Peace versus Justice: Creating Rights as well as Order out of Chaos

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While 'peace' and 'justice' advocates share ultimate goals, the short-term concerns and strategies of practitioners in the two fields may differ dramatically. The potential contradictions of pursuing peace and justice are a particular challenge in the context of large-scale conflict, whether internal or international. Both mediators and human rights advocates could use more humility and less arrogance, since neither group can create world (or even local) peace on their own. This article argues that the two disciplines need to build on their shared values of impartiality and independence, while maintaining the distinctive features of each approach, including their concern with ensuring that the less powerful are adequately protected and represented. Neither group should be tolerant of injustice. It concludes that collaboration, or at least mutual appreciation, is certainly feasible, particularly as greater empirical knowledge is gained about both the limits and possibilities of outside interventions.

Perhaps because we wish that it were true, advocates working in fields that might very broadly be called 'peace' (conflict resolution, conflict management, diplomacy) and 'justice' (human rights, transitional justice, accountability) often assume that peace and justice are always compatible and complementary. While this may be true with respect to ultimate goals – we all want both – the short-term goals and strategies of practitioners in the two fields may differ fairly dramatically. Recognition of those differences is a necessary first step to ensuring that the theoretically compatible goals of peace and justice may be pursued with the least possible tension, whether in the short or long term.[1]

The potential contradiction of pursuing peace and justice simultaneously is a particular challenge in the context of large-scale conflicts, whether internal or international. The peacemakers generally have a clear idea of their immediate task, which is to stop the violence and pave the way for negotiations. But where does human rights fit in negotiation, mediation or conflict resolution strategies? More specifically, how do human rights norms affect issues such as who comes to the table, whether human rights must be included as part of any formal peace agreement, how human rights will be monitored in the post-agreement period, where human rights fit into post-agreement capacity-building, and how human rights affect long-term rule of law issues?

Who Comes to the Table?

One of the significant advances in international law and politics in the past decade has been the increased attention focused on 'international' crimes, particularly

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genocide, war crimes and crimes against humanity. Initially reflected in the special tribunals created by the UN Security Council to deal with the former Yugoslavia and Rwanda, respectively, this concern found its clearest expression in the creation of the International Criminal Court (ICC) in 1998; approximately 100 states are now party to the ICC Statute. Additionally, special tribunals with at least some international component are found in Sierra Leone and Cambodia.

If one takes international criminal accountability seriously, this poses obvious problems for negotiators or mediators who believe that the only way to achieve peace is to create a setting in which all of the parties to violence can participate, no matter how vicious their crimes. Sadly, the worst perpetrators are often significant military and/or political actors, and threatening them with criminal sanctions is unlikely to get them to the bargaining table. Unfortunately, such sanctions also seem to have had little deterrent effect, although the proponents of expanding international criminal law often assume without proof that such deterrence exists.[2]

The standard view of mediators is perhaps expressed in a publication by Conciliation Resources, a London-based NGO: 'It seems obvious that third parties should work to ensure that the parties to the conflict operate in ways that maintain humanitarian standards... But in the midst of conflict the issues become very difficult. Seldom does any party have "clean hands" and they have all fallen short of accepted humanitarian standards'.[3] The same organization implicitly prioritizes its own work as follows, putting itself firmly on the side of 'peace' rather than 'justice': 'While engagement with armed groups by states can involve complex issues of international law, state sovereignty and national interest, the issue is fundamentally about improving the lives of the local populations who are the victims of conflict.'[4]

Until 1999, the United Nations had no specific policy with respect to amnesties for crimes committed during conflict, and it is not difficult to think of countries in which new governments preferred not to investigate the past; Mozambique, where atrocities were widespread during its civil war, comes readily to mind. However, as some UN officials and NGOs became increasingly uncomfortable with the impunity enjoyed by former combatants for even the most horrific crimes, a set of guidelines was eventually developed under the leadership of long-time senior UN diplomat Alvaro de Soto and promulgated as an informal document in 1999.[5] These guidelines formed the basis of the UN's formal rejection of the amnesty that was included in the July 1999 Lomé Agreement on Sierra Leone.[6] At least one of the guidelines has been reiterated publicly and demarcates one of the normative boundaries of UN engagement: 'United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights.'[7] This principle has been scrupulously followed by UN representatives. Thus, the United Nations has adopted at least a negative norm: It will not lend its approval to impunity for international crimes, even if all parties to a conflict wish to do so.[8]

Thus far, no observer seems to have suggested that rejecting blanket amnesties means that mediators should not talk with suspected war criminals or invite them to participate in negotiations or any subsequent peace process. Given the unfortunate likelihood that widespread crimes will be committed in most of today's wars, any

other option would require that the international community pick a side and create peace, not just broker it, and actively seek to punish perpetrators. However, since an outside mediator usually becomes active only when neither side is likely to 'win', such an approach would be highly problematic even if there were sufficient political will to adopt it – which is clearly not the case in the present international environment.

