Negotiating Justice? Human Rights and Peace Agreements

Summary
THE PROJECT

Many recent peace agreements include specific commitments to human rights. Some believe that such commitments are necessary if government institutions, particularly law enforcement bodies, are to become fair and accountable and peace is to be sustained. Others argue, in contrast, that human rights requirements can limit the hand of negotiators and make it harder to bring all parties to the table, or explore all options – including options that may compromise ‘justice’ for the sake of achieving a cease-fire and peace process.

This Summary presents the findings of a report by the International Council that examines the perceived clash between ‘principled’ and ‘pragmatic’ approaches to peace negotiation. It lays out the dilemmas and trade-offs that those involved face when they consider human rights and, based on country cases, suggests how such difficulties can be managed and sometimes resolved.

Tensions primarily arise because the same political and military actors who waged a conflict (and were usually responsible for human rights abuses) tend to negotiate the peace – and, as a result, to define the post-war political order. The balance of power between these actors, during negotiation and after settlement, influences the scope and content of human rights provisions that are included in a peace agreement, and how the agreement is implemented. At the same time, however, human rights law has increasingly become a dominant normative framework, which lays down standards and obligations – regarding the responsibility carried by those who committed human rights crimes in the past, for example – that cannot be set aside for the purposes of negotiation.

The report’s analysis suggests that human rights can make a practical and positive contribution to many areas of conflict resolution, during the negotiation and implementation of peace agreements. Yet tensions certainly occur, especially regarding accountability for past crimes. The report describes the different roles that human rights provisions can play throughout peace processes, and argues that no one single method deals perfectly with these tensions. Approaches that impose human rights standards on principle, or jettison them for short-term negotiating purposes, are both unlikely to produce lasting solutions. It may be more effective to view dilemmas between ‘justice’ and ‘peace’ as ones that need to be managed as actors search for forms of settlement that are just and sustainable.
The report examines human rights provisions and monitoring mechanisms in the following peace agreements, as well as the arguments for and against their inclusion. The cases were:

- **Cambodia** (Final Act of the Paris Conference, October 1991)
- **El Salvador** (Peace Agreement in Mexico City, January 1992)
- **Mozambique** (General Peace Agreement, October 1992)
- **Bosnia-Herzegovina** (Dayton Peace Agreement, December 1995)
- **Guatemala** (Agreement on a Firm and Lasting Peace, December 1996)
- **Northern Ireland** (Good Friday/Belfast Agreement, April 1998)
- **Sierra Leone** (Lomé Peace Agreement, July 1999)
- **Burundi** (Arusha Peace and Reconciliation Agreement, August 2000)

These agreements were selected because they are geographically diverse, and illustrate various forms of conflict and approaches to international mediation. It should be noted that in most cases the agreements are still being implemented. For this reason, and because many other factors are in play, the research did not seek to draw conclusions about the impact of human rights provisions on the long-term success of peace agreements. The report’s purpose is to discuss how human rights standards can be used constructively in peace processes.

The report develops three main themes in order to identify areas of tension and complementarity between human rights and conflict resolution:

- **Frameworks for protection.** What kind of human rights frameworks and mechanisms for their implementation were included in peace agreements?
- **Repairing the past: forcible displacement.** To what extent did peace agreements protect the needs of forcibly displaced people. In particular, were they able to return to their homes and claim their rights to property?
- **Dealing with the past: impunity and accountability.** To what extent did peace agreements include measures to deal with past abuses?

In each case, the report examines whether the provisions that dealt with these issues comply with international law and whether legal requirements advanced or obstructed the progress of negotiations. It examines pragmatic arguments for drawing on human rights as a tool for conflict resolution, while acknowledging that principled arguments exist.

Chapters end with detailed recommendations and a list of questions that those involved in negotiations might use to assist them in addressing the issues.
FRAMEWORKS FOR PROTECTION

Peace agreements often include human rights frameworks (in the form of bills of rights or the incorporation of international conventions) and set out institutional reforms designed to establish public institutions that meet key human rights requirements, such as independence, equality, accountability, and ability to protect.

The report poses three main questions:

- **What** kind of human rights protections have been provided for in peace agreements?
- **How** were they to be implemented, and what institutional reforms were planned?
- **Why** were human rights protections provided? What role were they to fulfil?

Case studies suggest that adding human rights to a negotiating agenda helps to address, or at least monitor, abuses; and in addition, may create opportunities to advance talks, as parties often have an interest in protecting their own rights. Peace settlements also need to create political and legal institutions that offer parties non-violent ways to resolve their disputes: human rights frameworks and mechanisms can help achieve this objective, because they restrain power and promote fair and accountable legal institutions.

