

Promoting reconciliation and protecting human rights: An underexplored relationship

Introduction

The United Nations (henceforth, UN) was correct in asserting that the absence of war ‘can only create a space in which peace can be built’.¹ This chapter examines the challenges that exist in filling this space and particularly, in reconciling previously warring groups in ethnically divided societies. First, it argues that reconciliation can only be achieved when members of different ethnic groups rehumanise and start trusting each other. It then makes the case that reconciliation and human rights do not coexist in an easy relationship; rather, the connections between them are varied and often contradictory. On the one hand, human rights are indeed positively connected to reconciliation. On the other, the two terms can also be at odds with each other: human rights protection can undermine reconciliation, while the language of reconciliation sometimes derails the process of protecting human rights. In addition to these positive *and* negative connections between the two terms, it is also possible that human rights and reconciliation remain completely unconnected. While the former is well suited in inducing *legal and institutional* changes, it is *social and psychological* changes that the latter requires.

These conclusions about a nuanced relationship between human rights and reconciliation directly challenge the UN orthodoxy. The long-standing assumption of the international community has been that there is an exclusively positive connection

¹ Panel on United Nations Peace Operations, 'Report of the Panel on United Nations Peace Operations', (New York: United Nations, 2000), para. 3. (Henceforth, 'Brahimi Report'.)

between the two terms and that reconciliation in ethnically divided, post-conflict societies always ‘requires that past human rights violations be addressed’.² This is often treated as a self-evident truth and no attempts have been made to explain it in any more detail. It is merely sufficient it seems, to reiterate that ‘United Nations human rights personnel can play a leading role [...] in helping to implement a comprehensive programme for national reconciliation.’³ Challenging this orthodoxy about the relationship between reconciliation and human rights is not only an exercise of theoretical importance. Rather, it can have profound practical implications on how human rights are used in post-conflict societies themselves. Thus, I support my theoretical conclusions by using examples from four such case studies; Northern Ireland, Bosnia and Herzegovina, Cyprus and South Africa. These conclusions are of increased significance in light of the ongoing ethnic conflicts in the Middle East and elsewhere and the prominent role that international peacebuilders are likely to play in their aftermath.

Defining ‘reconciliation’ and ‘human rights’

The frequent repetition of the term ‘human rights’ in connection with ‘reconciliation’ in UN reports, confirms the expectation that they both have important roles to play in peacebuilding operations. For example, the High-level Panel on Threats, Challenges and Change refers to the importance of ‘local capacity-building for human rights and reconciliation’, which ‘can greatly benefit long-term peacebuilding’.⁴ Similarly, the Brahimi Report argues that ‘a mission well accomplished’ is one where the

² Ibid., para. 24

³ Ibid., para. 41

⁴ High-Level Panel on Threats Challenges and Change, ‘A More Secure World: Our Shared Responsibility’, (New York: United Nations, 2004), para. 229.

population of the post-conflict country has been given the opportunity ‘to build and hold on to peace, to find reconciliation, to strengthen democracy, to secure human rights.’⁵ Despite such references however, the UN has defined neither reconciliation nor human rights. I will be using a definition of reconciliation that emphasises the importance of *meaningful cooperation* between the members of previously warring groups. In order for this meaningful cooperation to be achieved, I argue that it is necessary for people to start rehumanising and trusting each other. I will also suggest that peacebuilders have adopted a rather narrow definition of the term ‘human rights’, as only referring to the protection granted by *legal* bodies, such as domestic and international courts. Both of these definitions have, at least impliedly, been accepted and relied on by UN peacebuilders in practice. Yet, little attention has been paid to the fact that the narrow and legalistic understanding of human rights is often unhelpful in promoting the broader objectives of reconciliation.

The term ‘reconciliation’ has been subject to various different definitions. For example, McEvoy *et al* conceptualise reconciliation as the need to respect the rights of others and argue that this definition is practically important because it provides a discourse and vocabulary in which political conflicts can be framed.⁶ Arguably however, this understanding of reconciliation is too restrictive because it ignores the fact that not every single political conflict can be expressed in rights terms. Moreover, in the likely scenario where the parties are not in agreement as to what each competing right actually entails, expressing the political conflict in rights terms, only rephrases, rather than successfully resolves, the problem. Finally, this definition

⁵ Brahimi Report, p. xv.

⁶ Lesley McEvoy, Kieran McEvoy and Kirsten McConnachie, 'Reconciliation as a Dirty Word: Conflict, Community Relations and Education in Northern Ireland', *Journal of International Affairs*, 60/1 (2006), 81-106.

should be avoided for the purposes of this chapter because of its unsuitability in answering the question at hand: since our objective is to clarify the relationship between rights and reconciliation, any analysis becomes circular if reconciliation itself is defined as the respect of other people's rights.

A more appropriate definition of reconciliation therefore focuses, not on the *rights* of others, but on the importance of promoting *meaningful cooperation* between the previously warring parties. Two important distinctions should be made in order to clarify this definition of reconciliation. The first is between meaningful cooperation and inter-group harmony because despite the numerous hurdles in achieving the former, this is a much more modest aim than the arguably utopian goal of achieving the latter.⁷ As Govier and Verwoerd put it, a 'realistic goal in contexts of reconciliation is not total harmony; nor is it a state of blissfully enduring unity.'⁸ In order for harmony to exist, there must be a compatibility of the groups' needs and interests, but competitive politics in divided societies operate by highlighting precisely this lack of compatibility. Moreover, had such compatibility existed, it is unlikely that the society would have become ethnically divided and resorted to war in the first place. Separate groups, characterised by such distinct identities, needs and interests, do not have to be assimilated in order for reconciliation to be achieved. Reconciliation does not require the elimination of differences, but the ability to live with these differences through cooperation.

