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ARTICLE

Peace Settlements and Human Rights: A Post-Cold War Circular History

Christine Bell

Abstract

This article analyses the broad shifts in the relationship between peace settlements and human rights from 1990 to the present day. The article points to three phases of development: from 1990 to 2000, which saw a rise in peace processes and agreements and creative engagement with human rights; from 2000 to 2010, when new approaches to human rights and peacemaking were rapidly ‘normativized’ in new international legal standards, but at a cost of a more nuanced political practice; and from 2010 to the current date, an ‘era of disillusionment’ as regards the apparent failures of peacebuilding efforts, where human rights also have a more precarious global position. In the current era I suggest that we are witnessing renewed attention to the ‘politics of the local’ which questions and even rejects formalized human rights approaches to peacebuilding. Counter to the pessimism of the current era, I suggest that this new context may in fact offer new opportunities to return to the idea of human rights as a political practice. Rather than approaching rights as a set of external normative standards to propel liberal institution-building, human rights-based peacebuilding would aim to support a political practice in which rights are given meaning through the process by which they are ‘negotiated’ into being as part of an ongoing politics of inclusion. Such an approach would not only assist engagement with peace processes but might also invigorate a radical conflict prevention approach.

Keywords: conflict resolution; human rights; humanitarian law; peace agreements; peacebuilding

Introduction

The end of the cold war around 1990 saw a new practice of using peace settlements to end protracted social conflict within states. This article attempts a brief narrative account of the key shifts and controversies in the relationship between peacebuilding and human rights with reference to this practice. It does so with a view to addressing the current context, which I suggest is one in which disillusionment with peacebuilding is married with cynicism and retreat from human rights as generally accepted international norms.

I trace the practice of human rights-based peacebuilding through three decades: the first, 1990–2000, was a decade of heady experimental approaches to conflict resolution and human rights; the second, 2000–2010, a decade of institutionalization and normativization of peace settlement practice; and the third, now under way, of frustration and disillusionment with peace processes, transitions, and indeed human rights. I suggest that the move from the first to the second decade saw a move from a local political practice of human rights which international actors attempted to accompany and support, to an increasingly formalized approach of international legal regulation of peace processes through human rights standards. This second decade saw specific peace process applications of human rights norms given institutionalized forms within the international legal system in an attempt to regulate particular outcomes to persistent peacebuilding dilemmas. I suggest that this shift from human rights as a political practice to human rights as a regulator of peace processes had a price. The practice of

The author (christine.bell@ed.ac.uk) is Assistant Principal (Global Justice), and Professor of Constitutional Law at the University of Edinburgh.

human rights-based peacebuilding moved from an approach to human rights that understood rights as an integral part of political negotiations to one that saw human rights as a set of norms which stood above and outside of the political process. The move to institutionalization and normativization paved the way to the current decade which is one of disillusionment in which both peacebuilding and human rights practices are being questioned in a move that risks jettisoning what has been one of the most successful practices in ending violent conflict globally.¹

My main overarching purpose is to inform this current context of disillusionment. I approach this context deliberately with both sober realism and high optimism, suggesting that it may open the way to a more political practice of human rights again. Realism and optimism can be married by a return to understanding the political nature of human rights practice as part of a much more creative localized, political and constructive peacebuilding project. As a constructive project, peacebuilding involves negotiating local concepts of the 'just peace' as at once a normative legal and pragmatic political project, which attempts to create a space of dialogue in which to accommodate contested local and global visions of what justice and peace require and entail.

Setting the context

The early 1990s saw a rapid proliferation of peace processes due to three main factors relating to the end of the cold war: first, a rise in intra-state conflict and associated peace efforts to resolve them; second, new possibilities for ending long-standing conflicts that had had geopolitical dimensions which had now shifted; and third, increased international attention and new possibilities for institutional responses such as peacekeeping that the end of the cold war enabled (see Bell 2008: 28–31). The end of the cold war produced clear changes in how international and local actors engaged with intra-state conflict, that is, conflict arising primarily within the borders of states. The term 'intra-state' is preferred to the traditional distinction of 'internal', because such conflict had strong regional and even international dimensions. The key changes between the post-1990 practice of conflict resolution and earlier practices were threefold.

The first distinctive element of the post-cold war approach involved a move to resolve such conflicts not through strategies of military victory, or co-option of key moderates in processes of pacification, but through face-to-face negotiations between states and their armed non-state opponents that took seriously the need to fundamentally revise the state to make it more inclusive. The post-cold war approach to intra-state conflict involved the use of formalized negotiations between states and their armed opponents, and sometimes also other stakeholders such as wider political parties and social movements. Attempts to negotiate ends to conflict in the post-cold war period were not a completely new practice. Informal negotiations between governments and armed opposition groups had often been used to end protracted social conflict, including in the negotiations between the UK and the IRA in the early 1970s, or the Italian state's negotiation with the Red Brigades in the 1980s (see Maloney 2002; Meade 1990). However, by and large, these negotiations processes were secret or semi-secret, and focused on the state's offer of mechanisms for demobilization in return for amnesty and minor legal adjustments related to returning combatants to 'normal life'. In contrast, post-1990, conflict contexts saw more ambitious efforts at restructuring the state with a view to moving it from being 'owned' by one section of a very divided society, to a more inclusive structure capable of incorporating those who contested the state's legitimacy into a fundamentally revised set of political and legal institutions to which human rights and equality protections were central.

¹ See for example the statistics from the Global Peace Index, <http://www.visionofhumanity.org>.

The second defining feature of post-cold war peacemaking was that peace negotiations aimed to result in a formalized written publicly available ‘contract’ between the state and its non-state armed opponents. Across many varied conflict types and geographies, these processes involved the coupling of commitments to ceasefire and demobilization to new more inclusive constitutional frameworks. The idea of a ‘peace process’ as a process aimed at reaching ‘a peace agreement’ was born and became an international phenomenon.² The peace agreements concluded typically involved quasi-constitutional commitments establishing shared political institutions using mechanisms such as power-sharing; fundamentally revised legal institutions reflecting human rights safeguards; and mechanisms aimed at both ‘undoing the past’—enabling displaced people to return, releasing prisoners, and ‘repairing the past’, through processes of truth-telling, accountability and reparation.

