; prisons whose conditions and brutality violate human rights standards, and where people have languished for years without charge or trial; a civil society that is in tatters, terrified, under-resourced and with leadership in exile or dead; rife corruption in public offices; and organised crime dealing in drugs and arms and human trafficking.

In this context, international actors may play various, often simultaneous, roles with regard to implementation of human rights:

- *Providing technical assistance and expertise.* In particular, areas of criminal justice reform, judicial reform and reform of policing (police and army), may all benefit from transnational expertise.
- *Providing for international norm promotion functions.* Commentators have argued that the effectiveness of international actors in the peace agreement context lies less in their capacity to provide enforcement guarantees, and more in their capacity to promote international law norms, particularly human rights standards, so that they are internalised by the parties to the conflict.¹⁶⁶ This can include support for the implementation of human

rights frameworks included in agreements, and indeed, put pressure for enforcement.

- *Providing for guarantees of compliance.* International actors may monitor and verify compliance with the agreement. With respect to the United Nations, these functions can be underwritten by UN Security Council Resolution, with associated review processes.

Peace agreements often include a range of overlapping mechanisms aimed at implementing them. There are broad range of possibilities for international actors, only some of which can be listed here: peacekeeping operations; interim transitional authorities; specific roles of international organisations relating to specific provisions, such as elections (OSCE), returnees programmes (UNHCR), or prisoner release (ICRC); or contact groups of 'friends'. In different ways, international actors aim to assist and thereby ensure the implementation of agreement commitments.

THE DIFFICULTIES OF IMPLEMENTING HUMAN RIGHTS PROVISIONS – GENERAL PROBLEMS

A full analysis of implementation difficulties is beyond the scope of the report. The following are some of the key factors which affect the implementation of the human rights aspect of a peace agreement, and which should be borne in mind at the drafting stage.

The peace agreement does not hold and violence reignites. If this happens, human rights protections will often not be implemented and new forms of human rights abuses will arise. However, it is worth noting that mechanisms for protecting human rights often stand independently of new political institutions. Human rights mechanisms can therefore play a role in limiting the conflict and keeping the possibility of a new phase of a peace process alive, even if the political process should break down. In Sri Lanka, for example, a monitoring mechanism for a cease-fire agreement which included embryonic rights provisions, continued to some extent during a negotiation stalemate and played a small role at least in preventing breakdown of the cease-fire. In Northern Ireland, where the main political institution collapsed, the on-going implementation of the Agreement's human rights measures gave the peace process some tangible forward momentum in a situation of political stalemate. A conflict resolution role for human rights monitoring can, however, lead to some difficult distinctions between human rights monitoring and cease-fire monitoring, and pressures to present a 'balanced' picture of human rights abuses so as not to further move the parties away from negotiations. This has led to suggestions in several processes (Burundi, Guatemala, El Salvador), that at critical junctures in the peace process there was an unwillingness to publicise human rights abuses perpetrated by one side only, and that monitoring became skewed by the pressure to show 'balanced fault' even where it was unbalanced.

The implementation of human rights measures involves a transfer of power which is resisted. The integral relationship of human rights provisions to 'the constitutional fix', means that even though framed in neutral terms, these provisions will in-effect often operate to limit the power of a previously powerful group. The implementation of human rights in practice will often be resisted by those groups who were least in favour of including human rights provisions. In Bosnia, for example, implementation of human rights measures and the right to return were resisted and required international intervention. Those used to controlling the police and military and using them to their own ends, will typically see reform as a threat. The general language of human rights standards may be useful to reaching agreement on including it in a peace agreement. However, this general language may also mask clear differences between the parties as to what implementation requires. International actors need to recognise the political dimension of implementation to be effective. A narrow focus on technical capacities such as case-management, forensic skills and investigation techniques, will miss key issues such as who has power over the institutions, and who can nominate, promote or remove officials who fail to yield to real reform.

Some core issues are not dealt with, and human rights become an on-going bargaining tool. Often core issues (such as dealing with the past in Northern Ireland) are not dealt with and continue to cause difficulties. As new negotiations aimed at implementing the agreement take place, the delivery of an agreement's human rights commitments can continue to be used as a bargaining chip.

Socio-economic rights have not been dealt with. Peace agreement provisions with regard to socio-economic rights are in general rather weak, and transitional justice institutions often do not deal with socio-economic violations. However, socio-economic issues often lie at the core of conflicts, and are particularly implicated in the transitional period, when reconstruction of war-torn societies must take place. Reconstruction issues themselves have the capacity to build or destabilise conflict. The issue of socio-economic rights particularly comes to the fore because many peace processes (such as those of Eastern Europe) involve transition not just from conflict to peace, but also an economic transition. International institutions such as the World Bank and the International Monetary Fund often push for market-driven reforms which may not take adequate account of the post-agreement need for large-scale public spending. The failure to have adequate socio-economic provisions and reconstruction can perpetuate the conflict, not just by creating on-going grievances, but by prompting non-state armed groups (sometimes including former state actors) to turn to organised crime in a cycle of self-sustainability.¹⁶⁷ Other socio-economic issues include the use and abuse of natural resources (often a source of violent conflict in sustaining combatants), and the need to repair a criminally damaged environment.

External processes of monitoring and verification are weak, or external actors operate to undermine the peace agreement. International involvement, in the short-term at least, may be crucial to implementation. Where international enforcement is weak, a peace agreement and/or its human rights provisions may remain as paper commitments. This is particularly so when international actors have provided the main impetus for the peace process. Coherent implementation of human rights standards and mechanisms, in line with international law, may require on-going international involvement either as over-seer, or even as participants in 'local' institutions such as courts. However, international intervention cannot be assumed to be human rights friendly in all cases. International groupings and institutions can also play potentially harmful roles in the post-conflict phase. In particular, as mentioned earlier, international financial institutions are often criticised for imposing free market reforms which limit the social spending which is vital to reconstruction.¹⁶⁸ Similarly, given that the importance of international actors is linked to their norm-promotion capacity, where the normative basis for the intervention, or the mechanisms for the accountability of international actors is unclear (for example in Iraq, or to a lesser extent in the UN Interim Transitional Administrations), this is likely to undermine their effectiveness and lead to local cynicism about human rights.

Civil society is weak, being restrained, or made dysfunctional by the peace process itself. The role of civil society will be crucial to long-term national implementation of human rights, and also the legitimacy and ownership of the concept of human rights. In the longer-term the on-going implementation of human rights measures will depend on a degree of internalisation of both human rights standards and mechanisms at the national level. The case of Cambodia indicates how even robust international enforcement can deliver minimal results where national processes fail to take over (although admittedly the strongest measures did not focus on delivery of human rights). Institutional reform is not enough to ensure national implementation: an active citizenry, aware of their rights and able to access them, will be crucial to making human rights practices a national reality. Where civil society does not exist, or has little grasp or experience of human rights matters, it may need to be supported. Where societies have little experience or faith in 'law-based' solutions, diverse culturally appropriate approaches to human rights will be needed. There is also evidence that, paradoxically, civil society, and notably domestic human rights NGOs, face a particular set of organisational difficulties consequent on a peace agreement.¹⁶⁹ They tend to have to revise their mandates in light of the agreement, search for new sources of funding (when international donors view the conflict as 'resolved'), and can dramatically lose personnel to new state structures, as illustrated in South Africa. If the peace process breaks down, human rights defenders can find themselves even more at risk than during the conflict – targeted as opposition by military actors seeking to avoid the appearance of attacking 'the other side'.

Human rights are narrowly understood to include only matters and groups relevant to the conflict. Important issues with capacity to make peace real,

such as gender equality or the rights of minorities other than the 'main ones' (including indigenous peoples), are likely to be eclipsed by a narrow view of the politics of the conflict. While the very link between human rights and the conflict places human rights provisions at the centre of a peace agreement, this may also operate to limit their scope. In particular, the needs of women and minorities not at the centre of the conflict or negotiation process, may be a low priority in implementation or not dealt with at all. This may lead to a lack of rights for key sectors of society, and indeed perpetuate a narrow view of the role of human rights as relevant only to the society's main divisions – enabling rights to be resisted by these same key groups. The language of human rights, however, is one which claims to be inclusive. Peace processes form an important opportunity to address the needs of excluded groups. Conversely, the ability of the peace process to deliver for these groups may be one of the tests of the substantive content of 'peace' as a lived experience. Designing human rights institutions so that they address the needs of these groups may also be useful to moving from an idea of human rights as 'belonging to one side' only.

RULE OF LAW REFORM – A PARTICULAR CHALLENGE

These general problems manifest themselves in particular ways around rule of law reform, focused on building the institutions of criminal justice and law enforcement institutions, and national human rights institutions. Rule of law institutions are vital to making peace agreement commitments a reality. Some peace agreements have made very specific provision for such reform (El Salvador, Guatemala, South Africa); others, only vague provision (Haiti, Cambodia, Sierra Leone). In Bosnia, the Dayton Peace Agreement provided a comprehensive human rights framework, and multiple international, domestic, and 'hybrid' institutions for their enforcement, but said very little about judicial reform. Recently, UN Security Council Resolutions have made substantial rule of law provision, even when not addressed in the peace agreement which the Resolution follows up.¹⁷⁰

Institutional reform is particularly difficult to implement. Even without open resistance, processes of institutional reform are increasingly recognised as long-term and difficult. Matters such as reform of criminal justice, of the judiciary and of the police are not easy to achieve in any society. Translating processes of reform into changed practices is often an elusive task. Clearly, reform will be more difficult in societies where these institutions were implicated in the conflict. Furthermore, in states where these institutions are fragile or non-existent in any acceptable form, merely establishing them as functioning may prove a difficult and long-term task, with interim alternatives required. As a practical matter, institutional reform can involve: drafting new penal codes and codes of criminal procedure; working to establish the mandates, funding lines, and general support of national human rights institutions; participating in the design and delivery of training programmes for professionals in all rule of law institutions; building the infrastructure of courts, prisons and police; procuring equipment;

building the management infrastructures of legal institutions; monitoring and reporting on their functioning; working to establish independence and accountability within the institutions; working to build transnational contacts for the institutions aimed at improving their expertise and reassuring them; and working closely with local community groups to include their perspectives in the processes of reform.

These needs present challenges of expertise, resources, local involvement, and international co-operation. Failures in one rule of law area impact negatively on other areas where progress has been made. While creating new police forces with little existing basis proved difficult in Kosovo, Haiti, Rwanda and East Timor, it was even harder to get the judiciary functioning at a minimally acceptable level. This created a situation where the gains in policing were undermined by the on-going difficulties with the rest of the criminal justice system. While after two years the police were arresting people according to the Constitution and law, observing their rights and holding them for trial, the courts failed to process the charges expeditiously. As a result, police detention facilities and prisons soon started to overflow with suspects awaiting trial. Prison conditions, which had dramatically improved, soon deteriorated and overcrowding led to increased tension and violence in the prisons. Eventually prisoners started to be released because they had not been formally charged within the constitutionally mandated time limits. This frustrated both the police who had followed all the rules, and the public who saw dangerous people back on the streets. It undermined human rights and the rule of law as individuals took justice into their own hands, summarily executing suspected drug traffickers and leaders of criminal gangs.¹⁷¹

On-going monitoring is crucial to ensuring rule of law. At an agreement's implementation stage, monitoring is less related to collecting evidence for public reports and denouncing those responsible for violations, and more focused on understanding the strengths and weaknesses of the justice system so that projects aimed at reform are based on an informed understanding of actual practice. This of course presents a new set of challenges for human rights NGOs.

Two key questions may usefully guide the goals of international actors:

- Will the work impart skills, knowledge and tools so that local institutions responsible for the rule of law are stronger than before?
- Can local actors (NGOs, National Human Rights Institutions, Police Civilian Review Boards, and independent, impartial Judicial Inspection Units and Ombudspersons), investigate, analyse, report, monitor, and continue strengthening their institutional capacity without the further help of international experts?

RECOMMENDATIONS

The following recommendations are based on lessons which can be learned from existing practice, even though each situation will be unique.

Reform of criminal justice, police, and judiciary must be seen as concepts which go beyond the basics of courts and institutional structures. They are concepts which will go to the heart of specific problems unique to the situation in which they operate. Property disputes, birth registrations, juvenile justice, citizenship/statelessness, and Disarmament, Demobilisation and Reintegration (DDR) can all be essential to insuring an end to conflict and establishing the rule of law. While constitutional courts are often a focus of reform, it is often at the lowest court level, or through the actions of police, that the most marginalised and excluded find themselves denied access to justice.

Attention must be paid to rule of law initiatives at the start of a peace operation. Waiting can mean that 'spoilers' or those with vested interests become established, making the job harder.