⁷ For a definition of reconciliation as inter-group harmony, see Yaacov Bar-Siman-Tov, 'Dialectics between Stable Peace and Reconciliation', in *From Conflict Resolution to Reconciliation*, ed. by Yaacov Bar-Siman-Tov (Oxford: OUP, 2004), 61-80, where he argues that reconciliation involves 'transforming the relations between rival sides from hostility and resentment to friendly and harmonious relations.' (p. 72)

⁸ Trudy Govier and Wilhelm Verwoerd, 'Trust and the Problem of National Reconciliation', *Philosophy of the Social Sciences*, 32/2 (2002), 178-205, p. 185.

The second distinction that must be made is between meaningful cooperation and mere co-existence among members of different ethnic groups. If people are living next to each other without communicating, cooperating or having common goals, wishing that they did not have to mingle with the other group at all, there is no real reconciliation.⁹ It is just a brief pause before the negative perceptions of each group resurface and potentially result in even more violence. If the UN is right that post-conflict states need a ‘society wide system of values [...] to put a premium on peace, to desire peace, to seek peace and to stand for peace’, then reconciliation has to mean more than simple co-existence.¹⁰ Rejecting this minimalist definition however does not mean that meaningful cooperation has to stem from altruistic goals of loving one’s enemy. It could result from the simple understanding that unless the members of different ethnic groups reconcile, the alternative will be catastrophic for all of them.¹¹

It transpires that meaningful cooperation occupies the middle ground in the spectrum between inter-group harmony and mere co-existence. Relationships of meaningful cooperation only become possible when members of different ethnic groups start trusting each other; in other words, when they form a confident expectation that one will not act in a manner, which will take advantage of the other’s vulnerability.¹² This expectation is unlikely to be popular, especially in the early stages of the peacebuilding process, but what is needed is not absolute trust. Rather, members of different ethnic groups must be comfortable enough with each other in order to form

⁹ This type of reconciled society is envisioned in Roger Mac Ginty, 'Everyday Peace: Bottom-up and Local Agency in Conflict Affected Societies', *Security Dialogue*, 45/6 (2014), 548-564.

¹⁰ United Nations, 'Proceedings of the United Nations Department of Public Information’s International Encounter for European Journalists on the Question of Palestine', (London: United Nations, 1993).

¹¹ Charles Villa-Vicencio, 'Reconciliation', in *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice*, ed. by Charles Villa-Vicencio and Erik Doxtader (Cape Town: Institute of Justice and Reconciliation, 2004), 3-9.

¹² Ibid.

working relationships that can lead to functioning societies. Ideally, in the long term, this will produce a virtuous cycle whereby improved cooperation between the ethnic groups will result in better functioning societies, thus leading to higher levels of trust, which will in turn encourage even more cooperation.

The question remains however: how is trust to be built in the first place? In conflict and post-conflict societies, levels of trust have been undermined due to a process of dehumanisation. It is because of the problems created by *dehumanisation*, that *rehumanisation* plays such an important part in reconciliation efforts. Rehumanisation, on which trust relies, requires that the hurdles that prevent former enemies from being perceived as people are removed.¹³ During the conflict, negative stereotyping, propaganda against and fear of the other side usually make people view members of the opposing group – the ‘others’ – as less than human. The ‘others’ are perceived as parts of a homogeneous unit and the possibility that there are those among them that are feeling scared, victimised or ashamed of the actions of their fellow group members is often wholly dismissed. Illustrative of this are the reactions of members of different ethnic groups in Bosnia and Herzegovina when they were asked who was to blame for the war.¹⁴ Most of them expressed the belief that while atrocities had been carried out by all sides, the ones committed by the ‘others’ were premeditated, while those committed by their own people were just individual excesses.¹⁵ As such negative stereotyping of the ‘other’ becomes more common, the

¹³ Arie Nadler, 'Reconciliation: Instrumental and Socioemotional Aspects', in *The Encyclopedia of Peace Psychology*, ed. by Daniel J. Christie (New York: Wiley-Blackwell, 2012), pp. 536-540.

¹⁴ Dinka Corkalo et al., 'Neighbors Again? Intercommunity Relations after Ethnic Cleansing', in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. by Eric Stover and Harvey M. Weinstein (Cambridge: CUP, 2004), 143-161.

¹⁵ These differing perceptions of who is to blame raise an interesting question: if all parties to the conflict consider themselves victims and the ‘others’ necessarily as the blameworthy perpetrators, to what extent can human rights provide a neutral language through which the atrocities of the war can be objectively described and then overcome?

individuality of the stereotyped group's members is lost and their dehumanisation becomes easier.¹⁶ This stereotyping, portraying whole groups of people as less than human, predatory and unreasonable in their personal and political relationships, is the biggest hurdle to meaningful cooperation. At the heart of reconciliation therefore, there is a need to challenge negative stereotypes and begin the process of rehumanisation; it is the contribution of human rights to this rehumanisation and trust-building process that I seek to examine in more detail here.