Many factors influence how peace agreements deal with human rights matters. They include:

- *The role and nature of human rights abuses, and mechanisms designed to address them*;
- *The presence of international actors, particularly to monitor and report abuses*;
- *The degrees to which the conflict spills across borders, or is internationalised*;
- *The political attitudes towards human rights of the parties and civil society*; and
- *The peace settlement, including its use of human rights mechanisms to hold authorities accountable*.

Peace agreements provide a unique opportunity to establish a broad human rights framework. Overall, experience suggests that the hardest choices for negotiators concern the extent to which an agreement should describe in detail institutional reforms and mechanisms to protect rights; or, how much this detail should be left for the future.

The dominant role that political and military élites play in peace talks means that they may block or dilute essential reforms. It may be undesirable to insert detailed provisions before civil society and human rights organisations have been consulted. On the other hand, failure to be specific (on timetables and mechanisms, or on sensitive issues like judicial reform) can mean that parties evade their commitments.
Mediators usually face five choices when they incorporate a human rights frameworks:

**An aspirational or judiciable approach.** Human rights law establishes both broad principles and detailed rights immediately enforceable in courts. When negotiating an agreement, however, it is often necessary to strike a balance between setting the highest possible standard for human rights protection, and ensuring that the framework chosen is realistic and can be implemented.

**International or tailored standards.** International standards have obvious legitimacy because they are internationally recognised, and use language that is neutral with respect to the parties; in addition, the state concerned may already be bound by them. However, they may not seem to address local issues directly or appropriately. Moreover, in the end, human rights protections must be locally-owned to be effective. For this reason, it may be appropriate to tailor provisions for particular problems, taking into account local legal practice. However, longer-term objectives can usually be signalled by referring to more comprehensive international standards.

**International or domestic enforcement.** The international community’s role can be short-term and specific, or longer-term and developmental. International organisations are rarely able to sustain commitment, however, and national institutions must eventually take charge of reform processes. For this reason, international organisations have a duty to build local capacity.

**Outline or detail.** During negotiations it is easier to agree outlines, principles and broad processes. Broad processes allow space for change and evolution, and permit civil and human rights organisations to be consulted on emphasis and detail. On the other hand, parties may be unwilling to reach agreement unless certain issues are clarified, requiring a measure of detail.

**Final or revisable form.** Agreement on broad principles may mask deep disagreement over human rights. During implementation, parties to a peace agreement nearly always try to renegotiate or reinterpret it to their advantage – and human rights provisions often become an area of dispute precisely because they constrain and reallocate power. On the other hand, the inclusion of precise and mandatory human rights clauses can restrict institutional development later on, and parties may refuse to discuss human rights matters that the agreement did not address. It can be useful to state in the agreement that its provisions do not preclude the introduction of additional human rights standards and mechanisms that are consistent with international law.
Conflict frequently causes forcible displacement and land dispossession; these may even be military objectives (‘ethnic cleansing’). Enabling displaced people to return home often involves dealing with clashing entitlements to land and property between pre-war and post-agreement populations. Unfair distribution of land may also be a prime cause of conflict when it causes inequity or deprives people of a livelihood. In post-conflict situations, willingness to return can be an indicator of confidence in the future, and a test of the capacity of national political and legal institutions to protect communities.

Many agreements give attention to the return of refugees and displaced persons because:

- It is an important indicator of peace and the end of conflict.
- High rates of return can validate the post-conflict political order, for example, by legitimising elections.
- Return of refugees is sometimes a precondition for peace, if the refugees are politically and militarily active.
- Return of displaced populations can contribute significantly to economic recovery.
- To avoid future conflict, it may be vital to deal with land disputes.

At the same time, return can sometimes be argued to put stability at risk because:

- Land claims by returnees can rewrite territorial compromises at the heart of an agreement.
- The treatment of refugees and displaced persons, and management of land disputes, can cause instability.

In many instances, it is difficult to establish a connection between the rate of return and the presence of provisions on return in a peace agreement. Broader political circumstances and levels of violence are the most important factors. Return may therefore happen even where a peace agreement omits reference to it, or fail to happen when provided for. Nevertheless, the inclusion of such provisions can encourage parties to create safe conditions and respect the human rights of returnees.
A RIGHT TO RETURN?