Finally, the third common characteristic that distinguished post-cold war peacemaking from earlier efforts was the acceptance, both by states and increasingly by international actors, that human rights law and humanitarian law had relevance to peace negotiations and provided at least a regulatory influence over negotiations (and their outcome). Rather than being viewed as a legal framework that was in tension with practices of conflict resolution, human rights and humanitarian law were viewed as facilitative of the practice, and perhaps even generative of it in varied ways. The end of the cold war in its ‘end of history’ version (Fukuyama 1992) was understood as the triumph of concepts of liberal democracy to which human rights were foundational: peacemaking served as a kind of realization of the Kantian peace (Kant 1795). Further, a post-cold war rise in intra-state conflicts created pressure to resolve them, not least because greater capacity for human rights monitoring of conflict meant that atrocities by all sides were ever more visible and exposed. To little fanfare the prior decade had seen increasing civic mobilization engaging with human rights monitoring in terms of domestic and international rights standards, which had gone far in debunking the idea that states were always perfect and automatically legitimate and non-state armed actors were purely and simply terrorists driven by a commitment to violence. Human rights monitoring told a more nuanced story as to the root causes of violence as connected to a complex breakdown of the social contract in which human rights abuses were both causes and symptoms of violent conflict, and therefore required to be addressed if conflict was to be ended. As regards humanitarian law, states in conflict often presented internal conflict not as conflict, but as a massive crime wave which required a state of emergency (Ní Aoláin and Gross 2006: 328–9, 359–63). While they did this because they feared giving status and recognition to their armed opponents, at the point of seeking a settlement they often found that reference to humanitarian law standards was useful to peacemaking. Humanitarian law standards applicable to non-international conflict, such as common article 3 and Protocol II (and to a lesser extent Protocol I) of the Geneva Conventions 1949, were useful to states seeking ends to armed conflict precisely because—unlike human rights law—they applied not just to states but to non-state armed actors and appeared to underwrite politically matters such as amnesty.

The three distinctive characteristics of peace processes that emerged in the post-cold war period also set the ground for a parallel series of political, moral, and legal tensions that occupied the years to come and still lie at the centre of both theory and practice.

First, the new approach to peacemaking put those who were at the heart of the conflict at the heart of the new political dispensation. Those most responsible for the conflict were often those placed at the

² For peace agreement databases covering this period see PA-X (<http://www.peaceagreements.org>), UN Peacemaker (<http://peacemaker.un.org>), the Peace Agreement Matrix of the Kroc Institute for International Peace Studies (<http://peaceaccords.nd.edu>), or the Uppsala peace agreement database (available at <http://ucdp.uu.se/downloads/>).

heart of post-conflict governance structures in ways that were responsive to human rights challenges to the state's inclusiveness, for example through power-sharing arrangements. Yet this form of inclusion also raised new questions as to the legitimacy and competence of both state and non-state actors who had been at the heart of the conflict to be builders of a new rule of law state capable of good government in the future. While the peace/justice debate is currently especially associated with tensions between amnesty and accountability (discussed further below), in fact it burst onto the scene in academic terms in an article by 'Anonymous' relating to Bosnia which did not focus on lack of accountability and transitional justice but with the entire peace process and political settlement itself (Anonymous 1996; see also Gaer 1997).³ Writing about the conflict in Bosnia in 1996, just after the Dayton Peace Agreement (1995) had been signed, 'Anonymous' pointed to how human rights advocates had opposed draft peace agreements on the ground that their constitutional arrangements conceded too much territory and power to those responsible for ethnic cleansing (ibid.). The author castigated the human rights community for prolonging the war in former Yugoslavia by insisting on requirements of justice. By judging every peace blueprint primarily in terms of whether it rewarded aggression and ethnic cleansing, human rights 'pundits' and negotiators, it was argued, had rejected pragmatic deals which, with hindsight, were as good or better than the eventual settlement reached in Dayton. The accusation against human rights actors was stark: '[t]housands of people are dead who should have been alive—because moralists were in quest of the perfect peace' (ibid: 258).

Closely related to the first tension, a second tension arose from the common approach of combining ceasefires with new constitutional frameworks. This coupling meant that the short-term demands of peacemaking focused on 'negative peace'—ending conflict, demobilizing combatants and stabilizing the security situation—were coupled with the longer-term demands of peacebuilding focused on 'positive peace'—establishing inclusive state structures based on fundamental reform of political and legal institutions, establishing the rule of law, and repairing the past. Short and long-term requirements of peacebuilding often appeared to be in tension with each other.

Third, a tension between the letter of human rights standards and the compromises necessary to peacebuilding played out with reference to diverse issues implicated in peace negotiations. For example, with regard to transitional justice, short-term demands of peacemaking, often with a human rights imperative of ending the conflict, seemed to require forms of amnesty and inclusion of those fighting the war. Longer-term attempts to build societies based on the rule of law, however, seemed to require a measure of accountability however 'soft'. Other tensions included tension over whether the political settlement would focus on liberal democracy or group participation. A political settlement focused on liberal democracy understands a singular political community to comprise the *polis* within an agreed territory, with elections and individual equality rights to be central to the concept of a unified *demos*. In contrast a political settlement based on group accommodation using forms of complex power-sharing understands equality to require equal participation at the centre of the state's political and legal structures. Group equality measures can be in tension with individual equality measures. Similarly tensions were also present in how return of refugees, displaced persons, and land were managed. While issues associated with return could not be achieved easily in the short term, in the longer term if conflict-fuelling diasporas were not to persist, or localized disputes around return and land to re-ignite national conflict, then some sort of provision needed to be put in place. Yet return of the displaced can destabilize political settlements as well as stabilize them, in particular when it stands to rework ethnic demographics around which the new territorial divisions agreed in the peace process have been based.

³ See also contribution by Simpson in this special issue.