Even in the most favourable conditions, the processes of rehumanisation and building inter-ethnic trust are time-consuming; reconciliation does not occur naturally, it needs effort and time and it is rarely the result of a linear process.¹⁷ While for example, positive attitudes between individuals from different groups might develop in the workplace, social pressures might prevent them from materialising in their personal lives.¹⁸ Further, such positive attitudes might increase or decrease depending on a number of external factors, such as economic crises or spoilers. Consequently, a number of reconciliation methods, bottom-up and top-down, and spanning different periods of time have to be used. Each method has its strengths and weaknesses and might work with some people, but not with others, so peacebuilders on the ground should use a combination of these. The specific combination of reconciliation methods that should be used in each context depends, among others, on the kind of

¹⁶ Halpern Jodi and Harvey M. Weinstein, 'Empathy and Rehumanization after Mass Violence', in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. by Eric Stover and Harvey M. Weinstein (Cambridge: CUP, 2004), 303-322. Also, for a discussion of how simplified stereotypes and zero-sum conceptualisations of identities characterise (ethnic) conflicts, see Marlene C. Fiol and Edward J. O'Connor, 'Managing Intractable Identity Conflicts', in *The Encyclopedia of Peace Psychology*, ed. by Daniel J. Christie (New York: Wiley-Blackwell, 2012), 937-940.

¹⁷ Daniel Bar-Tal and Gemma Bennink, 'The Nature of Reconciliation as an Outcome and as a Process', in *From Conflict Resolution to Reconciliation*, ed. by Yaacov Bar-Siman-Tov (Oxford: OUP, 2004), 11-38.

¹⁸ Jennifer Todd et al, 'Does Being Protestant Matter? Protestants, Minorities and the Re-making of Ethno-religious Identity After the Good Friday Agreement', *National Identities*, 11/1 (2009), 87-99.

conflict, the resources available and the cultures of the groups involved.¹⁹ It is unsurprising therefore that even when human rights make positive contributions to the process of reconciliation, they are not on their own enough; rather, they must be supplemented by other peacebuilding tools as well.

The definition of reconciliation as meaningful cooperation is not expressly included in UN reports, but it is broadly in line with the organisation's stated objectives in post-conflict countries.²⁰ Similarly, although official documents never define human rights, they do refer to the ways in which they expect them to contribute to peace operations; through these references, a narrow definition of *legal human rights* emerges.²¹ Illustrative of the UN's tendency to primarily focus on the legal protection of human rights, rather than emphasising their moral attributes is *An Agenda for Peace*, which refers to the need to 'identify and support structures which will tend to consolidate peace' and uses the monitoring of elections and the protection of human rights as examples.²² Elsewhere in the report there are also mentions of professionals who can help in peacebuilding operations; these include human rights monitors and electoral officials, in other words, those who are concerned with the implementation of legal provisions.²³ A similar emphasis on the legal, rather than moral characteristics of human rights, is found in the Brahimi Report, which recommends that the Office of

¹⁹ Bar-Tal and Bennink, 'The Nature of Reconciliation'.

²⁰ This is, for example, reflected in para. 56 of the UN 'Agenda for Peace', which states that in the aftermath of war, 'post-conflict peace-building may take the form of concrete cooperative projects which link two or more countries in a mutually beneficial undertaking that can not only contribute to economic and social development but can also enhance the confidence that is so fundamental to peace.'

²¹ UN Secretary-General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', (New York: United Nations, 2004), para. 7.

²² UN Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992', (New York: United Nations, 1992), para. 55. The emphasis on structures is also apparent in UN Secretary-General, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', para. 2.

²³ UN Secretary-General, 'An Agenda for Peace', para. 52.

the High Commissioner for Human Rights should increase its peacebuilding efforts by creating ‘model databases for human rights field work’.²⁴

Several divided societies around the world have adopted mechanisms for the protection of legal human rights as part of their peacebuilding operations. For example, peacebuilders in South Africa have relied on the Truth and Reconciliation Commission (henceforth, TRC) and the Commission on Restitution of Land Rights,²⁵ while those in Bosnia and Herzegovina have been focusing on the International Criminal Tribunal for the Former Yugoslavia (henceforth, ICTY). Differently still, peacebuilding efforts in Cyprus have been predominantly affected by the European Court of Human Rights (henceforth, ECHR).²⁶ At the same time, the Constitutional or Supreme Courts in all three jurisdictions have produced human rights case law that has also contributed, whether positively or negatively, to reconciliation efforts. These institutions became part of the UN peacebuilding toolbox at different points in time and each contributes to the protection of human rights in diverse ways.²⁷ Moreover, some of them (most notably the ICTY) are concerned, not with the protection of human rights *per se*, but with addressing international crimes. While international

²⁴ Panel on United Nations Peace Operations, 'Brahimi Report', para. 244. Also see para. 324 of the same report for a similar comment.

²⁵ The Promotion of National Security and Reconciliation Act [34 of 1995], which established the TRC, seeks to ‘provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights [...] emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations’. Similarly, the Restitution of Land Rights Act [22 of 1994], which established the Commission on Restitution of Land Rights, aims to ‘promote [the] full and equal enjoyment of rights in land’ of ‘persons disadvantaged by unfair discrimination’.

²⁶ Nikos Skoutaris, 'Building Transitional Justice Mechanisms Without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus issue', *European Law Review*, 35/5 (2010), 720-733.