Under international human rights law, states should not prevent people from returning to their country of origin, or their former homes or home areas. States have a duty to ensure that return can take place ‘in safety and with dignity’. In practice, however, state policies often prevent return indirectly – particularly where political or economic conditions make return unsafe.

Recent peace agreements have affirmed that refugees and displaced persons are entitled to return specifically to their former homes. They usually emphasised the voluntary character of return, under conditions of safety and security, and some created mechanisms to monitor respect for these provisions.

A RIGHT NOT TO RETURN?

Under international customary law, no state (whether or not it is party to specific international instruments) may return individuals to another state where they would be at risk of persecution (prohibition against refoulement). Furthermore, it is increasingly argued that as time passes refugees can claim rights in the place of refuge. When local integration is not a viable option, those in continuing need of protection should be given the opportunity to resettle in a third country.

Similarly, human rights standards seem to prohibit states from moving internally displaced persons against their will, to places where their rights would be violated by either officials or non-state actors.

PROPERTY RIGHTS?

The right to be protected against arbitrary deprivation of property says little about how to resolve clashes of rights that occur when, as a result of prolonged conflict, several owners may claim that they have a legal and valid title to the same property. Many peace agreements assert that property lost because of displacement must be restituted, or that the owner should receive compensation. Compensation however, should not be an alternative to restitution, but should be available when restitution is not possible.

A RIGHT TO COMPENSATION?

The right to a remedy for human rights violations implies a right to reparation or compensation for forcible displacement. Restitution should therefore include return to one’s place of residence and return of property; and when restitution is not possible, compensation ought to cover, among other things, material damages.
DEALING WITH THE PAST: IMPUNITY AND ACCOUNTABILITY

During a political transition, how should gross human rights violations that were committed in a conflict be dealt with? International standards establish procedures and principles for holding to account individuals who committed serious abuses. Is compromise on such matters sometimes justified in order to secure peace?

In addition to arguments that international standards must be respected because of their legally binding nature, there are several practical reasons to hold individuals accountable for past crimes:

- Accountability strengthens, whereas impunity undermines, the legitimacy and authority of new political arrangements.
- At the end of conflicts, prisoners who have not committed serious crimes need to be released.
- Society needs to come to terms with its past.
- Institutional reforms to establish the rule of law will be ineffective if impunity is tolerated.
- Vetting (removal of human rights abusers from public positions) cannot take place without an accountability process.
- Individual victims cannot forgive and communities cannot reconcile in the absence of accountability.
- Accountability provides a deterrent against future abuse.

At the same time, efforts to end impunity can also destabilise a peace process because:

- Investigations, prosecutions and punishment may block negotiation or reignite conflict.
- They raise complex issues of due process (related to the nature of crimes committed) that new and fragile democracies cannot satisfactorily deal with.
- Mechanisms often fail to achieve the moral, legal or political objectives that processes linked to efforts to hold accountable those who committed abuses were expected to achieve.
- Traditional forms of legal actions and punishment may not always be appropriate to the conflict or the culture in which they take place.
- When guilt and responsibility are shared by a large proportion of the population, truth-telling and acknowledgement that abuses have occurred may be more successful at enabling all sides to participate in the new political order.

The report argues that it is best to analyse such tensions in terms of different actions required in the short-term to sustain the cease-fire (which may justify some forms of amnesty) and actions required in the long-term to create a stable and democratic society based on rule of law principles. The question then becomes: under what circumstances, and for what crimes, are amnesties permissible?
The report analyses grey areas in international law with respect to amnesties, and discusses compromises that peace agreements have made between ‘blanket amnesty’ and ‘no amnesty’, and the extent to which these are compatible with international law. These include:

- **Truth for amnesty/investigation without prosecution.** Reconciliation, institutional reform and vetting can become easier when a full and accurate record has described the abuses, those responsible and victims.
- **Forgoing punishment.** Pardons and other measures, such as vetting, may follow investigation and prosecution. International law does not specify what ‘punishment’ requires or, in the case of imprisonment, the length of sentence.
- **Proportionate accountability based on responsibility.** Peace processes suggest this is emerging practice, though humanitarian law clearly states that individuals are responsible for their actions even if they followed orders, just as officers are responsible for the actions of those they command.