Over the next decade each of these debates went on its own journey, from experimental practice influenced by normative standards, to attempted normative guidance, to normativized regulation, to retreat and disillusionment. Through this journey the attempted application of human rights law and humanitarian law to dilemmas of transition for which they had not been designed saw legal standards reshaped by political settlements, even as they tried to shape them (see further Bell 2011, 2014). I set out this trajectory in three phases—somewhat caricatured and with their exact temporal boundaries of course more flexible than the caricature suggests.

1990–2000: The rise of peace settlements as experimental practice

In the early phase of post-cold war peacemaking and building, peace processes saw a level of experimentation. This took place both at the domestic level and at the international level, as international organizations developed what was to become a rapidly evolving international peacebuilding machinery. In the early days of 1990 each peace process appeared as an isolated event, propelled by its own particular political circumstances and dynamics. Those making connections between peace negotiations and human rights had to push against the idea that mediation had to take place in as free a climate as possible, and that reaching agreement was the main imperative to which questions of the normative content of that agreement came second.⁴ Peace processes and peace mediation were understood as having little to do with human rights; they focused on the high business of political settlement and elite bargaining. Even at the level of civil society within conflict situations a division often existed between peacebuilding groups and human rights groups. These divisions were seldom created or sustained with divisive intent, but reflected quite different imperatives to conflict resolution, as set out in a table adapted from one by Crocker et al. (1999: 33).

Table 1. Mediation-focused versus human rights-focused approaches

Mediated peacebuilding approaches	Human rights approaches
<ul style="list-style-type: none"> • Goal is conflict management • Inclusive of all actors • Focus on reconciliation and relationships • Approaches based primarily on pragmatic justifications • Approaches rooted in local cultures and particularist solutions • Moral neutrality • Moral equivalence 	<ul style="list-style-type: none"> • Goal is democratic transformation • Exclusive of human rights violators • Focus on justice and fair political structures • Approaches based primarily on principled justifications • Approaches rooted in universality, the common good and normative approaches • Accountability • Taking a position

The divisions are caricatures. Yet, in some sense they capture at least distinct priorities between mediation/peacebuilding approaches and human rights approaches as regards the importance of norms to the substance of any agreement reached. In practice, however, divergent approaches to conflict resolution and human rights seemed unhelpful to fashioning peace agreements that were at once

⁴ For key early initiatives see Forsythe (1993), Nherere and Kumi (1990), and Parlevliet (2002). For a good overview of literature and developments see Parlevliet (2009).

exercises in mediating ends to conflict, and to attempts to set in place normative constitutional structures based on greater fairness, equality and inclusion than before.

During conflicts, human rights were often viewed as a divisive issue and the property of one side in the conflict. However, at the point of reaching settlement, human rights often came to the centre as a framing language of change that helped mediate the wider political disputes and their resolution by providing safeguards against abuse of power into the future. How then could the relationship between human rights and peacebuilding be better understood? My own experience in Northern Ireland serves as an example. Here, as the peace process began, local human rights actors often reiterated the phrase ‘since human rights were a part of the problem, they have to be part of the solution’ as a form of peace process intervention. Yet, even within our human rights group (the Committee on the Administration of Justice) we initially had no clear sense of how we should or could intervene with respect to political negotiations understood as mediating a national dispute over whether sovereignty over Northern Ireland should lie with Britain or Ireland. My own academic work developed in part out of a hunger to understand, for the Northern Ireland context, the ways in which human rights had been used to frame peace negotiations and settlements.

I developed comparative work at an early stage to trying to understand when and how human rights issues—often viewed as divisive to raise during the conflict—could come to be addressed in peace negotiations which were constructed around elite deals over access to power. ‘Peace Agreements and Human Rights’, for example, mapped out the complex principled and pragmatic dynamics whereby peace processes incorporated human rights standards based on a comparative study of Northern Ireland, Israel/Palestine, Bosnia and South Africa. These cases revealed the way in which human rights became negotiated as part of an overall political settlement in a process that involved ‘[n]either wholly principled, nor completely unprincipled political barter’ (Bell 2000: 320).

While human rights in settled states often involve understanding human rights as prior political claims, and ‘trumps’ to political positions, human rights language and structures emerged in peace agreements in a much more negotiated and contingent way. Three main factors can be seen to drive the relationship between peace settlements and human rights, and accounted for when and how human rights provisions were included in peace settlements (see further Bell 2000).

The first and most critical determinant of whether and how human rights are addressed and institutionalized is the central deal providing for any revised political settlement as regards access to power through institutions and territory. The central deal of political–military elites as regards access to power controls whether human rights protections are addressed in the peace settlement at all. For example, where the deal moves towards a complete ‘divorce’ between peoples and partition of territory, as in the case of the Oslo Accords in the Israel/Palestine process, then the political elites of both sides may not have an interest or reason to write human rights protections into the text of that ‘divorce agreement’. The initial Declaration of Principles (1994) did not mention human rights, although a later Gaza–Jericho Agreement, in Article XIV, included a short provision entitled ‘Human Rights and the Rule of Law’ which stated that ‘Israel and the Palestinian Authority shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law’, a formula repeated in later Agreements again without any more elaborate framework for implementation.

Conversely, where territorial separation is not contemplated, human rights institutions may be crucial to enabling agreement on access to government. Human rights protections are then resorted to as a means of addressing past allegations of lack of state legitimacy. They can also provide for future safeguards against abuse of power under the new governmental and territorial arrangements—

arrangements which in peace agreements almost inevitably involve power-sharing or splitting. These arrangements create new minorities and majorities, and divided groups remain at risk of discrimination and domination by 'the other side'. However, the political arrangements themselves can also be understood as responding to past human rights abuses such as exclusion and domination, with mechanisms such as complex power-sharing aiming to deliver forms of equality of political participation. It is in fact impossible to separate out the 'human rights' component of the peace settlement package from its overall political package, because human rights measures are an interwoven part of any attempt to reallocate power. In South Africa, for example, the entire process of constitutional transformation, encapsulated in the brokered Interim Constitution aimed at enabling multiparty democracy (South African Constitution of 1993), was a response to understanding past human rights abuses as related to apartheid anti-democratic measures. Specific mechanisms such as the Truth and Reconciliation Commission responded not just to the more specific need to deal with the past, but were shaped by the overriding concern to transition to a democratic framework in ways that would not destabilize the country—itsself a human rights imperative.

