Protecting Human Rights and Building Peace in Post-violence Societies

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Introduction

I. INTRODUCTION

Part of the bleak history of the ongoing failed attempts to resolve the Cyprus conflict is an encouraging success story: over the last few years, the Committee of Missing Persons, staffed by Greek Cypriot (GC) and Turkish Cypriot (TC) scientists, has made strides in discovering and identifying the bodies of individuals who had gone missing during the violence of the 1960s and 1970s.[1] This became possible after decades of frustrating stalemate, when the plight of missing persons' families was reconceptualised as a human rights problem affecting, and deserving a response from, both communities on the island.[2] At the same time, the authorities' failure to locate those who disappeared during the apartheid era in South Africa (SA), which was also understood and addressed as a human rights issue, has been described by the country's Truth and Reconciliation Commission (TRC) as 'perhaps the most significant piece of unfinished business' within its mandate.[3] The juxtaposition between these two examples illustrates a tendency among decision makers from very different backgrounds to rely on human rights in order to promote peace in post-violence societies. It also suggests that although the use of human rights as peacebuilding tools can have profound positive effects, this is not an absolute and universal truth.

There is a paradox surrounding our expectations around the protection of human rights: on the one hand, we anticipate that they will provide stability and legitimise the legal and political system within which they operate, and on the other hand, we envisage that they will act as agents of change and be the bearers of necessary social reform.[4] Yet, this paradox has not been translated in equally nuanced expectations about the way in which human rights can be utilised, and the effects they can have, in post-violence societies. Rather, human rights are seen as the 'universally recognised chic language' of writing and implementing peace

[1] For more information on the Committee of Missing Persons, see www.cmp-cyprus.org.

[2] Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared* (Cambridge, Cambridge University Press, 2017) 154.

[3] TRC, *Report of the Truth and Reconciliation Commission* (Pretoria, TRC, 1998), Volume 6, Section 4, ch 1 [96].

[4] Aileen Kavanagh, 'The Role of a Bill of Rights in Reconstructing Northern Ireland' (2004) 26 *Human Rights Quarterly* 956.

agreements,[5] and utterances that encourage measured expectations about what they can achieve are few and far between.[6] This study challenges the orthodoxy by arguing that human rights can indeed make valuable contributions to peacebuilding efforts, *so long as* the necessary conditions that allow this are in place. Understanding the precise ways in which they can help build peace and identifying the factors that assist in this process are important because these point to practical steps that decision makers can take to enhance their effectiveness in post-violence societies. Thus, clarifying the largely underexplored relationship between protecting human rights and building peace is not (only) an exercise of theoretical importance; rather, if its conclusions are taken seriously and adopted in good faith, they can give rise to a range of strategies that result in the betterment of people's lives around the world.

II. THE CENTRAL QUESTION

References to the peacebuilding potential of human rights are abundantly scattered throughout the literature. The seminal UN report *An Agenda for Peace* confidently declared that 'human rights monitors, electoral officials, refugee and humanitarian aid specialists' – in other words, those professionals who are most directly concerned with the protection of human rights – play a 'central role' in peacebuilding operations.[7] Similarly, the UN High-Level Panel on Threats, Challenges and Change expressed its support for the integration of human rights throughout the work of the UN and encouraged the development of strong domestic human rights institutions, especially in countries emerging from conflict.[8] This faith in human rights was reiterated by UN Secretary-General Kofi Annan when he argued that 'elements of good governance', among them 'monitoring [of] human rights', have received much attention because they 'can promote reconciliation and offer a path for consolidating peace'.[9] This positive relationship has also been explicitly acknowledged by other UN organs, with the General Assembly noting that 'the promotion of a culture of peace [is] based on … respect for human rights'[10] and the Security Council

[5] Christine Bell, *Peace Agreements and Human Rights* (Oxford, Oxford University Press, 2000) 298.

[6] Emily Pia and Thomas Diez, 'Human Rights Discourses and Conflict: Moving Towards Desecuritization' in Raffaele Marchetti and Nathalie Tocci (eds), *Civil Society, Conflicts and the Politicization of Human Rights* (Tokyo, United Nations University Press, 2011).

[7] 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*, A/47/277 – S/24111 (New York, United Nations, 1992) [52].