The United Nations, bilateral donors and host governments should agree on an overall rule of law strategy, specifying priorities, sequencing, benchmarks, indicators, evaluation mechanisms, responsibilities and deadlines, as well as follow-up.

Non-governmental organisations and civil society in general should participate in the strategising process, and local ownership should be fostered through facilitating local participation, and using local experts.

International actors who have supported human rights NGOs, should continue to support them at the implementation stage, by recognising that human rights advocacy is particularly challenging and often dangerous at this stage of a process.

The political dimension of rule of law reform, and the sites of resistance to it, should be understood from the start, and projects designed with clear goals and with strategies for dealing with resistance.

Creating accountability and ending impunity should be priorities. This should focus both on entry into the institutions, on promotion within them, and on the administrative, budgeting, oversight, planning and procurement processes. Training, while important, is secondary to these matters.

International donors should view funding to the conflict-zone equally vital both pre-agreement as well as post-agreement.

Financial reform must take account of the need for reconstruction, delivery of rule of law institutions, and of socio-economic rights, even though this may go against market-driven reform imperatives.

Work should continue on what it means to talk about an agreement's 'implementation'. This report has worked throughout with a notion of 'negative peace' (reduction in violence) and 'positive peace' (development of effective institutions for managing conflict and making sure that it is non-violent on an on-going basis). The former can be empirically measured, the latter is more difficult to measure. However, benchmarks of the judiciary and police, for example, should include: ethnic, racial and gender diversity of key staff; financial resources (percentage of national budget); objective appointment and promotion criteria; transparency in decision-making; accountability and applicability of professional codes of ethics; and protections from external interference. Delivery of institutional reform may be a better indicator of the agreement's success than the limiting of violent conflict, given that violence can sometimes be temporarily stopped by large degrees of repression, or displaced into criminal activity where it does not register as an on-going manifestation of 'the conflict'.

VII. CONCLUSION: THE ROLE OF HUMAN RIGHTS IN PEACE AGREEMENTS

Peace agreement practice evidences a positive relationship between human rights and conflict resolution in many areas. The analysis of the preceding chapters indicates that as regards key areas, such as creating human rights frameworks and mechanisms for their implementation, there will often be a close complementary relationship between human rights and conflict resolution. In other areas tensions may exist, most notably relating to the issue of accountability, and to a lesser extent forcible displacement-related issues.

This chapter builds on that analysis in stating the different roles that human rights provisions can play in peace agreements and peace processes.¹⁷² It then analyses some of the factors which influence the inclusion of human rights provisions in peace agreements. It concludes by examining the key choices for mediators and by making some general recommendations aimed at developing the role of human rights in peace agreements.

HUMAN RIGHTS AND CONFLICT RESOLUTION: ARGUMENTS FOR A COMPLEMENTARY RELATIONSHIP

Human rights abuses are a central component of internal conflicts. As the case studies illustrate, human rights abuses are both a cause and a symptom of conflict.

Human rights abuses are causes of conflict. Human rights abuses cause and escalate conflict. Many internal conflicts have their roots in the denial of human rights. As non-violent pressure for change and delivery of rights is resisted, violence is often engaged in by both the state and its opponents. Interestingly, many ethnic conflicts which are viewed as primarily secessionist conflicts began as demands for greater equality and human rights. Thus, conflicts in Kosovo, Macedonia, Northern Ireland and Sri Lanka, had claims for equality at the centre of their genesis. As these claims remained undelivered, or were actively resisted, violence resulted. Centralist/revolutionary conflicts and economic/criminal conflicts are often also generated by state repression, lack of equal access to resources, and the failure of the rule of law.

Human rights abuses are a symptom of conflict. As conflict escalates, human rights abuses escalate and cycles of repression and violence occur, often implicating all actors. Both Bosnia and Burundi stand as examples where mutual fears of domination, coupled with claims to territory, led to human rights abuses as a tool of war. There will often be disagreement within conflict zones as to whether human rights abuses are a symptom of conflict or a cause of conflict in what is in essence a debate over 'who started the war'. This evidences

the cyclical nature of conflict where new abuses create new grievances in a conflict that escalates and mutates, giving rise to new human rights abuses and providing a need for complex and multilayered 'solutions'.

Addressing human rights abuses is essential to moving from conflict.

Given the centrality of human rights abuses to conflict, addressing them will be vital to achieving peace. There are several reasons for this, which vary from conflict to conflict:

Human rights address basic human needs, whose denial is often asserted to be a root cause of the conflict. As the above analysis suggests, human rights protections will often be a vital tool in convincing parties that their fears of discrimination, domination and annihilation have been addressed, both with respect to resource allocation and to the exercise of state power more generally. While a 'deal' as to how governmental power is to be held and exercised will be crucial to assuaging these fears, so too will human rights protections. Electoral politics aims to reassure people by ensuring fair participation in government, but the mechanisms of participation are the fairly indirect ones of the periodic election of particular parties. Human rights mechanisms offer a different form of protection which can be accessed by individuals in situations of fear, regardless of who holds the dominant power position within government. This means that they can also usefully address the needs of those who do not wish to be allied with the main power-blocks, or indeed the needs of women, indigenous peoples, or other groups who may be outside of those main blocks.

Human rights protections address key manifestations of the conflict. Human rights protections also begin to address the symptoms of the conflict. They address issues of equality, accountability and the rule of law which, even if not trigger-issues for the conflict, will all have been implicated in the waging of conflict. The centrality of these issues to the conflict will often be reflected in the fact that human rights issues are important to one party, that insists on them being part of the solution. In Guatemala, the URNG saw human rights protections as vital to their interests. In Northern Ireland, a human rights and equality agenda began to take hold when it became clear that they were vital to Sinn Féin, whose inclusion was important to achieving peace (even though others had been and continued to assert human rights issues).

However, even if political élites do not view human rights protections as important to creating and sustaining peace, their importance to addressing aspects of the conflict will often be asserted by civil society and acknowledged by mediators. The dynamics which led to human rights frameworks being included in peace agreements featured in chapter II, evidenced the importance of those frameworks to the issues of accountability at the heart of the conflict.

Human rights mechanisms form a key vehicle for moving from short-term (negative) peace to long-term (positive) peace. Peace agreement drafting provides an opportunity to address the long-term values of society, and a

principled basis for institutional reform, which may take debates away from a 'them' and 'us' dynamic, as discussed further below. While a cease-fire may be the overriding goal of early peace agreements, in the longer-term a more positive peace is likely to be delivered through not just political institutions and democratic debate, but also through justice institutions such as a fair, independent and impartial judiciary and police service, as well as national human rights institutions.

While human rights standards use mandatory language, there are many ways to provide mechanisms for their implementation around which negotiation can take place.

While human rights instruments provide standards which are un-negotiable, often the mechanisms for their implementation can involve negotiation and have many possible forms. International law provides normative standards that should not be bartered away by state parties, whatever the motive. However, these standards contemplate national enforcement, and leave institutional design to national processes. Some of the tensions around human rights can be accommodated in the means of delivery. Indeed, human rights actors can play a key role in conflict resolution in providing options and encouraging debate as to how new or reformed institutions can best ensure the protection of human rights for all individuals and groups.

Human rights standards provide negotiators with useful tools, moral force aside. There are several aspects to this.

Human rights can provide a way of enabling parties to a conflict to move from irreconcilable positions, to addressing the more reconcilable interests underlying these positions, such as mutual fears of discrimination and domination. Conflict is often characterised by 'hard bargaining' where parties carve out extreme positions and stick to them, even when they cease to represent the underlying interests that generated the positions.¹⁷³ Finding a compromise will mean parties moving from these positions. A key tool for mediators in enabling them to do this, is to try to focus on the 'interests' that underlie the positions. A focus on 'human rights' can provide a useful way to discuss the core issues at stake for each party. To give an example: secessionist claims are irreconcilably at odds with assertions of territorial integrity in a zero-sum game. However, the underlying reasons for each position – fears of being a minority – can be mutually addressed, and human rights protections form one key tool. As discussed, human rights actors can enable and encourage debate on possible institutional formations, and both the processes and the fruits of such debate can be useful in re-framing the irreconcilable positions in terms of interests that can be met. This can operate with respect to the 'constitutional fix' as a whole or with respect to discrete issues. In Northern Ireland, focusing on how to implement human rights standards such as 'accountability' and 'representiveness' with regard to 'policing' (rather than 'the police'), helped to reframe the political debate away from polarised positions of 'no change' versus 'complete disbandment' as regards the existing police force. At early stages of a process, human rights measures can be important to confidence building.

Human rights standards have an objective legitimacy against which to test the self-interested claims of parties. Human rights standards provide impartial internationally accepted benchmarks, independent of the parties to a conflict, that can be used to separate out legitimate from illegitimate demands. Protection from discrimination is a legitimate interest, while power to dominate is not. Human rights standards provide one way to talk about legitimate and illegitimate demands, as a way of exploring the interests that underlie the positions. Even complex law on amnesties gives clarity to legitimate and illegitimate positions at either end of the spectrum: limited amnesty to facilitate prisoner release and 'normalisation' as an immediate measure is legitimate; permanent amnesty for serious international crimes is not. The use of normative international human rights standards can provide mediators with additional tools of persuasion, as they set the legal parameters within which a solution needs to fall in order to be acceptable internationally and, it can be argued, sustainable locally.

Addressing human rights issues can facilitate agreement on the issues, such as equality, freedom and identity, considered to be at the heart of the dispute. Aside from the ability of human rights standards to capture a party's basic interests, human rights protections may have a value in facilitating agreement in other areas. Human rights can provide a common language of 'values' in which to ground other debates. As regards the parties to a conflict, a move towards new territorial boundaries and political structures may be accompanied by a move towards designing human rights institutions aimed at providing standards for abuse of any power re-allocated, drawing the constitutional 'sting'. Those who were once majorities, or in power as such, and who resisted human rights protections, may come to push for them in a process which will make them minorities. This was the case in South Africa, where the move towards a bill of rights was driven both by the ANC's interests in establishing a multi-racial democracy that was to be distinguished from the past by its commitment to human rights, and by the (then National Party) South African government's interest in protecting its forthcoming position as a political minority. Human rights measures aimed to provide a new set of values around which the country's political landscape could coalesce.

Alternatively, those who resist human rights protections for minorities during the conflict, may in negotiations come to view these protections as a price worth conceding to legitimise the borders and sovereignty which ensure their majority status. This was the case in Northern Ireland, where British Unionists could concede human rights and equality issues more easily than areas which implicated sovereignty, such as cross-border bodies with British/Irish executive powers. In Bosnia, human rights protections operating at an inter-entity state level and focused on minority protections and a 'right to return', were the 'price' for devolving power to ethnically defined entities, and resistant domestic parties accepted them under this incentive. However, even in cynical strategic moves towards acceptance of human rights measures, the possibilities of a new political landscape can be sown through the very mainstreaming of human rights (although delivery often remains a difficult on-going process).

International mediators may also turn to international human rights standards in an attempt to provide some shared values and spaces for divided societies. Where political arrangements focus on territorial and/or consociational arrangements defined around acknowledging and working with ethnic divisions, then human rights institutions may offer important 'cross-community' fora, capable of operating across entity divisions and building an inter-communally shared space. These institutions may be the only official fora in which good faith co-operation between divided groups is contemplated. Human rights mechanisms may therefore be contemplated to have both 'integrative' and 'legitimizing' roles. In providing values capable of applying to all groups, human rights standards may be held out as a potentially shared value system able to give political cohesion to deeply divided societies.

Human rights standards provide guidance as to good practice in key justice areas and in particular with reference to addressing institutional reform. Given that institutional reform will be a key issue in many peace agreements, human rights standards will be useful to setting out good practice as regards key institutions. The many soft law standards that exist as regards policing and judiciary, for example, contain what are in-effect blueprints of good institutional design, aimed at fair delivery of the core functions of these institutions (see appendix three).

A structured approach to human rights issues can assist in process design, both by enabling sequencing of a peace process, and also facilitating broader modes of participation. Addressing human rights protections may also have functions which go beyond the direct provision of rights, making them attractive to mediators.