The second factor affecting human rights provisions in peace settlements is the context of the abuses of the past; human rights provisions are also shaped by the contextual conflict-specific history of past human rights abuses. They do not emerge as 'ideal-type' institutions, but as a response to specific claims of abuse. The context of how human rights abuses have taken place—and the complicity of specific institutions and practices—shapes the type of institutional remedy put in place in the peace settlement. Rights-based reform to policing and security structures, human rights frameworks and revision of law and court structures all flow from the idea of 'what needs to be fixed'. The abuses of the past are also important to questions of accountability, shaping any transitional justice mechanisms and approaches to amnesty. The criminal justice and policing provisions of the Belfast or Good Friday Agreement (1998) stand as an example.

Thirdly, both group and individual human rights provisions are shaped by international human rights law. While constitutional arrangements and specific human rights institutions are produced as a result of inter-group bargaining, and shaped by both the experience of past abuses and visions of a better future, international law also plays a crucial role. International legal positions taken during the conflict shape the central deal, perhaps more than is often given credit. But more importantly, perhaps, when it comes to choosing and designing human rights institutions in the peace agreement, international law influences the choice. While the deal controls whether and how the parties view human rights protections as in their reciprocal self-interest, and the particular context of past abuses shapes human rights provisions, prevailing notions of international legal best practice are also influential. Judicial reform, policing reform, bills of rights, and human rights commissions are all informed by international legal standards pointing to best practice. International human rights standards inform negotiations, because they have broad legitimacy as agreed by state parties and having the status of international law. However, they also operate in mediation-parlance as objective standards external to any of the parties to the conflict, which are useful to reframing absolutist conflict-generating positions rooted in discrimination and domination. The wholesale incorporation of 13 human rights treaties into the Bosnia Constitution provided by the Dayton Peace Agreement (1995) is an example.

Parties at the heart of the state, who during the conflict have resisted the application of international human rights law standards may come to accept them during peace negotiations as having a protective function if these parties fear their power is to be reduced. Parties who rejected rights frameworks may also subscribe to international human rights law standards for strategic instrumentalist reasons, with

human rights law operating as the internationally chic language with which to curry international favour as ‘the good democrats’. International human rights institutions may also play a role in peace agreement implementation: they can adjudicate on how transitional provisions comply with human rights law. Thus, domestic truth and reconciliation processes may well be challenged in international legal forums, and new institutions such as police will be monitored through the mechanisms of human rights conventions which will often have been ratified as part of the peace agreement package.

In any particular conflict, the balance between these factors will be different and will play out differently in terms of how they interact to shape the human rights provision of a peace agreement. Whatever the precise balance, human rights will play both a principled and a pragmatic role: this ranges from attempting to reframe absolutist clashes of power involving fundamentally different positions as regards the nature of the state to addressing the interests which underlie those positions by putting in place protections against abuse of power. This very political role for human rights also begins to explain the difficulties of ensuring the implementation of human rights commitments: human rights play an ongoing redistributive role in situations of incomplete political agreement.

In summary, the first decade of peace process practice saw an integrated approach to human rights and peacebuilding not because of a strong policy or academic commitment to rights-based approaches to peacebuilding, but because the dynamics of political negotiation propelled a close relationship between rights and political deal-making.

2000-2010: The fall of the peace agreement and new normativization

If the first decade of the practice involved a creative attempt to use human rights to challenge simple deals of ‘splitting the difference’ between state and non-state actors, the second decade saw both peacebuilding and human rights having to negotiate their place in an ever more complex global landscape. I suggest that this landscape was characterized by contradictory moves to normalize and institutionalize human rights-based peacebuilding on the one hand, and increased international use of force-based solutions that simultaneously co-opted and dismantled human rights discourse on the other hand.⁵

Institutionalizing human-rights based peacebuilding

As regards human rights, the second decade saw institutionalization of human rights-based approaches to mediation. Attempts to provide specific guidance as to the application of human rights in conflict saw standards developed in a process that continues to the present day, addressing the role of women (UN Security Council Resolution 1325 2000),⁶ the treatment of children (UNICEF 2007), return of displaced persons and refugees (UN Commission on Human Rights 1998), housing issues (UN Commission on Human Rights 2005), and, of course, transitional justice (UN Commission on Human Rights 1997: Annex II; UN Commission on Human Rights 2004). Over the decade these human rights agendas in relation to conflict often became almost new ‘regimes’ within the international legal system (for example the ‘women, peace and security’ agenda). Most notably, the attempt to embrace human rights and peacebuilding generated new international institutionalization. This ranged from the new peacebuilding architecture provided by restructuring of the United Nations

⁵ See contribution by Petrusek in this special issue.

⁶ See also other subsequent resolutions on UN Women website, <http://www.unwomen.org/about-us/about-un-women> (referenced 21 November 2016).

around the Peacebuilding Commission,⁷ and similar restructuring of regional organizations (for the African Union, see Engel and Porto 2010), to specific innovations such as the new UN Special Representative of the Secretary-General on Sexual Violence in Conflict, and the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.⁸

In some senses this normativization and institutionalization of human rights-based peacebuilding was a vindication of human rights arguments that mediation required some normative basis. Yet this approach sat uneasily with any sense of the politics of human rights practice as having to be negotiated into local political settlement processes rather than imposed. The increasing bureaucratization of the practice began to silo the practice into different institutions: for example, the UN Department of Political Affairs led mediation efforts; peacekeeping was the responsibility of the UN Department of Peacekeeping Operations, with UNIFEM and later UN Women serving as the lead on women, peace and security, and matters such as constitution-making often lying with the UN Development Programme. Further, new normative initiatives such as the responsibility to protect or the women peace and security agenda, often had an unclear relationship with long-established human rights treaties risking undermining the standing of the treaty system and its enforcement mechanisms by becoming almost parallel regimes whose rights basis was much less clear.⁹