[8] UN Secretary-General's High-Level Panel on Threats Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565 (New York, United Nations, 2004) [284].

[9] Kofi Annan, 'The Quiet Revolution' (1998) 4 *Global Governance* 123, 123.

[10] United Nations General Assembly Resolution 52/13 (15 January 1998), art 2.

stressing 'the urgent need to promote peace and national reconciliation and to foster accountability and respect for human rights', while highlighting 'the key role' that Human Rights Commissions can play in this respect.[11]

Such peacebuilding expectations should be taken with a pinch of salt. Often, the absolute and overreaching, yet vague, language of UN instruments reflects compromises that took place during their drafting process rather than accurate assessments of what human rights can deliver. For this reason, it is not always appropriate to use soundbites from lengthy UN reports and treat them as evidence of simplistic assumptions on behalf of policy makers that protecting human rights necessarily leads to peace. Even so, the history of peacebuilding operations confirms that such statements have, in fact, shaped practices on the ground. Since 1945, which marked the first modern attempts to build peace, and until today, peacebuilding operations have evolved and become much more sophisticated in their objectives and methods. Yet, at no point during this process has the effectiveness of human rights as peacebuilding tools been seriously questioned. The emphasis that was placed on them during the early years is reflected in the establishment of the Nuremberg and Tokyo Tribunals, which were intended to prosecute perpetrators of serious human rights violations.[12] International peacebuilding went into hibernation during the Cold War, but the fall of communism at the end of the twentieth century led to the second stage of its development.[13] Peacebuilding operations during this period – for example, in SA and Latin America – questioned a number of key assumptions, such as whether the use of criminal trials was the best way to promote peace, or whether Truth Commissions, coupled with amnesties, were more appropriate.[14] Yet, paying attention to human rights, either by punishing or being open about their violations, remained among the cornerstones of peacebuilding efforts. The third, and current, stage places even more emphasis on human rights by making them a key tenet of liberal peacebuilding, which since the mid-1990s has been implemented, around the world.[15] This peacebuilding strategy is based

[11] United Nations Security Council Resolution 1270 (22 October 1999), art 17.

[12] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2nd edn (Cambridge, Cambridge University Press, 2012) 109–19; Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 952, 958.

[13] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.

[14] For an excellent literature review of this debate, see Kieran McEvoy and Louise Mallinder, 'Amnesties in Transition: Punishment, Restoration and the Governance of Mercy' (2012) 39 *Journal of Law and Society* 410.

[15] Oliver Richmond, *The Transformation of Peace* (Basingstoke, Palgrave Macmillan, 2006). The literature addressing the limitations of liberal peacebuilding is vast and growing. See, eg, Oliver Richmond, 'A Post-liberal Peace: Eirinism and the Everyday' (2009) 35 *Review of International Studies* 557; Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transnational Justice' (2007) 21 *Global Society* 579; Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Cambridge, Polity Press, 2016); Ronald Paris, 'Wilson's Ghost: The Faulty Assumptions of Postconflict Peacebuilding' in Chester Crocker, Fen Osler Hampson and Pamel Aall (eds), *Turbulent Peace: Conflict Resolution versus Democratic Governance: Divergent Paths to Peace?* (Washington DC, United States Institute of Peace Press, 2001); Roger Mac Ginty,

on the premise that the establishment of liberal institutions – among them a democratic and free market, the rule of law and, importantly, the protection of human rights – is all that is needed for the transformation of post-violence societies.

Thus, examples from such societies confirm that there is indeed an almost universal and extensive reliance on human rights as peacebuilding tools. For instance, the post-war Constitution of Bosnia and Herzegovina (BiH) has made the country a member to 16 international human rights agreements,[16] while the SA Final Constitution contains one of the most robust Bills of Rights, with civil, political, economic, social, cultural and group protections.[17] Northern Ireland's (NI) Belfast Agreement often refers to human rights, precisely because any impasse during the negotiations was overcome by resorting to them[18] and many of the peacebuilding initiatives that have been adopted in Cyprus are explicitly based on their protection.[19] Moreover, confidence in the peacebuilding potential of human rights has been echoed by many academics, who are not restrained by the same limitations as diplomats and policy makers. Thus, Parlevliet notes that 'the sustained protection of rights is essential for dealing with conflict constructively',[20] while Barash and Webel,[21] Little[22] and Lederach[23] include human rights protections among their recommended peacebuilding tools. Finally, a literature review by Bonacker et al points to widespread expectations that human rights can help desecuritise conflicts[24] and even Brewer's otherwise