Human rights provisions can help with peace process sequencing. The development of a broad human rights agenda can provide a basis for the staging of a peace process, and underwrite the sequencing of issues. Addressing human rights abuses often involves stopping the abuse through immediate monitoring and intervention with regard to at least the most egregious abuses, followed by institutional reconstruction aimed at providing longer-term mechanisms to avoid human rights abuses, such as a fully independent judiciary and a fair and accountable police service. At a pre-negotiation stage therefore, human rights standards may provide a useful tool in setting limits on a conflict – limits which can later be extended. They may operate as a useful confidence-building measure as the parties inch towards substantive negotiations. In El Salvador, a human rights agreement implemented prior to a fully implemented cease-fire, and monitored by the United Nations, helped to create a dynamic which enabled a full cease-fire. At a framework/substantive peace agreement stage, human rights mechanisms may provide for staged reform or transformation of key legal institutions. By pinning down key aspects of reform and mapping out processes to take it forward, a peace agreement often sets the agenda and sequencing for the implementation stage. At the implementation stage, human rights monitoring may be useful to ensuring compliance with the agreement as

a whole. If political institutions stall, it can sometimes be possible to still move forward with matters of legal institutional reform: talking about matters such as a bill of rights, may provide a way to keep some forward momentum to the process as a whole. National human rights institutions may continue to play important peace-building roles, even when agreements break down.

Human rights reinforce the need for the inclusion of civil society. The development of human rights mechanisms provides a need and a legitimate basis for civil society to be involved in the peace process. The detail of the design of truth commissions, national bills of rights, or reform of the legal system, are all matters which are better not drafted by a small group of political and military élites, or international mediators. A negotiation process is unlikely to be representative of a broad enough section of the community or expertise, to either draft these mechanisms well with regard to the problems requiring to be addressed, or to garner the type of popular acceptance necessary for the mechanisms to achieve their goals. The importance of national consultation as regards institutional design has been reinforced by the recent Updated Principles on Impunity, and the UN Secretary General's recommendations included in his August 2004 report. Implementing these recommendations involves designing inclusive processes which reach beyond political and military élites. The notion of good practice with regards to human rights-based reform provides mediators with a strong case to open-up peace processes, both on grounds of principle (it is right to do so) and on grounds of pragmatism (it will lead to better reform).

Human rights provide a basis for on-going international involvement. While the international community, such as third party states or international and regional organisations, are often involved in negotiated ends to conflict, in the absence of state consent the international legal basis for involvement can often be unclear. A broad human rights agenda and mechanisms for enforcement often legitimise on-going international involvement in the post-conflict phase and enable an on-going role in mediation and/or implementation. In Bosnia, domestic human rights and justice institutions had international members, along with ethnically balanced representation. On-going issues such as reform of the judiciary, and internationalised (wholly or 'hybrid') transitional justice mechanisms provide both a rationale and a means for international involvement. A word of caution is necessary: international action is not always benevolent and the actions of the international intervenor itself can violate human rights standards. Where on-going international involvement has little connection to building up local human rights mechanisms but continues to undertake the normal business of local democratically accountable institutions over a long period of time, can negate rather than assist a local human rights culture.

PEACE AGREEMENT PRACTICE

The above arguments present the case for synthesising human rights and conflict resolution approaches. However, this is not to deny some of the tensions

which exist and have been outlined throughout this report. The difficult issue of how to deal with the past and the permissible scope of amnesty provisions, and to a lesser extent the issue of refugee return, all illustrate potential tensions between human rights provisions and conflict resolution. As this report argues, these tensions may be better viewed as tensions between the demands of short-term (negative) peace-making and long-term (positive) peace-making.

However, this still leaves dilemmas which are not easily resolved. There may be no clearly 'correct' way to approach these dilemmas. Neither an attempt to impose human rights standards as abstract principles, nor the jettisoning of such standards in the search for a cease-fire, is likely to produce lasting solutions. Rather, the best approach to 'peace v. justice' dilemmas may simply be to view them as on-going dilemmas which require to be managed in pursuit of a just and sustainable peace. These dilemmas may be better managed by a fuller appreciation of their relationship to the sequencing of a peace process. Accountability may be difficult in the short-term, but necessary and achievable in the longer-term. Reform of justice issues is likely to require an on-going process. International recommendation of the use of national consultation suggests that there are limits to the institutional detail which should be included in peace agreements. However, while appreciations of the importance of sequencing may minimise some of these tensions, it is unlikely to eliminate them completely.

Given the on-going existence of such dilemmas, the apparently competing approaches of human rights actors and conflict resolution actors are often both valuable. Both the labels 'human rights actor' and 'conflict resolver' are often used to caricature actors whose actual practices are not as polarised as the labels suggest. Conflict resolvers often find human rights standards useful in terms of identifying basic needs and elements of human dignity, and in deepening their understanding of the structural causes of conflict. Human rights actors are often skilled in processes of problem-solving and negotiation, in addition to their traditionally perceived advocacy and adversarial approaches. Both often work in loose alliance to what they believe to be common goals of peace. It is therefore crucial to acknowledge that differences in approaches between different actors are important, and that on-going dialogue and interchange between human rights proponents and mediators is vital to forming a tapestry of approaches.

Furthermore, a distinction should be made between resistance to human rights matters by the parties at the heart of the conflict, and the more nuanced debates around the relative prioritisation of human rights and conflict resolution which occur one step removed (track two) from the conflict. The key negotiators of peace agreements are often national political and military élites (track one) who are neither 'conflict resolvers' nor prepared to implement human rights protections. Resistance of parties to human rights protections on the grounds that they are 'divisive' on the track one level, should be treated rather differently from debates about the prioritisation given to human rights occurring at the track

two level of civil society. However, mediators must be creative and proactive enough to distinguish legitimate concerns from illegitimate demands while recognising why parties adopt different positions in relation to human rights, in order to explore the possibilities for movement.

FACTORS AFFECTING THE ROLE OF HUMAN RIGHTS IN PEACE AGREEMENTS

To further understand the role of human rights in peace agreements it is also useful to consider the following factors as relevant to why, how, and in what form, human rights provisions enter peace agreements.

Whether process is internally or externally driven. Conflicts and peace processes all have different degrees and types of internationalisation. This affects whether, how and why human rights measures are included in peace agreements and in turn, this affects the difficulties of implementation. It has been suggested that parties to a conflict move towards negotiations when there is a 'mutually perceived hurting stalemate', that is when both parties, at the same time, view attempts to win the conflict militarily as costly and ineffective.¹⁷⁴ In some cases, for example Northern Ireland, this point was reached due primarily to the internal dynamics of the conflict. At the other end of the spectrum, in other conflicts the international community and geopolitical events have been crucial to both creating such a stalemate and to forcing the parties to reach agreement. In Bosnia Herzegovina, for example, increasingly strong enforcement measures including air strikes were used to end the conflict. The DPA was then hammered out between reluctant political élites, under US pressure. Other processes, such as those of Central America, while internationalised and requiring to be initiated and sustained through regional impetus, were better at enabling the involvement of local community processes.

The degree and type of internationalisation of a peace process affects the human rights provision in different ways. Where processes are focused exclusively on military and political élites, the international community may be the only party at the negotiations bringing a human rights agenda to the table. However, the international community may at times bring a 'one-size-fits-all', internationalised blueprint for how human rights are included. Moreover, where external pressures have forced parties to agreement and forced human rights measures as part of the solution, on-going external pressure will then be crucial to implementation. A package of idealised human rights measures and institutions is unlikely to be implemented coherently – or at all – if left to parties who saw it as at best as irrelevant, and at worst as threatening, to the deal they understood themselves to be cutting.

Where internal positions drive the process, or are at least an integral part of the process, human rights measures are typically included because one party to the conflict has insisted that their inclusion is vital. In Northern Ireland, for example, human rights measures resisted by the majority and embraced by the minority,

came to be included in the agreement as 'confidence-building measures' for the minority, and 'safeguards' on majority power. However, typically human rights provision here will have involved 'trade offs' which affect the capacity for coherent implementation of human rights measures. Differences between the parties as to the role of human rights measures, and what implementation should involve, may mean that the difficult issues are postponed to the implementation stage of a peace agreement. It may also mean that 'human rights' become an on-going political battlefield, as the parties to an agreement aim to re-shape the latter by implementing them in their own image.

The extent to which 'bottom-up' processes impact on 'top-down' ones. This reveals the question of whether and how 'bottom-up' processes have impacted on the peace process, as an important one. Differences in how conflicts are mediated and the extent to which civil society is involved affect the types of human rights measures designed and the vision for their implementation. Where deals were particularly 'top down' and did not involve civil society or human rights NGOs, by and large human rights measures have tended to take a generalist approach. Where individuals at the sharp end of human rights abuses, through experiencing them or monitoring and suggesting reform, have input, this will affect institutional design. The specifically crafted human rights agreements in El Salvador and Guatemala, for example, contain detailed provisions including practical measures (not found in the main human rights conventions) aimed at stopping disappearances. Those with experience of trying to combat disappearances input to the drafting, thereby drawing on the actual experience of human rights violations. These human rights provisions stand in contrast to the wholesale 'on paper' incorporation of rights in Bosnia and Herzegovina. Here rights were not accompanied by the full range of institutional reforms necessary to bringing these rights home in practice. Exclusively 'top-down' processes create a need for local processes of implementation. Human rights provisions must be brought home institutionally with a sense of ownership fostered, particularly in a climate where the main protagonists to the deal view rights as irrelevant.

The nature of the 'big constitutional fix'. The political and territorial arrangements regarding how power will be held affect the strategic role which human rights measures play as regards the parties to a conflict, and the degree of self-interest that parties will have in implementing them. Most obviously, whether and how territory is divided will affect the degree of self-interest that parties have with regard to the implementation of human rights. Where peace agreements include shared territory, or create new minorities, then both sides may have an interest in human rights measures as a potential safeguard against an abuse of power for 'their' kin-minority groups. Where territory is to be divided so as to include largely homogenous populations, there will then be little reciprocal self-interest in promoting human rights and minority protections. Therefore, the territorial divisions at the heart of a deal will shape what human rights measures are included and the prospect of their implementation. Bosnia stands as an example.

Who has been making human rights claims during the conflict and why.

It is worth emphasising that not all parties will view human rights discourse in the same way. Human rights claims are seldom viewed by all the parties to a conflict as 'neutral' and legitimate. During a conflict, human rights standards are often asserted by those not holding power, and sometimes this means the non-state groups view human rights as a tool in challenging the legitimacy of the state and the state's assertion of the illegitimacy of armed opposition. The state, for its part, may see human rights claims as alternative ways for parties to assert their claims under cover of international legitimacy, to gain political or military advantage. In some processes no parties will accept human rights standards, or will only accept them insofar as they are seen only to apply to 'the other side's' abuses. These dynamics will affect how human rights are negotiated in an agreement.

What the human rights 'needs' are.

At a more general level, the pattern of human rights abuses, and local understandings of who needs 'protection' and why, will affect whether and how human rights measures are included in peace agreements. The human rights provisions of a peace agreement, and the degree to which they are capable of producing real change are affected by: the types of human rights abuse which prevailed during the conflict; the different degrees of violations by state and non-state actors; the relationship of human rights violations to root causes of conflict; the political and legal culture of the society; the degrees of faith in law-based solutions (such as institutional reform); and the existing capacity (or lack thereof) of key institutions such as police and judiciary. This all points to the importance of human rights monitoring during a conflict to any eventual peace process. It also points to the importance of developing ideas around how human rights abuses could practically be prevented through new mechanisms and institutional reform, even when the prospects of a peace process seem distant.

The degree to which mediators see their role as normative and proactive.

Particularly where the formal peace process involves political and military élites to the exclusion of others, the role and approach of mediators will be crucial to the inclusion of human rights. Two issues are key: the extent to which mediators see their role as normatively constrained; and the degree to which the mediator sees their role as a proactive one of enabling of an agreement, rather than a narrow role of 'chairing' or 'hosting' talks.

Certain mediators, most notably the United Nations, by virtue of their relationship to human rights law, should be 'normative' mediators. They are constrained by the normative commitments of the organisation, such as those found in United Nations promulgated human rights standards. While this has not always been the case in practice, the UN Secretary-General's report states that peace agreements and security council mandates should "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United

Nations-created or assisted court.”¹⁷⁵ The effect of the normative dimension can be illustrated by the UN disclaimer to the Lomé Accord in Sierra Leone. Other mediators, rightly or wrongly, may not view themselves as bound by normative constraints and this may affect their role in relation to human rights. This report has sought to demonstrate some of the pragmatic arguments for inclusion of human rights provisions, but of course their normative claim is still important.

The second significant factor in the role of a mediator is the extent to which they see their role as proactive or passive. The case studies have shown the considerable scope for mediators to push for inclusion of human rights provisions as necessary to addressing root causes of violence. They have also illustrated how international mediators are sometimes the only parties at the table who may have some interest in raising these issues. However, where a passive view of facilitation is taken, mediators may view it as inappropriate to suggest matters as important where the parties to the conflict have agreed on excluding these matters. This may result in human rights opportunities being lost, and in solutions which are focused on stopping violence rather than building a positive peace. The stance of mediators with regard to human rights is often crucial to human rights provision.