The Thorny Issue of Accountability

It should first be clarified that individual criminal accountability per se does not constitute part of the main corpus of international human rights law, although many have argued strenuously that it should do so.[9] Human rights norms are primarily applicable to states, and their violation contravenes international law; such violations do not automatically (or even frequently) carry with them individual criminal sanctions. Although the persistent refusal of a state to safeguard rights through a policy of benign or deliberate neglect (for example, by refusing to conduct serious enquiries or institute prosecutions in situations of political disappearances or widespread spousal abuse) would constitute a human rights violation, discretion in the prosecution and punishment of crimes normally falls within a government's 'margin of appreciation'.[10]

Despite this fact, the issue of criminal accountability for past 'human rights' crimes is thought by many to be the essence of 'transitional justice' and human rights in post-conflict societies.[11] The major international human rights NGOs dedicate significant efforts to promoting such accountability, and calls for trials of (usually only the major) perpetrators of war crimes and crimes against humanity have been raised in nearly every large-scale conflict since the early 1990s. The New York-based International Center for Transitional Justice was founded in 2001 (with a reported budget of $25 million over five years) to promote accountability for 'past mass atrocity or human rights abuse' through criminal prosecutions and other methods, such as truth commissions.[12] These calls are based on demands for 'retributive justice', but the claim also is made that prosecuting war criminals and their ilk will serve as a deterrent against similar conduct in future armed conflicts, that it responds to legitimate demands by victims, and that it is a necessary component of healing or reconciliation processes that must occur in order to ensure meaningful long-term peace.

Demanding criminal accountability is very different from the formal UN position of simply refusing to endorse any peace agreement that provides for blanket amnesty or impunity for international crimes. Neither the UN guidelines for mediators referred to above nor subsequent UN practice clarifies whether mediators should actively seek prosecution or some kind of truth commission arrangement to document past atrocities.

In 1997, French expert Louis Joinet submitted a final report on impunity to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which included a set of principles for the protection and promotion of human rights through action to combat impunity.[13] Several years later, another independent expert, US law professor Diane Orentlicher, was appointed by the

UN Commission on Human Rights to update the principles; her report, with an updated set of principles, was submitted to the Commission in 2005.[14]

These principles have been cited as constituting 'best practice' in the area of accountability, and they set an extremely high standard for states to follow.[15] As potential international norms, however, they certainly reach far beyond the current state of the law. The principles include an 'inalienable right to know the truth about past events',[16] and an obligation on states to 'ensure that victims do not again have to endure violations of their rights'.[17] This latter obligation requires that states 'undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions'.[18]

Although Orentlicher claims that her report 'chronicle[s] remarkable advances in national and international efforts to combat impunity',[19] her enthusiasm is warranted only if one focuses on 'efforts' rather than 'achievements'. It is clearly too soon to determine on the basis of any objective evaluation whether criminal accountability is always necessary or even conducive to a sustainable peace settlement, however much human rights advocates would like to believe this to be the case. With respect to international tribunals, for example, Helena Cobban observes: 'The idealists who supported the ICC's creation hoped that it would help check the power of governments and improve the well-being of much-abused people. There is little to suggest that it will do either'.[20]

In this context, one also might consider the decision of the East Timorese government not to pursue prosecutions against perpetrators of the massacres in that country in 1999 and to opt instead for a Commission on Truth and Friendship. 'What's more important for us?' said Nobel Peace Laureate, Jose Ramos-Horta, East Timor's foreign minister, 'That democracy slowly is consolidated in Indonesia? Or the blind pursuit of justice at the expense of stability in Indonesia?'[21] Another analysis of accountability efforts in Southeast Asia concludes: 'For now, the jury should stay out on whether the various permutations of the transitional justice industry will be taking East Timor, Indonesia and Cambodia back into the fire or out to safety', although the author does observe that 'to date, the accountability efforts have not caused major disruption or destabilization in any of the three countries.'[22]

One possible way of reconciling the need for accountability with the necessity of overlooking many, if not all, crimes in the course of negotiating a peace settlement and establishing a transitional government may be found in the concept of 'sequencing'.[23] Sequencing allows criminal actions against perpetrators to be delayed until some later date, when they are out of power and/or the state itself is more stable. These subsequent investigations and prosecutions require either non-adoption or annulment of broad amnesty provisions and are perhaps best exemplified by the attempts to institute criminal prosecutions in countries such as Argentina, Chile and Cambodia decades after the crimes occurred. Of course, sequencing (or avoiding difficult decisions) may violate the maxim that 'justice delayed is justice denied', but it may be the only realistic option in many situations.