'Indigenous Peace-Making versus the Liberal Peace' (2008) 43 *Cooperation and Conflict* 139; Charles Thiessen, 'Emancipatory Peacebuilding: Critical Responses to (Neo)Liberal Trends' in Thomas Matyok, Jessica Senehi and Sean Byrne (eds), *Critical Issues in Peace and Conflict Studies: Theory, Practice and Pedagogy* (Lanham, MD, Lexington Books, 2011).

[16] Constitution of Bosnia and Herzegovina, Annex 4 of the General Framework Agreement, signed on 14 December 1995, Annex I.

[17] Constitution of the Republic of South Africa (108 of 1996), ss 7–39.

[18] The Northern Ireland Peace Agreement, Agreement Reached in the Multi-Party Negotiations, signed on 10 April 1998 (Belfast Agreement); Bell (n 5) 173.

[19] Nikos Skoutaris, 'Buidling Transitional Justice Mechanisms without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus Issue' (2010) 35 *European Law Review* 720.

[20] Michelle Parlevliet, *Bridging the Divide: Exploring the Relationship between Human Rights and Conflict Management* (Cape Town, Centre for Conflict Resolution, March 2002) 20.

[21] David P Barash and Charles P Webel, *Peace and Conflict Studies*, 2nd edn (Thousand Oaks, SAGE Publications, 2009).

[22] David Little, 'Peace, Justice and Religion' in Pierre Allan and Alexis Keller (eds), *What is Just Peace?* (Oxford, Oxford University Press, 2006).

[23] John Paul Lederach, 'Beyond Violence: Building Sustainable Peace' in Arthur Williamson (ed), *Beyond Violence: The Role of Voluntary and Community Action in Building a Sustainable Peace in Northern Ireland* (Belfast, Community Relations Council, 1995).

[24] Thorsten Bonacker et al, 'Human Rights and the (De)Securitization of Conflict' in Marchetti and Tocci (n 6). For additional evidence of this, see Tim Dunne and Nicholas J Wheeler, '"We the Peoples": Contending Discourses of Security in Human Rights Theory and Practice' (2004) 18 *International Relations* 9.

critical analysis of liberal peacebuilding concludes that '[t]he human rights discourse … is essentially a language of peace'.[25]

Yet, despite such endorsements, relatively little attention has been paid to the specific ways in which human rights can help build peace and the conditions that must be in place for this to happen. Referring to the African context, Widner notes that: 'Because the language of the rule of law is now so much in vogue, observers too often tend to assume that courts can easily promote peace and democratic change in postconflict regimes, without looking closely at the grounds for such optimism.'[26] This tendency is problematic, since it can result in significantly undertheorised expectations. We protect human rights in post-violence societies without having settled on, or even properly discussed, what is the ultimate goal of the intervention, which actors are expected to deliver it, how we envisage this to materialise, whether there are any conditions that must be in place and what are the associated risks with the process.[27] Among the few academics that have adopted a more subtle analysis is Christine Bell, who notes, on the one hand, that the strength of human rights protections and the success of the peacebuilding mission are integrally linked, but warns, on the other hand, of the need to establish strong and effective institutions.[28] Similarly, Marchetti and Tocci argue that whether the human right in question is an individual or a collective one and the way in which it is used in each instance affect its overall peacebuilding potential.[29] The study joins these more critical voices by examining the adjudication, implementation and post-implementation challenges of human rights protection, and identifying the steps that should be taken for these to be addressed.

At the moment, the dominant perception is that any failures of human rights and other liberal tools to promote peace are mainly due to their non-implementation or other exogenous factors, such as underfunding or lack of cooperation between peacebuilders.[30] Disappointing results are never regarded

[25] John D. Brewer, *Peace Processes: A Sociological Approach* (Cambridge, Polity Press, 2010) 48.

[26] Jennifer Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95 *American Journal of International Law* 64, 64.

[27] Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-conflict States* (Cheltenham, Edward Elgar, 2017) 65.

[28] Bell (n 5) 294.