The new decade saw a ground-shift so that justice issues were placed centre stage. However, the tensions between human rights and peacebuilding had not been eliminated; rather the pendulum had swung from a peacebuilding-first approach to a human rights first-approach. As a senior member of staff in the Office of the High Commissioner on Human Rights proudly announced at a meeting I attended towards the end of the decade, the peace/justice debate is over, and justice has won. Except, of course, that the debate was not over—it had been driven by real dilemmas of how to create peace through getting those involved in violence to negotiate, and then to broaden and sustain the peace agreement into a wider more normative constitutional framework. The shift towards the primacy of justice risked missing an opportunity to successfully manage the tensions between human rights and peacebuilding. Rather than a victory for human rights-first over mediation/peacebuilding-first approaches, what was needed was a nuanced practice of understanding rights and peacebuilding as a combined political practice. This practice needed to be rooted in the recognition that human rights always have to be negotiated into being in country contexts, using complex political bargaining processes if they are to be effective in addressing power. The apparent victory of human rights discourse was in a sense a defeat of this more political approach to human rights. It risked blue-printed approaches to human rights-based peacebuilding as a simple project of requiring liberal

⁷ See UN Peacebuilding Commission website <http://www.un.org/en/peacebuilding>; see also explanation, description and critique of the UN peacebuilding architecture in the recent report of the Advisory Group of Experts (United Nations 2015a).

⁸ See Office of the UN Special Representative of the Secretary-General on Sexual Violence in Conflict at <http://www.un.org/sexualviolenceinconflict>; UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence at <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>.

⁹ For example, the UN Security Council 1325 Women, Peace and Security Agenda laid little emphasis on the Convention on the Elimination of All Forms of Discrimination against Women, and it was not until 2013 that the Committee on the Elimination of Discrimination against Women produced General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, in which it attempted to set out standards for applying the Convention in situations of conflict and peace processes (UN Committee on the Elimination of Discrimination against Women 2013).

democratic frameworks, whether these had any traction or relevance to the power games being played within states or not.

Standards relating to peace process applications of human rights multiplied, but also created new tensions within the discourse of human rights itself because they drew on human rights standards that had not been framed with the tensions and dilemmas of peace processes in mind. Two of the areas central to these tensions illustrate. The first is the concept of participation and inclusion. As noted, the peace settlement phenomenon had focused on attempting to rework an exclusive state to include its key armed challengers. In deeply divided societies rather than one constituent people, there are often several constituent peoples to be accommodated. Group accommodation as a solution to conflict had come to be underwritten by a range of standards relating to minority rights, notably the UN Declaration on National Minorities, and the Council of Europe's Framework Convention for the Protection of National Minorities, and the UN Declaration on Rights of Indigenous Peoples. At the start of this decade, new forms of group participation were asserted to also be relevant to peace processes. Most notably, with regard the inclusion of women in peace negotiations, UN Security Council Resolution 1325 insisted on women's inclusion in all parts of peace processes, and that post-conflict equality concerns were addressed (UN Security Council 2000: see in particular para. 8).

It should be said clearly that these were all positive developments that stood to reinforce attempts to ensure inclusion in peace settlements. However, little attention was given to how to include groups in new constitutional frameworks, or how the tensions with individual-based rights approaches—also built into peace agreements—would be navigated (see generally Aroussi and Vandeginste 2013). As a result, the new normative developments were unstable, caught between a project of group accommodation and a project of liberal democratization that was wary of group rights. By 2008, Kymlicka (2007) was to note that an international legal approach of providing targeted norms of inclusion, that gave different rights to inclusion to differently placed groups, stood at a crossroads despite having proved effective in conflict resolution. He argued that international human rights law faced a tension between better normative support for differentiated standards relating to group accommodation, and retreat to addressing group inequalities of political participation through generalized anti-discrimination norms. Right on cue, the European Court of Human Rights demonstrated the tension, striking down the group accommodation constitutional provisions of the Dayton Peace Agreement for violating the individual equality rights of a Jewish and a Roma claimant.¹⁰

The second area of ongoing tension between the new normativization and the need for context-specific political practices is that of transitional justice. Here too the new decade saw a new wave of normativization and institutionalization, again emanating from diverse standard-setting initiatives and processes. In 1998, the Rome Statute establishing the International Criminal Court (ICC) was adopted and came into force in 2002. Although originally conceived as a response to interstate conflict and with post World War II origins, the world into which the Court arrived saw it immediately applied to intrastate conflict. Almost as soon as it opened its doors the Ugandan government asked it to investigate the activities of the Lord's Resistance Army (LRA), an extremely violent non-state armed group which at that stage was fighting a war within Uganda and which the government was having difficulty defeating.¹¹ The Court accepted a referral from the Ugandan government, and even

¹⁰ *Sejdic' and Finci v Bosnia & Herzegovina* App nos 27996/06 and 34836/06 (ECHR, 22 December 2009); see further McCrudden and O'Leary (2013).

¹¹ For information regarding ICC involvement in Uganda see the ICC website, <https://www.icc-cpi.int/uganda>.

conducted a joint press conference with Uganda's President Museveni, however without a public attempt to investigate the complex tapestry of a conflict in which the Ugandan government had also perpetrated abuses. Five leaders of the LRA were indicted, becoming the first people to be indicted by the Court.¹² The indictments posed an immediate issue for any peace process in Uganda in ways that Museveni was to later attempt to find ways around.¹³ While the previous decade had focused on how to find creative ways to accommodate the apparent tension between justice and peace, often under the banner of 'transitional justice', the ICC's existence meant that the justice vs peace dilemma was squarely on the table again (see Allen 2006).

The year 2000 also saw the UN first pin its own flag to the mast as a 'normative mediator'. Secret guidelines on human rights and peace processes were given to UN Secretary-General Representatives in the field, and these came to light and were in a sense normativized by their first dramatic application in practice. When the UN came to sign the Lomé Peace Accord for Sierra Leone, they were faced with a peace accord with a broad amnesty for Revolutionary United Front (RUF) combatants and in particular its leader Foday Sankoh.¹⁴ The UN had witnessed a virtually identical peace agreement with similar amnesty provisions in Sierra Leone in 1996. However, faced with the Secretary-General's new guidelines, the UN mediator in 1999 added a 'rider' qualifying his signature dissenting from the amnesty provision (see UN Security Council 1999). By 2004, UN Secretary-General Kofi Annan publicly formalized the UN's normative commitment to transitional justice in his seminal report on the topic, reiterating his commitment not to sign peace deals that provided for blanket amnesties or the death penalty (UN Security Council 2004).