This approach is implicitly reflected in the following September 2003 statement to the Security Council by the UN Secretary-General:

> Ending the climate of impunity is vital to restoring public confidence and building international support to implement peace agreements. At the same time, we should remember that the process of achieving justice for victims may take many years, and it must not come at the expense of the more immediate need to establish the rule of law on the ground ...
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> We also know that there cannot be real peace without justice. Yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times, and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult, or even impossible, to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive.
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> But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.[24]

The Role of Human Rights in Peace Agreements

Concluding an examination of peace versus justice in the UN context in late 2004, this author observed that empirically testing the relationship between the inclusion of human rights provisions in peace agreements and their impact on both the course of negotiations and ultimate implementation of the agreement 'is long overdue'.[25] Since that time, at least one new study, by the Geneva-based International Centre for Human Rights Policy (ICHRP), has partially filled that gap;[26] the study's primary author, Christine Bell, is also the author of one of the few earlier studies devoted to this topic.[27]

Most contemporary peace agreements do include reference to human rights principles, if only through a general promise by all parties to respect human rights in the future. However, as Bell notes: 'General rights frameworks often do not threaten the interests of the parties.... Agreement on basic human rights principles framed in general terms can mask and postpone disagreement in the application of human rights in practice.'[28] Nonetheless, there seems to be little harm in including a commitment to guarantee human rights in the future, even if the guarantee is more symbolic than substantive.

The key issue, of course, is the implementation of the human rights (and other) provisions found either in initial ceasefire or interim agreements or in more comprehensive powersharing or transitional arrangements for post-conflict governance. Here, the details become important, and any role for the 'international community' in monitoring the agreement is likely to be crucial. Vague political commitments to human rights are unlikely to be enforceable, and differing interpretations of such commitments (for example, to protect 'minority rights' or establish 'democracy') may actually make implementation more difficult. Even broad incorporation of the international norms contained in major

multilateral treaties may mean little, in the absence of any mechanism for monitoring, reporting or enforcing their provisions.

On the other hand, where human rights violations were at the core of the conflict itself – for example, in El Salvador or Guatemala – international human rights norms help to legitimize the inclusion of both general and situationally specific human rights provisions in peace agreements. In some instances, particularly where these norms set at least minimum standards that govern minority–majority relations or participation in the political process, obtaining agreement to specific provisions may also resolve some (although certainly not all) of the differences that lay at the basis of the conflict.

One must be careful not to push parties too far beyond their real willingness to compromise or change tactics, but mediators might also encourage inclusion of meaningful human rights provisions by promising to provide financial and/or technical assistance to ensure that they are implemented. New institutions devoted to aspects of human rights protection and promotion are frequently created in peace agreements, even though this does not guarantee that they will be politically relevant in the post-settlement phase.

Outsiders must be wary of adopting an overly reactive approach to human rights, in which provisions in peace agreements are designed primarily to ensure monitoring and enforcement, as opposed to a partnership approach in which the promotion of human rights will be achieved by building government institutions. Tonya Putnam has been particularly critical of this approach, arguing that tactics such as gathering information about violations, expressing formal protests, pressuring the government, and using the justice system to enforce individual accountability are doomed to fail, 'because they assume the functionality of the very institutions that peace implementation operations are tasked to help bring into existence'.[29]

One also should guard against using the opportunity of drafting wide-ranging human rights provisions in peace agreements or new constitutions in order to promote particular agendas (no matter how worthy) unrelated to the conflict itself. For example, while one cannot disagree with the substance of the ICHRP recommendation that 'the particular needs of women and of vulnerable groups should be specifically addressed in human rights frameworks',[30] the inclusion of such issues where they are not directly relevant to the conflict (women's rights per se, for example, were hardly a major concern in conflicts such as Northern Ireland or Sri Lanka) simply expands an already long list of human rights obligations that are likely to be extremely difficult to meet.

Bearing in mind the difficulty of determining causation in any complex post-settlement situation, we are left with insufficient evidence to conclude that the mere inclusion of human rights provisions in peace agreements, without institutional change and/or significant capacity-building, makes reaching an agreement easier or more successful in the short or medium term. At the same time, the (re)assertion of human rights norms is an appropriate goal in and of itself, and there is no evidence that including human rights provisions makes it more difficult either to reach agreement or to implement peace settlements.

