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Peace Agreements and Human Rights
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member of the BiH presidency.⁶⁷ The preservation of both deal and 'democracy' requires to be sustained through the trumping of elected officials, and legislature by unelected international actors. In the ultimate paradox, it appears that the price of democracy is democracy. A similar paradox hovers over the problems of internal inconsistencies of Constitutions. Rewriting of the Constitutions to eliminate these inconsistencies becomes difficult for an international community which is also concerned to foster the primacy of democratic constitutionalism.

Exacerbating these structural weaknesses are weaknesses in the enforcement mechanisms at the disposal of the international community. Robust enforcement of the human rights mechanisms designed to achieve a unitary pluralist democratic state has not taken place. As more fully addressed in the next chapter, the difficulties lie in the willingness of the multinational military implementation force (IFOR, now SFOR) to take on a clear enforcement role; the lack of any alternative executive enforcement mechanism for the OHR; and lack of clarity regarding who is to implement what.⁶⁸

The DPA illustrates the danger of broad blueprints for ethnic conflict. Although the DPA seems to comply formally with international law and build on its evolutionary trends, the devil is hidden in the detail. That detail reveals deep tensions between individual and group rights and an ongoing failure to resolve a bitter self-determination dispute. These questions are coming increasingly to the fore with the question of when and how the international community can fashion an exit strategy.

Israel/Palestine

In Israel/Palestine the creation of an interim stage claims to postpone resolution of the self-determination issue. Ostensibly the agreements are neutral as to end outcome and therefore consistent with international law's normative application. Writing in 1998, Cassese argued that while the agreements left unclear how external self-determination would be implemented, international lawyers should be satisfied with emphasizing two things:

firstly, that at long last, the path suggested by international norms, that is, a peaceful process of negotiation between the parties concerned, has been taken; secondly, that as an initial measure, provision has been made for the exercise of *internal* self-determination by the Palestinians, as a stepping stone to external self-determination.⁶⁹

⁶⁷ Decisions by the High Representative available at www.ohr.int/decisions.htm (last visited 7 Aug. 2000).

⁶⁸ See generally International Crisis Group (1999); Joulwan and Shoemaker (1998).

⁶⁹ Cassese (1998b: 249-50).

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However, on the eve of permanent status agreement, lack of clarity regarding how, or if, external self-determination is to be exercised, raises questions as to whether its form has been preordained by the Declaration of Principles (DoP) (as amended by subsequent agreements and events). Furthermore, the increasingly repressive actions of the Palestinian Authority (PA) raises serious questions as to whether devolution of power is capable of producing internal self-determination.

As regards external self-determination, the most pressing question for Palestinians currently is whether the two-stage process contemplated by the DoP has, in practice, created a situation in which the temporary compromise of Palestinian islands of authority within an Israeli state is, in effect, to become permanent. Commentators had noted that this 'solution' was prefigured in the DoP and Interim Agreements, and in the Israeli settlement-building patterns which had preceded them.⁷⁰ They argued that given that the agreements explicitly avoided addressing ongoing settlement-building, the Israeli vision of the end outcome was not only left open by the agreements, but its creeping implementation was facilitated by them. Detractors from this analysis have faded as the difficulties with implementation of Israeli withdrawal specified in the DoP and Interim Agreements have continued. Rather than entering final status negotiations with approximately 80 per cent of West Bank land under Palestinian control, it has been a struggle to obtain control of 17.2 per cent of the land in A areas and 23.8 per cent in B areas. In the meantime, Israeli settlement-building and construction of roads to link Israeli-populated areas while bypassing Palestinian areas has further destroyed the possibility of a future independent Palestinian West Bank with territorial integrity.⁷¹

A plan leaked by Netanyahu in 1997 indicated that Likud foresaw handing over about 40 per cent of the West Bank, divided into four areas with no territorial contiguity, plans which Barak and Labour did not express objections to.⁷² In 1999 it was reported that Barak was to propose a Palestinian state on 18 per cent of the West Bank.⁷³

In the negotiations of Camp David II in July 2000 Israel seemed to contemplate a Palestinian state in over 90 per cent of the West Bank and perhaps all of Gaza. However, in return West Bank settlements containing 80 per cent of current settlers were to be annexed to Israel. With the detail and map-drawing remaining secret the exact shape and contiguity of any proposed Palestinian state is unclear. Furthermore, this comparative 'generosity' of Israel as compared to earlier positions may well have been dependent on Palestinian concessions on Jerusalem, although proposed

⁷⁰ Shehadeh (1997); Said (1995a, b).

⁷¹ Aronson (1996); LAW (1998a); Shah (1997); Shehadeh (1997).

⁷² *Ma'ariv*, 22 Oct. 1999.

⁷³ Beinun (1999).

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options may now be difficult to row back from. While final status agreement seems likely to create a Palestinian state, it is this state's capacity for independence from Israeli policies and decision-making which will determine whether nominal statehood is in fact functional autonomy operating in a manner not dissimilar to interim agreement arrangements. Such independence will be crucially affected by the extent of Israel's ability to control entry to and exit from Palestinian territory and the extent to which such territory is contiguous.

As with BiH, it can be argued that autonomy arrangements of the interim agreements and indeed any attenuated statehood which might result from final status negotiations draw on the evolutionary direction of self-determination law. The interim agreements and Israeli proposals for final status solutions move towards a situation where the labels 'sovereignty' and 'state' may be given to arrangements which rework both concepts into a divisible package of differentiated powers and functions for different issues, areas, and people, rather than territorially based unitary concepts. The Israeli/Palestinian interim agreements (while refusing to deal explicitly with sovereignty or statehood) separate out territorial, functional, and geographic jurisdiction in devolving power, so as to simultaneously devolve power for urban centres to Palestinians, while retaining such Israeli control as is perceived necessary to Israel's security. More explicitly the Camp David II Israeli proposals on Jerusalem would seem to be based on ideas of international lawyers (among others) to take this division of powers further with regard to Jerusalem, and begin to think of functional, geographical, and personal sovereignty, as an alternative to unified territorial control.⁷⁴

As discussed above, evolving self-determination proposals focus on precisely these types of innovative divisions of power, territory, and government, in an attempt to achieve a measure of group self-determination regardless of where state borders officially lie. Current self-determination trends usually conceive of minority self-governance taking place within the larger state structures (to preserve state integrity). However, it can be argued that if the parties agree to label an entity which has a high level of territorial and functional control of an area of a 'state', then they should be allowed to do so. Even if the entity's functions, powers, and territorial control are not as absolute as those of many states, concepts of sovereignty have traditionally been diverse, and even the most 'traditional' states are losing accepted attributes of statehood as global economies and

⁷⁴ See N. Shragai, *Sovereignty and Power-Sharing: How is Jerusalem Likely to be Shaped by a Final Status Agreement?*, Ha'aretz Special for the on-line edition, 13 June 2000 (which attributes the development of such ideas for Jerusalem to the Jerusalem Centre for Israel Studies, and in particular international lawyer and expert on autonomy regimes Professor Ruth Lapidot).

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governance expand.⁷⁵ The distinction between state and non-state entity is therefore increasingly one of degree rather than principle.

However, as with BiH, there are problems with analysing these arrangements as moving in parallel with international self-determination law's evolutionary direction. The difficulty is twofold. First, any arrangement which seeks to make permanent autonomy or attenuated statehood will not give continuity to international self-determination law by filling in its gaps, but will in effect trump the clear normative demands of international law as understood prior to the peace process. Secondly, the arrangements in the interim agreements effectively bypass the rationale for developing the new approaches to self-determination which underwrite mechanisms such as autonomy in the first place.

Rewriting International Law?

The gradual rewriting of international law's normative demands for Palestinian self-determination can be illustrated by examination of the questions that the interim agreements posed for international lawyers. The notion of differentiated jurisdiction in the interim agreements posed difficult questions for the application of international law and in particular Geneva IV. These were questions such as, Did the agreements end Israeli occupation or not, and if so, to what extent and in what areas? Or, put another way, Did Geneva IV cease to apply in any areas?

Common sense would seem to indicate that occupation cannot end as long as Palestinian powers and territories do not add up to statehood. Neither Palestinian Liberation Organization (PLO) nor PA are sovereign governments under the interim agreements, and Israel retains all residual powers. However, Benvenisti argues a contrary position. Given that Israel had derived its status in the Occupied Territories as an occupying power, with its powers as occupier flowing from its effective control of the area,⁷⁶ Benvenisti argues that, having relinquished control through the agreements, Israel has no right to reoccupy the areas relinquished, and that the DoP therefore constitutes an 'irreversible step' towards the settlement of the conflict.⁷⁷ In contrast, Malanczuk doubts these conclusions for two reasons. First, because in the event of the agreements breaking down, Israel might well reoccupy released territories, and then, whether occupation was justified or not, the laws of war would apply, although this surely would also be the case were statehood conceded. Secondly, because Israel retains jurisdiction over Israelis and Israeli settlements; because it

⁷⁵ See e.g. Falk (1995: 79–103).

⁷⁶ Effective control being a necessary component of occupation; see Article 42 of the Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, 18 Oct. 1907; cited in Benvenisti (1993: 545–6 n. 25).

⁷⁷ Benvenisti (1993: 545–6).

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controls security and external relations; and because it has retained 'residual power', Malanczuk suggests that:

In effect, Israel is therefore still an occupant with regard to the fields which it has not transferred to the Palestinians for self-government. A different conclusion would lead to the absurd result of legalising the current status quo, including the Israeli settlements, from the view-point of international law.⁷⁸

Yet, it would seem that the very difficulties of applying international law to interim agreement arrangements has indeed furthered a process of de facto 'legalization' of the status quo, including Israeli settlements. This was a process begun by international inaction in enforcing Geneva IV, and by the sheer length of Israeli occupation. However, the creation of Palestinian autonomy and the existence of a 'peace process' has further contributed to undermining international legal consensus that withdrawal of Israel from all of the Occupied Territories is called for, as apparently contemplated by UN Resolution 242, and that building of settlements is an impermissible violation of Geneva IV.

There remains a further international legal problem with the likely shape of final status agreement. International law of occupation appears to set limits on the type of arrangement which Israel can achieve through negotiation. It has been suggested that the application of Geneva IV should preclude a settlement which in effect involves repartition of the West Bank with clumps of settlements remaining in Israeli control. This would raise problems under Article 49 of Geneva IV, which provides that an occupying power 'shall not deport or transfer parts of its own civilian population into the territory it occupies'; and Article 47, which provides that

[p]rotected persons who are in occupied territory shall not be deprived in any case or any manner whatsoever, of the benefits of the present Convention by any change introduced as the result of the occupation of a territory, into the institutions or government, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

It could be argued, as Campbell has, that any solution attenuating Palestinian sovereignty of the Occupied Territories 'would seem to fall foul of article 47 since it would deprive the local Palestinian population of their right to be free from settlements and thus of the benefits of the Convention.'⁷⁹ While a sovereign authority can cede territory, this is very different from 'the representatives of an occupied people ceding part of occupied territories to the Occupying Power.'⁸⁰ Benvenisti argues a contrary position that Israeli deployment and granting of authority to the

⁷⁸ Malanczuk (1996: 487).

⁷⁹ Campbell (1996).

⁸⁰ Campbell (1996: 53).

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PA in certain areas means that these areas are already 'not "occupied" in the sense of the international law of occupation.'⁸¹ Malanczuk takes something of a middle course, suggesting that the situation described in Article 47 does not really fit the situation created by the DoP and Interim Agreements. He argues that these are agreements not with local authorities but with the PLO as 'an entity recognised as representing the people in the occupied territories as a whole.'⁸² This entity has agreed to these institutions as a stepping-stone to a much broader self-determination claim. As Malanczuk puts it, 'there is no autonomy, possibly as a pre-stage to independence, without delegation of authority and responsibility.'⁸³ However, a question remains regarding the extent to which Geneva IV limits Israeli-PLO negotiations, and the extent to which it constitutes *ius in bello*, only preventing settlement-building and annexation during occupation prior to negotiations. Given international ambivalence about enforcing Geneva IV or clarifying permissible self-determination outcomes, this argument may be fairly academic. Article 47's application to final status compromises would be even further complicated by a land transfer, if, for example, final status agreement saw Israeli annexation of settlements accompanied by a land transfer of non-occupied territory to Palestinians. Such an arrangement would appear to be a lawful exchange rather than an unlawful annexation. Yet, if such an exchange was unequal and accepted only owing to an imbalance of power between occupier and occupied, and the 'fact' of illegal settlements, then it would seem that the Article 47 prohibition on annexation might still be relevant.

Internal or External Self-Determination?

Geneva IV aside, the 'clumps of autonomy' approach to Palestinian statehood, built through the interim agreements, does not seem consistent with satisfaction of Palestinian claims to self-determination. While autonomy would seem to be a key tool in the current emphasis on internal self-determination for groups, its use as a 'solution' in the Israel-Palestine conflict does not play out the underlying rationale which has created this emphasis.⁸⁴ The essence of autonomy as a device for management of ethnic conflict is that it provides for a territorially based internal self-determination for minorities in areas where they predominate. However, the underlying rationale of autonomy regimes is supposedly to ensure access to government and the adequate protection of the minority rights likely to be trampled in a majoritarian system. In the words of Hannum,

⁸¹ Benvenisti (1996: 57).

⁸² Malanczuk (1996: 498).

⁸³ Ibid. Although it should be noted that Malanczuk argues that Israel is still an occupant as regard autonomous areas.

⁸⁴ On models of autonomy see generally Hannum (1990); Lapdith (1997).

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autonomy should not be an end in itself, but a 'political tool to ensure that other rights and needs are appropriately addressed.'⁸⁵

Evaluated in terms of this underlying rationale, the design of Palestinian autonomy as found in the interim peace agreements is problematic, with implications for any final status settlement. The contours of interim autonomy arrangements revolve around the relationship between Israel and the PLO-PA, dealing with questions of power, control, and status. These are more typically the subject-matter of external self-determination concerns than internal self-determination concerns. Yet external self-determination is supposedly not being dealt with.