²⁷ For instance, the process at the ICTY is instigated by the prosecutor, while at the ECHR by the victim itself; moreover, the two institutions result in different types of remedies and against different actors (the individual perpetrator in the case of the ICTY and the state itself in the case of the ECHR).

human rights and international criminal law are distinct areas of law,²⁸ they share a common objective in that they are both responses to an increasingly urgent demand to safeguard values, such as human dignity.²⁹ Therefore, despite differences between them, all of these societies offer examples of attempts to protect human rights through *legal mechanisms*.

The emphasis on legal protections should not obscure other ways in which human rights can contribute to reconciliation. For instance, there does exist some literature on the importance of moral rights in relation to peace education,³⁰ and there have also been some small-scale grassroots attempts to apply these theoretical findings in practice.³¹ Nevertheless, the overwhelming attention and resources of peacebuilders have been directed towards the protection of human rights through legal mechanisms. Therefore, while the UN's implied definition of reconciliation is rather broad, the opposite applies to human rights, which have been understood to (mostly) operate within the rather narrow realm of the law. In turn, this variance in the ambit of the

²⁸ Darryl Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, 21 (2008), 952-963.

²⁹ The connection between human rights law and international criminal law has been highlighted by the ICTY in *Kunarac* ICTY T. Ch. II 22.2.2001, para. 467, which referred to 'their resemblance, in terms of goals, values and terminology'. It has also been accepted by the academic community; see, for example, Ruti G. Teitel, 'Transitional Justice Genealogy', *Harvard Human Rights Journal*, 16 (2003), 69-94; A. Cassese *et al.*, *Cassese's International Criminal Law* (3rd edn.; Oxford: OUP, 2012), p. 6, stating that 'this increasingly important segment of law [i.e. human rights law] has impregnated the whole area of ICL [i.e. international criminal law].'; and Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (2nd edn.; Cambridge: CUP, 2012), p. 13, which states that 'The similarities of both bodies of law are clear; both seek to provide a minimum standard of humane treatment.'

³⁰ Lesley McEvoy and Laura Lundy, 'In the Small Places': Education and Human Rights Culture in Conflict-Affected Societies', in *Judges, Transition, and Human Rights*, ed. by John Morison, Kieran McEvoy, and Gordon Anthony (Oxford: OUP, 2007), 495-514; Felisa Tibbits, 'Understanding What We Do: Emerging Models for Human Rights Education', *International Review of Education*, 48/3/4 (2002), 159-171.

³¹ Sara Clarke-Habibi, 'Transforming Worldviews: The Case of Education for Peace in Bosnia and Herzegovina', *Journal of Transformative Education*, 3 (2005), 33-56.

definitions of the two terms has had important ramifications for the relationship between them.

The dual relationship with reconciliation: assessing rights' strengths and weaknesses

Despite the UN's expectation that there is a positive association between human rights and reconciliation, few attempts have been made to explain this in any more detail. I will argue here that the former can indeed contribute to the promotion of the latter, but that this positive connection only presents one facet of the relationship in question. In addition to this, it is also possible that human rights and reconciliation are negatively connected in the sense that one might undermine, rather than promote, the other. This possibility complicates the relationship between them and makes peacebuilding operations even harder to plan and execute, but ignoring it is to the peril of divided societies themselves.

The most obvious positive connection between human rights and reconciliation stems from the fact that protecting the former sends a clear message that the war is truly over. On the one hand, this legitimises the new state of affairs and pushes members of all ethnic groups to work and cooperate towards its success. In addition to its symbolic significance however, the protection of human rights can also contribute towards reconciliation in more practical ways by making post-conflict societies more secure. It has been argued, for example, that protecting civil and political rights, such as the liberty and security of the person, contributes to freedom from fear among the

population.³² While reconciliation does not happen automatically after people's fears have been alleviated, the Brahimi Report is right that 'a relatively less dangerous environment [...] is a fairly forgiving one.'³³ An additional contribution of human rights is that they provide the tools to the victims of the conflict to demand that they are remedied for what has been done to them.³⁴ Especially when such remedies are accompanied by meaningful apologies on behalf of the state, they can pave the way for a more reconciled society.³⁵ Finally, arguments have been made that punishing perpetrators of human rights violations can contribute to reconciliation, not only because this provides a sense of closure to the victims, but also because it makes the public feel more confident that such atrocities will not be repeated again.³⁷

In order for human rights to promote reconciliation in these positive ways, it is necessary that certain conditions are satisfied. Even in best-case scenarios, human rights protections do not, on their own, result in reconciled populations. Rather, it is also important that they are delivered by a body that the public considers legitimate, that members of all ethnic groups are engaged and familiar with its most important findings and that these are accompanied by a positive public campaign.³⁸ An assessment of the ICTY provides evidence why these conditions are indeed necessary for the promotion of reconciliation. The ICTY has cost the international community

³² James Spigelman, 'The Forgotten Freedom: Freedom from Fear', *International and Comparative Law Quarterly* 59 (2010), 543-570.

³³ Brahimi Report, para. 25.

³⁴ Dinah Shelton, *Remedies in International Human Rights Law* (OUP, 2006, 2nd edn.), Chapters 13 and 14.

³⁵ Patricia Lundy and Bill Rolston, 'Redress for past harms? Official apologies in Northern Ireland', *The International Journal of Human Rights*, 20/1 (2016), 104-122.

³⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2000), p. 305 (stating that 'if the international community does not punish war criminals, then in many cases victims will be tempted to take justice into their own hands').