CHOICES FOR MEDIATORS

This report has shown the difficulty of moving from a situation of human rights violations and abuses, to one where the rule of law is respected. As regards the drafting of peace agreements, the best approach might be an incremental one: concentrating on immediate delivery of basic human rights with temporary measures of immediate international monitoring and enforcement if necessary, together with a road map for institution-building and legal reform which copperfastens the parties’ paper commitments and places these issues on the peace process agenda, but leaving their detail to be taken forward in the future and to include national processes of consultation. At each stage mediators should consider analysis of the root causes of a conflict, and their role of human rights abuses. Differentiated conflict analysis will assist in deciding how and to what extent human rights should be addressed as part of a peace process.

GUIDELINES

Mediators

1. What sources of human rights information are available?
2. Is there relevant human rights expertise at the talks, both in terms of the parties and the mediators?
3. What is the local capacity in relation to human rights expertise?
4. What mechanisms bring human rights concerns to the negotiating table?

Parties to a conflict

5. Human rights commitments will bring a form of international legitimacy to those who proactively commit to them and evidence that commitment.
6. Within human rights law, there is some room to negotiate as regards processes of implementation.
7. Human rights standards do not for the most part provide absolute rights but also allow for rights to be constrained with regard to democratic objectives, provided that this is done by law, and also allow for competing rights to be balanced against each other.
8. Human rights need not be viewed as 'concessions' but as matters which focus around basic human needs, relating to identity, freedom, security, participation and welfare, which it is in the interests of all parties to address.
9. There are certain matters which are difficult to negotiate, such as amnesty, and they may have very little effect in practice due to international legal requirements and international possibilities for un-doing them.

Track two actors / civil society

10. What mechanisms exist for civil society to input to peace processes, negotiations and agreement? Where they are inadequate, can civil society push for new or parallel processes?
11. How can civil society best 'agenda-set' in a peace process? What different approaches are needed at the pre-negotiation, negotiation and implementation stages?
12. What role can civil society play as regards human rights and the peace process?
13. Can civil society encourage human rights commitments from the parties to the conflict?

14. What is civil society's route into negotiations?
15. How can it be improved?

Human rights NGOs

16. Inclusion of human rights provisions in a peace agreement is a job that begins during the conflict
17. Are human rights violations and abuses a serious problem?
 - How accurately are they being monitored with reference to international standards?
 - Are all the relevant international mechanisms being used?
 - Is further capacity needed?
 - Are international NGOs being used to raise concerns internationally?
18. Can knowledge of human rights abuses be used to inform possible processes of institutional reforms?
19. Bargaining will occur around human rights issues during a peace process, but engaging with the negotiation process is the price of inclusion.
20. Can short-term human rights requirements be separated from long-term ones, and issues which have a measure of cross-party assent separated from measures which create more disagreement?
21. What opportunities does the process hold for making human rights arguments? How can different peace process forums be creatively used? What are the possible benefits and risks of making pragmatic arguments for inclusion of a human rights agenda?

International and regional organisations and donors

22. What can be done to support local human rights capacity?
23. What role is there for local monitoring of human rights commitments?
24. To what extent can mediators adopt a creative and pro-active human rights focused mediation role?
 - Where civil society is weak or excluded from talks, then the mediator may be the only party bringing human rights to the table.
 - Mediators should not immediately or easily accept the analysis that promoting human rights protections will 'break' negotiation processes, but should creatively explore the range of relationships to human rights within and outside the talks processes.

RECOMMENDATIONS

The following general recommendations are aimed at building further understanding of the relationship between human rights and conflict resolution.

Human rights monitoring should be a priority during periods of nascent conflict or when conflicts escalate. This will inform any future negotiations.

Human rights provisions in peace agreements should be consistent with international human rights standards and should provide appropriate mechanisms to implement and enforce them. However, there remains some room within which to negotiate, given the need to apply these standards domestically, and the possibility of sequencing their implementation.

Negotiators should have access to human rights advice, be trained in human rights, humanitarian law, and equality standards, and contemplate appointment of full-time human rights advisers. The United Nations and other international organisations should select mediators who are steeped in human rights culture.

Mediators and parties to negotiations should consider appointing a dedicated human rights advisor.

All parties involved in peace negotiations must ensure that the promotion of gender equality is an integral part of the process through the participation of women (both as mediators and local participants), and through appropriate gender advice.

Those involved in negotiations should engage with civil society, and particularly human rights non-governmental organisations, particularly for the purpose of identifying and monitoring human rights abuses, and defining and implementing institutional reforms.

International donors should actively support peace processes and protection of human rights, and institutional reforms to which they give rise, and should devolve to national authorities any direct responsibilities they undertake, as soon as feasible. They should promote the exchange of good practice between different peace processes, and domestic actors involved in them.

There should be greater synthesis of conflict resolution and human rights approaches, while acknowledging the different roles of different types of actors.

APPENDICES

APPENDIX ONE: AN OUTLINE OF THE CASE STUDIES

This report drew on eight main case studies. What follows is a short outline of the conflicts (inevitably inadequate and contestable) by way of background, focusing on human rights issues, and setting out the main peace agreements which resulted. A more detailed account of each conflict can be found in the background research papers at www.ichrp.org.

These case studies all reached the point of a framework peace agreement but involved different types of conflict as well as different forms of international mediation, levels civil society participation and approaches to human rights. They also cover a broad time period (they are presented here chronologically at the time of signature of the main agreement). They therefore reflect an evolution in the role of human rights, and in peace process patterns, enabling some comparative evaluation. While the outcome of most recent processes is very uncertain, it is possible to begin to assess whether some of them have been 'successful' or 'failed', and to explore what success or failure might mean.

CAMBODIA

Conflict. Freed from France's colonial rule in the mid 1950s, Cambodia entered decades of various states of conflict. In 1970 the US backed Vietnam War openly spilled across its borders, and in April 1975 the Khmer Rouge marched into its capital, Phnom Penh. During the following three years and eight months, some 1.7 million people died or were murdered – one quarter of the population. The Paris Accords however, addressed the conflict that came after January 1979, the month that the Chinese-backed Khmer Rouge was ousted by invasion by neighbouring Vietnam, who installed a government largely made up of Khmer Rouge defectors. This invasion angered China and upset Thailand, Vietnam's long-standing regional rival, simultaneously renewing Indochina's status as a front line in the Cold War. The Khmer Rouge and its followers created a government in exile, known as Democratic Kampuchea, which was recognised by the United Nations and given support by the US, China and Thailand. The US, the Association of Southeast Asian Nations, and several Western governments aligned themselves with China. Over the following years they funnelled military and other assistance into an anti-Vietnamese resistance. This resistance came to include three factions: the republican Khmer People's National Liberation Front (KPNLF), the royalist Funcinpec faction, and the Khmer Rouge. Meanwhile, Vietnam tapped into Soviet support offering in return highly strategic Pacific naval facilities at Cam Ranh Bay near Nha Trang. Solving Cambodia's conflict consequently came to require settling domestic differences *and* ending external involvement.

A decade of attempts to resolve the conflict was unsuccessful until, in the late 1980s, external events began to complement efforts to find an internal

settlement. Diminishing Soviet support as the Cold War drew towards conclusion led Vietnam to withdraw its armed forces from Cambodia. Meanwhile, the US and its allies were facing domestic and foreign questioning over a policy of supporting resistance forces that were in alliance with the Khmer Rouge. All sides were faced with the need to assess strategic interests and determine priorities for dealing with a post-Cold War Asia. Between 30 July and 30 August 1989, the first session of the Paris Conference on Cambodia took place, chaired by the foreign ministers of France and Indonesia, and attended by the UN Secretary-General and his Special Representative. In addition to the Cambodian factions, eighteen nations participated, including Zimbabwe, for the Non-Aligned Movement. While the negotiations failed, they began to clarify the elements necessary for settlement. Discussions at the UN Security Council led to a framework document, agreed to on 28 August 1990, which was accepted by the Cambodian parties as a basis for settling the conflict. This was endorsed by UN Security Council Resolution 669 of 15 October 1990. The framework subsequently provided the structure on which the Final Act of the Paris Conference was built.

Serious human rights problems were part of the ongoing fighting, which resulted in deaths, injuries, and large numbers of internally displaced persons and refugees, most of the latter living in camps in Thailand. The justice system introduced by the Vietnamese had very significant failures, with little respect for the rule of law. Although international human rights groups had very limited access to Cambodia, reports from the period speak of large numbers of political detainees, widespread torture, and frequent detention without trial.¹⁷⁶ In 1990, Human Rights Watch reported that all four Cambodian factions were responsible for avoidable civilian deaths, some deliberate, with three factions having engaged in arbitrary forced conscription.¹⁷⁷ Children were used in the war as soldiers, as was torture, and there was extensive use of landmines.

Peace Agreements. Cambodia's sole peace agreement, the **Final Act of the Paris Conference on Cambodia**, was signed at an international meeting in the French capital on 23 October 1991. The details were contained in three instruments, here referred to as the Paris Accords, namely:

- **Agreement on a Comprehensive Political Settlement on the Cambodia Conflict**
- **Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia**
- **Declaration on the Rehabilitation and Reconstruction of Cambodia**

The Agreement on a Comprehensive Political Settlement on the Cambodia Conflict provided the central framework. It outlined arrangements for a transitional period leading to popular elections, a legislative assembly and government. It also contained elements relating to the withdrawal of foreign forces, a cease-fire and cessation of outside military assistance, protection of

human rights, international guarantees of Cambodia's sovereignty, release of prisoners of war and civilian internees, and principles for a new constitution. Four annexes provided for: United Nations Transitional Authority in Cambodia (UNTAC) mandate, elections, repatriation of Cambodian refugees and displaced persons, and principles for a new constitution. The other two agreements, as their names suggest, respectively provided for: Cambodia's sovereignty and non-interference by the US, China, the then Soviet Union and other regional actors who had played a part in the conflict; and rehabilitation and reconstruction.

The Paris Accords provided that the UN was to be responsible during a transition period for ensuring implementation of the peace plan, including organising elections. UNTAC was established and given 'powers necessary to ensure the implementation of the Agreement'.¹⁷⁸ Although sovereignty was retained by a Supreme National Council comprised of representatives from Cambodia's main factions, the UN ended up dealing with a significant body of public administration matters as well as creating a neutral political environment conducive to democratic elections. In total, the UN deployed more than 20,000 foreign military and civilian personnel, and had additional authorisation to employ some 4,830 Cambodian staff supplemented by international contractual staff and election personnel.

The Paris Accords mainly provided a solution to the problem of *outside* involvement in Cambodia's war. The inclusion of guarantees to defend Cambodia's sovereignty, withdrawal of foreign forces, and cessation of outside military assistance meant that, to a large extent, the external factors driving conflict were removed. This assisted regional stability and within a few years of the Agreement the principal regional protagonists, China and Vietnam, were able to normalise relations, with Vietnam subsequently becoming a member of the formerly non-Communist Association of Southeast Asian Nations and normalising trade and other ties with the United States and other Western governments. The fact that, fourteen years after the Accords were signed, Cambodia is no longer in a state of internal war is undeniably a positive outcome. However, it took a further seven years of fighting after the Paris Accords had been signed before this outcome was achieved.

The Accords were, however, less successful in addressing *internal* conflict, both at the level of hostility between factions, and at the level of conflict by Cambodia's powerful ruling élites against the powerless population at large. These latent tensions persist today.

EL SALVADOR

Conflict. The civil war in El Salvador between the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) and the Government and army of El Salvador (GOES) lasted from 1979 to 1992. Its root causes were the dominance of the

armed forces and social injustice and, in particular, an extremely inequitable system of land tenure with 60% of the population landless. Society had become highly militarised and civilian affairs were subordinated to military power. In the early 1980s it had appeared that the rebel FMLN – a coalition of social Christians, social democrats, communists, and other progressives – might win a victory over the US-backed Armed Forces of El Salvador. Following US intervention a Christian Democratic candidate was elected as president. Over the next decade, the Republican National Alliance (ARENA), a right-wing party which grew out of the death squads, gained influence and won the presidency in 1989. The US continued to back the army and ARENA. It also financed the war until the end of the Cold War altered the climate.

The conflict was characterised by brutal political killings, disappearances, arbitrary detention and torture. Anyone with an opinion different from the ruling right wing Army alliance was considered subversive and targeted. Those most at risk were political, human rights and trade union activists, church leaders, teachers, students and journalists. Credible reports linked the majority of violations to the Salvadoran Armed Forces and to the death squads were comprised primarily of members of the military, or supported by them. Institutionalised impunity for human rights violators was the norm, aided by a weak and corrupt judiciary, by the overwhelming strength of the military and paramilitary groups, and subsequently, by amnesties promulgated by the Salvadoran Government.