Accountability for the past may be difficult to discuss early in a negotiation, but may be accepted later. The question then arises: how much to provide for at what stage? The following peace agreement innovations may be fruitful for mediators to consider further:

- **Creative wording.** Amnesties can be confined to permissible crimes or may be temporary. However, emerging international law provisions against impunity, together with the principle of universal jurisdiction and the International Criminal Court (whose prosecutorial discretion is not fettered by peace agreement provisions), limit the scope of such amnesty provisions.
- **Different mechanisms for different purposes at different times.** Various mechanisms are used, sometimes simultaneously, to deal with past crimes. They include domestic courts, inquiry and truth commissions, international tribunals, and ‘hybrid’ tribunals with international and domestic participation.
- **Focus on victims’ needs.** Some agreements distinguish delivery of services to victims from reparation. In practice this can help to make reparation for victims less contentious and means that their needs can often be met more quickly. Reparations can still follow for relevant victims.

### Amnesties under international law

**Impermissible:**
- Blanket amnesties covering minor and serious international crimes, including genocide, crimes against humanity, grave breaches of humanitarian law, war crimes, torture and enforced disappearances.

**Permissible:**
- Amnesties applied to insurgent forces simply for belonging to, or fighting with, insurgent forces, or for related offences such as carrying arms or false identification.
- Possibly minor crimes associated with rebellion.

The exercise of human rights cannot be a crime; ‘crimes’ of this sort should be considered null and void rather than amnestied.
IMPLEMENTATION

It is difficult to implement peace agreements. The involvement and support of international organisations or external actors is often necessary initially, though in the longer-term national institutions must take responsibility if peace is to be sustained.

Different scenarios may occur:

- The peace agreement does not hold and conflict reignites. If mechanisms for protecting human rights operate independently of political institutions, they can continue to help limit violence and keep space open for a new peace process.
- The implementation of human rights provisions reallocates power and is resisted. Human rights provisions are often framed in general language that masks differences between the parties, which can re-emerge when the agreement is implemented.
- Core issues, such as impunity, are not dealt with and human rights become the subject of new negotiations.
- Socio-economic rights are not dealt with. Peace agreements rarely cover socio-economic issues in detail, although they are central to post-war reconstruction.
- External processes of monitoring and verification are weak, or external actors operate to undermine the peace agreement. To achieve effective implementation of human rights provisions, oversight and monitoring by international institutions, or their participation in local institutions, may be necessary.
- Civil society is weak, restrained, or made dysfunctional by the peace process. Civil society organisations play a vital role in monitoring and implementing human rights. More generally, their work gives legitimacy to human rights in the wider society.
- Human rights are narrowly understood to include only matters and groups relevant to the conflict. Peace processes should include excluded groups and address their needs. Women’s rights and the rights of minorities are often not adequately considered.

The report discusses challenges associated with rule of law reform, and building effective law enforcement institutions. Institutional reform involves a wide range of tasks, from drafting new law codes to training officials in human rights, or constructing courts and prison infrastructures. Not only is it difficult to change the practices of such institutions (even in stable democratic societies), but during the conflict they have often been weakened, corrupted, or implicated in abuses making transformation even more difficult. Few of the changes required can be accomplished quickly, and many require expertise and resources from outside, as well as local commitment and investment.
CONCLUSIONS

COMPLEMENTARITY

Experience gathered from past agreements suggests that human rights often make a positive contribution to conflict resolution. Human rights abuses are both a cause as well as a symptom of conflicts, and action to tackle them is often a vital component of policies to bring about peace. Action to protect human rights may also convince parties to conflict that their fears of discrimination, domination and annihilation can be addressed by means other than violence.

Human rights standards use mandatory language. At the same time, governments have some flexibility as to how to implement them. This creates opportunities to advance human rights in negotiations. International human rights law suggests good practice for reform in public institutions, in particular for those responsible for law enforcement. It provides internationally accepted and impartial language for setting norms and benchmarks, which can help parties to distinguish legitimate from illegitimate demands. Because parties may have a common interest in protecting human rights (albeit often for different reasons), agreement over human rights protections can help to create the conditions for further talks, or unblock stalemates.

Human rights are relevant at different phases of negotiation. Before negotiation begins, preliminary human rights frameworks can help to contain the conflict. During negotiation, measures to protect human rights can build confidence and set baselines for institutional and legal reform. During implementation, human rights monitoring can strengthen compliance with the agreement as a whole and, more generally, generate public confidence in it.

Furthermore, the development of human rights mechanisms provides an opportunity to involve civil society. The report argues that it is vital to consult NGOs and public opinion in the course of negotiating and implementing national reform plans. Their involvement helps to ensure that reform is relevant and legitimate, and that the peace process does not remain under the exclusive control of political and military élites.