But neither is internal self-determination being dealt with. As examined further in the next chapter, both sides had reasons not to negotiate into the peace agreements, a package which would harmonize Palestinian autonomy with internal self-determination requirements. As a result the contours of Palestinian autonomy are prescribed by Israeli security concerns. Indeed by the Wye Memorandum, Human Rights Watch were arguing that the security obligations on the PA on which Israeli withdrawal was conditioned would in implementation require the PA to commit human rights abuses against Palestinians.⁸⁶ After the interim agreements it has become unclear who is responsible for human rights violations within areas of Palestinian autonomy. It has even become unclear whether anyone can sign human rights conventions with regard to these areas.⁸⁷ Furthermore, the interim agreements set up an autonomy which then justifies differential standards of living and access to water, jobs, and other socio-economic benefits as between Israelis and Palestinians, rather than ensuring equality between these groups, as is a usual objective of using internal self-determination as a conflict management device.

The paradox of the interim agreements is that they use the language and mechanisms of internal self-determination to move towards a change of status, or external self-determination, rather than to deliver internal self-determination as substantively understood. Yet, the precise resulting status of Palestinian areas remains, and may well continue to remain, unclear. The concepts of internal and external self-determination are played off against each other so that neither is delivered in a coherent form. This runs contrary to the human-rights-based rationale for developing innovative approaches to statehood and sovereignty in the first place. A narrow focus on how to change the status of the Occupied Territories so as to 'end occupation' as the route to satisfaction of Palestinian self-determination should not bypass the overarching principle of self-determination, which,

⁸⁵ Hannum (1990: 474); cf. also Steiner (1991).

⁸⁶ Human Rights Watch (1998).

⁸⁷ Cf. Benvenisti (1994b).

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Cassese argues, 'transcends, and gives unity to' customary rules, 'casting light on borderline situations.'⁸⁸ This is a principle of self-determination as a free and genuine expression of the will of the people concerned. This principle seems to point to procedural requirements on how a solution is negotiated, including answers to a series of crucial questions. Namely, against a backdrop of a negotiating power imbalance, are there any legal limits on what deal the PLO can accept, in terms either of Geneva IV or of self-determination law? Are there any requirements on the PLO to ensure that they are the legitimate representatives of the people, and that negotiated solutions are popularly accepted? Or does PLO accession to any permanent status agreement itself amount to satisfaction of the self-determination claim, regardless of either PLO legitimacy or the content of what is agreed to? These pertain, regardless of any more substantive self-determination content that might apply.⁸⁹

The interim agreements present a complex set of interlocking conundrums for international lawyers. They provide for a change of status of territory but not external self-determination. They provide for Palestinian autonomy but not internal self-determination. They devolve power and remove some Israeli forces, but do not end occupation. Or they end Israeli occupation but do not create a Palestinian state. They are interim and transitional but may become permanent if negotiations do not succeed. Paradoxically, if negotiations do succeed, substantially the same arrangements may be asserted to comprise a Palestinian state, even while the ability of political elites, and even more so ordinary Palestinians, to self-determine their future is limited.

Before looking to the international community to solve these conundrums it should be noted that the difficulties in evaluating the self-determination provided for in the interim agreements in terms of international law merely reflect back international law's gaps with regard to Palestinians. As with Bosnia Herzegovina, it can be argued that the failure of international law and the international community to set down clear parameters for resolution of the self-determination claim, or to limit the numbers game played in the interim through settlement-building and population transfer, has become transcribed into the deal. Lack of agreement on, or commitment to, a common end goal for negotiations, and a negotiating focus on separation, means that internal self-determination has become lost in the unresolved battle over external self-determination, even as external self-determination has been redefined.

⁸⁸ Cassese (1998b: 319).

⁸⁹ See e.g. discussion in Drew (1997).

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that their role is purely symbolic, or even cynical. They arrive in peace agreements as a result of instrumental demands. Those who have suffered human rights abuses in the past often successfully win human rights protections in the deal as an element crucial to resolving the conflict, as South Africa and Northern Ireland demonstrate. Human rights protections legitimize the deal internationally, but also may legitimize it in the eyes of a significant party.

As regards their integrative ambition, human rights protections form part of the peace agreement's attempt to redefine state-ethnic relations. They claim to ensure that in the new regime created no one should be penalized on the basis of ethnicity. Human rights protections supposedly take the sting out of the sovereignty issue. If everyone's rights are equally protected no matter who is in power, then the issue of sovereignty should become much less important. Thus human rights institutions aim not merely to police the division between law and politics found in the polity, as in the classic liberal-democratic state, but also to *create* the polity by mediating communal divisions. This is perhaps most striking in the case of Bosnia Herzegovina, where the human rights protections aim to undo ethnic cleansing, and rewrite the bargain at the heart of the deal.

This integrative ambition is a vital part of the institutional protection. As Reilly and Reynolds note, 'institutional design takes on an enhanced role in newly democratising and divided societies because, in the absence of other structures politics becomes the primary mode of communication between divergent social forces.'¹⁴ While pluralist Western democracies have a variety of channels through which to carry on these conversations, such as civil society, social and sporting clubs, and churches, in divided societies with fledgling democracies these institutions are characterized by rigid separation of communities. Therefore, 'political institutions take on even greater importance' and 'become the most prominent, and often the only, channel of communication between disparate groups.'¹⁵ This is no less true of the human rights institutions than the institutions of government. Indeed where, as in Bosnia, the government institutions are designed to facilitate group separation, then the human rights institutions may take on this role largely unaided.

¹ ISRAEL/PALESTINE

The approach of the Israeli/Palestinian peace agreements to institution-building provides the starkest and most negative example of how the self-determination deal can impact on human rights provisions.¹⁶ The

¹⁴ Reilly and Reynolds (1999: 3). ¹⁵ Reilly and Reynolds (1999: 4).

¹⁶ Much non-governmental organization material has been published dealing with specific human rights violations. For some overviews on Human Rights and the Oslo Accords, see B'Tselem (1999); LAW (1999c); Mar'i (1997).

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separation nature of the deal meant that the institutions identified in international instruments as crucial to human rights protections, such as police or the criminal justice system, are provided for with barely a mention of human rights or any grounding principles. The focus of the institutional provision in the agreements is the transfer of power and the precise delimiting of Palestinian Authority (PA) spheres and powers.

Overarching Rights

The agreements do not include an explicit list of rights, provision for a Bill of Rights or incorporation of international instruments, and therefore do not include human rights enforcement institutions.¹⁷ There is no attempt to provide any overarching rights framework.

Human rights are not mentioned in the Declaration of Principles (DoP). They are first mentioned in the Gaza-Jericho Agreement; Article XIV, entitled 'Human Rights and the Rule of Law', states 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.'¹⁸ This is repeated in the later Interim Agreement (Oslo II).¹⁹ However, both the Interim Agreement and subsequently the Wye Memorandum which reiterate this language suggest that internationally accepted norms are to be subject to the agreement, rather than vice versa.²⁰ While some specific rights receive a scattered mention throughout the agreement, this does not amount to even an embryonic rights framework.²¹

Social and Economic Rights

Economic issues are addressed in the Israeli/Palestinian Agreements as one of their 'cornerstones' but not as 'rights' issues, and without a reference to equality.²² Rather, mechanisms for development and economic cooperation are established. Economic cooperation is addressed by the DoP,²³ and subsequently by the Protocol on Economic Relations, 29 April

¹⁷ Although 'an independent judiciary' is mentioned in the context of Palestinian Authority-Council administration of justice, Article VI Gaza Jericho Autonomy Agreement, 4 May 1994 (hereafter Gaza-Jericho Agreement). ¹⁸ Gaza-Jericho Agreement.

¹⁹ Article XIX Interim Agreement between Israel and the Palestinians, 28 Sept. 1995 (hereafter 'Interim Agreement').

²⁰ Article XI, para. 1, Annex 1 Interim Agreement; cf. also Article II(4) Wye Memorandum.

²¹ See e.g. the right not to be tried twice for same crime (in the context of Israeli-retained jurisdiction over offences committed against Israelis), Article 1(7), Annex III Gaza-Jericho Agreement; restriction on use of capital punishment, Article 2(7)(g), Annex III Gaza-Jericho Agreement.

²² The only convergence of an economic issue and mention of a 'right' is in the term 'water rights', which the Israeli-Palestinian Continuing Committee for Economic Cooperation is to focus on, Article 1, Annex III DoP.

²³ See Annex III and IV DoP.

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1994 (later incorporated in the Gaza-Jericho Agreement), which provides many of the administrative mechanisms for economic cooperation. These mechanisms are supplemented or implemented by the Interim Agreement,²⁴ Wye Memorandum,²⁵ and Sharm el Sheik Memorandum, and Safe Passage Protocol.²⁶

The agreements provide for economic matters within a framework of Israeli-Palestinian cooperation,²⁷ and a development plan consisting of two elements: an Economic Development Programme for the West Bank and the Gaza Strip, and a Regional Economic Development Programme.²⁸ As Fassberg notes, the framework suggests that Israeli-Palestinian economic relations are to contribute to the establishment of some form of regional economic union.²⁹

The history of Israeli economic policies with regard to Palestinian Occupied Territories has been analysed as one of 'de-development' of the Palestinian economy so as to serve Israeli strategic and economic interests.³⁰ It is into the context of this pre-existing relationship that the agreements arrive and must be judged. When the detail of the agreements is explored, the economic relationship therein is exposed as lopsided. Detail of provision for customs, monetary affairs, movement of persons and services, and even the mechanics of the legal facilitative arrangements reveals ambivalence between two aims: 'to establish the Palestinian Authority as an economic actor, and to limit its power in order to protect the Israeli economy.'³¹ In examining the potential of the agreements to improve the Palestinian economy, Elmusa and El-Jaafari argued in 1996 that two broader political factors would be determining:

the degree to which Israel allows the free movement of goods, labour, and capital into and out of West Bank, and Gaza . . . and the ability of the . . . PNA [PA] to set up the prerequisite institutions and regulatory framework as well as to pursue the appropriate economic policies.³²

In implementation, the broader power-political concerns of Israel and the PA have often frustrated both.³³

²⁴ See generally Annex III and Articles V and VI, Annex VI Interim Agreement.

²⁵ See Article III Wye Memorandum (restarting the DoP committees dealing with economic cooperation, and dealing with the establishment of an international airport, a business park, and a sea port at Gaza).

²⁶ See Article 5 (dealing with safe passage) and Article 6 (dealing with building Gaza Sea Port) Sharm el Sheik Memorandum. See also Protocol concerning Safe Passage, 5 Oct. 1999.

²⁷ Annex III DoP.

²⁸ Annex IV DoP.

²⁹ Fassberg (1996: 157).

³⁰ Roy (1995, 1996).

³¹ Fassberg (1996: 164).

³² Elmusa and El-Jaafari (1996: 189).

³³ See e.g. Arnon and Spivak (1998) (noting a severe decline in Palestinian standards of living between 1993 and 1996, largely owing to Israeli closures, which deprived many Palestinians of work in Israel).

Cultural Rights

Cultural rights as such are nowhere mentioned in the agreements. However, it can be argued that the provision of autonomy for a Palestinian Council is itself designed to ensure Palestinian cultural rights. The matters devolved immediately by the DoP to the PA include education and culture.³⁴ The Gaza-Jericho Agreement and the Interim Agreement mention cultural and educational cooperation with specific reference to its particular role in fostering 'peace between Israel and the Palestinian people', 'peace in the entire region', and 'mutual understanding and tolerance'.³⁵ However, the underlying thread of Israeli security concerns emerges here and there in tiny details. For example, the devolution of postal services to the PA notes that Palestinian stamps must be designed 'in the spirit of peace'.³⁶

Policing and Criminal Justice

While policing and criminal justice both receive detailed treatment, unlike South Africa and Northern Ireland this detail deals with logistics rather than principle. As regards policing, provision is made for how many police, where, and when? As regards criminal justice, provision deals with the scope of Palestinian jurisdiction.

The DoP provides that

[i]n order to guarantee public order and internal security for the Palestinians of the Gaza Strip and the Jericho Area, the Palestinian Authority shall establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.³⁷

In the Gaza-Jericho Agreement the duties of the police are listed in a functional way as:

1. performing normal police functions, including maintaining internal security and public order;
2. protecting the public and its property and acting to provide a feeling of security and safety;
3. adopting all measures necessary for preventing crime in accordance with the law; and,
4. protecting public installations and places of special importance.³⁸

³⁴ Article VI DoP.

³⁵ Article II(9), Annex II Gaza-Jericho Agreement; Article VII, Annex VI Interim Agreement. See also Article VIII, Annex VI Interim Agreement establishing a 'people-to-people' programme.

³⁶ Article 29(c), Annex III Interim Agreement; cf. also Article II(26)(b), Annex II Gaza-Jericho Agreement.

³⁷ Article VIII DoP.

³⁸ Article III(2), Annex I Gaza-Jericho Agreement; cf. Article II, Annex I Interim Agreement.

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The agreements progressively provide the detail of how many police, their relationship to Israeli security forces, recruitment, number of arms, ammunition and equipment, and specific areas of deployment.³⁹ Explicit or implicit references to human rights protections are virtually impossible to find.

As with policing, the fairly extensive criminal justice provisions deal with the delimitation of Palestinian jurisdiction as regards Israeli jurisdiction, and also impose obligations regarding security issues.⁴⁰ Apart from a passing reference to an 'independent judiciary',⁴¹ there are no mechanisms for ensuring rights protection.

Implementation Prefigured

The agreements preserve the status quo wherein Israeli human rights abuses take place: they neither provide new rights mechanisms nor address the issues which underlie many human rights abuses, such as settlement-building and population transfer.⁴² While the absence of confrontation between intifada and Israeli security forces has reduced certain types of human rights abuses, such as deportation and the overall number of deaths in the conflict, other types of abuse have stayed the same (for example, percentage of Palestinian prisoners tortured) or even increased (for example, the revocation of residency rights in Jerusalem).⁴³ The agreements mean that the PA can also commit human rights abuses.

On closer examination the lack of an overarching human rights framework, either in the agreements, or to which the agreements are subject, does not merely preserve a status quo, but has led to a dynamic whereby rights have simply disappeared. This dramatic statement can be illustrated by a few examples on different levels.