The Armed Forces of El Salvador (FAES) violated international humanitarian law, including indiscriminate aerial bombings and other attacks against the civilian population and collective summary executions in rural areas. The FMLN was also responsible for abuses, albeit on a smaller scale. The principal violations by the FMLN were targeted assassinations of mayors and other government officials and of suspected informants, execution of captured combatants, kidnapping for ransom, committing acts of sabotage against the economic infrastructure and widespread use of landmines. Both sides engaged in forced recruitment, including that of children under 15 years-of-age.

Peace Agreements. Between April 1990 and December 1991 the Government and the FMLN concluded a series of far-reaching agreements. The United Nations – through the Secretary-General and his Personal Representative – played a very active role in the negotiations of the accords as well as in their implementation.

April 1990 General Agreement. In April 1990 a framework agreement was signed by the parties in Geneva, which identified the objectives of the process as:

- ending the armed conflict by political means,
- promoting the democratisation of the country,

- guaranteeing unrestricted respect for human rights, and
- reunifying Salvadoran society.

May 1990 General Agenda and Schedule for the Comprehensive Negotiation Process (Caracas Agreement). A general agenda and timetable comprising two phases was set, identifying the following priority issues: reform and reduction of the armed forces; human rights; judicial, constitutional and electoral reform; economic and social problems. The Agreement also stipulated that all agreements would be verified by the UN.

The first substantive agreement was the **July 1990 San José Agreement on Human Rights** concluded. This is the main human rights agreement that has been discussed throughout this report. In short, it provided for immediate human rights guarantees aimed at limiting the impact of the conflict on the civilian population, and providing for unprecedented international verification by the UN.

In the **April 1991 Mexico Agreements** the parties agreed to constitutional reform relating to: the Armed Forces and the establishment of a National Civilian Police; reform of the judicial and electoral systems; the establishment of the post of National Council for the Defence of Human Rights (Ombudsperson) and of a Truth Commission to investigate past human rights violations.

In the **September 1991 New York Agreement** the parties agreed to a 'compressed' agenda for negotiating all outstanding issues. The Agreement provided for the creation of the National Commission for the Consolidation of Peace (COPAZ); an agreement in principle on reduction, 'purification' and governing 'doctrine' of the Armed Forces; the creation of a National Civilian Police; and for some limited economic and social measures.

On 31 December 1991, a **Final Agreement** was reached in New York setting the timetable for a cease-fire and calendar for the demobilisation of the FMLN and its integration into civilian life (**New York Act I**). In a subsequent meeting on 13 January 1992 in New York (**New York Act II**), the parties declared that they had resolved all outstanding issues, and the entire package of peace accords was ceremoniously signed at Chapultepec Castle in Mexico City on 16 January 1992.

The peace agreements put an end to twelve years of civil war which had left 75,000 dead and over one million – almost one quarter of the total population – displaced. Throughout the implementation process there were several delays in the timetable due to each party making its compliance with certain key points of the calendar contingent on compliance with specific undertakings by the other. The Secretary-General and senior officials from the UN Department of Political Affairs intervened several times to push the parties to get back on track. However, the Salvadoran process is largely successful, especially

by comparison with others. Violating human rights is no longer state policy, resolving disputes violently is no longer acceptable. While serious reform of the justice sector was launched and there were signs of real improvement, in recent years the process has stagnated and some reversal has been noted. An awesome post war crime wave continues, placing additional strains on the justice and public security sectors.

MOZAMBIQUE

Conflict. The roots of the conflict in Mozambique lie in its colonial past, and the route by which it obtained its independence, based on armed resistance rather than the pressure of international bodies. The Frelimo government which emerged from the independence struggle inherited a shattered country, and attempted a radical economic, political and cultural restructuring of the country based on its Marxist-Leninist radical ideology. A planned economy was introduced and private property abolished, with the new government absorbing the country's production resources through forced nationalisation. At the same time, the Frelimo government attempted to unify the country under the Marxist banner and bring together ethnic groups that did not identify with the new political setting.

The response of the opponents to Frelimo was a violent one. It was bolstered by a regional dimension with both South Africa and then-Rhodesia supporting the emergence of the Renamo (*Resistência Nacional Moçambicana*), which engaged the new Frelimo government in a civil war. The sixteen-year civil war that followed claimed the lives of one million Mozambicans and produced four million refugees and internally displaced persons.

Peace Agreements. On 4 October 1992, the **General Peace Accord (GPA)** was negotiated between the Frelimo government and the opposition forces of Renamo, in negotiations hosted in Rome by the Catholic lay community of Sant' Egidio and mediated by a group of four impartial observers, including the Catholic Bishop of Beira, a member of the Italian Parliament, and two members of the Sant' Egidio community. The negotiations required mobilisation of the international community spearheaded by the United Nations, the Italian Government and the United States along with representatives of other governments and the subsequent involvement of the United Nations.

The GPA deals with military, political and humanitarian issues. It consists of seven protocols agreed upon during the negotiations process, and a number of joint communiqués and declarations. These all became part of the GPA itself. Although the agreement was a huge success it still fell short of expectations of many human rights activists in that, while it provided for rights mainly related to ensuring free and fair elections, it did not provide for a specific human rights framework. Human rights principles are not mentioned, and the peace agreement itself does not address any substantive protection issues. There are

neither human rights justice system reforms envisioned nor national human rights institutions identified.

The results of the Mozambique peace process have, however, been very successful. The level of violence in the country is minimal, and economic growth has been significant. Three democratic presidential elections have been held since the GPA was signed, all accepted by local actors and the international community as legitimate. Relatively successful processes of democratisation and stabilisation have continued, albeit with some setbacks. However, concern remains around the extent to which abject poverty and political divisions are being dealt with.

BOSNIA AND HERZEGOVINA

Conflict. The conflict in Bosnia was linked to the disintegration of the former Yugoslavia. In the early 1990s the constituent parts of the Socialist Federal Republic of Yugoslavia moved towards becoming independent republics. Those within the constituent parts, fearful of a new situation as a 'minority', started to claim autonomy and became supported by their kin majorities in other neighbouring republics. This led to several different but related wars. The most brutal and longest of which was the conflict in Bosnia and Herzegovina where, bolstered by nationalist sentiment, Serbia and Croatia had made expansionist claims aimed at dividing Bosnia and annexing their kin populations to new Serbian and Croatian Republics. This left Bosnian Muslims (Bosniacs), and over time the international community (at least rhetorically), defending the territorial integrity of any Bosnian Republic. The conflict was particularly long and bloody given the intermixing of the population in Bosnia and Herzegovina, which made any ethnic partition of the country impossible. Before the war, the 1991 Census figures showed that Bosnia and Herzegovina had a population of 4.4 million, with Muslims (later known as Bosniacs) constituting 43.7% of the population, Serbs 31.3%, and Croats 17.3%, while the rest of the population described itself mainly as 'Yugoslav' or by some other name. This population was intermixed throughout the Republic.

As a result, a key feature of the conflict became 'ethnic cleansing' – killing or forcibly moving minority groups from an area. During the conflict, it is estimated that in Bosnia 278 000 people were killed, died or went missing, 174,000 were wounded, two and a half million were driven from their homes, and 1,100,000 left for other countries.¹⁷⁹ Around 60% of the total housing stock and 28% of the roads had suffered serious damage.¹⁸⁰ The war was characterised by mass violations of human rights, international war crimes, crimes against humanity, violations of humanitarian law, ethnic cleansing, genocide, ethnically-based sexual violence, and the destruction of religious, cultural and historical monuments.¹⁸¹

Peace Agreements. The international community's attempts to broker agreements changed emphasis as the conflict changed territorial boundaries and ethnic realities. Initial attempts to prevent or condition the disintegration of former Yugoslavia became refocused on attempting to end the resulting conflicts, in essence by giving large amounts of territorial autonomy to the different ethnic groups. Eventually, violent conflict was brought to an end by two agreements, first **The Washington Agreement signed on 18 March 1994**, which brought an end to violent conflict between Croats and Bosniacs in a region of Bosnia and Herzegovina. The conflict was finally brought to an end in an agreement that also included the Serb population and Serbia, **The General Framework Agreement for Peace in Bosnia and Herzegovina**, (known as the 'Dayton Peace Agreement') was agreed in Dayton, Ohio, United States, on 21 November 1995 and signed in Paris on 14 December 1995. This agreement formed the culmination of a series of attempts aimed at finding a constitutional framework, and a set of territorial 'entity' boundaries that would accommodate competing nationalist claims.

The 1994 Washington Agreement established a Bosnian-Croat Federation that provided the federal units with a high degree of decentralisation. It brought violent conflict between Croats and Bosniacs to an end. The Federation was divided into 10 cantons, all but two of which were homogeneous in terms of either Croats or Bosniacs. In 'mixed' cantons, power was largely devolved to ethnically homogenous municipalities. The Agreement provided for the incorporation of international human rights instruments, refugee return, and the protection of property. In particular, it provided for a Constitution of the Federation of Bosnia and Herzegovina, adopted on 30 March 1994.

The 1995 Dayton Peace Agreement brought the violent conflict finally to a close. It comprised a central agreement which, while affirming its status as a unitary state (Republic of Bosnia and Herzegovina), divided Bosnia and Herzegovina into two ethnically homogenous 'entities', the (Serbian) Republika Srpska, and the (Bosniac/Croat) Federation of Bosnia and Herzegovina. The Agreement also provided further agreement on a range of issues as listed below. It included four Annexes (3, 4, 6, and 7) dealing directly with human rights issues.

Annex 1A: Military Aspects of Peace Settlement and Appendices to Annex 1A

Annex 1B: Regional Stabilisation

Annex 2: Inter-Entity Boundary Line and Related Issues

Annex 3: Elections

Annex 4: Constitution

Annex 5: Arbitration

Annex 6: Human Rights

Annex 7: Refugees and Displaced Persons

Annex 8: Commission to Preserve National Monuments

Annex 9: Establishment of Bosnia and Herzegovina Public Corporations

Annex 10: Civilian Implementation of Peace Settlement

Annex 11: International Police Task Force

The agreements were successful in bringing violent conflict to an end. However, they incorporated a clear compromise whereby the unitary nature of the state was only preserved by handing much of its power over to the ethnically defined 'entities' that had been produced by large-scale violence. These entities were ambivalent about their relationship to the unitary state. This was controversial in terms of the justice of the settlement as a whole. As a practical matter, it meant that implementation of the agreements would come to depend on the on-going involvement of the international community.

GUATEMALA

Conflict. Like in El Salvador, the root causes of the conflict in Guatemala included social injustice, and in particular inequitable distribution of wealth, income and land ownership, with 80% of the population living below the World Bank poverty standard. Furthermore, about 60% of the population is Mayan, and together with a much smaller Xinca and Garifuna populations, they are subjected to racism and discrimination rooted in structural and multiple exclusions from public life. These stark economic, social and cultural inequalities were exacerbated by the absence of political spaces for even moderate political opposition, as well as a long succession of military governments, some *de facto*, others imposed through fraudulent elections.

This resulted in internal-armed conflict from 1962 to 1996. Insurgent organisations, inspired by the Cuban revolution and other national liberation movements, grew strong in the late seventies, their ranks being strengthened by state violence. Counter-insurgency terror tactics were routinely employed by the government, with systematic repression of social activists and political opponents that was more or less constant throughout the period of the armed conflict. Forced disappearance was common practice with some 30-40,000 victims. During the early 1980s the army committed hundreds of massacres and was responsible for acts of genocide against the Mayan population. Over the entire period of the conflict, some 200,000 people were murdered or disappeared, and hundreds of villages destroyed. Around 93% of all violations were committed by the state (including army, police and paramilitary forces under Army control) and 3% by guerrilla forces.¹⁸²

Peace Agreements. Achieving peace took eight years, involved four different governments, and required strong national, regional and international initiatives. The final peace accord, known as the **29 December 1996 Agreement for a Firm and Lasting Peace (AFLP)**, was signed after eight years of talks. This agreement provided an overall framework for peace, asserting basic concepts and principles and incorporating the seven substantive agreements and three operational agreements which had been signed over the previous three years of negotiations under United Nations moderation. The substantive accords (with date initially signed) are:

- **30 March 1990 Basic Agreement for the Search for Peace by Political Means (Oslo Agreement)**
- **29 March 1994 Comprehensive Agreement on Human Rights**
- **17 June 1994 Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict**
- **23 June 1994 Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer**
- **31 March 1995 Agreement on Identity and the Rights of Indigenous Peoples**
- **6 March 1996 Agreement on Socio-Economic Matters and the Agrarian Situation**
- **9 September 1996 Agreement on Strengthening of Civilian Power and the Role of the Army in a Democratic Society**
- **7 December 1996 Agreement on Constitutional Reforms and the Electoral Regime**

Two of the operational accords covered all aspects of the cease-fire, demobilisation of combatant forces and the integration of insurgent combatants, including the transformation of the URNG into a political party:

- **4 December 1996 Agreement on the Definitive Ceasefire**
- **12 December 1996 Agreement on the Basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatemalteca**

The Comprehensive Agreement on Human Rights and the human rights provisions included in the Indigenous Peoples Accord went into effect immediately upon their initial signing, while all of the other agreements took effect upon the signing of the AFLP at the end of 1996. While there were eventual problems with compliance by the parties, these accords proved to be among the easiest to implement, reflecting both a shared political will and the limited nature of military actions by the time they went into effect. A third operational accord, commonly known as the **'Calendar Agreement', 29 December 1996** provided a four-year time framework for the implementation of the several hundred commitments contained in all of the accords. This Accord was later modified by the Parties to extend the time frame for an additional four years (through 2004). When UN verification of accord implementation ended in December 2004, many provisions of the substantive accords had still not been implemented, especially those related to constitutional reform, indigenous rights, and socio-economic and agrarian issues.