³⁸ Aoife Duffy, 'A Truth Commission for Northern Ireland? ', *International Journal of Transitional Justice*, 4/1 (2010), 26-46.

between 1993 and 2009 \$1.585.490.022;³⁹ the expectation was that this would in turn ‘contribute to the restoration and maintenance of peace’ in the Balkans.⁴⁰ Indeed, in terms of numbers the Tribunal has produced some positive results: overall, 161 individuals have been indicted and 74 of them have been found guilty of violations of international criminal law.⁴¹

Nevertheless, this has not resulted in a more reconciled Balkan population. Surveys in the region suggest that only a tiny percentage of people trust the ICTY (7.6% in Serbia and 3.6% in the Serb part of Bosnia and Herzegovina) and that the majority of Serbs consider it biased against them.⁴² This profound hostility is coupled with a lack of knowledge about the institution itself: there is the misconception that it unfairly and overwhelmingly indicts Serbs and the majority of the Serb population consider it ‘the greatest danger to national security’.⁴³ A sizable number of people polled (19%) believe that Serbia should not cooperate with the ICTY no matter the cost, while only 15% believe that it is important to do so for reasons of justice and reconciliation.⁴⁴ These statistics should have been expected considering that there has been no public campaign that addresses the Balkan population, explains the purpose of the ICTY and presents the Tribunal’s findings in a neutral way. As a result, rather than the ICTY’s decisions being perceived as attempts to punish certain individuals for violations of international criminal law, they have been portrayed as unwarranted attempts by the international community to collectively punish the defendants’ ethnic groups as a whole. If such outcomes are to be avoided therefore, peacebuilders must identify and

³⁹ Cryer et al., *An Introduction to International Criminal Law*, p. 135.

⁴⁰ Preamble of United Nations Security Council Resolution 827 (1993).

⁴¹ Key figures of the cases of the ICTY, <http://www.icty.org/sid/24> [accessed 12 January 2015].

⁴² Mikro Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', *Journal of International Criminal Justice*, 7 (2009), 89-96, pp. 91-92.

⁴³ *Ibid.*, p. 89.

⁴⁴ *Ibid.*, p. 93.

work towards achieving those conditions, which promote, rather than undermine, the reconciliation-promoting potential of human rights.

In the presence of these conditions, human rights can support reconciliation efforts in divided societies in two additional ways. The first stems from the fact that human rights are popularly associated with ideas such as dignity and respect of the person.⁴⁵ Adhering to and respecting these ideas can contribute to the rehumanisation of members of the other ethnic group and ultimately lead to reconciliation. The second is based on the notion that human rights can challenge dominant narratives that present one group's identity as diametrically opposed to the other's. By highlighting the concerns that members of various ethnic groups have in common, human rights advocates reject perceptions of unavoidably conflicting interests between them. An example of this is the foundation of the Northern Ireland's Women Coalition, the members of which, Protestant and Catholic alike, building on their common experiences, worked towards the protection of women's rights.⁴⁶ Nevertheless, while these are important ways in which human rights can contribute to reconciliation, expressions such as 'dignity', 'respect of the person' and 'common interests between the ethnic groups', do not frequently find their way to Courts, which is where the legal protection of human rights takes place.⁴⁷ Although human rights language can contribute to reconciliation therefore, the extent of its contribution should not be exaggerated.

⁴⁵ Bertrand Ramcharan, 'Human Rights and Human Security', *Disarmament Forum*, 3 (2004), 39-47, p. 45.

⁴⁶ Robin Whitaker, 'Debating Rights in the New Northern Ireland', *Irish Political Studies*, 25/1 (2010), 23-45.

⁴⁷ One example in which reconciliatory values found their way to a judicial decision is the post-apartheid South African case of *August and Another v. Electoral Commission and Others (CCT8/99) [1999] ZACC 3*. In that case, Sachs J declared that 'The vote of each and every citizen is a badge of dignity and of personhood.' (para. 17)

Moreover, if the language of human rights can lead to reconciliation, the reverse is also true since references to reconciliation have often been (ab)used in such a way so as to prevent robust human rights protections. This danger, identified by McEvoy *et al* when analysing the conflict in Northern Ireland, usually arises when the powerful group in the society argues that the ethnic conflict exists because of a lack of reconciliation rather than due to human rights abuses.⁴⁸ Attempts by the weaker party to label the problem as one of non-compliance with human rights law are often dismissed as being too divisive. Instead, attention is being focused on using the language of inter-ethnic cooperation and reconciliatory values. These values however can be abused and be detrimental to overall peacebuilding attempts, especially where they crowd out other activities that could have led to the remedying of past injustices in the country. Indeed, this is what happened in Bosnia and Herzegovina where shortly after the end of the war, the leaders of the different ethnic groups committed to allow refugees to return to their homes and made vague political promises to this effect. This general talk of sustainable return (which in Bosnia was equated with reconciliation⁴⁹) appeased the international community and stopped it from demanding more robust strategies for the remedying of displaced people.⁵⁰ Thus, while attempts for the remedying of displaced people began in 1996, by 2000, the first time the international community systematically started collecting statistics, only 12% of applications by displaced people had been dealt with.⁵¹ It took another half a

⁴⁸ McEvoy, McEvoy and McConnachie, 'Reconciliation as a Dirty Word'.

⁴⁹ Leopold Von Carlowitz, 'Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding' *International Peacekeeping*, 12/4 (2005), 547-561, p. 558.

⁵⁰ Ayaki Ito, 'Politicisation of Minority Return in Bosnia-Herzegovina: The First Five Years Examined', *International Journal of Refugee Law*, 13/1/2 (2001), 98-122.