The Palestinian autonomy provided for in the agreements has muddled the question of responsibility for international human rights obligations, as was discussed in Chapter 5. While legally Israel arguably retains responsibility for human rights violations in the absence of a Palestinian state, as a practical matter human rights advocacy must also be addressed at the PA. Although the PA has affirmed its (moral) commitment to international human rights standards⁴⁴ and even set up a national institution for human rights—the Palestinian Independent Commission for Citizens'

³⁹ See e.g. Articles XIII, XIV Interim Agreement, and Article II, Annex I Interim Agreement

⁴⁰ See generally Shuqair (1994). ⁴¹ Article VI Gaza-Jericho Agreement.

⁴² See e.g. B'Tselem (1999). ⁴³ Ibid.

⁴⁴ Arafat stated in a meeting with Amnesty International that 'human rights would be a high priority for [the Palestinian Authority] and that international human rights standards will be incorporated into new legislation.' See Amnesty International News Service 23/96, dated 8 Feb. 1996.

Rights (PICCR)⁴⁵—in practice the PA has been responsible for a broad range of human rights abuses.⁴⁶ This of course must be blamed on the PA itself. As a regime it has failed to make a transition 'from behaving like a liberation army of soldiers and commandos to one of bureaucrats and civil servants, who put the law above political expediency.'⁴⁷

But the structure of Palestinian autonomy found in the agreements also militates against Palestinian attempts to build a society based on rule of law and human rights.⁴⁸ In addition to its inability to ratify international instruments, PA domestic jurisdiction is limited and the Interim Agreement makes clear that legislation

which exceeds the jurisdiction of the Council or which is otherwise inconsistent with provisions of the DoP, this Agreement, or any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void ab initio.⁴⁹

All legislation has to be communicated by Palestinians to Israel, and the Israeli side can refer any legislation which it views as incompatible with the DoP and other agreements to a joint Legal Committee established by the agreements.

This makes Palestinian state-building more difficult. For example, a Palestinian draft basic law prepared by the Palestinian Legislative Council (PLC) and containing a Bill of Rights is arguably inconsistent with the agreements and would automatically exceed PLC authority.⁵⁰ Although the law has in fact become a casualty of PA reluctance to enact it, the agreements provide a buffer to the PA against the demands of civic society. While a significant amount of international money has been channelled in the direction of Palestinian democracy and rule of law projects, this cannot make up for the flaws in the framework through which these issues must be addressed.⁵¹ State-building is difficult without a state.

At a deeper level the agreements build in disincentives for the PA to

⁴⁵ Established on 30 Sept. 1993 by Presidential Decree No. 59/1994; pub. in *Palestinian Gazette* 2 (Jan. 1995), 33. See further Azzam (1998) for description of mandate and operation in first four years.

⁴⁶ See e.g. Palestinian Independent Commission for Citizens' Rights (1996, 1997, 1998, 1999). ⁴⁷ Azzam (1998: 344).

⁴⁸ Cf. Aruri (1995).

⁴⁹ Article XIII Interim Agreement.

⁵⁰ Palestinian Legislative Council, The Basic Law, 2 Oct. 1997 (non-official translation by Jamal Aabu Kadijeh). For further background and context on the draft law, see Al Qasem (1996).

⁵¹ For recent audit of funding, see Office of the United Nations Special Coordinator in the Occupied Territories (1999). In an interesting illustration, when this very report was published, a PA official misrepresented it as demonstrating that human rights non-governmental organizations (NGOs) were working to an externally funded agenda, and were corrupt; this appears to have been part of a broader attempt of the PA to attack the work of human rights NGOs and frustrate attempts to provide a basic law governing the role of Palestinian NGOs.

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velop a culture based on the rule of law. The political dynamic means that Israel and the United States emphasize Israeli security concerns above other considerations. The agreements, most overtly illustrated by the Oslo Memorandum, focus on PA needs to prevent dissident Palestinian violence against Israelis and subject human rights obligations to this overriding obligation. The central bargain of 'land (for Palestinians) for peace (for Israelis)' often asserted to underlie the peace process means that the PA must be seen as trying to deliver 'peace' to Israel, even if that is at the expense of Palestinian human rights. Paradoxically, this 'security-based' approach undermines long-term peace-building based on the elimination of root causes of violence. It leads to a dangerous dynamic where the failure of the peace process to deliver change on the ground for Palestinians diminishes Palestinian grass-roots support for the PA, resulting in attempts at coercion which further reduce that support. This establishes a vicious circle whereby Palestinian-on-Palestinian repression and the failure of the peace process reinforce each other.

The division of powers between Israel and the PA has also erased some principled struggles in domestic law. Matters which prior to the DoP had no principled basis for struggle between the individual and the Israeli state are now a matter of bargaining between the PA and the Israeli state. For example, as regards family reunification, the previous procedure of petitioning the Israeli High Court against revocation of residency for those who returned to the territories after their exit permits expired has now been adjudicated to be beyond the jurisdiction of the High Court because authorities in this matter have been transferred from Israel to the PA.⁵²

In summary, in both their text and their implementation the Israeli/Palestinian peace agreements demonstrate an almost complete divorce between the concept of peace and the concept of justice. The concept of peace embodied in the agreements is a concept of managed separation, whose contours are shaped by Israeli security concerns. The negotiating dynamics between the parties mean that it was always unlikely that the agreements between them would include human rights constraints on Palestinian autonomy. However, it would have been possible for the peace process to have been subject to overarching international law constraints, although imagining this is difficult, and involves reimagining the peace process and international context.

⁵² HCJ 2151/97 *Shaqir et al. v. Commander of the IDF in the West Bank Region et al.*, 6 Nov. 1997 (unpub.). See further HaMoked (1998: 10–11). Note, as a further example attempts to limit Israeli liability for security force actions during the intifada period through a draft Law Concerning Handling of Suits Arising from Security Force Activities in Judea, Samaria and Gaza Strip (Exemption from Liability and Granting of Payment), 1997.

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ferent religious belief, political opinion or racial group.⁵⁸ In implementation this could begin to move public bodies towards considering whether their decisions would be likely to separate further or to bring together the divided communities, and provides an embryonic example of how sharing could be legislated for.⁵⁹ The potential conflict between 'integration' and equality is dealt with by prioritizing equality.⁶⁰

Israel/Palestine

Refugees

The refugee dimension of the Israeli/Palestinian conflict is complex.⁶¹ The complexities include:

1. that Palestinian refugee populations exist in many different countries and are treated differently by different countries.
2. that different populations of refugees and displaced persons were created at different points in the conflict (most notably in 1948 and 1967).
3. that the self-determination claim and the refugee issue have been increasingly intertwined.
4. that international law, as we have seen, has treated Palestinian refugees as a distinct category for the purposes of legal regulation.
5. that while for many years the issue of *non-refoulement* has been the focus of international law, Palestinian refugees have sought to assert a right to return, and this right was emphasized by the General Assembly.

These complexities affect the negotiation process in the following ways. There are multiple possible players who must be involved in any attempt to negotiate the issue. There are many host countries and similarly groups of refugees with very different contexts; neither parties can easily be represented in a unitary way. The overlap with self-determination issues means that progress on return is related to resolution of that issue: the question of refugees is difficult to agree outside an overall negotiated package. These factors form a backdrop to understanding the treatment (and non-treatment) of the issue in the peace agreements, and ongoing attempts to address the issue outside them. In short, agreements establish different negotiating forums but do not substantively deal with the issue,

⁵⁸ Section 75(2) Northern Ireland Act 1998.

⁵⁹ Boal *et al.* (1996); Craig and Hadden (2000).

⁶⁰ See section 75(2) Northern Ireland Act 1998. The potential for conflict had made the insertion of the 'sharing' provisions somewhat controversial. There was a fear among many human rights promoters that they would be used to trump hard-won equality protections, either in law or in practice, by virtue of civil service minimalism, based on the alleged difficulty of implementing the dual burden.

⁶¹ For overviews, see e.g., Morris (1987); Nur (1992).

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although they do suggest that 1948 refugees and 1967 displaced persons will be dealt with differently.⁶²

Bilateral and Quadrilateral Negotiating Processes

The Declaration of Principles (DoP) ostensibly postponed the issue of refugees until final status negotiations.⁶³ However, the issue of persons displaced in 1967 did receive attention in the DoP. Annex I notes that the future status of displaced Palestinians who were registered for election purposes on 4 June 1967 'will not be prejudiced because they are unable to participate in the election process due to practical reasons.'⁶⁴ Article XII of the DoP also provides that a Continuing Committee comprising representatives of the governments of Israel, Jordan, Egypt, and Palestinians shall 'decide by agreement on the modalities of admission of persons displaced from the West Bank and the Gaza strip in 1967, together with necessary measures to prevent disruption and disorder.' This commitment is repeated in both the Cairo and the Interim Agreements. The reference to 'modalities of admission' for post-1967 displaced persons seems to further accept implicitly that they have a right to return, although this disguises deep disagreement over who should be regarded as displaced. The reference does not address the 1948 refugees. This Continuing (or Quadripartite) Committee first met in May 1995 and until 1997 a further five meetings were held until the deterioration of the peace process brought the work almost to a halt. However, the Sharm el Sheikh Memorandum provided that it would resume its activity on 1 October 1999.⁶⁵ By March 2000 it was agreed to reconvene the Continuing Committee with the supporting technical experts committee.

The October 1994 peace treaty signed between Jordan and Israel in Article 8 also dealt with refugees and displaced persons. The parties agreed to seek to resolve the refugee problem through the DoP and multilateral Refugee Working Group (RWG), and also created the possibility of direct bilateral refugee negotiations between Jordan and Israel.⁶⁶ Some provisions addressing discrete issues of residency and family reunification were addressed in the Gaza-Jericho and Interim Agreements, and in May 1994 in the wake of the Gaza-Jericho Agreement a joint Israeli/

⁶² On the refugee issue and the peace process, see generally Brynen (1997); Brynen and Tansley (1995); Quigley (1998); Tamari (1996); Takkenberg (1998: 32-40). See also www.arts.mcgill.ca/MEPP/PRRN/ (last visited 16 Aug. 1999).

⁶³ Article V Declaration of Principles (hereafter DoP).

⁶⁴ Article III, Annex 1 DoP.

⁶⁵ Article 1c, The Sharm el Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 4 Sept. 1999.

⁶⁶ Article 8 Treaty of Peace between Israel and Jordan, 26 Oct. 1994.



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Palestinian committee was established to coordinate work on family reunification.⁶⁷

Multilateral Negotiations

In addition to the bilateral and quadrilateral fora established under the peace agreements, another forum for negotiation exists. This is the multilateral committee with a regional focus, established during the Madrid Process.⁶⁸ This multilateral negotiating forum arose prior to the Oslo process in the less secret Madrid Process, in which the PLO were not officially present. At the Moscow Middle East Peace Conference arising out of the Madrid framework a Refugee Working Group (RWG) was established in the multilateral track to deal with the overall refugee problem. This committee was mandated to treat the refugee problem as a regional issue; to develop common points of reference for studying the issue; and to recommend practical steps for mobilizing international resources towards improving the immediate circumstances of the most destitute of the refugees, pending the completion of negotiations on their permanent disposition. Between 1992 and 1995 this group had eight plenary sessions.⁶⁹ It dealt with six different issues: databases; an inventory of assistance to Palestinian refugees; human resources; training, job creation, economic and social infrastructure; public health; child welfare and family reunification. In 1997 the Arab League called for a boycott of the multilaterals in protest over Israeli policies, although lower-level work by the RWG continued. In February 2000 the multilateral track steering committee set a date in May 2000 for the RWG to be reconvened in plenary. While this group has instituted a number of practical initiatives, it was intended to complement bilateral negotiations, and in practice this also served to limit its actions.⁷⁰

⁶⁷ Article II (27)(1) Gaza-Jericho Autonomy Agreement, 4 May 1994 (hereafter Gaza-Jericho Agreement) (providing that the Palestinian Authority may grant permanent residency within the Gaza Strip and Jericho Area with prior approval by Israel). Annex II Interim Agreement between Israel and the Palestinians, 28 Sept. 1995 (hereafter Interim Agreement) provides a mechanism for gaining residency through electoral law which is not linked to prior approval; Article 28, Annex III, Appendix 1 Interim Agreement provides for Palestinian Authority granting of entry in certain situations; residency subject to Israeli approval for investors and family reunification; residency for children whose parents are residents; visiting rights and work permits; and residency for those who had lost their residency because they exceeded the time limit imposed by Israelis for returning to the territories. In addition to this, the multilateral Refugee Working Group reached an agreement with the Israelis on a new quota for reunification numbers (which was below Oslo Accord Palestinian expectations). See further Tamari (1996).

⁶⁸ For overview of the three levels of diplomacy, see Takkenberg (1998: 32-40).

⁶⁹ Israel boycotted the first session in May 1992, and in Nov. 1992 its participation was delayed by a dispute over the presence of Palestinian National Council members and cut short by the inclusion of family reunification on the agenda.

⁷⁰ See Brynen (1997); Tamari (1996).

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The Difficulties

Substantive consideration of refugees and displaced persons in these different forums has been fraught with tension between framing refugee rights in a humanitarian aid paradigm (which Israel can to some extent accept) or a political rights one which would link to Palestinian self-determination claims. As regards the RWG, this tension has played out with respect to the issue of family reunification which can be framed within either paradigm with different implications. As regards the Continuing Committee, difficulties have revolved around the definition of 'persons displaced in 1967'. Lying at the heart of both these sub-debates are differing Israeli and Palestinian views on the numbers of Palestinians who might ultimately be admitted; on the parts of Israel and the Occupied Territories to which they would be admitted (or compensated in lieu of admission); and on whether Palestinians or Israelis would control admission. These issues go to the heart of the self-determination dispute as broadly conceived, and it is precisely because of this linkage that little progress towards a comprehensive long-term solution to the issue of displaced persons and refugees has been made. The refugee issue has become a way of restating the self-determination dispute through different language, as will be examined further in the conclusions below. However, it is worth pointing out at this stage that these negotiating dynamics are at odds with any individualized notion of the right to return, as provided for in human rights standards and resolutions of the General Assembly.