Peacemakers often undervalue the concept of justice (excluding the issue of criminal accountability) in fashioning a viable agreement, but it may be an essential tool in attempts to achieve balance among parties with different degrees of power. In addition, internationally recognized human rights norms set a floor for negotiations and may favourably constrain some negotiation options (for example, by rendering impossible a consideration of any agreement by the most powerful factions that would wholly exclude less powerful groups). At the same time, human rights advocates should not let the best be the enemy of the good, by insisting that only complete adherence to international 'best practice' is acceptable.

Monitoring and Protecting Human Rights in the Immediate Post-agreement Period

Once accountability is dealt with, and assuming that some human rights provisions are included in a peace agreement, how careful should one be about ensuring that human rights abuses do not continue? While the answer may appear obvious – of course, human rights abuses must cease – reality again rears its ugly head. The dilemma is that there are great pressures to give the benefit of the doubt to transitional or coalition governments, many or all of whose partners may have been guilty of gross human rights violations during the conflict, because of the fear that public criticism of that government on human rights grounds may undermine the carefully constructed coalition and lead to instability. The dilemma is even more acute when there is no history of responsible, rights-protecting government in the past, and the expectations of human rights advocates and civil society groups may be wildly unrealistic, in light of a country's history. One cannot pretend that post-conflict society is likely to live up to normal peacetime human rights norms, particularly when such norms were not respected before the conflict. There is a difference between pre-Pinochet Chile, a country with a long history of constitutionalism and rule of law, and pre-genocide Rwanda, a country wracked by massacres and authoritarian government from its inception. Such differences must be taken into account by both negotiators and human rights practitioners.

One somewhat technical way around the dilemma might be to rely on the concept of states of emergency, during which the temporary derogation from many normal human rights norms is permitted. Even though open armed conflict has ceased, a fragile country recovering from massive violence might certainly be able to make a legitimate case for restricting some rights that would otherwise be guaranteed. The key to adopting this approach, however, is to ensure that such derogations or exceptions are subject to a meaningful degree of oversight, preferably by both national and international bodies. International norms regarding permissible derogations are strict, requiring that any suspension of rights be only 'to the extent strictly required by the exigencies of the situation . . . not inconsistent with . . . [states'] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language,

religion or social origin.'[31] In practice, this means that a derogating state must justify the specific derogation in terms of its being both necessary and proportionate to ensuring a legitimate goal. And, of course, any derogation must be temporary.[32]

Whatever the human rights standard to which the parties agree, continuing abuses will undermine the legitimacy of any government and lead the population to believe that little has changed since the end of the conflict, except for the presence of new (sometimes along with the old) and equally corrupt leaders. Whatever the decision with respect to accountability for past abuses, it is essential that future abuses not be tolerated. Such a position is not inconsistent with granting a relatively broad 'margin of appreciation' to a new government, so long as that deference does not include turning a blind eye to abuses or attempting to excuse them by arguing that meaningful criticism might destabilize a carefully crafted transitional regime.

Finally, although the focus in the immediate post-agreement period is usually on physical security and political rights, the rapid implementation of economic, social, and cultural rights also will tend to support any peace accord. Many conflicts stem from economic and social inequities (whether real or perceived), and progress towards the non-discriminatory, equitable distribution of resources is essential. Such human rights issues go well beyond the lip service normally given to 'development', and foreign economic assistance in the short term should be directed at satisfying basic rights and needs.

Rule of Law and Long-term Capacity Building

Much of human rights is about procedural fairness, where the government acts as a neutral arbiter and follows the agreed-upon rules of the game so that solutions to past and future problems can be determined in a manner that the population generally perceives as fair.[33] In many countries, incompetent or inadequate police forces, biased or corrupt courts, and inhumane prisons not only perpetuate human rights violations but also undermine attempts to introduce stability and accountability to newly formed governments.

The scope of 'rule of law' is clearly beyond that of any single international entity, and one challenge of peacebuilding is to coordinate activities designed to promote the rule of law in a manner that is both efficient and sustainable.[34] The breakdown or absence of the rule of law often leads to violence, since aggrieved parties believe that they cannot receive a fair hearing in administrative or judicial fora. Given the stresses in any post-conflict society, improvement in equality and procedural fairness is even more essential in ensuring that an often fragile peace agreement or societal accommodation does not disintegrate. This need not only extends to politically sensitive issues, such as the treatment of minorities or freedom for political parties, but is equally required with respect to ordinary civil disputes, the treatment of individuals by the government bureaucracy, land issues, non-political criminal justice, training of correctional officers and similar issues.