⁵¹ Office of the High Representative, 'Statistics: Implementation of the Property Laws in Bosnia and Herzegovina', (Sarajevo: Office of the High Representative, 31 May 2000), on <http://www.ohr.int/plip/pdf/PLIP5.00.PDF> [accessed 10 June 2014].

decade for peacebuilders to abandon the language of reconciliation and replace it with actions that actually enforced human rights and resulted in the return of displaced people's properties to them.⁵²

An additional limitation of human rights is that they can be abused by judges seeking to justify nationalist practices with which they personally agree. A tendency to view domestic courts separately from the larger institutional context in which they operate has resulted in the mistaken assumption that the judiciary is always progressive and independent.⁵³ Nevertheless, this is particularly misleading in relation to issues that have to do with ethnic identities, which deeply affect people's perceptions of what is right, whether they have had legal training or not.⁵⁴ Illustrative of the dangers of ethnically biased case law is the statistical evidence gathered by Gibson and Gouws in South Africa, which suggests that an intolerant judgment of the Constitutional Court increases intolerant public attitudes in relation to the same issue from 58.3% to 75%.⁵⁵

An intolerant judgment, according to Gibson and Gouws, is one which is based on the idea that someone is not like us and therefore does not deserve our support; for

⁵² This happened with the introduction of the Property Law Implementation Plan, which removed the emphasis from the political right of return and reconciliation and shifted it instead, towards the robust protection of the legal right to property. As a result of this, approximately 93% of applications had been dealt with by December 2003. (Charles Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed: Finishing with Property Restitution to Bosnia Herzegovina's IDPs and Refugees', *Journal of Refugee Studies*, 18 (2005), 1-24.)

⁵³ Erik G. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* ed. by Erik G. Jensen and Thomas C. Heller (Stanford: Stanford University Press, 2003), 336-381.

⁵⁴ The difficulty of maintaining judicial neutrality might be particularly pronounced if the Constitution of the ethnically divided, post-conflict society itself includes quotas for the ethnic composition of the judiciary; see for example: Constitution of the Republic of Cyprus, Article 133(1)(1) for the Supreme Constitutional Court and Article 153(1)(1) for the High Court of Justice; Constitution of Bosnia and Herzegovina, Article VI(1)(a) and (b). For a more general discussion on the composition of apex courts in divided societies, see Sujit Choudhry and Richard Stacey, 'Independent or Dependent? Constitutional Courts in Divided Societies', in *Rights in Divided Societies*, ed. By Colin Harvey and Alex Schwartz, (Oxford: Hart Publishing, 2012), 87-121.

⁵⁵ James L. Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (Cambridge: CUP, 2003), p. 173.

instance, a court renders an intolerant judgment if it refuses to protect the civil liberties of an unpopular, or highly disliked by the majority, group of people. Such intolerant judgments are problematic in themselves, but they become even more dangerous when they are couched in human rights language, which provides them with additional legitimacy and undermines reconciliation attempts even further.

This limitation of human rights can arguably be dealt with through a good vetting procedure and adequate training for the judiciary.⁵⁶ Human rights however, also suffer from other – unavoidable – deficiencies as well. Perhaps the most important among them is that they make black-and-white distinctions between perpetrators and victims and thus, often fail to reflect the complex terrain of a post-conflict society. They ignore, for example, that someone can, at the same time, be both a victim and a perpetrator of human rights violations and that there are those who committed violations, yet in the eyes of the people, acted justly.⁵⁷ An example of such an ambivalent figure is Winnie Mandela who suffered greatly as a victim in the hands of the apartheid regime, but was also allegedly responsible for human rights violations herself; violations, which some members of the South African community considered necessary responses to the actions of the regime.

Moreover, the language of human rights often clouds the fact that there are different types of perpetrators in a conflict.⁵⁸ For instance, in most conflict situations there are those who give the orders for the commitment of human rights violations and there

⁵⁶ This has happened in South Africa for example, with the South African Judicial Education Institute Act [No. 14 of 2008], which seeks ‘to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers’ (Preamble of the Act).

⁵⁷ Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa', *Human Rights Quarterly*, 25 (2003), 1088-1116.

⁵⁸ *Ibid.*

are others who execute these orders. Another part of the population falls in the category of people who were not actively involved in the commitment of the culpable acts, but were nevertheless benefiting from these acts and therefore simply failed to stop or report them. These subtle distinctions between the different levels of culpability are lost however, when someone is labelled with the generic term 'perpetrator'.⁵⁹ Coupled with the fact that human rights are morally loaded concepts, with perpetrators always being presented as villains and diametrically opposed to them being the disempowered victims,⁶⁰ human rights trials might polarise, rather than bring together, those ethnic groups that have different perceptions for who is to blame for the conflict.

A similar limitation of human rights exists in relation to victims. Prosecutions of human rights violations tend to only deal with an arbitrarily narrow segment of injustices caused during the conflict, either because these are deemed more important than others or due to evidentiary reasons. However, decisions to only prosecute specific types of violations often mean that those who suffered by unjust policies in other ways are not formally considered victims. This changes the way different types of harms caused by the conflict are portrayed, and as a result, affects people's perception of whether someone should be blamed for them. For example, the TRC in South Africa condemned violations of the right to life and freedom from torture, but did not deal with the more general discriminatory practices of the apartheid regime in

⁵⁹ Mark Osiel, 'Who are Atrocity's "Real" Perpetrators, Who Its "True" Victims and Beneficiaries?' *Ethics and International Affairs*, 28/3 (2014), 281-297.