Land Claims

The issue of communal control over land is of course at the heart of the self-determination claims of both Palestinians and Israelis. Communal claims to territory in part play out through issues such as revocation of residency rights, disputes over private ownership, evictions, house demolition and sealing, the legal recategorization of land through zoning, and associated Israeli settlement-building.⁷¹ As Shehadeh notes, Israeli settlements in the broadest sense include the web of legal and administrative arrangements which has facilitated their building and sustenance.⁷²

The peace agreements do not provide any means for adjudicating on the human rights issues which settlement-building have given rise to. Indeed the postponement of the 'settlements' issue (for which there is no definition provided in the agreements) to final status negotiations has perpetuated property disputes, particularly in Jerusalem. Despite the illegality under Geneva IV of building settlements in occupied territory, this postponement

⁷¹ See e.g. B'Tselem (1997a, b, 1998b); LAW (1998a, b 1999a, b); Oyediran (1997); Palestinian Centre for Human Rights (1996); Shuqair (1996, 1997); Welchman (1993).

⁷² Shehadeh (1988, 1997).

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has built-in ambiguity relating to whether further settlement-building through expansion of existing settlements or completely new developments is permitted by the agreements during the interim period or not.⁷³ Article XXXI(7) of the Interim Agreement provides: 'Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.' While a very formalistic reading of the word 'status' might support Israeli arguments that the accords do not prohibit the construction of new Jewish housing in these areas, there are good arguments that such construction does indeed change the status of the land as it makes it more likely to remain in Israeli hands as Camp David (II) has confirmed.

As Watson points out, the agreements implicitly limit settlement activity in other aspects. The redeployment process itself implies that Israel will stop building settlements in the West Bank as the purpose of those provisions is 'to shrink, not expand, the Israeli presence in the West Bank.'⁷⁴ Furthermore, given that the Interim Agreement makes reference only to existing settlements, it can be argued that 'to add new settlements, or expand existing ones, is to alter the factual foundations of the parties' agreement.'⁷⁵ Legal arguments aside, the provision on settlements is another example of the ambiguity which characterizes the agreements and which results in different interpretations by Israelis and Palestinians which often derail the process.

In conclusion, as with the forward-looking human rights provisions, mechanisms to 'undo the past' are absent. Although some forums for considering the issues have been established, the dynamics of the agreements and their linkage to the issue of self-determination (not to be resolved until final status negotiations) serve to make some of these issues ongoing and more difficult to resolve. They also reduce issues of rights to political bargaining chips.

Bosnia Herzegovina

Refugees

The conflict in Bosnia Herzegovina resulted in the largest displacement of people to occur in Europe since the Second World War. In 1996 UNHCR estimated that over 2 million people had been displaced, with approximately 1 million displaced within BiH, half a million living in the neighbouring constituents of the former Yugoslavia, and approximately 700,000 receiving temporary protection in other countries, of which half that number are in Germany.⁷⁶ In response to the large numbers fleeing

⁷³ See generally G. R. Watson (2000, ch. 7).

⁷⁴ G. R. Watson (2000: 284).

⁷⁵ Ibid.

⁷⁶ United Nations High Commissioner for Refugees (1996b).

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bodies of some of those people whom it was alleged had 'disappeared'—that is, were murdered and buried without acknowledgement. Other non-governmental, non-paramilitary attempts to account for and classify civilian or military status, religion, and political belief of those killed in the troubles are beginning to be produced.⁸⁸ Victims' groups have also proliferated since the signing of the agreement, or found more public voice since then, but often have membership drawn from primarily one side of the community or the other, reflecting the focus of their mandate.

At the time of writing, while ad hoc governmental responses in the form of inquiries into specific instances of alleged state abuse (such as the killing of defence lawyers Pat Finucane in 1989 and Rosemary Nelson in 1999) seem likely to continue, as do non-governmental attempts to 'cos the conflict in human terms, there is no coherent proposal from any sector on how to 'deal with the past' in any comprehensive or holistic way. Nor have recommendations for lustration mechanisms for past human rights abusers been made by any of the commissions set up under the agreement.

Israel/Palestine

As with Northern Ireland, the Israeli/Palestinian agreements do not provide any holistic mechanism to 'deal with the past'. This is unsurprising given the interim status of the agreements. As with Northern Ireland, elements of the past are addressed.

Prisoner Release

At the start of the process there were approximately 12,337 Palestinian prisoners in Israeli detention facilities. Although prisoner release was not dealt with in the text of the Declaration of Principles (DoP), Israeli government statements indicated that there would be a mass release of Palestinian prisoners.⁸⁹ This was to include stipulations. The cut-off arrest date for prisoners who could be released was the date of the DoP, 13 September 1993. Members of political parties that opposed the agreement were to be excluded, no release would take place unless the Palestinians declared an amnesty for collaborators, and release would be conditional on progress on the issue of missing Israeli soldiers.

Prisoner release is dealt with as a 'confidence-building measure' in several of the later agreements, although there were in practice often difficulties with implementation. The Gaza-Jericho Agreement of 4 May 1994 stated that, upon signing, 'Israel will release, or turn over, to the

⁸⁸ Fay *et al.* (1999); McKittrick *et al.* (1999); Ní Aoláin (2000).

⁸⁹ See McEvoy (1998: 3).

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Palestinian Authority within a period of 5 weeks, about 5000 Palestinian detainees and prisoners, residents of the West Bank and the Gaza Strip.⁹⁰ By the end of July 1994 4,500 prisoners had been released, although release was conditional upon signing an individual declaration to support the peace process, a condition not in the agreement, which was the subject of much protest.⁹¹

The Interim Agreement, also under the heading of 'Confidence Building Measures', provided for three phases of prisoner release: on signing, prior to elections, and at a later stage.⁹² Palestinians from abroad who were permitted to enter the West Bank and the Gaza Strip were not be prosecuted for offences committed prior to 13 September 1993.

An Annex (VII) set out criteria for selection for release. The provisions were in part based on general humanitarian criteria based on the status of the prisoner: the old, the young, the sick, women, and those who had already served a considerable length of time in prison; and in part were reminiscent of humanitarian and human rights standards relating to seriousness of offence. There was no attempt at a generic description of 'political offence', and indeed the terms 'security offence' and 'non-security offence' seem to blur any distinction between 'political' and 'non-political' offences, rather than attempt to create the distinction. The provisions provided for the release of

- all female detainees and prisoners (to be released in the first stage of releases)
- persons who have served more than two-thirds of their sentence
- detainees and/or prisoners charged with or imprisoned for security offences not involving fatality or serious injury
- detainees and/or prisoners charged with or convicted of non-security criminal offences
- citizens of Arab countries being held in Israel pending implementation of orders for their deportation

Four categories of person meeting these criteria were then to be 'considered for release':

- prisoners and/or detainees aged 50 years and above
- prisoners and/or detainees under 18 years of age

⁹⁰ Article XX Gaza-Jericho Autonomy Agreement, 4 May 1994 (hereafter Gaza-Jericho Agreement).

⁹¹ See McEvoy (1998: 39).

⁹² Article XVI Interim Agreement between Israel and the Palestinians, 28 Sept. 1995 (hereafter Interim Agreement). The Note for the Record, which accompanied the later Hebron Protocol, also made reference to the third phase of prisoner release, noting that it should be dealt with in accordance with the Interim Agreement. Note for the Record prepared by Ambassador Dennis Ross at the Request of Prime Minister Benjamin Netanyahu and Ra'ees Arafat, 15 Jan. 1997, para. 2.

- prisoners who have been imprisoned for ten years or more
- sick and unhealthy prisoners and/or detainees

The agreement does not include a systematic release mechanism for adjudicating on individual prisoners, suggesting a political, rather than a systematic legal, application of the criteria.

In practice, the assassination of Yitzhak Rabin, Palestinian suicide bombings, and the election of Netanyahu's Likud-led coalition government eventually led to the Israeli government unilaterally freezing all discussions on prisoner release at the beginning of 1996. As McEvoy notes, the prisoner situation was further complicated by other factors. These included continued use of administrative detention, including detention of those who had completed their prison sentences and were immediately rearrested, and the view among some sections of the Palestinian community that the Palestinian Authority (PA) had been unenthusiastic in their pursuit of prisoner release, given that many prisoners had come to oppose the peace process publicly.⁹³

While the text of the Wye Memorandum agreed between the PA and Netanyahu's government did not appear to provide for prisoner release, surrounding publicity indicated that prisoner release had been agreed as part of the package. Newspapers reported that an agreement on prisoner release had been made as part of a security agreement. Around 500 prisoners were to be released, as identified by the PA on a list passed to Israel through the US Central Intelligence Agency (CIA).⁹⁴ In the event, approximately 250 prisoners were released, but according to Palestinians they were 'normal criminals' rather than those imprisoned as a result of their part in the conflict. Resulting Palestinian protests and allegations of Israeli bad faith were one of the factors ensuring that the peace process stayed at a standstill despite the memorandum. As of 20 June 1999 an estimated 2,261 Palestinian prisoners were still held in Israeli detention facilities (many of these imprisoned post-DoP).⁹⁵

The Sharm el Sheik Memorandum, agreed between the PLO and Barak's government, provided that the two sides would establish a joint committee to follow up on issues of prisoner release.⁹⁶ The Israeli government agree to release 'Palestinian and other prisoners who committed their offences prior to September 13, 1993, and were arrested prior to May 4, 1994.' Two phases of release are provided for. The first is to consist of 200 prisoners and the second, 150 prisoners, all of whose names are to be agreed by the joint committee. This committee is then to recommend further lists of names for release to the 'relevant Authorities' through a

⁹³ McEvoy (1998: 39–40).

⁹⁴ See e.g. Segal (1998).

⁹⁵ Figures supplied by Mandela Institute, Ramallah, West Bank.

⁹⁶ The prisoner release provisions are in Article 2 Sharm el Sheik Memorandum, 4 Sept 1994.

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Monitoring and Steering Committee. The section concludes with the statement that '[t]he Israeli side will aim to release Palestinian prisoners before next Ramadan.' However, the absence of the indefinite article indicates that this may not mean the release of all remaining prisoners.⁹⁷

Limited Truth and Reconciliation

Only two other aspects of the 'past' are dealt with: the return of the bodies of people killed in the conflict, and informers. The Gaza-Jericho Agreement and Interim Agreement both provide that both sides shall cooperate in assisting the other to find missing Israelis and Palestinians and their bodies.⁹⁸

Both the Gaza-Jericho and Interim Agreement, in what is an implicit reference to informers in their confidence-building measures sections, provide that the Palestinian side will not prosecute or harm those 'Palestinians who were in [or have maintained (Interim Agreement)] contact with the Israeli authorities.'⁹⁹

The only other measure directed at the past is Annex 6 to the Interim Agreement, which talks of Israeli/Palestinian cooperation with the stated aim of peace-building and *reconciliation*.

Bosnia Herzegovina

The ICTFY was set up during the conflict, less as a way of dealing with the past (for the conflict was not of course past) than as a way of 'ensuring that such violations [of humanitarian law] are halted and effectively redressed.'¹⁰⁰

However, its mandate continued through the peace negotiations and into the Dayton Peace Agreement (DPA). In so continuing it played some part in shaping Dayton—Bosnian Serbs Karadžić and Mladić, as indicted war criminals, were excluded from the Dayton negotiations. The ICTFY was also given a role in the Dayton framework, and the DPA underwrites the continued functioning of the ICTFY affirming the duty to cooperate with the tribunal.¹⁰¹

⁹⁷ 151 Palestinian Prisoners were released pursuant to the agreement on 15 Oct. 1999.

⁹⁸ Article XIX Gaza-Jericho Agreement. The obligation is not symmetrical. The PA is to provide 'all necessary assistance in the conduct of searches by Israel . . . as well as by providing information about missing Israelis.' Israel is to provide 'necessary information about, missing Palestinians'; Article XXVIII Interim Agreement.

⁹⁹ Article XX(4) Gaza-Jericho Agreement; Article XVI(2) Interim Agreement (also providing that 'ongoing measures will be taken, in coordination with Israel, in order to ensure their protection'). On the issue of 'collaborators', see further Rigby (1997).

¹⁰⁰ UN SC Res 827 (1993).

¹⁰¹ Preamble and Article IX (impliedly) of The General Framework Agreement for Peace in Bosnia and Herzegovina, 4 December 1995 (hereafter Dayton Peace Agreement or DPA). This is emphasized even more clearly by accompanying UN SC Res 1022 (1995), which notes that 'compliance with the requests and orders of the [ICTFY] constitutes *an essential aspect* of implementing the Peace Agreement' (emphasis added). See generally Jones (1996).

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'Back to the Future': Human Rights and Peace Agreements

This book set out to examine, first, the place and role of human rights provisions in peace agreements, and secondly, their relationship to international law. Throughout the book, a narrative has emerged which can now be summarized and expanded.

The human rights component of a peace agreement is shaped by three main factors. First, the central deal providing for access to power and, if relevant, territory. This deal itself can be seen as part of the human rights component of the peace agreement, as it aims to address the self-determination and minority rights issues at the heart of the conflict. Yet this central 'deal' also profoundly affects institutional provision for individual rights. Secondly, both individual and human rights provisions are also shaped by the contextual history of past human rights abuses. They do not emerge as 'ideal-type' institutions, but as a response to specific claims of abuse, and this both shapes their design and affects their role. Thirdly, both group and individual human rights provisions are shaped by international human rights law. These factors will be considered in turn and used to return to some of the underlying theoretical questions about the relationship between justice and peace, and law and politics, raised at the start of the book.

HUMAN RIGHTS AND THE DEAL

The book began by asking, what are peace agreements and what are human rights, and exploring what it meant therefore to talk about the 'human rights component of a peace agreement'. Examination of the framework agreements in the four case-studies has indicated just how impossible it is to separate the 'human rights' component of a peace agreement from the overall political package that is the peace agreement. It is impossible to separate the law from the politics. Individual and group rights mesh together to form complex constitutional arrangements. These arrangements form, in essence, a contract between competing groups regarding access to power and, depending on the conflict, territorially based control.

Individual human rights provisions (both forward-looking and backward-looking) are crucially shaped by the deal at the heart of the peace

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agreement. The central deal controls whether human rights protections are addressed at all. Where the deal in essence moves towards a complete 'divorce' between peoples and partition of territory, as in the case of Israel/Palestine, then the political elites of both sides may not have an interest in seeing human rights protections written into the text of that divorce agreement.