Collectively these developments reflected what was arguably a Kuhnian 'paradigm shift' in the approach to human rights and peacebuilding. From the situation at the start of the 1990s where human rights advocates had to make arguments that international standards on accountability were relevant to transitions from conflict, by 2000 criminal legal accountability had become a requirement of peace processes. Once assumed to stand at odds with negotiated transitions by undermining efforts to reach elite compromises meant to 'stop the killing', accountability was now asserted to be a precondition of any negotiated settlement. The new approach 'regulated' peace processes by making clear normative demands of settlement terms, but in so doing reduced the space to negotiate local solutions. Paradoxically, the new international institutionalization of human rights-based approaches to peacebuilding took place in a world in which the global positioning of human rights as a consensus tool for peacemaking was unravelling.

¹² These people were Joseph Kony, Raska Lukwiya, Okot Odhiambo, Dominic Ongwen, and Vincent Otti. Proceedings were terminated against Lukwiya after his death in 2006 (proceedings terminated 2007). Currently reportedly only Ongwen and Kony are still alive, and Ongwen is at the time of writing, being tried by the ICC (see further Burke 2016).

¹³ See agreements with the LRA, initialled but never signed, which provided for forms of special criminal proceedings involving restorative justice, See Uganda: Annexure to Agreement on Accountability and Reconciliation, 29 June 2007, http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf (referenced 21 November 2016). Despite the failure of these agreements, the special divisions of the High Court were set up in 2008.

¹⁴ See article IX, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, 7 July 1999, <http://www.sierra-leone.org/lomeaccord.html> (referenced 21 November 2016). Interestingly, no such rider was added in an earlier (failed) peace agreement with a similar amnesty, see Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Abidjan on 30 November 1996, <https://peaceaccords.nd.edu/accord/abidjan-peace-agreement> (referenced DATE).

Co-opting and dismantling human rights-based peacebuilding

During the first decade of the new peace process practice, human rights were understood by local actors to be useful to challenging exclusive distributions of power in ways that underwrote attempts to move to inclusive concepts of the state so as to address conflict. However, in this second decade states began using human rights arguments at the international level to underwrite a return to international force-based solutions to conflict. This move in essence saw the co-opting of human rights arguments by internationally powerful actors in pursuit of projects of power that stood to undermine attempts to foster human rights-based approaches to peacebuilding.

The humanitarian intervention of NATO in Kosovo that used human rights abuses as a justification for international use of force, but without UN Security Council authorization, began to position human rights not as a tool for restraint of state power, but as a justification for powerful Western states to go to war against states understood to be committing gross violations. Subsequent attempts to define when conditions for humanitarian intervention might exist were to result in the responsibility to protect doctrine.¹⁵ Initially arising from an attempt to provide a post-Kosovo definition of when international force-based intervention in the name of human rights might be justified (ICISS 2001: 32), the responsibility to protect doctrine that emerged became so general that most states and many key international human rights NGOs signed up to it.¹⁶ However, the doctrine's redefinition of state sovereignty as conditioned on a state's willingness and capacity to protect the rights of its citizens had of course wider implications for what use of force is enabled; the implications were made clear by interventions focused on regime change in Iraq, Afghanistan and later Libya—all justified using human rights arguments.

Both human rights and peacebuilding were also confronted with a new set of difficulties as a consequence of the terrorist attacks on the New York World Trade Center in 2001. As regards peacebuilding, the 'war on terror' created a much more difficult world. In practical terms, new requirements to proscribe terrorists made face-to-face negotiations more difficult to hold. A US Supreme Court ruling even suggested that any attempt to support peace processes might violate anti-terrorist legislation as constituting 'material assistance' to terrorists.¹⁷ However, the war on terror also had ambivalent counter impulses. A 'failed state' discourse viewed failed states as breeding grounds for terrorists and extremists and therefore affirmed a commitment to institution-building in those states to end their intra-state conflicts (see e.g. The White House 2002: 1).

As regards human rights, a full frontal attack on the prohibition against torture struck at the heart of human rights law, sending out a global signal that human rights protections could be dispensed with during moments of existential threat. While the peace negotiations era had been underwritten by a sense that states were not always completely legitimate and non-state armed actors not always completely illegitimate, the war on terror started to re-institutionalize an approach in which the state's

¹⁵ For details and background documentation see the website of the International Coalition for the Responsibility to Protect at <http://www.responsibilitytoprotect.org> (referenced 21 November 2016).

¹⁶ The International Coalition for the Responsibility to Protect defines the responsibility to protect as 'a new international and human rights norm', but in fact sets out three principles the last one of which includes a suggestion of a generally worded 'collective use of force' if authorized through the UN Security Council. See further contributions by Petrasek and Babitt in this special issue.

¹⁷ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705. The Supreme Court found that the Humanitarian Law Project, which sought to help the Kurdistan Workers' Party in Turkey and Sri Lanka's Liberation Tigers of Tamil Eelam learn how to peacefully resolve conflict, could fall foul of the USA Patriot Act's prohibition on providing material support to foreign terrorist organizations (18 USC. para. 2339B).

legitimacy was now to be reasserted and reified—and in which human rights abuses were justified when faced with the ‘terrorism’ of its non-state opponents.

These developments, emerging stochastically rather than through coherent designed direction, created over time a new more complex relationship between human rights and peacebuilding, in which both concepts lost their shiny new look. Both were caught in a curious dynamic of simultaneous promotion and rollback. Yet they exhibited some resilience: peacebuilding because ending political conflict almost invariably requires negotiation; and human rights because equality and inclusion are an inevitable part of what requires to be negotiated.