⁶⁰ Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', *Social and Legal Studies*, 22 (2013), 489-513; David Kennedy, 'The International Human Rights Movement: Part of the Problem?', *Harvard Human Rights Journal*, 15 (2002), 101-126 .

relation to housing or education.⁶¹ This narrow understanding of the harm caused by the regime made the general discriminatory practices less condemnable and those who committed or acquiesced to them less likely to apologise for their actions. Illustrative of this is the fact that 77% of black South Africans consider apartheid to be a factor that has influenced land inequality in the country today, but only 34% of white South Africans agree.⁶² This difficulty of human rights to accurately describe the victims' experiences during the conflict risks polarising members of ethnic groups rather than encouraging them to trust and cooperate with each other.

Promoting reconciliation through non-legal tools

Despite the UN's expectations of a positive connection between reconciliation and human rights, it transpires that often, one undermines rather than promotes the other. Nevertheless, perhaps the most important observation about the relationship between the two terms is that in the majority of cases they are not connected at all. As Philpott put it, '[t]hough reconciliation encompasses core commitments of the liberal tradition, such as human rights, it is a far more holistic concept'.⁶³ In order for rehumanisation and trust to develop in an ethnically divided, post-conflict society, which is what reconciliation requires, it is necessary for people to challenge some deeply held beliefs about their identity and that of the 'other'. While therefore, reconciliation does not require the abandonment of ethnic identities, it does involve the re-evaluation of

⁶¹ The South African Promotion of National Unity and Reconciliation Act [No. 34 of 1995] limits the investigations of the Truth and Reconciliation Commission to 'gross violations of human rights', which it defines in Section 1 as 'the killing, abduction, torture or severe ill-treatment of any person' or 'any attempt, conspiracy, incitement, instigation, command or procurement to commit' such acts.

⁶² James L. Gibson, *Overcoming Historical Injustices: Land Reconciliation in South Africa* (Cambridge: CUP, 2009), p. 46.

⁶³ Daniel Philpott, 'An Ethic of Political Reconciliation', *Ethics and International Affairs*, 23/4 (2009), 389-407, p. 390.

people's attitudes and perceptions. It is difficult however, to see how such *psychological* changes can be the result of the *legal* protection of human rights.⁶⁴ Even in the event where human rights are implemented successfully, which is not always the case, their enforcement will result in an amendment to the law, a change to the relevant procedures or a reform of an institution. Such changes might be necessary and beneficial for the societies under discussion because, for example, they promote the more effective functioning of different state institutions. They do not however, automatically result in psychological changes *per se*.⁶⁵ In order for the legal protection of human rights to lead to social and eventually to psychological changes, it must be supplemented by other peacebuilding strategies as well.

Illustrative of this is the ECHR decision of *Aziz v. Cyprus*, which condemned the 50-year disenfranchisement of Turkish Cypriots in the Republic of Cyprus as a violation of the right to vote and freedom from discrimination.⁶⁶ The decision was swiftly enforced and the Cypriot electoral law was amended in order to allow the applicants and those in a similar position to vote.⁶⁷ In theory, this legislative amendment, which treated Greek and Turkish Cypriots as equal citizens of the Republic, should have contributed to the reconciliation efforts that are underway on the divided island. However, the legal change was not accompanied by any public debate about the issue,

⁶⁴ For the contrary view, emphasising the power of international law to change perceptions, see Robert Sloane, 'The Expressive Capacity of International Punishment', *Stanford Journal of International Law*, 43 (2007), 39-94.

⁶⁵ In best case scenarios, legal change can contribute to social change, which can gradually result in psychological change. See, for example, the legal provisions promoting equality and their socio-economic impact in Northern Ireland. (Colin Harvey, 'Contextualised Equality and the Politics of Legal Mobilisation: Affirmative Action in Northern Ireland', *Social & Legal Studies*, 21/1 (2012), 23-50, pp. 34-35.)

⁶⁶ *Aziz v. Cyprus* (2005) 41 E.H.R.R. 11.

⁶⁷ Ο περί Άσκησης του Δικαιώματος του Εκλέγειν και Εκλέγεσθαι από Μέλη της Τουρκικής Κοινότητας που Έχουν Συνήθη Διαμονή σε Ελεύθερο Έδαφος της Δημοκρατίας (Προσωρινές Διατάξεις) Νόμος του 2006 (2(I)/2006) [The Law Concerning the Right to Vote and be Elected of the Members of the Turkish Community that Permanently Reside in the Unoccupied Areas of the Republic, Law of 2006 (2(I)/2006)].

thus leaving most Greek Cypriots unaware of the amendment and its implications. Moreover, the new law was introduced without any popular discussion about the reasons that Turkish Cypriots had been disenfranchised in the first place. Thus, while the equal right to vote could have made a contribution to reconciliation, in the absence of a communication strategy to supplement the Court's decision, its positive effects remained marginal.