Conversely, where complete territorial separation is not contemplated, then human rights institutions may be crucial to enabling agreement on access to government. Human rights protections can address past allegations of lack of legitimacy. They can also provide for future safeguards against abuse of power under the new governmental and territorial arrangements. In Bosnia Herzegovina (BiH) it is the preservation of a unitary state and the vision of an ethnically mixed BiH which necessitates the human rights mechanisms of the Dayton Peace Agreement (DPA). The human rights protections in turn give the unitary state substance (or not, depending on their implementation). The strength of the human rights protections and the unitary state are integrally linked—they thrive or fail together. For without human rights protections people will remain within areas where their ethnic group controls power.

In Northern Ireland the Belfast Agreement provides a political arrangement for devolving power to a Northern Ireland power-sharing Assembly and Executive, together with a North-South executive dimension. Human rights protections form a safeguard against dominance and discrimination for both communities. Like the political institutions, the human rights dimension signals a fundamental change in the nature of the state. It is to be a state which recognizes both nationalist and unionist aspirations and identities as equally legitimate. In South Africa human rights protections are central to what is in essence a transfer of power. Human rights provide a new legitimacy to a new regime, but also aim to establish the new regime as multiracial or pluralist, and capable of protecting rights regardless of ethnicity, rather than a mirror image of its predecessor.

In all these examples provision for the protection and promotion of individual human rights is part of a bigger constitutional picture. Conversely, the political arrangements which form the other dimension of that picture are equally addressed to remedying past human rights abuses such as exclusion and domination. The overlap between politics and law does not evidence a lack of principle. Rather it indicates that peacemaking is often in fact constitution-making. The 'deal' and specific human rights institutions and protections together constitute 'the human rights component' of a peace agreement, although for the sake of clarity the term 'human rights' will be used to refer to specific provision other than self-determination provision throughout the remainder of this chapter.

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Typical Human Rights Dynamics

Understanding the relationship between political issues of access to power and human rights issues helps to explain some typical negotiation dynamics as regards human rights. It helps to explain characteristic sequencing in which such issues are addressed, and complex constitutional arrangements developed. It also helps to explain why some human rights issues are more difficult to reach agreement on than others.

Sequencing

As regards sequencing, Table 10.1 indicates a typical sequencing of human rights issues in pre-negotiation, framework, and implementation agreements.

Pre-Negotiation Agreements

Human rights institutions often enter a peace agreement as a result of principled demands based on experience of past human rights abuses. The pressure for a human rights component within a peace agreement usually comes from one side's analysis of the causes of the conflict. Human rights therefore require to be addressed in any attempt to resolve the conflict by negotiation. Given that many conflicts are asymmetrical, the demand for human rights protections is usually initiated by the weaker party, which sees human rights as addressing a status quo against which it is battling.

During the pre-negotiation stage of negotiations, however, the human rights issues which come to be addressed are usually confined to discrete issues which impinge on the negotiating context itself. This is because human rights issues go to the heart of the substance of the dispute, and to address them substantively involves addressing the conflict substantively. Pre-negotiation human rights provision therefore tends only to include measures to limit the waging of violent conflict so that face-to-face negotiations can take place, and measures to ensure that such negotiations will not be used as cover to achieve a military defeat. Depending on the conflict, measures typically include ceasefires and/or governmental commitments to cease certain types of human rights abuse, such as use of the death penalty or aspects of emergency law such as administrative detention.

However, in other conflicts a substantive-framework peace agreement may be negotiated while the conflict is being pursued unabated and unlimited by human rights constraints. The pressure for a peace agreement may come from primarily external forces rather than internal ones. Both the Israel/Palestine peace process and the Dayton process for BiH

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TABLE 10.1. *Sequencing of human rights issues*

Peace agreement	Human rights issues typically addressed
Pre-negotiation	<p>Provisions to limit the conflict:</p> <ul style="list-style-type: none"> • ceasefires • scaling back of emergency legislation • compliance with humanitarian and human rights standards • monitoring of compliance <p>Humanitarian relief to victims of conflict</p> <p>Ad hoc addressing of past:</p> <ul style="list-style-type: none"> • partial prisoner release • partial amnesties • independent commissions to investigate alleged abuses • return of bodies disappeared
Framework	<p>Arrangements for access to power and territory</p> <p>Provision of a human rights agenda:</p> <ul style="list-style-type: none"> • bill of rights • human rights commission • other commissions • reform of policing • reform of criminal justice • reform of judiciary <p>Provision for an agenda for undoing the past:</p> <ul style="list-style-type: none"> • return of refugees • return of land <p>Ad hoc measures addressed at the past:</p> <ul style="list-style-type: none"> • amnesties • prisoner release • measures for reconciliation • measures addressed at helping 'victims' • embryonic and partial truth processes <p>Provision for civic society to become involved in implementation</p>
Implementation–renegotiation	<p>Refinement/clarification/renegotiation of central deal</p> <p>If agreement continues to move forward:</p> <p>Demilitarization:</p> <ul style="list-style-type: none"> • monitoring <p>Taking forward of human rights commitments:</p> <ul style="list-style-type: none"> • establishment of institutions • institutions engage with society and continue to define human rights <p>Increased involvement of civic society in human rights agenda (and process generally)</p> <p>More measures to deal with past human rights abuses, including perhaps a unified holistic mechanism</p>

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provide examples. In the Israeli/Palestinian peace process a secretly negotiated deal arrived into a violent conflict which was continuing. In BiH international attempts to negotiate peace took place simultaneously with the waging of conflict and gross violations of humanitarian and human rights standards, which the international community had failed to limit. The framework agreements, particularly in BiH, were in essence complex constitutional packages aiming to deal with many dimensions of the conflict simultaneously, thus eliminating underlying reasons for violence.

Framework Agreements

Unlike the pre-negotiation agreement, human rights rhetoric only takes hold in a framework agreement if it serves the interests of both sides for it to do so. Although the less powerful often articulate their claims in human rights terms, the generality, abstract impartiality, and international basis of human rights standards mean that, as the process progresses, both sides may turn to the language of human rights.

At the framework or substantive agreement stage an arrangement regarding access to government and territory aims to address the self-determination issues at the heart of the deal. At this point the language of human rights can provide a vital negotiating tool by helping to carve out win-win solutions from zero sum demands. Individualized human rights protections can address fears of annihilation, domination, and discrimination that motivate claims to territory and statehood, potentially diffusing such claims.¹ Institutions for protecting human rights can soften a power allocation at the centre of the deal by providing protections against its abuses. If the deal is one where political institutions and a unified territory are to be shared between different groups, then both sides may have an interest in seeing human rights language used, despite radically different notions of what human rights are, and of what their implementation will lead to in practice. In the text of a peace agreement such differences can often be masked and postponed by the general and universal language of rights.

More cynically, the language of rights may be rhetorically useful to those who do not contemplate conceding the human rights demands of the other side. Those who have not framed their demands in human rights language during the conflict will often come to do so during the peace process, recognizing it as an internationally endorsed language. Rights language may signal the satisfaction of the human rights claims at the heart of the conflict, even where substance has not been conceded. Human rights institutions may stamp an agreement with the badge of

¹ Cf. Fisher and Ury (1991); see Bell (1999).

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democracy, giving it international legitimacy. In other words, human rights mechanisms can be conceded as the universally recognized chic language in which to write peace agreements.² Bosnia Herzegovina, and arguably Northern Ireland, provide two very different cases where human rights language was conceded by those who had not traditionally subscribed to such language, for some of these reasons.

Whatever the reasons, human rights institutions are typically included as integral to the central deal, as it emerges as a constitution-making project. These provisions include bills of rights, national institutions for protecting rights, and reform of the criminal justice system, including the judiciary and police. Often provision is not complete, but provides for broad statements of principle and a process of development and implementation. Both South Africa and Northern Ireland illustrate this type of staging. While making substantive provision for human rights, the peace agreements also provide for the further development and negotiation of this provision. This both avoids having to reach full and final agreement on everything at once, and enables a wider section of society to become involved in the negotiation of fundamental institutions, thus broadening and deepening the process.

Framework or substantive agreements may also include measures aimed at undoing the conflict, such as return of refugees, adjudication of land claims, and release of prisoners. These may be accompanied by other measures aimed at the past, such as provision for victims, and preliminary inquiries into certain past atrocities. However, a more holistic mechanism for adjudicating on past human rights abuses is rarely agreed at this stage. Only in BiH was a broad mechanism in place at the time of the signing of the peace agreement, and this was only because the mechanism—the Ad Hoc International Criminal Tribunal for Former Yugoslavia (ICTFY)—was in fact a pre-Dayton wartime mechanism aimed at limiting the conflict and inducing settlement through deterrence.

Implementation: Winners and Losers

At the implementation stage, as noted in Chapter 2, a measure of renegotiation often takes place as parties explicitly renege on earlier commitments or more subtly try to reshape the agreement in their own image. Depending on how the agreement holds, the human rights institutions will continue to be implemented and begin their adjudicative and integrative functions. Often this is the point at which civic society can become more involved in a structural way in the peace process through

² Cf. Pogany (1996) (noting that while recent constitution-making in Eastern European countries has followed Western liberal/international law patterns, genuine constitutional transformation has often remained elusive).

the new institutions. However, as described in Chapter 7, the nature of the 'deal' also helps to predict some of the difficulties which will arise.

In particular, implementation is affected by the balance of power between the parties as documented in the deal. Negotiated settlements are usually based on trying to avoid the appearance of winners and losers. If one side is going to lose in negotiation, then it is likely to continue violent conflict in the hope that military victories will change the negotiating dynamics, or even deliver a victory directly. As noted in Chapter 2, ethno-political conflict often typically involves a meta-conflict, or conflict about what the conflict is about. Negotiations therefore involve 'meta-bargaining', or bargaining around the analysis of the conflict.³ The meta-bargain which emerges in the subtext of a peace agreement will usually not be evenly balanced. It is likely to be more consistent with one side's analysis than the other's. Where the international community is providing the main impetus for deal-making, as in BiH and the Israeli/Palestinian conflict, then the bargain struck in the agreement will reflect less a meta-bargain between the parties, and more the international community notion of what the meta-bargain should be, however incomplete or confused that notion is. The international positions adopted during the conflict crucially affect the power relations between the parties to the conflict, and the shape of any peace agreement, as illustrated in Chapters 3 and 4.

The implementation of human rights measures is largely dependent on some type of meta-bargain having been reached. In BiH it is clear from the text of the DPA that the human rights institutions which aim to cement the unitary state stand at odds with the Entities and the scope of their autonomy. Given the lack of ethno-national consent to the unitary structure it is not surprising that there is resistance to implementing the decisions of the human rights institutions. In the Israeli/Palestinian agreements the failure of the international community to set limits on how the conflict was waged makes meta-bargaining difficult and increases the likelihood that Israeli analysis of the 'solution' to the conflict will prevail. The absence of rights protections to the process also means that the negotiating positions and actions of Palestinian elites can become increasingly separated from the interests of the people they supposedly represent. Both factors would seem to reduce the chances that the process will result in a permanent reduction, or end, to violence.

In Northern Ireland, while the reaching of an agreed text reflects the fact that a meta-bargain has begun to be reached, this bargain is incomplete. The agreement is compatible with both British unionist and Irish nationalist sovereign aspirations for the future. The agreement contains

³ Cf. Du Toit (1989)

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the potential for either vision to be achieved, although also on another view, for a transcendent non-state centred 'third way'.⁴ The human rights dimension of the agreement is likely to be a key site for a debate over the nature of the deal reached (especially if political institutions break down). This debate is likely to evidence tension around the extent to which human rights institutions should address the ability of the state to provide equality to Irish nationalists or not.

In South Africa, where a meta-bargain can be identified involving, in essence, a clear transfer of power with human rights constraints, implementation of the human rights provisions of the Interim and Final Constitutions has confirmed the nature of the transition. However, the failure of the new regime to deliver decisive movement towards socio-economic equality, and the accompanying high crime rate, indicate that, while the conflict has been transformed, it has not been eliminated.⁵ Implementation of the human rights provisions is likely to be affected in particular by pressure for economic justice, both within the human rights institutions, and also paradoxically in calls for the limitations of human rights in the name of economic stability.

Reaching Agreement

The relationship between the central deal and the human rights provisions, as evidenced by their sequencing, helps to explain why some types of human rights provision are easier to reach agreement on than others. In short, some types of human rights provision are more crucially dependent on a meta-bargain having been reached than others.

Forward-looking human rights provisions may be fairly easy to get agreement on in general terms, as they are often consistent with different views of the bargain at the heart of the deal. Bills of rights, national human rights institutions, impartial judiciary, and impartial police are fairly easy to agree on in principle at a general and abstract level. In South Africa, for example, disagreement on the scope of affirmative action was ultimately resolved by turning to the general and abstract language of international human rights provision.⁶ In Northern Ireland general statements regarding principles of policing avoided the central question of whether the pre-agreement Royal Ulster Constabulary did or could comply with those principles. While Irish nationalists signed up to the principles as a precursor to radical reform of policing, British unionists

⁴ See further p. 314. ⁵ Hamber (1998b).

⁶ Initial drafts of section 8(3)(a) of the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter Interim Constitution) were modelled on Article 1(4) of the International Convention on the Elimination of all Forms of Racial Discrimination. See Corder and Du Plessis (1994: 47, 144-5), and Ch. 7, p. 207.

signed up on the basis that the existing police force largely complied already. In BiH human rights were inserted in the agreement by adopting wholesale a raft of international conventions, avoiding the need to get agreement on every provision, but at the same time avoiding engagement with radically different notions of how much implementation would be necessary or possible.