> Reform of criminal justice, police, and judiciary must be seen as concepts which go beyond the basics of courts and institutional structures . . . . Property disputes, birth registrations, juvenile justice, citizenship/statelessness, and Disarmament, Demobilisation and Reintegration (DDR) can all be essential to insuring an end to conflict and establishing the rule of law. While constitutional courts are often a focus of reform, it is often at the lowest court level, or through the actions of police, that the most marginalised and excluded find themselves denied access to justice.[35]

Establishing the rule of law should not be confused with the more visible or external indicators of democracy, such as elections. Several studies have noted problems in holding early elections, such as those in Bosnia and Herzegovina soon after the 1995 Dayton Agreement, which may have the effect of consolidating existing ethnic and other divisions. Roland Paris warns against rapid attempts to democratize and introduce market reforms into post-conflict situations as follows: 'What is needed in the immediate post-conflict period is not quick elections, democratic ferment, or economic "shock therapy" but a more controlled and gradual approach to liberalization, combined with the immediate building of governmental institutions that can manage these political and economic reforms.'[36] The danger of this kind of gradualist or institutionalist peacebuilding is that it may ignore or downplay the implementation of fundamental human rights norms that are essential for even short-term stability, although the caution against quick-fix elections and economic restructuring may well be valid.

Long-term capacity building is often the biggest carrot available to outside mediators, because international donors are enamoured of the concept and are often willing to support institution building with financial assistance. However, institution building also provides an opportunity for squabbling over the 'spoils' of war (and international assistance), and the creation of civil society groups and NGOs often becomes the quickest way to relative riches in a post-conflict environment. And if one must prove one's civil society credentials by constantly criticizing the government, the risk is that criticism may displace the collaboration among government, civil society and individuals that is essential to (re)building a viable country.

No one would dispute that long-term capacity building and establishing the rule of law are essential to sustainable peace. At the same time, however, both mediators and human rights advocates must recognize that, in many cases, neither governmental capacity nor reliable justice ever existed in countries emerging from widespread conflict. Thus, the task is the *creation* of such institutions and attitudes, not merely their reconstruction.

Similarly, although the international community regularly calls for particular attention to be paid to women and other disadvantaged or marginalized groups, this cannot be accomplished to the detriment of more pressing needs of the whole population of the state. Ingrained cultural norms and prejudices often take generations to change; while a peace process may offer an opportunity to raise these issues, they are rarely central to the causes of the conflict and may not be central to the resolution of that conflict either. Of course, in some situations,

discrimination against particular regions or ethnic groups are at the heart of the conflict, and redressing such discrimination will be essential to creating a stable peace. However, general discrimination against women or the marginalization of the poor are quite different issues. Such problems must be addressed as soon as possible as part of any meaningful campaign to promote and protect human rights, but they should not be linked to wider issues of peacemaking or stabilization.

Flowing from these observations, it is likely to be counterproductive for the international community to promise more than it (or the country itself) can deliver in the medium or long term. Populations should not be promised that, in only a few years, their societies will become economically prosperous, politically open, ethnically tolerant and free of corruption and discrimination. Of course, these should be the ultimate goals of international intervention, both short-term and long-term. However, raising expectations too high in situations where reality will almost inevitably fall short will only put greater pressure on an often tenuous new government and make it easier for 'spoilers' to highlight the apparent failures of any peace agreement.

It is worth bearing in mind the following admonition from former Special Representative of the Secretary-General Lakhdar Brahimi:

> [Peacekeeping is becoming more difficult because] our expectations and agendas are not getting any more realistic. Instead, they have become more ambiguous and multifaceted, seeking to promote justice, national reconciliation, human rights, gender equality, the rule of law, sustainable economic development and democracy – all at the same time, from day one, now, immediately, even in the midst of conflict.[37]

Conclusions

The goals and expertise of the human rights advocate are different from the goals and expertise of the mediator or diplomat.[38] The normative and often adversarial approach of human rights professionals does not generally involve taking into account the views of all sides in a dispute, and neutrality is seen as inappropriate in the face of human rights violations. On the other hand, the mediators zealously guards neutrality as a essential attribute of their job, and the core conflict resolution principles of participation, inclusion, empowerment, cultural sensitivity and equity are quite different from the normative demands of human rights law.

At the same time, human rights practitioners and mediators share the values of impartiality and independence, which are essential to their tasks. Each discipline is concerned with ensuring that the less powerful are adequately protected and represented. Neither group should be tolerant of injustice, although they may disagree on the definition of justice and the degree of relevance it may have at various stages of negotiations.