This is not to argue that changing a state's formal practices cannot eventually influence the politicians' and public's opinions and promote reconciliation. In fact, Gibson and Gouws provide statistical evidence that a hypothetical decision of the South African Constitutional Court to allow an unpopular party to protest would likely increase levels of 'grudging tolerance' in the population.⁶⁸ However, it is unclear what the long-term impact of such a decision would be on the people and whether tolerant attitudes usually take root or are ephemeral, especially when these judicial decisions are not accompanied by other reconciliation promoting measures on the ground. Moreover, even if changes in laws and institutions are sometimes followed by a change in popular attitudes, this tends to be a fortuitous side effect, rather than a necessary consequence of mobilizing human rights. Promoting reconciliatory attitudes within a population requires legal and institutional amendments, changes in political and social attitudes and the rethinking of perceptions concerning the 'other'. Yet, a human rights decision is considered as having been successfully implemented as soon as the legal and institutional amendments have been put into place. The success of human rights lawyers therefore arrives well before – and irrespective of whether – the social and psychological

⁶⁸ Gibson and Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion*, p. 171. They argue that in such a case, the Court's decision could boost tolerance from 27.7% to 56.8%, an increase of 29.1%.

changes have taken place and the population has been reconciled. Finally, relatively few issues that have to do with inter-ethnic reconciliation can be put in legal language and be heard by the courts, and it is rare that judicial decisions are published broadly enough to become known to the public. Thus, since the contributions of human rights to reconciliation tend to be indirect and sporadic, it is better to supplement them with other peacebuilding and reconciliation-promoting tools as well.

The limited power of human rights to *automatically* result in the social and psychological changes that are needed for reconciliation is not in itself a weakness, as long as it is acknowledged. If this happens, the implementation of human rights will promote legal and institutional changes, while other peacebuilding tools will be used in order to support reconciliation efforts more directly. The problem arises from the fact that, in practice, peacebuilders have not acknowledged this limitation. The absence of 'legal humility'⁶⁹ and the expectation that 'a bit more human rights can never make things worse'⁷⁰ have resulted in an overemphasis on their protection. This, in turn, has shifted attention away from other peacebuilding strategies that could have addressed the psychological grievances created by the war and promoted reconciliation more effectively. An illustrative example of this is the tendency in many post-conflict societies to assume that the protection of the right to property is in itself sufficient to promote reconciliation among the displaced population.⁷¹ The legal protection of the right to property is indeed the most appropriate tool for the transfer of the property title. It is ill-suited, however, for the task of cultivating reconciliatory

⁶⁹ Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law & Society*, 34/4 (2007), 411-440, p. 425.

⁷⁰ Kennedy, 'The International Human Rights Movement', p. 124.

⁷¹ Theunis Roux, 'Land Restitution and Reconciliation in South Africa', in *Justice and Reconciliation in Post-Apartheid South Africa* ed. by Francois Du Bois and Antje Du Bois-Pedain (Cambridge: CUP, 2008), 144-171.

ideas, such as that the occupier of the refugee's property might have been a victim of forced displacement himself or that his actions could have been motivated by necessity rather than hatred. The problem of displacement is both a legal and a psychological one; if peacebuilders seek to address it only by relying on the legal protection of human rights, different ethnic groups might return to their houses, but this will likely result in mere co-existence rather than meaningful cooperation with each other.⁷²

Acknowledging that in addition to the positive and negative relationship between human rights and reconciliation, the two are often not connected at all, can fundamentally change the strategies adopted by peacebuilders in the societies under discussion. This analysis suggests that protecting legal human rights, strengthening the judiciary and making governmental institutions more efficient is important. It is also necessary however, for peacebuilders to focus on the – often-ignored – people on the ground. An example where this happened, albeit to a limited extent, is in Bosnia and Herzegovina, where the international community funded different enterprises that were jointly run by members of different ethnic groups.⁷³ Among the most successful projects was the creation of a coffee and cake shop in the Bosnian city of Drvar, which became the first place to not be characterised in ethnic terms, and as a result was frequented by members of all ethnic communities.⁷⁴ It is steps such as this that can supplement the protection of human rights and can most effectively promote reconciliation among victims and perpetrators.

⁷² Philpott, 'Though the Dog Is Dead, the Pig Must Be Killed'.

⁷³ Huma Haider, '(Re)Imagining Coexistence: Striving for Sustainable Return, Reintegration and Reconciliation in Bosnia and Herzegovina', *International Journal of Transitional Justice*, 3/1 (2009), 91-113.

⁷⁴ *Ibid.*, p. 106.

Conclusion

The UN's expectation that reconciliation and human rights are positively connected is accurate. It is however, also subject to several conditions. Human rights must be interpreted by judges and other officials who are positively predisposed to reconciliation efforts. Moreover, a public campaign is required that will reliably inform the people of important legal decisions and promote a reconciliatory dominant narrative. However, even if these conditions are satisfied, peacebuilders must acknowledge that the protection of human rights, if narrowly understood as legal tools, can also have negative consequences for reconciliation. The simple distinctions made between perpetrators and victims are not always – or even often – representative of what happened during the conflict. As a result, and especially because labelling an individual as a human rights violator can be perceived as an attack on his entire ethnic group, the legal protection of human rights might result in further polarisation among the people.

Equally important to acknowledging the positive *and* negative connections between reconciliation and human rights, is the realisation that the two might not be connected at all. Human rights, as the UN has understood the term, seem to result in legal, procedural and institutional changes to the ethnically divided society. If this is to be transformed to a reconciled one however, psychological changes must also take place. These are most effectively induced, not (only) through legal tools such as human rights, but by (also) adopting peacebuilding strategies that directly address the people on the ground. The best peacebuilding recipe therefore is to take human rights with a

pinch of salt and balance any positive contributions they are likely to make to reconciliation with the unavoidable dangers and limitations that accompany them.