In contrast, the detail of what is in a bill of rights, how those rights play out in application, composition of national institutions, or what constitutes impartiality—all much more difficult to resolve—often do not have to be resolved until the implementation stage. During implementation what was fairly easy to agree in the abstract will often be revealed in all its controversy. In South Africa the Constitutional Court, interpreting the equality provision of the Interim Bill of Rights, found that, given the country's context, 'equality' should be asymmetrical and thus justified different treatment of whites and blacks.⁷ In Northern Ireland, when the Patten Commission on policing finally made its recommendations, it was the recommendation to rename the Royal Ulster Constabulary, thus providing a symbolic break with both the past and a British ethos, which proved most difficult for unionists to accept.⁸

In contrast to the relative ease with which agreement can be achieved on forward-looking human rights provisions, the extent to which a society is able or willing to address past human rights abuses depends entirely on the balance of power struck in the deal, and the extent to which the deal itself has produced a meta-bargain on what the conflict was 'about'. Until there is substantial agreement about the causes of the conflict, it is almost impossible to reach agreement on how the divided society can account for the past, because the parties are still essentially waging the conflict. Out of the four case-studies, only in South Africa has a comprehensive attempt to deal with the past been made. Even there its detail was not agreed at the framework stage. The fact that the Truth and Reconciliation Commission was possible at all reflects the fact that a meta-bargain had been reached.⁹

⁷ *City Council of Pretoria v. Walker* (1998) (2) SA 363 (CC); 1998 (3) BCLR 257 (CC). Cf. also *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

⁸ Recommendation 150, Independent Commission on Policing for Northern Ireland (1999: 121).

⁹ See e.g. Hamber (1998b) (who in essence argues that the focus of the Truth and Reconciliation Commission on gross violations of individuals rather than the structural benefactors of apartheid reflected the fact that the meta-bargain involved a compromise between political change and economic instability which was at odds with the reconciliation it aimed to promote—which requires economic justice). Cf. also the harsher assessment of the deal by Pilger (1998: 604–10).

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THE CONTEXT OF THE PAST: THE JURISPRUDENCE OF TRANSITION

Human rights institutions are shaped not only by the context of the 'deal', but also by the particular context of past abuses. Individual rights protections signal a transition from a less liberal to a more liberal regime. The particular human rights issues addressed, and the institutions established to address them, are shaped by notions of past-injustice. The role of such institutions can therefore be understood as inherently transitional—mediating between past and future. This view of the role of law is useful for re-evaluating the tension between justice and peace, law and politics outlined at the start of the book.

In the first chapter examination of human rights and peace agreements was presented as a lens through which to examine the relationship between justice and peace, or between law and politics.¹⁰ These disputes can be jurisprudentially restated as a philosophical dispute about the boundaries between law and politics. There are two main competing versions of this relationship: that articulated by Kantian liberalism and that articulated by a range of utilitarian, critical and/or communitarian theories.¹¹

From the Kantian liberal position, questions of rights are prior to questions of the good; in other words, a framework for justice based on individual rights and freedoms must be prior to any attempt to prescribe communal values for living. Liberal theorists argue that ensuring a basic level of equality and rights enables political society to facilitate a multiplicity of personal life choices and that communal values must then be negotiated in political life, as subject to those rights. In human rights terms this translates to the argument that questions of rights are universal in application and so their protection should not be contingent on showing that they lead to another end (such as 'peace') but it is a prior matter. In other words, 'justice is not merely one important value among others, to be weighed and considered as the occasion requires, but rather the *means* by which values are weighed and assessed.'¹² As with the human rights activist's defences to the 'peace first' argument, the liberal asserts, first, that justice is the primary organizing principle of any society, in other words prior to the 'good' (in this case 'peace'); and secondly, that in a deeper sense justice is peace, if peace is understood as the presence of fair processes rather than any particular political vision. In contrast, a broad range of opposing positions denies that matters of justice are prior

¹⁰ Although human rights are not being equated with 'justice', it is chiefly through the human rights component of peace agreements that questions of 'justice' are addressed.

¹¹ For classic articulation of liberalism, see Kant (1781); Rawls (1971, 1993); for a critical legal approach, see e.g. Unger (1975, 1986).

¹² Sandel (1982: 15–16).

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to matters of politics, but that they must be negotiated as part and parcel of political matters.¹³

The case-studies reveal that the tension between justice and peace is often misconceived for two reasons: first, because, as we have seen, in practice political processes often assign value to human rights language and institutions for intensely pragmatic reasons.¹⁴ In other words, in practice the tension between justice and peace can be overstated in the abstract: human rights provisions are included in peace agreements precisely because without them peace cannot be achieved or has no content.¹⁵

More fundamentally, the tension between justice and peace, and, thus, the relevance of distinctions between different jurisprudential conceptions of their relationship, is misconceived because it fails to recognize the peculiar role of law in times of transition. Both forward- and backward-looking human rights provisions play a role in the processes of transition which is different from their role in times of less cataclysmic social change. Rather than evaluating human rights provisions in terms of whether they comply with liberal conceptions of justice or not, and bemoaning the subjection of justice to peace when they do not, it can be useful to evaluate the human rights provisions of peace agreements in terms of what Teitel has termed a 'jurisprudence of transition'.¹⁶

Teitel suggests that '[l]egal practices in such periods reveal a struggle between two points, between settled and revolutionary times, as well as a dialectically induced third position.'¹⁷ This dialectically induced third position comprises the transitory structures of the peace agreement. In ordinary times law and constitutions aim to provide stability and order, and forward-looking adjudication. Notions of the rule of law and of the constraints of constitutional interpretation are shaped by the demands of stability and order. In contrast, during times of transition law aims to mediate between the old regime and the new political arrangements. Law and constitutions in such times draw their sense of justice from past human rights abuses, and notions of the rule of law and constitutional interpretation are shaped by the attempt to construct a different future. As a result, during transition '[p]ersistent' dichotomous choices arise as to

¹³ Opposition to Kantian liberalism ranges from utilitarian critiques (Mill 1859) to communitarian critiques (e.g. Sandel 1982) to Southern challenges (e.g. wa Mutua 1995), the 'Asian values' challenge to human rights (see Ghai 1994; Kausikan 1993); the Islam and human rights debate (An Na'im 1990, 1992), and feminist and critical perspectives (e.g. Fraser 1999; Fraser and Lacey 1994; Rorty 1993).

¹⁴ Cf. Kaufman and Bisharat (1998a, b).

¹⁵ Constitutional theory based on empirical accounts of constitutionalism have interestingly come to similar conclusions; see e.g. Castiglione (1996) (arguing that while republican and liberal constitutionalism represent two different conceptions of the constitution, and, more generally, of the nature of politics, in fact historically the two paradigms were combined).

¹⁶ Teitel (1997).

¹⁷ Teitel (1997: 2077).

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law's role in periods of political change: backward versus forward, retroactive versus prospective, continuity versus discontinuity, individual versus collective.¹⁸

This transitional dynamic can be illustrated by a brief analysis of the distinctive legal nature of peace agreements. The difficulty of classifying peace agreements as legal documents testifies to a role which is simultaneously constitution-making and transitional. Their function as 'transitional constitutions' in turn helps to explain the characteristic difficulties for the human rights institutions established by peace agreements, difficulties which revolve around the above dichotomies.

The Legal Nature of Peace Agreements

Throughout this book framework peace agreements have been described as encapsulating a central 'deal' or 'contract' or set of political arrangements or 'constitution'. This variety of terms reflects the difficulty with classifying peace agreements as legal documents. The peace agreements themselves at times are called 'constitutions' or include a constitution. They often involve both domestic and international actors. Where they involve only state parties they comprise treaties, but often they involve both states and groups who have a status short of statehood but beyond that of internal political party. It is suggested that peace agreements are best thought of as distinctively transitional constitutions.¹⁹

Peace agreements provide a constitutional-type 'power map' for the state. They set out the organs of government and the other institutions of the society, and the nature of the relationship between the individual and the state. However, peace agreements have a transitional quality which means that they do not fit within traditional accounts of constitutionalism in either their form or their substance.

Traditional accounts of constitutionalism understand it as 'unidirectional, forward-looking, and fully prospective.'²⁰ The traditional constitution as social contract looks forward from its fictional point zero and regulates future conflict within a set of accepted power arrangements. If (as is usual) it is in the form of a legal text, it is intended to be more lasting than ordinary legislation (as evidenced by entrenchment), with clear mechanisms for judicial interpretation (key to separation of powers), and stands superior to other laws.²¹

In contrast, peace agreements can only be understood in terms of what has gone before, and what will come after, sharing the characteristics of

¹⁸ Teitel (1997: 2077).

¹⁹ This section uses Teitel's analysis (1997) of 'transitional constitutionalism', adapting it to peace agreements.

²¹ See e.g. Castiglione (1996).

²⁰ Teitel (1997: 2077).

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'transitional constitutions'.²² Peace agreements are distinctively partial and temporary. They balance continuity with discontinuity; they reference past constitutional structures and claim a degree of continuity with those structures, whilst simultaneously claiming legitimacy from the fact that they herald a new beginning. They tend to be produced outside prior mechanisms for constitutional reform, although often also draw on them partially.

Furthermore, unlike traditional constitutions, peace agreements tend to be neither purely domestic, nor international legal documents. Constitutions traditionally form the ultimate domestic legal document—in essence founding and defining the state. Peace agreements, however, form transitional documents which redefine the territorial, political, and power boundaries of the state. In doing so, they incorporate transnational mechanisms and signatories, which in some cases are states, but in others are not. Yet, often they do not classify as traditional treaties, even while a clear international dimension can be identified. They establish the future for what are essentially domestic power arrangements, but often internationalize those power arrangements by involving other states in internal structures, by acknowledging the international status of some non-state entities, and by providing a role for international actors in their implementation.

Peace agreements are further distinctive from traditional constitutions in depending for enforcement not primarily on the courts (who nevertheless may have some role), but on more overtly political processes. In particular they depend for enforcement upon the notion that the deal reached was the only deal that could be reached. The deal is sustained by 'enlightened self-interest', that is the knowledge that any attempt to renegotiate would result in the same net gains and losses for the parties involved. Where that notion is not persuasive, the agreement often breaks down, and constitutional adjudication, or reliance on international law adjudication, cannot save it. Agreements tend to be enforced by notions of reciprocity, by fluid mechanisms for arbitration, review, and renegotiation, or by the involvement of international guarantors, as well as, or instead of, court processes.

The Case-studies

The peace agreements of the case-studies illustrate arrangements which are both constitutional and transitional. The South Africa Interim Constitution, while called a 'constitution', significantly differs from traditional notions of constitutions. It is at the same time a peace agreement. It

²² Cf. Teitel (1997).

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claims constitutional status and a new dispensation, but is established as an Act of the apartheid legislature. It speaks of legal continuity of past laws and the South African state,²³ but also of discontinuity and a 'new order'.²⁴ In the words of its section on National Unity and Reconciliation, the Constitution 'provides a historic bridge' between a past characterized by injustice and a future 'founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'

The Interim Constitution complies with definitions of constitutions as providing the basic rules of society, including the framework for government operating according to the rule of law—or a 'power map'. However, this power map is for an interim phase only; the Constitution provides for its own demise and replacement with a Final Constitution. Despite the Interim Constitution's interim status, binding constitutional principles aim to project an image onto the more lasting new Constitution. The detail of its provisions reads more like an insurance contract than the type of general institutional framework normally found in a constitution.

As regards enforcement, the Constitutional Court is given power to enforce the provisions of the Interim Constitution.²⁵ Unusually for a Constitutional Court it is also given the role 'founding' the Final Constitution; it has to certify whether the Final Constitution complies with the Constitutional Principles of the Interim Constitution. Through this provision the Constitutional Court is tasked with formulating a uniquely transitional judgment—forming both the continuity and discontinuity with the past regime and past constitution-making processes. It is a once-off politico-legal task, through which the court must simultaneously establish its own legitimacy and independence from political processes (in a truly wonderful piece of jurisprudence).²⁶

The main body of the Belfast Agreement in Northern Ireland has no apparent domestic legal status. The agreement is signed by the British and Irish governments and the political parties who participated in the talks—a mixture of international and domestic parties. It may well constitute a form of international agreement. The end section, consisting of an agreement between the British and Irish governments alone, clearly constitutes a treaty. Yet, its content is addressed primarily at Northern Irish structures and institutions. The agreement contains no legal

²³ Sections 229 and 231 Interim Constitution (providing for continuation of laws and international legal personality).

²⁴ Preamble Interim Constitution.

²⁵ Section 98 Interim Constitution.

²⁶ A process enhanced by the rejection of the first version of the Final Constitution (Constitution of the Republic of South Africa Act 108 of 1996) as not in compliance with the Constitutional Principles. See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

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enforcement mechanism, neither does it provide a basis for judicially reviewing other legislation. It does, however, provide for political processes of review by the British government alone, the British and Irish governments jointly, and by the institutions themselves.²⁷

Although the agreement is not presented as a constitution, it is implemented largely through the Northern Ireland Act, which sets out the detail of devolution and in effect amounts to a Northern Ireland Constitution. The Northern Ireland Act 1998 documents the parameters of devolution, the relationship of the institutions to the overarching British (and Irish) Constitutions, and the principles (of equality and non-violence) which constrain the political structures. In form the Northern Ireland Act 1998 provides continuity with past devolution measures, such as the Northern Ireland Constitution Act 1973. However, in substance it marks a further break from a past British constitutional tradition of 'pragmatic empiricism' (the Constitution as a traditional working arrangement) moving towards 'constitutional idealism' (the Constitution as embodying values and ideals).²⁸ The Belfast Agreement and Northern Ireland Act 1998 encapsulate an overtly value-driven constitutionalism. They set out a number of values which the institutions are to promote. Decision-making is evaluated and constrained by the extent to which it conforms with those values.²⁹ Furthermore, the values deal not just with the relationship between individual and state, but with the relationship between groups of individuals. This discontinuity with traditional constitutional processes is marked by the fact that it is an all-Ireland referendum which grants the new arrangements legitimacy rather than previously accepted domestic processes of British constitution-making or law-making. This signals that the Belfast Agreement and Northern Ireland Act 1998 do not codify an existing consensus, but aim to effect that consensus.

The Israeli/Palestinian Declaration of Principles does not claim to be a constitution but, as its title suggests, a 'declaration of principles' within which future negotiations should take place. Subsequent agreements claim to be implementing these principles. The principles and arrangements found within the agreements contain copious detail delimiting the devolution of power to the Palestinian Authority in language which is

²⁷ Belfast Agreement (hereafter BA), Review Procedures Following Implementation, Validation, Implementation, and Review.