Finally, the adoption of a human rights framework and mechanisms for its implementation creates space for international institutions to play a continuing role in monitoring and implementing an agreement. This can be essential during the initial phase. Though ultimately, international agencies should pay attention to their own legitimacy and accountability, and work to devolve their direct responsibilities to national institutions as soon as it is feasible.
TENSIONS

Tensions do arise in relation to human rights in the course of negotiating peace agreements. The report concludes, however, that there is no intrinsic incompatibility between those who seek ‘justice’ and those who seek ‘peace’. The challenge is not to eliminate discordance, but to reconcile long- and short-term objectives of a peace process, and to promote understanding between different approaches.

The case studies suggest that the approaches of specialists in human rights and in conflict resolution are often mutually supportive. The latter often find human rights standards help them to identify basic needs and understand the causes of conflicts. Human rights activists are often skilled in processes of problem solving and negotiation. While differences of approaches should be acknowledged, their interaction extends the range of skills and techniques that can be applied to peace processes.

FACTORS AFFECTING THE ROLE OF HUMAN RIGHTS IN PEACE AGREEMENTS

- *Whether the process is internally or externally driven.* Where peace processes focus exclusively on military and political élites, international representatives may be the only participants to raise a human rights agenda; in such cases, continued external pressure may be vital during implementation. Elsewhere, human rights measures are often raised by at least one party to the conflict; but difficult aspects are often postponed and reappear during implementation.

- *The extent to which ‘bottom-up’ processes impact on ‘top-down’ ones.* The extent to which civil society and mediators are involved influences the choice of human rights measures in an agreement as well as plans to implement them. Where agreements are essentially negotiated by a political élite, human rights measures tend to be drafted in general terms.

- *The nature of constitutional arrangements.* Overarching political and territorial decisions about the reallocation of power affect the strategic role that human rights measures play, and the degree to which parties have an interest in implementing those measures.

- *Human rights needs.* The human rights provisions in an agreement, and their ability to generate change, are affected by: the types of human rights abuses that occurred during the conflict; the responsibilities of state and non-state actors for them; the extent to which they were a cause of the conflict; the political and legal culture of the society; public confidence in law-based solutions and institutional reform; and the capacity of key institutions such as the police and judiciary.
CHOICES FOR MEDIATORS

The report argues that the best approach to drafting peace agreements might be an incremental one combining immediate delivery of basic protection, supported by temporary monitoring and enforcement measures (using international actors where necessary), with longer-term reform plans that build institutions and institutional capacity and establish an effective legal environment based on respect for human rights. It is necessary to ensure that parties who sign the agreement are committed to it: in practice this often implies establishing core general principles while leaving much detail to be filled in after a more inclusive process of national consultation.

Mediators should be aware of the importance of their role to the inclusion of human rights. Experience suggests that they have considerable scope to raise human rights issues during a peace process, and may be the only ones able to do so. Where possible such opportunities should be taken, on pragmatic grounds as well as on principle, since their overall objective should not merely be to stop violence, but to create the conditions for sustained peace.

Recommendations

Human rights monitoring should be a priority during periods of nascent conflict or when conflicts escalate.

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 (in particular, on gender equality and the rights of minorities), and contemplate appointment of full-time human rights advisers.

Mediators should have at least basic training in human rights and humanitarian law requirements, and equality issues.

Those involved in negotiation should engage with civil society, particularly for the purpose of identifying and monitoring human rights abuses, and defining and implementing institutional reforms. Women and minorities should also be included during negotiations.

International donors should actively support peace processes, and institutional reforms to which they give rise, should encourage the parties involved to engage with civil society. International actors should devolve to national authorities any direct responsibilities they undertake, as soon as feasible.

While acknowledging their different roles and expertise, specialists in human rights and in conflict resolution should learn more from one another’s approaches to peace agreements.
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All papers are available on www.ichrp.org

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ABOUT THE COUNCIL

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Are peace agreements negotiated more easily if they include references to human rights? If so, is peace more durable as a result? “Negotiating Justice?”, summarised here, examines eight recent peace agreements to assess how they addressed issues such as impunity and forcible displacement. It concludes that human rights can make practical and positive contributions to many areas of conflict resolution. Each chapter ends with recommendations and questions that can help negotiators, mediators and human rights advocates to address dilemmas that arise during the negotiation of peace agreements and when the latter are implemented.

Foreword by Thomas Greminger, Head of the Human Security Division at the Swiss Federal Department of Foreign Affairs, and Petter Wille, Deputy Director General at the Norwegian Ministry of Foreign Affairs.

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Former Senior Official, UNHCR and OHCHR

“… thoughtful, well-considered and well-documented … a pleasure to read …”

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