To summarize, this second decade of practice saw the project of human rights-based peacebuilding very differently positioned, both locally and globally, than in the first decade. Whereas the first decade had been characterized by experimentalism with regard to how to reconcile the normative commitments to human rights standards within peace processes, both were viewed as progressive and capable of being brought together in a practical politics of peacemaking focused on more inclusive political settlements. To the extent that the imperatives of human rights norms and the imperatives of peacemaking appeared to clash, their antagonism paradoxically propelled the articulation of some middle ground and the creation of a practical politics of inclusion that depended on creative approaches to addressing the peace/justice tensions. This was an approach which was rooted in an understanding of human rights norms as abstract normative concepts which always have to be negotiated into application in complex local contexts: human rights as literally having to be ‘instantiated’ locally to be effective.

In contrast the second decade with its ambiguous dual processes of institutionalized normativization peacebuilding on the one hand, and rollback and co-option of human rights norms on the other, left little room for understanding and supporting more situated attempts to use human rights to reallocate power within peace process state restructurings. There was a price to be paid in terms of the effectiveness of international intervention in peace processes. The move from human rights as a tool for accompanying local searches for a just peace, to human rights as a tool for regulating the outcomes of peace processes, left local more political approaches to human rights and peacebuilding unaccompanied. Local human rights advocates seeking creative compromise now had to not only outsmart powerful internal actors determined to cut narrow bargains of inclusion, but also reckon with the tick-box regulatory demands of international human rights interveners as regards peace process outcomes. Moreover, the perception that Western states were using international human rights arguments to encroach on state sovereignty through the use of force created its own push-back from receiving states against the new institutionalization, which was to come to a head in the third decade.

2010-current: Era of disillusionment

By the third decade an era of disillusionment with peace processes and human rights had emerged. This disillusionment has had a number of different drivers.

First, peace processes had now taken place over a long period of time and those who had supported them were asking questions as to what they had achieved. What appeared to have been a successful practice of transition management by the end of the first decade appeared much less successful at the end of the second decade. A number of related failures were in play. First, some states appeared to have resisted all attempts to foster transition. A set of ‘fragile and conflict-affected states’ had been the target of multiple interventions by multiple states and international organizations who had poured in an inordinate amount of attention, intervention and money. These interventions had failed to transform ‘fragile and conflict affected states’, which remained caught in apparently unalterable

cycles of fragility, conflict, and poverty. Despite strongly internationally supported attempts to broker peace agreements and negotiate new constitutional orders, states such as Somalia, Nepal, the Democratic Republic of Congo and South Sudan appeared to have defied all attempts to promote transition, despite exhibiting moments of success (Cilliers and Sisk 2013). In addition, reconstructing inclusive state institutions or indeed functioning constitutional orders at all, had proved very difficult post international force-based intervention in states such as Iraq and Afghanistan.

Second, some past relative transitional ‘successes’ appeared less successful than they once had. Across very different regional contexts, many transitional societies, now well down the line from their transitional moment, appeared to be still ‘transitional’ and stuck in a ‘no war no peace’ liminal space. Transitions in Central America, while having formally replaced dictatorship with democracy, were now characterized by enduring forms of ‘state ownership’ by political elites, high levels of inequality and exclusion, and high levels of corruption and violence, now in the form of organized crime (see further Arnson 2003). In Europe, transitions in divided societies such as Bosnia or Northern Ireland seemed to be ‘stuck’ with their apparently liberal democratic institutions remaining hostage to the difficulty of sustaining power-sharing governments among groups whose ethnic divisions the arrangements appeared to freeze. At the same time interventions in other states (notably those of the Caucasus) had succeeded in ending violence only to freeze the conflict at an even less ‘resolved’ stage. In Africa in addition to the transitional ‘failures’ outlined above, some once-apparently-successful transitions, notably Burundi, appeared susceptible to reversal almost overnight. Even the paradigmatic transitional state of South Africa seemed to be on a less certain liberal democratic trajectory than was once assumed.

As a result, international intervenors have now begun to seriously question their practices, attempting to understand and respond to these failures. Development actors, ranging from UK (Whaites 2008; Evans 2012) and Australian (AusAID 2011) government aid agencies to the World Bank (2011) and the OECD (Brown and Grävingholt 2011), began to question their approaches to projects of state-building as a development objective. As demonstrated by the World Bank’s report (2011) on Conflict, Security and Development, they started to question liberal institutional peacebuilding. The development discourse began to move to the language of ‘inclusive enough coalitions’, and to warn against the dangers of blueprinted approaches to liberal democratic institution-building.

Similarly, peacebuilding literature and policy interventions started to question why the liberal political orders supported by their interventions had failed to come about. Academic literature began to analyse the ways in which liberal peacebuilding models had failed to produce liberal democracy, and instead produced more ambiguous ‘hybrid’ political orders rather than liberal ones (Boege et al. 2008). Forms of uneasy ‘peacebuilding contracts’ were said to exist (Mac Ginty 2010, 2011; see further Barnett and Zürcher 2009). This analysis suggested that rather than liberal democracy, post-conflict countries were seeing a complex in-country game, whereby local actors had become ever more adept at dressing up local power structures in the language of human rights and democracy, in ways that international actors often failed to recognize, much less had strategies to address. At the policy level, by 2015 the sense of disillusionment had triggered three major reviews within the UN from the UN’s Group of Experts on the UN’s Peacebuilding Architecture (United Nations 2015a), its High Level Independent Panel on UN Peace Operations (United Nations 2015b), and the Women, Peace and Security Global Study into the women, peace and security agenda of UN Security Council Resolution 1325 (UN Women 2015). All of these focused on how to address perceived failures in each of these areas, but also attempted to address the slicing of transition management into different institutions within the UN, all operating from different strategic perspectives.