²⁸ For further explanation of these terms in the Northern Ireland context, see McCrudden (1994). While current developments throughout the United Kingdom, in particular the incorporation of the European Convention on Human Rights in the Human Rights Act 1998, are also moving towards a form of constitutional idealism, at present it is at the level of process more than substance.

²⁹ Cf. McCrudden (1994) (noting that prior to the peace process this was the direction of constitutionalism in the Northern Irish context).

more contractual than constitutional. The agreements concentrate on logistics rather than values, yet in providing for logistics they aim to provide the framework for how Palestinians are to be governed in the interim period, and in that sense are still 'constitutional'. They establish the form, composition, and powers of Palestinian institutions, together with commitments regarding Israeli deployment.

The Israeli/Palestinian peace agreements seem to be international legal documents.³⁰ They are signed by the parties, and also (like the Camp David Accords before them) witnessed by other states. Potentially they are treaties, but only if the Palestinian Liberation Organization (PLO) has signed on behalf of an existing Palestinian state; but the current existence of a Palestinian state which satisfies criteria for statehood is, at best, debatable.³¹

If they are not treaties, it seems that, given the PLO's status as an international organization, they are at least international agreements, and as such capable of being legally binding.³² Yet, even were international legal processes capable of producing binding adjudication on breaches of these agreements, which is unlikely, evaluating when a clear breach has occurred is difficult, as a detailed discussion by Watson indicates.³³ This is largely because of the agreements' extreme ambiguity. However, it is also because the early agreements set out a framework for future progress, and this staging of the process means that drawing a tight distinction between a mere slowing of the process and a 'breach' of an agreement can be unclear. While there is a dispute resolution mechanism built into the agreement, it is essentially a political mechanism dependent on cooperation from both sides.³⁴ If such cooperation has not sustained the agreement itself, it seems unlikely that it will produce a successful resolution of any dispute.

In BiH the DPA comprises a central agreement with a number of attached agreements (as annexes), several of which are signed by different permutations of parties.³⁵ The central General Framework itself, signed on behalf of the Republics of BiH and Croatia and the Federal Republic of Yugoslavia, has treaty status with commitments given by the signatories as regards implementation of the annexes. However, as

³⁰ For a detailed discussion of the status of the agreements, see Watson (2000: 55–102). See also Alting von Gesau (1995: 91–5); Malanczuk (1996: 488–92).

³¹ See Boyle (1990); cf. Crawford (1990).

³² See Article 3 Vienna Convention on the Law of Treaties. See also Alting von Gesau (1995: 91–5); Malanczuk (1996: 488–92); Watson (2000: 92–102).

³³ Watson (2000: 201–64).

³⁴ Article XV Declaration of Principles 1993 provides that disputes are to be resolved by 'negotiations' through the Joint Israeli-Palestinian Liaison Committee established by the agreement. This provision also talks of the parties agreeing to a mechanism of conciliation and also a possible arbitration mechanism

³⁵ See Chs. 3 and 7 n. 133.

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an international treaty it contains several distinctive aspects, in particular what has been described as a unique 'hypertrophy of international guarantees'.³⁶ While the three republics signed the General Framework Agreement, only the Republic of BiH is party to its central annexes. Thus, the treaty seems to be one of 'guarantee', with the Republic of Croatia and Federal Republic of Yugoslavia undertaking to ensure compliance with the various annexes.³⁷ While the Federal Republic of Yugoslavia seems in places to be signing on behalf of the Republika Srpska, no legal mechanism of agency was established, reflecting a compromise between preventing the participation of indicted war criminals at Dayton and failing to represent Bosnian Serbs at all. As with the Israeli/Palestinian agreements, the witnessing of the DPA by other states and by the European Union can be seen as a form of political underwriting and influenced by the Camp David Accords, which the Dayton process seems to have been modelled on.³⁸ Other annexes are signed by the Federation of BiH and the Republika Srpska, which under the new arrangements are sub-state Entities. Again a mix of international and internal parties characterizes the peace agreement.

The method of concluding the treaty was also unusual. The DPA was only initialled at Dayton and later signed in Paris. While initialling indicated consent to be bound, the agreement itself only entered into force with signature—in other words signature was a suspensive condition, and this was underlined by UN SC Res 1022, which made suspension of sanctions conditional on signature.³⁹ Also distinctive is the placing of the power of interpretation of the treaties not with the parties, but with international actors, namely the Office of the High Representative and the multinational force (IFOR) commander.

To describe the DPA in its entirety as a transitional constitution might seem strange, given that a sub-section of it, Annex 4, comprises a 'Constitution'. However, if this annex is examined, it has several unique aspects as a Constitution.⁴⁰ First, it does not stand alone, but must be read with the rest of the agreement if it is to make sense. This is not just a matter of interpretative context, but of obtaining a complete constitutional text. For example, as regards refugees and displaced persons, according to

³⁶ Gaeta (1996: 155) (emphasized in original) (the discussion in this section is drawn more generally from Gaeta's analysis).

³⁷ See Gaeta (1996: 153). Both the Republic of Croatia and the Federal Republic of Yugoslavia also directly sign Annex 1B (regional stability) and Annex 10 (civilian implementation) of the General Framework Agreement for Peace in Bosnia and Herzegovina, 4 Dec. 1995 (hereafter Dayton Peace Agreement or DPA).

³⁸ Holbrooke (1998: 204–5).

³⁹ See Agreement on Initialling the General Framework Agreement for Peace in Bosnia and Herzegovina, 21 Nov. 1995.

⁴⁰ Cf. Gaeta (1996: 160–2).

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Annex 4, 'they have a right in accordance with Annex 7. . . . to have restored to them property of which they were deprived . . .'. In other words, Annex 7, it would seem, is incorporated in some fashion in the Constitution. Similarly, the Human Rights Commission is referred to in Article II(1) Annex 4, but provided for in Annex 6. The Constitution is also striking in its purported direct incorporation of a large number of international human rights conventions.

The 'constitutional' status of Dayton is also unusual as having been a product of international processes rather than internal processes. It was initially framed in English rather than any of the indigenous languages.⁴¹ It incorporates the previously negotiated Constitution of the Federation of BiH but also requires it to be modified. It claims to promote the legal continuity of the Republic of BiH, but does not use the procedures of, or even refer to, previous Bosnian Constitutions (discontinuity): 'The Republic of Bosnia and Herzegovina . . . shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders . . .'.⁴²

The means of enforcement of the agreement also reflects its peculiar international status. As regards the agreement as a whole, the Office of the High Representative is given a political role of interpretation (unusual as regards treaties), but has no clear enforcement arm. International actors hold the balance of power in key domestic institutions, such as the Constitutional Court, which has the power to interpret the Constitution, including 'the relationship between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina . . .'.⁴³ These mechanisms give it a continuing role in shaping the deal.

Understanding peace agreements as forms of transitional constitution acknowledges their constitution-making role. It also explains why, unlike traditional liberal-democratic constitutions, they are distinctively partial, temporary, and international, and why their interpretation and implementation is more overtly political. However, understanding the transitional dynamics of peace agreements and their role in social change also sheds light on the relationship between constitutionalism and social change more generally. Contemporary explanations of constitutionalism are increasingly focusing on the constitution as fluid, dialogic, and political, rather than relatively static, prescriptive, and legal. These explanations, interestingly, are prompted by analysis of examples which

⁴¹ See Gaeta (1996: 169).

⁴² Article I(1), Annex 4 DPA.

⁴³ Article VI(3), Annex 4 DPA.

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are in some way transitional, such as that of the European Union, but also by less obviously transitional attempts to find a constitutionalism capable of responding to the dynamic claims of multicultural societies, claims which have proved difficult to accommodate within traditional constitutional models.⁴⁴

This 'jurisprudence of transition' helps to explain the role of human rights institutions negotiated into the text of a peace agreement, and the characteristic dilemmas which face them. Although divided into forward- and backward-looking measures for the sake of analysis, the descriptions of the case-studies in Chapters 6 to 8 illustrate the indivisibility of forward- and backward-looking measures.

The forward-looking human rights institutions aim to provide a new legitimacy and a new order for the future, by looking to the abuses of the past and preventing their recurrence. Human rights institutions in the future are shaped by the abuses of the past rather than any free-floating notion of best practice. In implementation the human rights institutions must continue to construct the shape of the new order, and this will characterize their decision-making. They play a role in mediating between past and future.

Likewise, mechanisms for dealing with past human rights abuses aim not only to deal with the past, but in doing so to legitimize the new order. Partial criminal sanctions—partial in applying only to certain categories of person and crime, and partial in that they often do not require punishment—often emerge as a transitional tool. The partial criminal sanction provides an adjudication of the past which at the same time enables the transition to future legitimacy. The idea of undoing the past also provides an illustration. Specific measures aim to reverse the effects of the conflict by providing that refugees return home, that land is returned to those dispossessed, and that prisoners are released. In attempting to undo the past, they aim to reconstruct a future.

The role of the human rights provisions of transition is not therefore to replicate the liberal order, and cannot be evaluated in terms of whether it does or not. Rather the role of human rights provisions is to effect a transition from less to more liberal regimes. A transitional account of the role of law better explains the types of constitution, human rights institution, and mechanism for dealing with the past which emerge, and the dilemmas which characterize their operation.

⁴⁴ See generally Bellamy and Castiglione (1996), and in particular, Bellamy (1996); Shaw (1999); Tully (1995).

Transition from What to What?

Any transitional account of the role of law must, however, acknowledge that in many instances, as human rights institutions attempt to negotiate one type of transition, the very goals of transition may still be up for grabs. New human rights institutions appear to signal a transition from a less liberal regime to a more liberal regime and from a regime in which a party feels excluded to one where all are included. However, in at least three of the peace processes examined—Northern Ireland, BiH, and Israel/Palestine—there is still a struggle over what the transition is, in fact, from and to. Is the transition from a less liberal to a more liberal regime? Is it from a majoritarian regime to a more inclusive regime? Is it from an ethnically shared territory to ethnically divided territories? Is it from the sovereignty of one state to the sovereignty of another? Or is it merely transition from violence to non-violence, but leaving the nature of the regime substantively untouched? Time alone will tell what the transition in the case-studies has been from and to, as, certainly in three out of four cases, it is still unclear which vision of the future will prevail.

What is clear is that the ability or not of the deal to deliver on human rights commitments will significantly affect, and even determine, the nature of the transition.⁴⁵ Without effective human rights institutions, the transitions in each of these three situations will at best be from more violent to less violent conflict.⁴⁶ In South Africa majority power without majority social and economic justice is unlikely to lead to stability. In Northern Ireland power-sharing without the human rights agenda is likely merely to transfer ethno-nationalist struggles to the capsule of the devolved Assembly, leaving root causes of conflict unaddressed. In BiH the (current) failure of human rights institutions seems to point to either prolonged international involvement, or international exit and concurrent moves towards partition and instability. In Israel/Palestine the absence of human rights constraints means that it looks increasingly as if, while the actors might change, the lives of ordinary Palestinians will not.

⁴⁵ This is especially the case when political institutions collapse, as human rights institutions often can continue to function in such situations.

⁴⁶ Cf. Roniger and Sznajder (1999: 267–71) (who conclude after a review of the long-term human rights implications of ‘Southern Cone’ Latin American peace processes that, while acceptance of human rights language had occurred in the peace process, implementation of human rights practices had largely failed to follow, leading to past trends being re-enacted, and ultimately to continued threats to stability and new forms of human rights violations).

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 Law Shaping Peace Agreements

Most crucially, the international legal positions taken during the conflict shape the central deal, perhaps more than is often given credit. As illustrated in Chapters 3 to 6, an important part of the context for the deal is the international law positions adopted during the conflict. This shaping can be positive—a set of minimum standards set out with which any solution must comply, as in South Africa or Northern Ireland. Or it can be negative—a failure to set and/or enforce such minimum standards which results in the deal incorporating the conflict, as in Israel/Palestine or BiH. The nature of the deal in turn affects provision for human rights mechanisms, as described above. The international community's willingness and ability to enforce a human rights framework is therefore crucial. To put it starkly, human rights are an integral part of the DPA and an absent part of the DoP, in part because in BiH the United States required their inclusion, while in the Israeli/Palestinian process it did not.

Secondly, when it comes to choosing and designing human rights institutions, international law influences the process. While the particular context of past abuses shapes the human rights provisions, prevailing international law notions of best practice also are influential. Thus the institutional mechanisms have a superficial similarity—judicial reform, policing reform, bills of rights, and human rights commissions. This similarity in part arises from modern notions of constitutionalism as involving judicial protection for enumerated rights. But this notion is reinforced by the move of international law towards a particular set of institutions as necessary to realizing the abstract and general rights which governments commit to. International law can inform negotiations, while providing standards external to any of the parties to the conflict which command a degree of moral force.

International law may also continue to shape a deal during implementation. International human rights institutions may be used to adjudicate on the compliance of transitional provisions with human rights law. Thus, domestic truth and reconciliation processes may well be challenged by international law, and new institutions, such as police, will be monitored through the mechanisms of human rights conventions which have often been ratified as part of the peace agreement package.

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Peace Agreements Shaping International Law

Conversely, peace agreements shape international law. This can be illustrated by each of the types of human rights issue addressed. In the case of self-determination, peace agreements play out current normative trends towards robust internal self-determination and accommodation of minorities through group measures such as autonomy, power-sharing, and cross-border contacts. The peace agreements currently pose a question for international legal regulation concerning whether self-determination disputes can be resolved by a move away from sovereign statehood in its traditional sense.⁴⁷ Arrangements such as that in the Belfast Agreement may be best understood as 'transitional' either from violence to peace, or even from union with Britain to united Ireland. But could it be possible that the transitional arrangements could transcend the pull towards absolute statehood and form a lasting way of mediating conflicting notions of Irishness and Britishness, and a Northern Ireland which is under the sovereignty of neither or both? The very nature of peace agreements, as neither entirely domestic nor entirely international documents, points to their capacity to impact on traditional accounts of statehood.

In the case of human rights institutions, by drawing on international law notions of 'best practice', peace agreements underwrite international legal movement towards ideal-type institutional arrangements. In the case of undoing the past, as domestic mechanisms move towards greater accountability, they underwrite the moral stance of international criminal law as important but also as practical. However, they also address the wider notions of social truth and the needs of victims in ways that international law has only recently also begun to address.