What has become abundantly clear in the past decade is that neither 'negative peace' (the absence of violent conflict) nor an exclusive focus on human rights protection is sufficient to assist societies in moving from human rights violations

and conflict to a fairer, more peaceful life. The positive attributes and focuses of *both* disciplines must be promoted, alongside the efforts of other actors (ethicists, religious figures, intellectuals) who foster values such as humanitarianism, tolerance, generosity, and fairness.

Although they are rather prosaic, the conclusions of the ICHRP report are probably valid:

> Neither an attempt to impose human rights standards as abstract principles, nor the jettisoning of such standards in the search for a cease-fire, is likely to produce lasting solutions. Rather, the best approach to 'peace v. justice' dilemmas may simply be to view them as on-going dilemmas which require to be managed in pursuit of a just and sustainable peace.[39]

Human rights norms and standards provide a floor of justice below which no attempt at conflict resolution should go. This is not an exceptional statement – all mediators have a moral 'bottom line' that prevents them from, for example, facilitating the settlement of a conflict between two parties by condoning genocide against a third party. Conflict resolution practitioners should be aware of human rights norms in the same way that they are aware, in a purely domestic context, of any laws that might limit the scope of potential solutions to the conflict with which they are dealing (this is sometimes referred to as operating within the 'shadow of the law').

At the same time, very few international human rights norms are absolute, and there is legitimate room for taking local conditions into account when one attempts to translate general international norms into specific domestic practices. Neither peace agreements nor their implementation can reflect only global norms without ensuring their relevance to the particular situation at hand. One example is the post-1994 situation in Rwanda, when some international human rights NGOs condemned the use of the informal village-based *gacaca* process to deal with those involved in the genocide as incompatible with international fair trial norms. While *gacaca* may be flawed, insistence on 'fair trials' for over 100,000 detainees in a country without a functioning judiciary is ludicrous and counterproductive.

Human rights advocates are often adversarial in their approach, but this is not necessarily bad. As in the domestic context, reason and compromise do not always prevail, and there is room for attempting to protect rights 'the old fashioned way', through courts, adverse publicity, and public pressure. Such pressure may even be useful to mediators, as a means of narrowing distasteful options that might otherwise make it more likely that notorious criminals or corrupt officials are able to retain a major share of power in a post-settlement situation.

Similarly, conflict resolution techniques can be valuable at any stage of a conflict or potential conflict, whether or not human rights norms are also involved. The basic conflict resolution principles of neutrality, fairness, inclusiveness and 'a level playing field' are essential in helping to encourage adversaries to better understand their options. Human rights advocates need to understand that the goal is not to 'win' debates about violations but to change government practices and attitudes. This change may often be brought about more readily through

dialogue, consensus building and flexibility, rather than the 'naming and shaming' that is the stock-in-trade of most major international NGOs. At the same time, not every situation can be honestly described as 'win-win', and mediators must be more forthright when they attempt to persuade parties that this is possible. One of the goals of effective conflict resolution should be to articulate what 'losing' for one side might mean – and the human rights guarantees available to potential 'losers' might be not only relevant but reassuring.

Human rights norms were developed in the post-1945 era in large part as preventive tools to constrain governments from mistreating their own citizens. The goal was not only humanitarian but also to ensure international security; while the maxim that democracies do not go to war with one another may not apply in every situation, the notion that rights-respecting states whose populations are generally treated fairly are less likely to be outwardly aggressive rings true. Thus, human rights rely on peace for their effective implementation and contribute to ensuring that peace exists.

Unrealistically forcing peacetime human rights norms into a context of widespread violence or even into the fragile environment of post-conflict settlements may do a disservice to both human rights and peace. Other norms, such as refugee law and the laws of war, are of more immediate relevance. There is also scope for purely humanitarian activities, in addition to the imposition of law. At the same time, 'peace at any cost' often has a very high cost indeed, one borne on the backs of ordinary people who may see their rights sacrificed to appease those who began the conflict in the first place. Neither justice nor sustainable peace can be built on such a scaffold.

In the end, both mediators and human rights advocates could use more humility and less arrogance. Neither group can create world (or even local) peace by itself, and each must recognize that there are other morally and politically legitimate concerns that might have an impact on the way in which they do their work. Collaboration or at least mutual appreciation is certainly possible, and one should hope that it increases as we gain more knowledge about how to make our interventions more effective.