NORTHERN IRELAND

Conflict. The most recent phase of the conflict started in 1969 when a push for civil rights for Catholics focused around equal voting rights, equal access to housing, and equality in jobs, led to violent responses from the state and pro-state (Protestant) groups. A cycle of repression and violence saw conflict escalate and led to the re-emergence of the Provisional Irish Republican Army (IRA), and armed loyalist groups. Increasingly, draconian emergency legislation saw the United Kingdom with more violations before the European Court of Human Rights than any other country. Up until 1998, over three thousand people were killed in a jurisdiction with a population of 1.5 million (around 50% by republican, 40% by loyalists, and around 10% by the state). In 1994 the IRA declared a unilateral ceasefire, and some months later loyalists followed suit. After a stop-start talks process the parties eventually secured The Agreement reached in the Multi-Party Negotiations (10 April 1998).

Peace Agreements. The **1998 Belfast** or **Good Friday Agreement** provided for agreement over three strands. Strand one concerned relationships within Northern Ireland and provided for a Northern Ireland Assembly with power-sharing and proportional representation. Strand two concerned relationships across the two islands, and provided for a new British-Irish Agreement and North-South Ministerial Council, and a council made up of representatives from Ireland, and regions in the rest of the United Kingdom. Strand three dealt with rights, safeguards, and equality of opportunity; decommissioning; security; policing and criminal justice; prisoners; and validation, implementation, and review. The Agreement was agreed to by the main political parties (excluding Ian Paisley's Democratic Unionist Party (DUP) then the second largest Unionist party), and the British and Irish governments who backed up their commitments in a new British-Irish treaty, set out at the end of the Multi-party Agreement.

The Agreement has been successful in that many of its aspects have been implemented, and the ceasefires have largely held. However, certain aspects remain unimplemented. Crucially these include: devolution of power to the local Assembly, decommissioning of paramilitary weapons, and key aspects of the human rights agenda. The failure of the IRA to decommission led to the then main Unionist party, David Trimble's Ulster Unionist Party (UUP), to withdraw from the Assembly leading to its suspension by the British government. A series of negotiations saw a measure of decommissioning and some progress toward resolving the difficulties. However, as time progressed the pro-agreement UUP lost power to the anti-agreement DUP, who in the most recent elections of 2005 took nine out of eighteen seats in the Westminster Parliament to the UUP's one seat. Anti-agreement Unionists now also form the majority in the local Assembly, meaning that its revival without further agreement is unlikely, and could in any case be immediately stalled by DUP use of the veto system. During this same period, Sinn Féin, with whom the DUP will not share power, has become the majority Nationalist (Catholic) party ahead of the Social, Democratic and Liberal Party (SDLP). It is difficult to tell how these issues will be resolved, and what

the implications will be for the use of violence, although at present an uneasy 'peace' appears to be holding.

SIERRA LEONE

Conflict. The conflict in Sierra Leone dates from March 1991 when fighters of the Revolutionary United Front (RUF) launched a war from the east of the country near the border with Liberia to overthrow the government. With the support of the Economic Community of West African States Armed Monitoring Observer Group (ECOMOG), Sierra Leone's army tried at first to defend the government but the following year, the army itself overthrew the government. Nevertheless, the RUF continued the conflict. Parliamentary and Presidential elections in 1996 (not recognised by the RUF), paved the way for a new democratically elected government. However, in May 1997 there was another military coup, the army this time joining forces with the RUF. ECOMOG succeeded in ejecting the new regime from Freetown and much of western and southern Sierra Leone. In March 1998 elected President Kabbah returned from exile. A small UN mission, the United Nations Observer Mission in Sierra Leone (UNOMSIL) was established and the government, confident of its stability, embarked on a large scale process of bringing the junta civilian and military leadership, including RUF leader Foday Sankoh, before courts to be tried for the capital offence of treason.

The rebels however, continued to wield considerable force. They controlled the principal diamond fields and were in receipt of assistance from Liberia, and reportedly also from Libya and Burkina Faso. In contrast, ECOMOG was hampered by the lack of resources necessary to achieve sustained superiority and it was widely reported that they were suffering heavy losses. Their Sierra Leonean co-fighters, the traditional hunter militia known as the Civilian Defence Force (CDF) (comprised principally of the Kamajor group), could not be considered a disciplined military body.

The remaining months of 1998 saw a pattern of rebel successes reversing earlier ECOMOG gains. The continued instability and fighting, including the deliberate targeting and terrorisation of civilians, exacerbated country-wide human suffering.¹⁸³ There was ongoing displacement of civilians and high levels of malnutrition and disease. The social and physical infrastructure was destroyed with no opportunity to begin its repair. Throughout 1998, rebel forces perpetrated summary execution, amputation, mutilation and other forms of torture, as well as abduction and rape. Typically, they looted and destroyed houses in combat areas. The CDF were also responsible for serious human rights abuses, such as the ethnically motivated killing of non-combatants as well as the execution and ill-treatment of prisoners. There were also persistent reports of unacceptable behaviour by ECOMOG elements, including illegal detention, torture and ill-treatment of combatants during surrender or capture.

In the closing months of the year, the treason trials were coming to a close, with most of the civilian defendants found guilty and sentenced to death – though all of the convictions remained subject to consideration by an appeal court. Most of the military defendants were also convicted in a court martial, without right to appeal. Despite condemnation of the military trial process by the UN and others, as well as reminders from the rebels that they would exact revenge for any executions, twenty four of the defendants were killed semi-publicly (in a quarry close to Freetown), with photographs of the scene published in local newspapers.

In January 1998 the rebels attacked Freetown and occupied the eastern part of the city without difficulty, perpetrating atrocities. However, they were unable to maintain their hold. From January to April 1999, in contrast to the situation in much of 1998, it was generally assumed that an end to fighting would require an accommodation with the rebels and that the route ahead was that of the ‘twin-track’, that is, parallel military and diplomatic efforts. This mood was captured in the proceedings of a national consultative conference which took place in April 1999, and proposed terms for a peace settlement, broadly based on the provisions of the unimplemented 1996 Abidjan Peace Agreement. In return for a cessation of hostilities and recognition by the rebels of the legitimacy of the government, it suggested limited power-sharing in the lead up to national elections, conferring of amnesty on combatants, and the establishment of a truth and reconciliation commission.

Peace Agreements. This led to talks and eventually to the **July 1999 Lomé Peace Agreement**. The Sierra Leone conflict generated a number of ceasefire, peace and related agreements, some of which were never implemented. The most notable of the unimplemented accords were the **November 1996 Abidjan Agreement** (which had some similar provisions to Lomé) and the **October 1997 Conakry Accord** (providing for a ceasefire). This report focused on the Lomé Agreement.

The Lomé Peace Agreement constituted a formal declaration of cessation of hostilities and provided for a power-sharing arrangement between the elected government and the Revolutionary United Front. The Agreement stipulated that RUF members be appointed to public office and that they be accorded a proportion of seats in the cabinet. Foday Sankoh, leader of the RUF, was accorded the status of Vice-President of the country and appointed as Chair of the body responsible for management of national resources (including mineral resources) and national reconstruction. The Agreement anticipated a peace-keeping mandate for the UN, and accorded it and the West African regional peacekeeping force (the Military Observer Group – ECOMOG), the oversight of a national programme of disarmament, demobilisation and reintegration of former combatants. The agreement stipulated that the national army be restructured and that it recruit former combatants from all sides. Other provisions of the agreement addressing amnesty and human rights have been discussed further throughout the report.

BURUNDI

Conflict. The most recent phase of the conflict began after the assassination by (Tutsi) army officers in 1993 of Melchior Ndadaye, the first Hutu President of the country in the history of Burundi to be elected by universal suffrage, along with members of his government. This gave rise to a terrible outbreak of violence, beginning with large scale Hutu massacres of the minority Tutsi population, soon followed by the Tutsi-dominated army's bloody retaliation against the Hutu population. A power-sharing agreement aimed at ending the conflict in 1994 did not succeed due to the death of the new Hutu President Cyprien Ntaryamira in a plane crash (along with the Rwandan President). A subsequent power-sharing agreement resulted in a stalemate of the power-sharing system through the use of veto. Further attempts to negotiate an end to conflict under the auspices of Jimmy Carter and the facilitation of Julius Nyerere (former President of Tanzania) were pre-empted by a *coup d'état* in July 1996 whereupon regional governments imposed sanctions, supported by the then Organisation on African Unity (OAU) and the UN. Another round of negotiations was launched in Arusha in June 1998, including 19 parties, but excluding the main rebel group the Forces for the Defense of Democracy (FDD). These talks were initially under the auspices of Julius Nyerere and after Nyerere's death in October 1999, under the mediation of Nelson Mandela. They resulted in the Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000.

Burundi has experienced massive human rights abuses of political and ethnic nature. It is said to have the same ethnic mix as Rwanda: 85% Hutu and 15% Tutsi. During the civil war, the military, the political parties' militias and the rebels all committed atrocities against civilians: the military led terror campaigns, forcible displacement of populations, and massive arbitrary arrests and torture. The government suspended and harassed political parties, and restricted freedom of expression. The political parties and their militias organised *villes mortes*,¹⁸⁴ sought assassinations of Hutu politicians, and ethnic cleansing of some neighbourhoods in the capital. Rebels also led terrorist attacks on the roads, abducted people and extorted money from the population through a parallel administration.

Peace Agreements. While the staged approach of the Burundi process produced several agreements, the major ones considered here include: the **August 2000 Arusha Peace and Reconciliation Agreement for Burundi**. This agreement provides the main roadmap to peace. Preceded by several failed power-sharing arrangements between some of the conflicting parties, this agreement was reached through internal consultations, and with the occasional help of the UN Special Representative of the Secretary General. The Arusha Agreement was followed by smaller but connected agreements on power sharing during the transition (July 2001), and in the post elections Constitution (August 2004).

The text of the Arusha Peace Agreement marks an historical attempt to provide a real solution to the events that have torn the country apart since independence. It consists of five protocols, five annexes and two appendices. In particular, it provides for the following: (1) an undertaking by the parties to lead Burundians towards reconciliation by determining the truth about the origin and nature of the conflict, (2) a proposed institutional framework for the transition which will bring about conditions for a democratic renewal by fair power-sharing, (3) the end of hostilities and the establishment of security guarantees for all citizens, principally through a reform of the army, (4) a blueprint for the country's economic and social revival and its stabilisation including the resettlement and reintegration of refugees who have fled since the beginning of the seventies, and lastly, (5) international guarantees ensuring that the Arusha resolutions are credible and can be implemented.

The other main agreement of the Burundi Peace Process is the **October 2003 Pretoria Protocol on Political, Defence and Security Power-Sharing in Burundi**. It provided for a cease-fire between the Burundi military and the main rebel group, the FDD. It also provided for a programme to fully integrate the Burundi army and reform the security sector. This complemented the cease-fire reached earlier in 2002 with two minor rebel groups (the *Conseil National pour la Défense de la Démocratie* [CNDD]-FDD faction led by Jean-Bosco Ndayikengurukiye and the PALIPEHUTU-FNL faction led by Alain Mugabarabona). Following the Agreement, the African Union deployed South African, Ethiopian and Mozambican troops in the spring of 2003, which, a year later, were replaced by a UN peace keeping force (ONUB) authorised on June 1, 2004.