As this last example illustrates, there are some areas where peace agreements have resorted to arrangements not emphasized in international human rights law (soft or hard). In other areas, examination of peace agreements reveals areas where international law is unclear and where the lack of clarity flows more from incoherence among legal instruments, than from deep controversy as to justiciability, as in the case of self-determination. These areas suggest further lessons which international law could learn from the arrangements in peace agreements.

⁴⁷ Cf. Gottlieb (1993) (arguing that self-determination disputes can be dealt with by separating notions of nationhood and statehood). Cf. also MacCormick (1996) (arguing that in the European context constitutionalism should combine ties of ethnicity, religion, and nationalism with a liberal respect for persons, and that this has been made possible by the weakening of state sovereignty entailed by the European Union).

The Balancing of Human Rights Institutions according to Ethnic Make-up

Soft law international standards on institutional best practice often do not address the question of ethnic balance in such institutions.⁴⁸ New standards dealing with minority rights have begun to address balance in institutions of government through the idea of 'effective participation'.⁴⁹ Peace agreements tend also to provide for ethnic balance in human rights commissions, the police, and the judiciary, and for the symbols of each to be neutral as between competing nationalisms. Further international consideration should be given to the fairly unexplored notion of ethnic balance in national human rights institutions, and how this affects the functioning of each institution. This opens up, in particular, the difficulties of reconciling the integrative function of these institutions with their enforcement or legitimizing functions.

Restorative Justice Concepts for Dealing with the Past

While international law's move towards a normative statement against impunity for serious human rights violations is important, the arrangements found in peace agreements testify to other important goals for mechanisms for dealing with the past, and the possibility of reconciling these goals with international law's imperative against impunity, through notions of restorative justice. The mechanism in South Africa provides a good example. Drawing on international law, it incorporated a notion of restorative justice aimed at reconciling the social needs and needs of victims for truth with notions of accountability and justice. Recent international legal initiatives on the rights of victims of gross human rights abuses acknowledge a range of victim needs which include accountability, but also go much broader. Notions of restorative justice deserve further consideration at the level of international law.

A Structural Place for Civic Society

The peace agreements providing the most hopeful human rights regimes are ones where civic society was involved in the peace process, and where civic society is given a structural place in the negotiations and/or the deal. As noted in Chapter 7, internationally mediated deals, for different reasons, often exclude civic society from the process of deal-making. In

⁴⁸ As noted in Ch. 7, a possible example is the Principles Relating to the Status of National Institutions 1992. These principles provide that selection procedures shall 'afford all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) in the promotion and protection of human rights . . . ' (although this seems to relate to balance of professional and human rights background rather than of ethnicity).

⁴⁹ See e.g. UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 18 Dec. 1992, GA Res 47/135, UN doc A/Res/47/135 (1992); Council of Europe's Framework Convention on the Rights of National Minorities, 1 Feb. 1995, ETS No. 148.

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contrast in more domestically based processes civic society often finds a way of claiming a place in the process. In a divided community civic society plays a crucial role in mediating the positions of political elites. It provides a space for creative thinking. It provides a link with other conflicts and with international institutions—a resource for political elites which they often cannot directly access themselves. It provides an agenda which goes beyond the traditional political divisions, and so enables those traditions to be reconceived. Civic society can supplement an impoverished political sector with a narrow focus.⁵⁰

To use one example, ethno-nationalism is a process which is deeply gendered, but whose gendered aspects are often ignored. A peace process based on political elites is often a peace process designed by men for men. Journalistic accounts of the four peace processes are striking for their absence of female characters. Addressing gendered divisions often involves a radical reconception of the nature of the state just as much as addressing the traditional divisions.⁵¹ Yet women are drawn from across the traditional divisions and often have local experience in addressing those divisions. Addressing gender equality can therefore transform both the meaning and the processes of addressing other inequalities.

In an interesting and provocative account of modern constitutionalism Tully identifies identity politics as the challenge for modern constitutionalism.⁵² He suggests that modern constitutions should be 'dialogic'—they should provide ongoing ways of mediating a series of challenges on mainstream constitutionalism by women, minorities, and indigenous peoples. Peace agreements already have this dialogic quality, and can be improved if they deal with more than one attribute of identity. The peace agreements in Northern Ireland and South Africa not only deal with a broad range of rights issues, including provision for gender rights, but use the agreements to provide for a specific space for civic society.⁵³ In doing so they acknowledge the importance of civic society to implementation.⁵⁴

⁵⁰ See e.g. Baranyi (1998); R. A. Wilson (1997).

⁵¹ See Yuval-Davis (1997); Cockburn (1998).

⁵² Tully (1995). Cf. also Bellamy (1996) (also noting the dialogic ambition of modern constitutionalism); Shaw (1999).

⁵³ In South Africa the Final Constitution process itself included substantial input from civic society. Furthermore, the Interim Constitution provides for both law-making and political processes to be open (section 67), while the Final Constitution provides more proactively that the National Assembly 'facilitate public involvement in the legislative and other processes of the Assembly and its committees' and that civic society be involved in the selection of members of the Commissions (sections 59 and 193(6)). In Northern Ireland civic society receives explicit references in the Belfast Agreement, with provision for a civic forum, a possible North-South civic forum, and extensive civic participation through human rights mechanisms.

⁵⁴ In contrast the provision for civic society is very limited in BiH and Israel/Palestine. In BiH Annex 6 of the DPA provides that 'the Parties shall promote and encourage the

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International lawyers could consider whether standards should exist on who should be at peace talks, drawing on the same notions of legitimacy, accountability, and representation which more internally driven processes use. They could also consider whether it would be useful for international institutions to assert a place for civic society in constitutional or peace agreement arrangements. Finally, international organizations could also consider more consciously the impact of their own implementation operations on the development of local civic society.⁵⁵

Areas where International Law could Helpfully be Clarified

Finally, the study has revealed areas where international law could helpfully be clarified. First, human rights law standards and the law of armed conflict diverge in places, as illustrated by Table 10.2.⁵⁶

Given the difficulty in classifying ethnic conflict as internal or international, and the resistance which states have to applying humanitarian law standards to ethnic conflict within their borders, these distinctions are problematic. Indeed the dialectical evolutionary relationship between international law and such conflict has contributed to a breaking-down of distinctions between international and internal matters, and between state and non-state actors. While many of the distinctions relate to the conduct of violent conflict, they continue to be relevant during the peace process, in particular when mechanisms for dealing with the past are considered. It would seem possible to eliminate at least some of these inconsistencies, if not to provide a coherent legal regime scaled according to scale of conflict.⁵⁷

The continued distinction drawn by international law and practice

activities of non-governmental and international organizations for the protection and promotion of human rights (Article XIII(1)). In Israel/Palestine civic society is provided for as regards limited reconciliation measures such as a 'people to people' programme (see generally Cairo Article II, Annex II; Interim Agreement Article XXII, and Annex 6).

⁵⁵ This finds some support in UN GA RES 53/144 of 8 Mar. 1999, which incorporates the Declaration on the Rights and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (this protects human rights defenders and groups which promote human rights, although its focus is on the obligations of states and does not include international organizations). Cf. also codes of ethics of non-governmental organizations regarding participation of civic society, for example International Alert (1998); cf. also SANGOCO (1998: 68-79).

⁵⁶ Table reproduced from work of colleagues Tom Hadden and Colin Harvey with permission.

⁵⁷ For example, the South African Truth and Reconciliation Commission included the recommendation that renewed international consideration be given to the way in which liberation wars and civil wars are to be conducted, and the treatment of participants in armed combat in circumstances of war, civil war, revolutions, insurgency, or guerrilla warfare. In particular it recommended looking at 'whether it is acceptable for deserters or traitors to be executed, even if they have been tried by a tribunal', especially given the difficulties of such tribunals in complying with present international requirements. Truth and Reconciliation Commission (1998, vol. 5, ch. 8, Recommendation 112).

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TABLE 10.2. *Divergence between human rights law and law of armed conflict*

Human rights law	Law of armed conflict
Right to life granted high degree of protection	Right to shoot combatants formally recognized
Right to be tried rather than detained	Right of combatants to be detained but not tried is protected
Appears to be a continuing obligation to prosecute human rights violations	Obligation to grant amnesty when conflict is over for many conflict-related crimes
Primary responsibility for compliance imposed on states	Individuals as well as states may be held responsible for ensuring compliance

between international and internal conflict reduces the coherence of international legal provision in cases where what is international and what is internal is under dispute. Table 10.3 illustrates. Again, it would seem possible and useful to eliminate some of these inconsistencies, even without solving underlying controversies.

Law and Power Revisited

The mutually shaping relationship between international law and peace agreements can inform traditional accounts of the regulative power of international law. Much in the same way that accounts of domestic human rights are often caught between idealist (justice) and realist (peace or pragmatist) positions, so are accounts of the role of international law in international relations.⁵⁸

Koskenniemi has summarized international relations discourse on law as having two opposite strands, one which accuses 'international law of being too political in the sense of being too dependent on states' political power'; and one which argues that 'the law is too political because it is founded on speculative utopias':

From one perspective, this criticism highlights the infinite flexibility of international law, its character as a manipulable facade for power politics. From another perspective, the criticism stresses the moralistic character of international law, its distance from power politics. According to the former criticism, international law

⁵⁸ There is a large and varied international relations literature; for overviews, see Brown (1997); Hollis and Smith (1990). For overviews of the specific connections between international relations and international legal scholarship, see Byers (1999: 21–34); Koskenniemi (1990a); Slaughter Burley (1993); Scott (1994). Cf. also attempts to link international law philosophically to the Kantian and Rawlsian traditions: Franck (1992); Tesón (1992a, b).

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TABLE 10.3. *Examples of continuing significance of international-internal divide*

International	Internal
Self-determination debates focus around the inviolability of borders and the sovereignty and independence of states. Little focus during the peace process on the accountability or representativeness of negotiators	Emerging focus on 'internal self-determination' as including transnational arrangements and accountable, representative government with effective participation of minorities
Persons displaced across borders may classify as refugees	Persons displaced internally do not classify as refugees
Obligation to punish grave breaches of humanitarian law	Less clear discretion to punish breaches of humanitarian law

is too *apologetic* to be taken seriously in the construction of international order. According to the latter, it is too *utopian* to the identical effect.⁵⁹

International lawyers, he argues, tend to counter these claims either by stressing the normativity of law, and being consequently vulnerable to charges of utopianism, or by stressing the close connection between international law and state behaviour, thus diluting their normative claims. This book has fallen within a more 'liberal' international law tradition by examining the impact of international law not just on how states interact with each other, but also on the internal constitutional arrangements of states.⁶⁰

The description of the role of international law built up through examination of the case-studies indicates a relationship of interchange. As parties use international law to articulate their claims, so international law responds to their claims evolving in the process, as with South African or Palestinian or Yugoslav-republic self-determination claims. As Berman notes, 'the power of international law to shape the identity of the protagonists of such conflicts cannot be separated from even its principled activities to remedy them.'⁶¹

Similarly, as parties come to design political and legal institutions, so international law informs and facilitates the negotiation process. More recently, as negotiators come to design mechanisms to address past violations, international law sets out a moral standard as regards impunity. Yet, peace agreements also play a part in shaping international human rights law. They take the abstract moral baseline of international human rights standards and build around them practical institutions aimed at

⁵⁹ Koskenniemi (1990b: 9).

⁶⁰ See Slaughter Burley (1993).

⁶¹ Berman (1998: 28).

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mediating between the legacy of the past and a new future. In doing they impact on the evolutionary direction of international law.

Thus, the relationship of international law to the human rights provision of peace agreements is neither one of traditional legal regulation, nor one of irrelevance.⁶² The relationship is perhaps best understood as one of dialectical evolution. It is an evolution which continues into the implementation stage, as international law and practice draw on the arrangements in peace agreements, even while adjudicating on the human rights performance of the institutions established therein.

CONCLUSIONS

In conclusion, the role of human rights in a peace process is revealed as neither wholly principled nor completely unprincipled political barter. Similarly, the role of international law with relation to the human rights component of a peace agreement is accordingly also revealed as more complex than traditional debates of realist and idealist allow.

In both cases this observation contains both limits on and opportunities for the role of law in peace agreements. The human rights component of an agreement should not be dismissed by politicians, domestic or international, as an add-on to the political institutions agreed. The place, role, and scope of human rights institutions should be understood to be largely determinative of the type of transformation of both conflict and society which will be possible. This observation should inform future institutional design and implementation. Appropriate expertise should be fully utilized in negotiations, and if possible built in to mediation processes.

Conversely, even strong human rights language and well-designed institutions in a peace agreement cannot be taken by human rights activists as a victory. It signals merely the start of another process—that of making the language a reality. It is hoped that this account of the tensions between the political and the legal, and between peace and justice, can inform that struggle.

As regards international law, while its traditional regulative function may seem particularly susceptible to political vagaries, this observation is not new. However, the facilitative impact of a broad range of soft and hard law standards indicates a greater role for international law than might have been imagined, and a need for international law to rise to the occasion. Politicians agreeing to human rights measures in the heat of negotiations often draw on international standards. Continued evolution of the

⁶² Cf. Byers (1999) (arguing from a review of customary law-making that international law is neither strictly political nor strictly legal).

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facilitative function of international law does not necessarily depend on a hardening of law, but more on international law remaining creatively connected to notions of 'good practice' and capable of commanding a moral normativity.

In conclusion, one final influence on the human rights component of peace agreements should not be forgotten; that is, the influence of other peace processes and peace agreements. Clear examples of exchange between processes can be mapped. The resulting transplants usually take on a different dynamic in their new context. In this book I have largely concentrated on trying to unpack the specific negotiating dynamics which resulted in how human rights were dealt with in the four different sets of peace agreements. I have done this because comparison across agreements is often reduced to a comparison of particular institutions and mechanisms, rather than the processes by which they are negotiated and their place and role within an agreement. However, it is also clear that such processes of comparison, whatever their form, can stimulate creative imaginings for difficult situations. For those who would wage peace, this is an important tangible and spiritual resource. The stories of the peace processes should continue to be told.

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