Perhaps there are still lessons to be learned from what purports to be an old Irish proverb, which is frequently found on tea towels and plaques in souvenir stores: 'May I be given the serenity to accept the things that I cannot change, the courage to change the things that I can, and the wisdom to know the difference between them.' Neither human rights nor conflict resolution practitioners – nor the 'international community' – can change everything, and we need to understand the limits as well as the possibilities of what outside intervention can accomplish.

NOTES

1. There has been relatively little scholarship specifically devoted to examining the relationship between human rights and conflict resolution. In addition to references cited elsewhere in this essay, see Eileen F. Babbitt and Ellen Lutz (eds), *Human Rights and Conflict Resolution in Context* (forthcoming, 2007) [examining the cases of Colombia, Northern Ireland, and Sierra Leone]; Carnegie Council on Ethics and International Affairs, *Human Rights Dialogue* (Special

Issue on Integrating Human Rights and Peace Work), Winter 2002; Hurst Hannum and Eileen F. Babbitt (eds.), *Negotiating Self-Determination*, Lanham, MD: Lexington Books, 2006; Michelle Parlevliet, 'Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management', *Track Two* Occasional Paper, Vol.11, No.1, Centre for Conflict Resolution, University of Cape Town, 2002, pp.1–52; Joe Saunders, 'Bridging Human Rights and Conflict Resolution: A Dialogue Between Critical Communities,' report of Carnegie Council workshop, 16–17 July 2001 (available at www.cceia.org).

2. To offer only two examples, the existence of the ICTY obviously had no deterrent effect on the actions of Serb forces either in Srebrenica in 1995 or in Kosovo in 1999. The existence of neither the ICTR nor the ICC appears to have had much impact on the scale of atrocities in Africa, from Darfur to the Democratic Republic of Congo, although, in fairness, it is possible that meaningful and timely prosecutions by the ICC of those responsible for crimes in Sudan and Uganda could have an impact on conflicts in the future.
3. Clem McCartney, *Engaging Armed Groups in Peace Processes: Reflections for Practice and Policy from Colombia and the Philippines*, Conciliation Resources: London, 2005, p.7.
4. Robert Ricigliano, 'Introduction: Engaging Armed Groups in Peace processesP, in Ricigliano (ed.), *Choosing to Engage: Armed Groups and Peace Processes*, London: Conciliation Resources, 2005.
5. Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution. This is an internal, quasi-confidential document that guides UN mediators in a number of areas, particularly with respect to human rights and accountability for violations of international humanitarian law.
6. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Lomé, 7 July 1999 (www.usip.org/library/pa/sl/sierra_leone_07071999_toc.html).
7. *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (2004), para.10 (Rule of Law Report); cf. Michael O'Flaherty, 'The Sierra Leone Peace Process: The Role of the Human Rights Community, *Human Rights Quarterly*, Vol.26, No.1, 2004, pp.29–62.
8. Contrast this position with the following, which is discussed under the heading 'Difficult Issues and International Law': 'Questions of amnesty, human rights, treatment of prisoners, torture, maintenance of 'no-go' zones, laying of mines, etc. will arise at an early stage in most negotiated settlements to armed conflict. The mediator's responsibility is to draw the parties' attention to the appropriate international law provisions, while conceding that the terms of the agreement will ultimately be the responsibility of the parties themselves. With issues of amnesty in particular, the mediator may simply point out that such provisions will have limited applicability outside their territories and may serve to undermine their status and international support.' N. (Fink) Hayson, 'Engaging Armed Groups in Peace Processes: Lessons for Effective Third-party Practice', in Ricigliano (see n.4 above).
9. See, e.g., Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, Vol.100, 1991, pp.2539–615.
10. The phrase is taken from the jurisprudence of the European Court of Human Rights and many other international bodies.
11. For a discussion of the problematic nature of the term 'transitional justice', see Hurst Hannum, 'Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding, *Human Rights Quarterly*, Vol.28, No.1, 2006, pp.36–7.
12. See International Center for Transitional Justice Mission Statement, available at www.ictj.org/aboutus.asp.
13. UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997); the set of principles is contained in Annex II of the report.
14. UN Doc. E/CN.4/2005/102 and Add.1 (2005).
15. International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements*, Geneva: ICHRP, 2006 (draws on case studies of Bosnia-Herzegovina, Burundi, Cambodia, El Salvador, Guatemala, Mozambique, Northern Ireland, and Sierra Leone), p.96.
16. Orentlicher (see n.9 above), Add.1, Principle 2.
17. Ibid., Principle 35.
18. Ibid. Adequate representation of women and minority groups is considered to be 'essential' to the achievement of these aims.
19. Orentlicher, para.70.