APPENDIX TWO: USEFUL WEB SITES

PEACE AGREEMENTS/PROCESSES

United States Institute of Peace: www.usip.org/library/pa.html

INCORE (International Conflict Research), University of Ulster:
www.incore.ulst.ac.uk/services/cds/agreements

Conciliation Resources Accord Series: www.c-r.org/accord/series.html
(country-specific peace processes including text of key agreements)

International Crisis Group: www.icg.org

Public International Law and Policy Group Peace Negotiations Watch:
www.publicinternationallaw.org/peace (weekly electronic compilation of
articles about various disputes around the world)

Peace Agreement Drafter's Handbook:
www.publicinternationallaw.org/areas/peacebuilding/peacehandbook

John B. Kroc Institute for Peace Studies: www.nd.edu/~krocinst

HUMAN RIGHTS

Office of the UN High Commissioner for Human Rights: www.ohchr.org

Inter-American Commission on Human Rights: www.cidh.oas.org

Inter-American Court of Human Rights: www.corteidh.or.cr/index_ing.html

African Commission on Human and Peoples' Rights: www.achpr.org

European Council of Europe: www.coe.int

Court of Human Rights: www.echr.coe.int

University of Minnesota Human Rights Library: www1.umn.edu/humanrts

Amnesty International: www.amnesty.org

Human Rights Watch: www.hrw.org

Minority Rights Group: www.minorityrights.org

Women's Human Rights Net: www.whrnet.org

SOCIO-ECONOMIC RIGHTS

International Network for Economic, Social and Cultural Rights:
www.escr-net.org

Center for Economic and Social Rights: www.cesr.org

FIAN International – FoodFirst Information and Action Network: www.fian.org

Centre on housing rights and evictions: www.cohre.org

REFUGEES

Office of the UN High Commissioner for Refugees: www.unhcr.ch

HUMANITARIAN LAW

International Committee of the Red Cross: www.icrc.org

Centre for Humanitarian Dialogue: www.hdcentre.org

TRANSITIONAL JUSTICE

International Center for Transitional Justice: www.ictj.org

International Criminal Tribunal for the former Yugoslavia: www.un.org/icty

International Criminal Tribunal for Rwanda: www.un.org/ictw

Special Court for Sierra Leone: www.sc-sl.org

International Criminal Court: www.icc-cpi.int

COUNTRY-SPECIFIC

Guatemala and El Salvador: www.hemisphereinitiatives.org

Yale University Cambodian Genocide Program: www.yale.edu/cgp

Sierra Leone: www.sierra-leone.org

Northern Ireland: www.cain.ulster.ac.uk

United Nations Operation in Burundi: www.un.org/Depts/dpko/missions/onub

Organisations for Security and Co-operation in Europe Mission to Bosnia and Herzegovina: www.oscebih.org/oscebih_eng.asp

Office of the High Representative in Bosnia and Herzegovina: www.ohr.int

Centre for European Policy Studies ('European Neighbourhood' section contains information and resources on the Balkans): www.ceps.be

MEDIATORS/NEGOTIATORS/FACILITATORS/LAWYERS

Centre for Humanitarian Dialogue: www.hdcentre.org

Community of Sant'Egidio: www.santegidio.org/en

International Crisis Group: www.icg.org

Norwegian Ministry of Foreign Affairs: <http://odin.dep.no/ud/english/bn.html>

Public International Law Project: www.pilpg.org

Swiss Department of Foreign Affairs: www.eda.admin.ch

APPENDIX THREE: SELECTED STANDARDS FOR PEACE AGREEMENTS

PEACE AGREEMENT STANDARDS

The following instruments contain provisions and standards explicitly directed at peace process negotiations and peace agreements.

United Nations Security Council Resolution 1325 on Women, Peace and Security.

United Nations Commission on Human Rights, *Human Rights and Transitional Justice*, Human Rights Resolution 2005/70 of 20 April 2005, 61st Sess., UN Doc. E/CN.4/RES/2005/70.

United Nations Division for the Advancement of Women, (2003), *Peace Agreements As A Means For Promoting Gender Equality And Ensuring Participation Of Women – A Framework Of Model Provisions, Report Of The Expert Group Meeting Ottawa, Canada, November 10-13, 2003* (New York: United Nations Division For The Advancement Of Women).

Report of the Panel on United Nations Peace Operations (Brahimi Report), UN GAOR Council, 55th Sess., para. 58, UN Doc. A/55/305-S/2000/809 (2000).

The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General, UN Doc. S/2004/616 (Aug. 23, 2004).

INSTITUTIONAL REFORM

The following is a list soft law standards dealing with institutional reform.

Judiciary

United Nations Basic Principles on the Independence of the Judiciary, 1985.

United Nations Basic Principles on the Role of Lawyers, 1990.

Law Enforcement

United Nations Code of Conduct for Law Enforcement Officials, 1979.

United Nations Guidelines for the Effective Implementation of the Code of Conduct for the Effective Implementation for Law Enforcement Officials, 1989.

United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990.

United Nations (1997), *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police* (New York: United Nations).

Prosecutors

United Nations Guidelines on the Role of Prosecutors, 1990.

National human rights institutions

Principles relating to the Status of National Institutions (Paris Principles), UN Commission on Human Rights Resolution 1992/54 of 3 March 1992, annex (E/1992/22); General Assembly Resolution 48/134 of 20 December 1993, annex.

The Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions, 23 – 26 March 2004, Abuja, Nigeria.

International Council on Human Rights Policy (2000), *Performance and Legitimacy: National Human Rights Institutions* (Geneva: ICHRP).

United Nations (1995), *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (New York: United Nations).

FORCIBLE DISPLACEMENT

United Nations Commission on Human Rights (1998), Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2.

Sub-Commission on Human Rights Resolution 2002/30, *The Right to Return of Refugees and Internally Displaced Persons* (August 15, 2002).

United Nations Commission on Human Rights, *The Return of Refugees' or Displaced Persons' Property*, Working Paper submitted by Mr. Paulo Sérgio Pinheiro (12 June 2000), UN Doc. E/CN.4/Sub.2/2002/17.

Final report of the Special Rapporteur, Paulo Sérgio Pinheiro. Principles on housing and property restitution for refugees and displaced persons, *Annex: Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Commission on Human Rights, Sub-Commission on the Promotion

and Protection of Human Rights, 56th Sess., Item 4, UN Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

UNHCR, Conclusion on *Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, 8 October 2004, Executive Committee Conclusions, No.101 (LV) – 2004.

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Women, Peace and Security, Report of the Secretary-General, UN SCOR, UN Doc. S/2004/814 (2004).

United Nations Division for the Advancement of Women, (2003) *Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women – A Framework of Model Provisions, Report of the Expert Group Meeting Ottawa, Canada, November 10-13, 2003* (New York: United Nations Division For The Advancement Of Women).

Fourth World Conference on Women, Platform for Action (15 September 1995), UN Doc. A/CONF. 177/20.

Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974).

CHILDREN

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).

TRANSITIONAL JUSTICE/IMPUNITY

Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Commission on Human Rights, 61st Sess., Item 17, UN Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

Report of Special Rapporteur Louis Joinet, *The Administration Of Justice And The Human Rights Of Detainees, Question Of The Impunity Of Perpetrators Of Human Rights Violations (Civil And Political)*, UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., Annex, Agenda Item 11(d), UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

United Nations Commission on Human Rights Resolution: 2004/34, *The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, 55th meeting (19 April 2004) UN Doc. E/CN.4/2004/127.

United Nations Commission on Human Rights Resolution: 2005/35, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, E/CN.4/2005/L.10/Add.1.

APPENDIX FOUR: FURTHER READING

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ENDNOTES

- 1 ICCPR, article 4.
- 2 ICHRP, 2000.
- 3 Available on www.ichrp.org
- 4 Available on www.ichrp.org
- 5 Anonymous, 1996; Cf. Gaer, 1997.
- 6 *Ibid.*, p. 258.
- 7 Baker, 2001, p. 759.
- 8 *Ibid.*, p. 760.
- 9 See Mulvihill, 2002, (copy on file with the lead researcher); Cf. Integrated Network for Societal Conflict Research, 2003; and Zartman, 1995.
- 10 Sisk, 2001; See also *A More Secure World*, 2004, Agenda Item 55, para. 85.
- 11 There are other ways to classify agreements, for example, by their legal status. However, determining legal status is particularly difficult where the agreement is signed by state and non-state parties, as many peace agreements are: see further Bell, (forthcoming).
- 12 Press Release, UN Secretary-General, Secretary-General Comments on Guidelines Given to Envoys, Press Release SG/SM/7257 (December 10, 1999).
- 13 Resolution 1325 of 31 October 2000.
- 14 *The Rule of Law*, 2004.
- 15 E/CN.4/2005/102/Add.1.
- 16 UN Commission on Human Rights, *Human Rights and Transitional Justice*, Human Rights Resolution 2005/70 of 20 April 2005, 61st Session, UN Doc. E/CN.4/RES/2005/70.
- 17 In addition, the Paris Accords include an Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia and a Declaration on the Rehabilitation and Reconstruction of Cambodia.
- 18 Part III, article 15.2(a).
- 19 Part III, article 15.2(b).
- 20 Article 16.
- 21 Article 17, Agreement on a Comprehensive Political Solution on the Cambodia Conflict. Paris Accords.
- 22 Section E, annex 1.
- 23 Article 5, annex 5.
- 24 United Nations Security Council, UN Doc. A/45/772-S/21689 (Letter from the permanent five to the UN Secretary-General).
- 25 *Ibid.*
- 26 See Amnesty International, Text of Amnesty International open letter to Cambodian figures and foreign governments involved in the Cambodia peace negotiations urging strong human rights provisions in a settlement (November 14, 1990) – AI Index ASA 23/05/90.
- 27 Annex 5, article 2.
- 28 Article 5.
- 29 Samayoa, 2002.
- 30 On 16 November 1989 members of the army's élite Atlacal battalion entered the campus of the Jesuit-run Central American University and murdered six Jesuit priests, their housekeeper and her daughter. For a detailed account of the assassination case, see Lawyers Committee for Human Rights, 1993.
- 31 Part II: Fundamental Rights, Duties and Freedoms.
- 32 Preamble.
- 33 VI.(b).
- 34 Honwana, 1998, p. 75.

- 35 Annex 3.
- 36 Annex 4. For a discussion of the weaknesses of this framework, see O'Flaherty, 2001, and O'Flaherty and Gisvold, 1998.
- 37 Annex 4, Article II. 2
- 38 Annex 4, Art. II. 4
- 39 Article II(5) of the Constitution.
- 40 Annex 6.
- 41 Annex 6.
- 42 Article XII.
- 43 Rees, 2002, p. 51.
- 44 Preamble.
- 45 Article XIII.
- 46 Article IX.
- 47 Comprehensive Agreement on Human Rights, Art. V.5.
- 48 Article V.
- 49 Article IX (1).
- 50 Article IX.
- 51 Agreement reached in Multiparty Negotiations, also known as the 'Good Friday Agreement'.
- 52 Rights, Safeguards and Equality of Opportunity, Human Rights, 2.
- 53 Ibid., 4.
- 54 Strand III, para. 10.
- 55 The Agreement committed the Irish Government to ratifying the Council of Europe Framework Convention on National Minorities, to implementing enhanced equality legislation, and mandating them to "take further active steps to demonstrate its respect for the different traditions in the island of Ireland" (article 9).
- 56 Rights, Safeguards and Equality of Opportunity, article 9.
- 57 Policing and Justice, para. 1.
- 58 Rights, Safeguards and Equality of Opportunity, Economic, Social and Cultural Issues, Policing and Justice, 2.
- 59 Policing and Justice, annex B.
- 60 Article XXIV (1).
- 61 Article XXIV (2).
- 62 Article XXXI.
- 63 Part III, article XII.
- 64 Part IV, article XVII.
- 65 Establishment of institutions and mechanisms; release of abductees; children-related; promotion of the voluntary return of refugees and IDPs; promotion of economic, social and cultural rights, including the issue of humanitarian assistance; promotion of civil and political rights and constitutional review; and sensitisation of the community regarding the Agreement's human rights provisions.
- 66 See e.g. the statement by the heads of UNICEF, the Office for the Coordination of Humanitarian Affairs, and the High Commissioner for Human Rights, describing the acts of the rebels as "outrageous violations of human rights ... and grave breaches of international humanitarian law". UN Doc. HR 98/40.
- 67 Several human rights activists regarded the decision to accept this appointment as damaging to the credibility of the NCDHR as a truly autonomous commission, see Human Rights Watch, 2001.
- 68 Article 5, Protocol I.
- 69 Article 3, Protocol II, chapter I (Constitutional Principles of the Post-transition Constitution).
- 70 Protocol III, article 3.2.
- 71 Protocol II, chapter 2, article 17.
- 72 Chinkin, 2003.
- 73 Ethnic cleansing has been defined as "rendering an area ethnically homogenous by

using force or intimidation to remove from a given area persons from another ethnic or religious group". (Final report of the UN Commission of Experts established pursuant to Security Council Resolution 780 /1992) – Annex IV, the Policy of Ethnic Cleansing, UN Doc. S/1194/674/Add.2 (Vol. I), 28 December 1994, Introduction).