The era of disillusionment has also a wider global context that feeds it. Some of the current disillusionment reflects the fact that peace processes have now come of age and their results can be evaluated over longer time frames. The global financial crisis has pushed Western states to question what their ‘value for money’ has been in development and conflict resolution terms. The disillusionment has also undoubtedly been fuelled in part by rising conflict. The conflict in Syria and the wider regional conflict dynamics of the Levant have been globally significant. They have, single-handedly almost, reversed a steady decline in conflict related deaths, since 1990 onwards which now shows a sharp rise (see Koffmar 2015; IISS 2015). Notably, Western states have appeared impotent to address them; rather these conflicts have sucked Western states back towards geopolitical conflict and even undermined the international organizations established in the wake of the World War II to deal with conflict.

While the UN and international institutions grapple with how to better promote peace settlements and how to better protect human rights, a new global political marketplace is currently destabilizing the liberal democratic order of both Western states and the international organizations they have driven forward. As Carothers and Samet-Marram (2015) argue, this is characterized by an end to the transitional paradigm and any illusion that a third wave of liberal democratization is in play; the widespread nature of the crisis—it is indeed global and not just a few hotspots; and the increasing rise of new actors on the international stage—states motivated by diverse non-ideological interests, using increasingly forceful methods, with power asymmetrical and rules scarce (ibid: 1–2). Whether it is UK withdrawal from the European Union, Russian and now US noises about the value of NATO, general concern about the role and effectiveness of the United Nations, or the announced withdrawal of South Africa (and potentially other states) from the International Criminal Court, the very fabric of international institutions is now facing robust challenge.

A circular history: the return to politics

Where then does the current era leave the relationship between human rights and peace settlements? From one point of view, the outlook both for continued commitment to search for negotiated ends to conflict, rather than (often unachievable) military victories, and for the value of using human rights norms to guide settlement terms, appears unrelentingly bleak. Both peacemaking and human rights operate using devalued currency. Before resigning ourselves to bleakness, however, it is perhaps worth re-emphasising that the turn to negotiated ends to conflict rooted in a commitment to human rights was responsible for a massive decline in intrastate conflict and violence worldwide, and continues to be central to resolution of protracted intra-state conflict (see Colombia). There are only so many ways to end violent conflicts within states, and negotiated settlement is one of the least costly in moral, human and political terms.

Therefore, rather than luxuriate in the bleakness, in a deliberate act of optimism I suggest that there may be some opportunities in the current context for revisiting the potential of the practical political project of understanding human rights as a tool of conflict resolution. First, there are signs in the current era of disillusionment of a willingness to reconsider the need for a more locally situated practice of peacebuilding. Insofar as peacebuilding, development and international legal actors have formed common analysis of why their interventions have failed, across these varied actors it is that they have failed to sufficiently understand local political bargaining processes. Development actors speak of the need to approach ‘development as politics’ (Unsworth 2009), and in particular seek to better understand and navigate ‘the political settlement’ through which elites hold and exercise power. The political settlement can be understood as ‘the forging of a common understanding, usually between political elites, that their best interests or beliefs are served through acquiescence to a

framework for administering political power' (Di John and Putzel 2009: 4). Peacebuilding intervenors similarly increasingly acknowledge a profound failure to sufficiently understand and reckon with the power politics of the countries in which interventions take place. The three recent reviews (UN Women 2015; United Nations 2015a, 2015b) for example, all point to a need to better engage with the power politics of local political settlement processes and the need for mandates and modalities to be nimble enough to respond to changing local games if they are to be effective. International norm-promoters also demonstrate a turn to the local in a move towards understanding how distinct contexts affect the effectiveness of norms and how elite power politics affects the domestic institutions that seek to implement international norms. A recent report by the International Center for Transitional Justice (ICTJ) and the Kofi Annan Foundation, for example, examined truth commissions to explore the paradox that while truth commissions have expanded and shown a tendency towards uniformity based on their mandates, recent truth-seeking processes seemed to have gone through chronic crises. In place of any attempt to articulate new standards for truth commissions they called instead for 'well-informed analysis of concrete situations' which seeks to understand the conditions influencing whether truth commissions play a constructive or unconstructive role (ICTJ and Kofi Annan Foundation 2014).

This realization of the importance of the local political context brings an opportunity to revisit the ways in which local processes of conflict resolution can be supported to use human rights, not as a formula for liberal democratic institutions, but as a language which can facilitate political space in which to deal with deep disagreement as to the nature of the state. Human rights language, because of its close association with fundamental human needs and its international legal status, is often a language in which the parties can reach at least textual common ground, even if fundamental disagreement on how to fulfil rights remains (Parlevliet 2002, 2009). At the local level, respect for human rights and equality is often a way of contesting power structures, using language that the government has subscribed to in international treaties and which therefore has some traction. Rather than a legal project which aims to restrain politics, the human rights project of peacebuilding at the local level is often one which aims to create space for politics and political deliberation over how to live in community by making it difficult for power-holders to rig the state to serve a narrow set of partisan interests. Human rights claims become a mechanism of reframing disputes over the nature of the state into a set of practical projects of reform in which the nature of the state and its capacity for inclusion can continue to be contested. At the point of settlement, human rights language aims to bring contending elites from conflict into some sort of common framework of peaceful disagreement. Beyond the moment of peace settlement, human rights institutions are often relied on to carry that settlement beyond an elite bargain into a broader set of social understandings. This understanding of the role of human rights in peace processes views them as a necessary part of any redistribution of state power. Of course, this understanding also points to the likelihood of resistance from those who perceive themselves to be losing power, which will require to be navigated.

What then should be the research, policy and political agenda for those who wish to support a human rights approach to peacebuilding? I suggest that it can be fashioned by understanding human rights as a political practice that relates to the redistribution of power in a project that aims to construct some sort of commitment to political community and a common good (e.g. Richmond 2010). At a local level, this project involves better understanding of how to work with the elite bargains that are necessary on the state level to moving from violence, without capitulating to those bargains or entrenching them so as to prevent the emergence of a broader social contract necessary to peaceful politics. At the international level, understanding human rights as a political practice is also important to understanding the need to constantly build the consensus necessary to sustaining international

commitments to human rights and peacebuilding. At this level too human rights have to be negotiated into being on an ongoing basis, in the context of an incomplete international political settlement that establishes the international legal and political order. Commitments to the common good based on a common humanity levels have to be negotiated into being on an ongoing basis, at both the local and the international level.

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