20. Helena Cobban, 'Think Again: International Courts', *Foreign Policy*, March/April 2006, issue 53, pp.22–8. The subtitle of the article (perhaps not Cobban's words) reads: 'Criminal tribunals in places such as Rwanda and the former Yugoslavia were supposed to bring justice to oppressed peoples. Instead, they have squandered billions of dollars, failed to advance human rights, and ignored the wishes of the victims they claim to represent. It's time to abandon the false hope of international justice.' Also see Cobban, *Amnesty after Atrocity?: Healing Nations after Genocide and War Crimes*, Boulder, CO: Paradigm Press, 2006.
21. Ellen Nakashima, 'East Timor massacre survivors pursue justice', *Boston Globe*, 18 Sept. 2005, p. A14.
22. Suzannah Linton, *Putting Things into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia*, Baltimore: University of Maryland School of Law, 2005 (Maryland Series in Contemporary Asian Studies, No.3, 2005, pp.88, 82.
23. See, e.g., *Negotiating Justice?* (n.15 above), pp.90, 113.
24. Press Release, Secretary-General, 'Secretary-General Expresses Hope for New Security Council Commitment to Place Justice, Rule of Law at Heart of Efforts to Rebuild War-Torn Countries', UN Doc. SG/SM/8892, SC/7881, 25 Sept. 2003.
25. Hannum (n.11 above), p.46. For an early exchange on the topic, compare Anon., 'Human Rights in Peace Negotiations', *Human Rights Quarterly*., Vol.18, 1999, pp.249–58, with Felice Gaer, 'UN-Anonymous: Reflections on *Human Rights in Peace Negotiations*', *Human Rights Quarterly*., Vol.19, 1997, pp.1–8.
26. *Negotiating Justice?* (n.15 above); also see Cobban (n.20 above). Although they are not empirical studies, cf. an April 2006 speech by the Norwegian Minister of Foreign Affairs, Jonas Gahr Støre, 'The Role of Human Rights in Peace Agreements – Norway's facilitation of peace processes' (http://odin.dep.no/ud/english/news/speeches/minister_a/032171-090557/dok-bn.html), and Amnesty International's '15-Point Programme for Implementing Human Rights in International Peace-keeping Operations' (http://web.amnesty.org/pages/aboutai-recs-peace-eng).
27. Christine Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press, 2005. Another quasi-empirical study is Tonya L. Putnam, 'Human Rights and Sustainable Peace', in Stephen J. Stedman et al. (eds.), *Ending Civil Wars: The Implementation of Peace Agreements*, Boulder, CO: Lynne Rienner, 2002.
28. *Negotiating Justice?* (n.15 above), p.40.
29. Putnam, p.238. Contrast Bell's recommendation that 'human rights frameworks should have clear enforcement mechanisms which meet international standards', *Negotiating Justice?* (n.15 above), p.48.
30. *Negotiating Justice?* (n.15 above), p.48.
31. The quoted language is from art. 4 of the Covenant on Civil and Political Rights; other international instruments have similar provisions.
32. On derogations and states of emergency, see generally J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, Philadelphia: University of Pennsylvania Press, 1994; Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and Case-Law of the International Monitoring Organs*, The Hague: Kluwer, 1998.
33. Rule of Law Report (n.7 above), paras. 2, 4.
34. See generally Rule of Law Report (n.7 above); Hannum (n.11 above), pp.41–3.
35. *Negotiating Justice?* (n.15 above), p.105.
36. R. Paris, *At War's End: Building Peace After Civil Conflict*, Cambridge: Cambridge University Press, 2004, pp.7–8.
37. B. Crossette, 'The U.N.'s Top Envoy Speaks Out, But Who's Listening?' *UN Wire*, 19 July 2004. Others have reached similar conclusions: 'Democratisation efforts ... are premised on the idea that the democratic state functions as an entity in which the population participates. However, the fact that most populations have never experienced a democratic state or that their immediate experiences are not based on liberal-style democratic principles appears to have been overlooked.' Conflict, Security and Development Group, King's College London, *A Review of Peace Operations – A Case for Change* [Overall Introduction and Synthesis Report], London: King's College, 2003, para. 84, available at http://ipi.sspp.kcl.ac.uk/rep002/index.html.
38. See generally E. Lutz, E.F. Babbitt, and H. Hannum, 'Human Rights and Conflict Resolution from the Practitioners' Perspective', *Fletcher Forum of World Affairs*, Vol. 27, Winter/Spring 2003, pp.173–93.
39. ICHRP, p.113.