74 Most of the following arguments were derived from ideas in: UNHCR, 1997.
75 Ibid.
76 Adelman, 2002, p. 294.
77 E/CN.4/1998/53/Add. 2 (11 February 1998). Introduction: Scope and Purpose.
78 See Note on International Protection, A/AC.96/815, 31 August 1993, para. 25.
79 Article 13 (2).
80 Article 12 (4).
81 Article 5 (d) (ii).
82 Abkhazia and the Republic of Georgia: SC Res. 1287 (200), 1036 (1996), 971 (1995),
and 876 (1993); Azerbaijan: SC Res. 853 (1993); Bosnia and Herzegovina: SC Res.
752 (1992); Cambodia: SC Res. 745 (1992); Croatia: SC Res. 1009 (1995); Cyprus:
SC Res. 361 (1974); Kosovo: SC Res. 1244 (1999) and 1199 (1998); Kuwait: SC
Res. 687 (1991); Namibia: SC Res. 385 (1976); and Tajikistan: SC Res. 999 (1995).
83 "1. Everyone lawfully within the territory of a State shall, within that territory, have
the right to liberty of movement and freedom to choose his residence. 2. Everyone
shall be free to leave any country, including his own. 3. The above-mentioned rights
shall not be subject to any restrictions except those which are provided by law, are
necessary to protect national security, public order, public health or morals or the
rights and freedoms of others, and are consistent with the other rights recognised
in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter
his own country."
84 Kálin, 2000, p. 69.
85 See, e.g., Sub-Commission on Human Rights resolution 2002/30, *The right to return
of refugees and internally displaced persons* (August 15, 2002), article 2. See also
SC resolutions dealing with Abkhazia and the Republic of Georgia, Azerbaijan,
Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia,
and Tajikistan (see footnote 74 above).
86 UNHCR, 1996. Voluntary repatriation agreements signed between the country of
origin, countries of asylum and UNHCR often put in place useful complementary
protection regimes for returnees and returning internally displaced populations.
87 2005, Principle 26.
88 Kálin, 2000, pp. 37-38.
89 See *Human rights and population transfers*, E/CN.4/1997/23, 27 June 1997, para.
60. Report No. 14 (Dakar and Brussels: ICG).
90 Article 19 of *Basic Principles and Guidelines on the Right to a Remedy and
Reparation for Victims of Gross Violations of International Human Rights Law and
Serious Violations of International Humanitarian Law*, in Commission on Human
Rights Resolution: 2005/35 (19 April 2005).
91 Article 20(c).
92 Global Consultations on International Protection, 4th Meeting Voluntary Repatriation,
25 April 2002, EC/GC/02/5, at annex II.
93 *Akdivar and others v. Turkey* (1997) 23 EHRR 143; *Selcuk and Asker v. Turkey*, (1998)
26 EHRR 477; *Mentes and others v. Turkey* (article 50), 24 July 1998, Reports, 1998-
IV, 1686; *Bilgin v. Turkey* (2003) 36 EHRR 879; *Yöyler v. Turkey*, application No.
26973/9524, decision of 24 July 2003 (these cases all relate to the eviction of Kurds
from their villages in South-East Turkey). In *Loizidou v. Turkey* (article 50), 28 July
1998, Reports 1998-IV, 1807, compensation was also awarded to a woman who
was denied access to her property situated in the northern part of Cyprus which
had been invaded by Turkey. *Cyprus v. Turkey*, (2002) 35 EHRR 30, concerned
Turkish denial of Greek-Cypriot owners of property in northern Cyprus access to
their property and awarded compensation for this interference with their property

- rights. *Report on the situation of human rights of a segment of the Nicaraguan Population of Miskito origin*, 29 November 1983, OEA/Sev.L/V/II.62, Doc. 10, rev. 3 (the Inter-American Commission on Human Rights recognised that compensation should be awarded to returning internally displaced persons for loss of property).
- 94 See United Nations (2004), *Progress Report on housing and property restitution in the context of the return of refugees and internally displaced persons*, E/CN.4/Sub.2/2004/22, 2 June 2004.
- 95 Principles on Housing and Property Restitution for Refugees and Displaced Persons, E/CN.4/Sub.2/2005/17.
- 96 Protocol III, article 3.
- 97 Protocol III, article 4.
- 98 Annex 7, article 1(1).
- 99 Article XXII.
- 100 Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, Principle 1.
- 101 The Lomé Agreement, article XXII.
- 102 DPA Annex 7, article 1(1).
- 103 DPA Annex 7, article 3.
- 104 Cotonou Accord, 1993, Section F, article 18.
- 105 Arusha Accord, 2000, Protocol IV, Reconstruction and Development, article 2(2)(c).
- 106 Annex 7, article 1(2).
- 107 Global Consultations on International Protection, 4th Meeting Voluntary Repatriation, 25 April 2002, EC/GC/02/5, at para. 33 and annex I.
- 108 1991 Paris Agreement, Annex 4, article 7.
- 109 Article 3(j).
- 110 DPA Annex 7, article 1(4).
- 111 Arusha Accord, Protocol IV, article 3(f).
- 112 III. Productive Integration of Uprooted Population Groups and Development of Resettlement Areas.
- 113 Arusha Accord, Protocol IV, article 3(g).
- 114 See United Nations, 1996, section 6.2.
- 115 Annex 7, article VI.
- 116 Annex VIII Protocol on refugee issues, Article 2.
- 117 General Peace Agreement for Mozambique, Protocol III, article IV(e).
- 118 II. 9.
- 119 Annex 7, article 1(1). (Emphasis added.)
- 120 Adelman, 2002.
- 121 Ibid.
- 122 Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Commission on Human Rights, 61st Sess., Item 17, UN Doc. E/CN.4/2005/102/Add.1 (February 8, 2005).
- 123 Article 6 (5).
- 124 *The Rule of Law*, 2004.
- 125 Peace Agreement (Chapultepec), 1992, chapter I, article 3K.
- 126 Principle 2.
- 127 Principle 4.
- 128 Available at www.flghrwg.net/reports/UN2005/impunity.pdf
- 129 Principle 35.
- 130 See Annex to Letter dated Aug. 9, 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, S/2000/786, August 10, 2000.
- 131 Lomé Accord, article XXVI.
- 132 Siegel, 1998, pp. 431, 439.

- 133 With the exception of amnesty, this terminology comes from the newly Updated Principles on Impunity (February 2005).
- 134 Committee against Torture (CAT), Article 7.
- 135 Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1975 and to the Department of Law at the University of California of 15 April 1997 (referring to CDDH, Official Records, 1977, Vol. IX, p. 319, as cited in Pejic, 2002, pp. 13- 33 at n. 77.
- 136 Recommendation 65 (c) and *The Rule of Law*, 2004.
- 137 Report of Diane Orentlicher, independent expert to update the Set of Principles to Combat Impunity, and Set of Principles.
- 138 See Principle 24, Impunity.
- 139 Linas-Marcoussis Agreement, article 3(i).
- 140 Article 3(i).
- 141 See eg. *Jordan v. UK* 4 May 2001 (ECHR).
- 142 Principle 2.
- 143 Promotion of National Reconciliation Act, No. 34 of 1995, provided for “the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period”.
- 144 I/A Court H.R., Case of Barrios Altos vs. Peru. Judgement of March 14, 2001, para. 41. (Emphasis added.)
- 145 ICCPR, General Comment 20 (1992), concerning prohibition of torture and cruel treatment or punishment; and ICCPR, General Comment 31 (2004), on Article 2 of the Covenant The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.
- 146 Principle 24 read with Principle 19.
- 147 The clearest statements have come from the Inter-American system. As early as 1992, the Inter-American Commission held that blanket amnesty laws violated articles 8 and 25 of the American Convention, read in conjunction with article 1 establishing state responsibility. These determinations, in cases involving Argentina, El Salvador, Uruguay and Chile, all relied among other things on the Inter-American Court’s decision in Velasquez-Rodriguez, which had found that the state had an obligation to investigate and prosecute serious violations. See Velasquez-Rodriguez case, OAS Doc. OEA/Ser.L/V/III.19, doc. 13 (1988); Inter-American Commission on Human Rights, Report on the Situation of Human Rights, O.A.S. Doc. OEA/Ser.L./V/II.82, doc. 26 (1992) (El Salvador); OEA/Ser.L./V/II.82, doc. 25 (1992) (Uruguay); OEA/Ser.L./V/II.82, doc. 24 (Argentina). The European Court of Justice has found similar obligations, eg. in Streletz, Kessler and Krenz v. Germany, European Court of Human Rights, 22 March 2001, para. 86; Akkoç v. Turkey, European Court of Human Rights, 10 October 2000, para. 77. The UN Human Rights Committee, addressing the requirements of the ICCPR, has found that even disciplinary and administrative remedies were not “adequate and effective” under Art. 2(3) of the Covenant in the face of serious violations, and that criminal prosecution was required for such violations. ICCPR, General Comment 20 (1992).
- 148 UN SC Res. 1315, 2000, para. 3.
- 149 Ibid.
- 150 See further, Slye, 2004, p. 99.
- 151 SC Res. 1329, 30 Nov. 2000; SC Res. 1503, 28 Aug. 2003; also SC Res. 1534, 26 March 2004.
- 152 *Paper on some policy issues before the Office of the Prosecutor*, September 2003, available at http://icc-cpi.int/library/organs/otp/030905_policy_paper.pdf
- 153 Convention on the Prevention and Punishment of the Crime of Genocide, Article II.
- 154 ICG, 2005.
- 155 Updated Set of Principles on Impunity, Principle 12.
- 156 Commission on Human Rights Resolution: 2005/35 *Basic Principles and Guidelines*

on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 56th meeting (19 April 2005) UN Doc. E/CN.4/2005/L.10/Add.1.

- 157 Arusha Accord, chapter II, Protocol II, article 22.
158 Ibid., article 6.11.
159 Ibid., article 18.
160 Article III, 1.
161 *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vo. #B, Cha. VI, para. 11, quoted in Schabas, forthcoming 2006.
162 Interim Constitution, (Act No. 200 of 1993), chapter 15 "National Unity and Reconciliation", at www.oefre.unibe.ch/law/icl/sf10000_.html
163 Although, the Final Report of the Truth and Reconciliation Commission suggested that the establishment of the Special Court may have been a mistake and recorded a series of missed opportunities with regards to partnership between the two bodies, *Sierra Leone Truth and Reconciliation Commission Final Report*, 2004. See also Kelsall, 2005.
164 Bell, 2003.
165 See recommendations 64 (h).
166 Peceny and William, 2001.
167 See Collier et al, 2003.
168 See *ibid.* For a critical assessment of the IMF's involvement in Guatemala, see Fonseca, 2002.
169 Bell and Keenan, 2004, p. 330.
170 See eg. UN SC Res. 1542 on Haiti (30 April 2004) which provides that the Mission monitor and report on the human rights situation, and among other things, help to rebuild reform and restructure the Haitian National Police – including vetting – and develop a "strategy of reform and institutional development of the judiciary" and "assist with the restoration and maintenance of the rule of law, public safety and public order"; UN SC Res. 1536 of 26 March 2004 specifically requests action to establish a fair and transparent judicial system while working to strengthen the rule of law; UN SC Res. 1545 of 21 May 2004 authorises the UN Operation in Burundi to "complete the implementation of the reform of the judiciary and correction system".
171 O'Neill, W.G., 2004, "Reform of Law Enforcement Agencies and the Judiciary", ICHRP Working Paper, available at www.ichrp.org
172 See further Parlevliet, 2002.
173 Fisher and Ury, 1983.
174 Zartman, 1985.
175 *The Rule of Law*, 2004, recommendation 64(c).
176 Amnesty International, 1990.
177 Human Rights Watch, 1990.
178 Annex 1, Section C, article 1.
179 The Statistics Agency of BiH (1999) cited in Publication of the Helsinki Committee of BiH (2005) "Deset godina borbe za ljudska prava" (Ten years of the struggle for human rights), p. 24.
180 International Commission on the Balkans, 1996.
181 For definitions of 'war crimes', 'crimes against humanity', and violations of humanitarian law, see statutes establishing the International Tribunal for Rwanda, International Tribunal for the former Yugoslavia, and the International Criminal Court. Available at www1.umn.edu/humanrts/instree/auox.htm. See generally ICRC, 2002.
182 See further *Guatemala: Memory of Silence*, 1999, paras 1 and 82.
183 See the fourth and fifth progress reports of the Secretary-General on UNOMSIL, UN Docs S/1999/20 and 237.
184 Literally means 'dead cities'; refers to the practice of calling a general strike amongst shops and services in order to paralyse a city.

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