[29] Raffaele Marchetti and Nathalie Tocci, 'Conflict Society and Human Rights: An Analytical Framework' in Marchetti and Tocci (n 6).

[30] Roland Paris, 'Understanding the "Coordination Problem" in Postwar Statebuilding' in Roland Paris and Timothy D Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (London, Routledge, 2009). This is further confirmed by statements from the UN Secretary-General, who identified the problem of peace operations as being an institutional one, with the creation of the Peacebuilding Commission providing one solution (UN Secretary-General, *Address by United Nations Secretary-General Kofi Annan to the Fifty-Sixth Session of the Executive Committee of the High Commissioner's Programme* (Geneva, United Nations, 6 October 2005)).

as the result of human rights being used in an ill-suited way or under conditions that rendered them ineffective. Nevertheless, a belief that 'a bit more human rights can never make things worse' is dangerous because it necessarily 'places blame for whatever goes wrong elsewhere'.[31] As a result, the failures of human rights to build peace tend to be understood as encouragements to keep walking faster in the same direction rather than questioning the correctness of the path that peacebuilding actors are on in the first place. This study proposes a different response: in short, it entertains the possibility that what we ask of human rights in peacebuilding operations might simply be too much.

Undertaking this exercise is essential because continuing to rely on current assumptions can result in several potentially dangerous and counterproductive misconceptions. First, a lack of clarity on how human rights can assist peacebuilding efforts might lead to the inaccurate conclusion that making any human rights policy part of the peacebuilding agenda can have equally positive effects. Second, this can prevent decision makers from assessing whether reliance on human rights is preferable to, or should be supplemented by, the adoption of other peacebuilding strategies. Finally, neglecting to pay close attention to the conditions that make human rights effective peacebuilding tools might lead to the misguided belief that their protection will always result in a positive outcome, irrespective of the context in which they are being implemented. Consequently, this can result in the adoption of uniform strategies with little appreciation of how the peculiarities of each post-violence society should be taken into account. While these dangers might not be an unavoidable eventuality, they become more likely to materialise if the nuanced relationship between human rights and peace is not in the forefront of decision makers' minds.

III. AN ANATOMY OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND PEACE

The study clarifies the relationship between human rights and peace by relying both on the development of a theoretical framework and the assessment of hypotheses derived from it through the comparison of human rights-related peacebuilding practices in four post-violence societies. Chapter 2 starts building on the theory by proposing that peacebuilders should be working towards striking a balance between three inter-connected but also potentially conflicting elements. The first, *security*, seeks to both objectively reduce the levels of violence and promote a subjective sense among the population that their physical well-being is no longer under threat. The second, *justice*, involves efforts to address the injustices of the past and ensure that further injustices will not be

[31] David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 124 and 122 respectively.

perpetrated in the future, while the third element, *reconciliation*, aims to build meaningful relationships of cooperation among previously warring parties. As with security, efforts to promote justice and reconciliation should result in institutions that objectively improve people's lives, the effects of which are also experienced and understood as such by the target audience itself. Chapter 3 continues by noting that striking a balance between the three elements of peace does not require the elimination of conflicts among previously warring parties, but ensuring that these conflicts are resolved in a non-violent manner. Human rights can assist peacebuilding efforts by contributing to this conflict resolution process in two ways: on the one hand, they can be used during the adjudication of a conflict in the courtroom and provide guidance to the judge as to the best way to respond to it; on the other hand, they can be given a role during the political process, when activists and concerned citizens frame their arguments in human rights terms and lobby for the enactment and implementation of policies that will respond to a particular conflict. Through these strategies, human rights can give rise to both objective and subjective feelings of security, justice and reconciliation among the population. Their specific peacebuilding contributions depend on a series of factors, which are explored in detail in the three practical chapters that follow.

Chapter 4, which is concerned with the peacebuilding effects of human rights during the adjudication process, argues that these can provide meaningful guidance to judges when they respond to relatively minor, as opposed to fundamental, conflicts. Attempting to resolve fundamental disagreements in the courtroom can result either in a refusal of the judiciary to become involved in the dispute or in the delivery of vague and contradictory judgments that can undermine each of the elements of peace. At the same time, the judiciary's conflict resolution potential also depends on the nature of the court hearing the dispute and, in particular, on whether it is a domestic or an international forum. Finally in terms of adjudication, *when* the disagreement is litigated – specifically, whether a comprehensive peace settlement is in place and the amount of time that has passed since it came into operation – can affect the peacebuilding potential of human rights. Similarly, whether human rights-inspired laws can assist in the conflict resolution process depends on a series of factors and, in particular, on the extent to which they are successfully enforced. Thus, Chapter 5 proposes that the implementation of human rights – and the consequent building of peace – are matters of degree and are shaped by how much political willingness to induce change is present among policymakers. Additionally, the extent of the ability of such laws to influence the conflict resolution process depends on skilful legislative drafting and the presence of enforcement bodies that have the independence, powers, resources and expertise to fulfil their mandate successfully.

Judicial guidance and lobbying for the protection of human rights are useful strategies because they can induce legal and institutional reforms that are necessary for the building of objective peace. However, if the beliefs of the

people are also going to be challenged, which will in turn contribute to a subjective sense of peace in the post-violence society, two additional conditions, which are discussed in Chapter 6, must be present. The first is that the protection of human rights must have an impact on the lives of the people in the sense that it results in meaningful socio-economic and psychological changes among the population. Related to this is the second condition, which provides that these changes must not only resolve conflicts as a matter of fact, but should also be understood by their target audience as having this effect. The three sets of conditions, discussed in Chapters 4, 5 and 6, are not exhaustive and cannot guarantee that, when present, the protection of human rights will necessarily result in successful conflict resolution. However, paying attention to them can elucidate the connections between the two concepts and enhance the effectiveness of peacebuilding operations on the ground.

IV. THE METHODOLOGY

This volume explores the relationship between human rights and practice through a comparative analysis of four case studies: BiH, Cyprus, NI and SA. In doing so, it engages in a 'practical reasoning' methodological approach, which 'seeks to derive general conclusions from particular instances and to appreciate a complex reality'.[32] Like a pendulum, it does this by oscillating between theory and practice: it reaches theoretical conclusions through an analysis of specific human rights initiatives in the four case studies, while at the same time, it assesses these initiatives in light of the developing theoretical framework.

A. Defining a Post-violence Society

Post-violence societies are societies that have experienced communal violence, whose effects they are currently recovering from.[33] The definition is concerned with violence emanating from intra-state, rather than inter-state, conflicts because these have been the most common and destructive types of conflicts since the end of the Cold War.[34] Intra-state violence usually results in a higher number of civilian victims and, due to the very close proximity between the combating parties, causes the greatest levels of insecurity among the population.[35]

[32] Tom Gerard Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge, Cambridge University Press, 2017) 18.

[33] Brewer (n 25).

[34] Between 1989 and 2003, there were only seven inter-state and 116 intra-state conflicts. See Mikael Eriksson and Peter Wallensteen, 'Armed Conflict, 1989–2003' (2004) 41 *Journal of Peace Research* 625.

[35] Between 1945 and 1999, 20 million deaths took place as a result of intra-state conflicts and three million due to inter-state conflicts. See Sujit Choudhry, 'After the Rights Revolution: Bills of Rights in the Post-conflict State' (2010) 6 *Annual Review of Law and Social Science* 301, 308.

Additionally, this type of violence is linked to a vicious cycle of mistrust that gives rise to unique peacebuilding challenges: the violent conflict intensifies the group divisions that are undermining peace on the one hand, while the securitisation of group identities encourages the continuation or resumption of violence on the other hand. Of course, the distinction between intra-state and inter-state violence is not always clear, with several societies having experienced a combination of the two.[36] While, for instance, the eruption of violence in Cyprus in the 1960s had an intra-state character, in the 1970s this morphed into an inter-state conflict, following Turkey's military invasion of the island.[37] This proviso notwithstanding, the study focuses on examples where the eruption of *communal violence* has affected a *single society* that is currently implementing some form of a *peacebuilding strategy as a response*.

Although violence is always directed at the individual, whether towards his or her person or property, *communal* violence is characterised by attacks that are motivated by the intended victim's membership in a given group. In the four case studies examined here, the violence has been caused by largely unchanging group identities, such as those relating to race, ethnicity, language or religion, rather than, for example, political affiliation, which can more easily fluctuate throughout a person's life. Racial, religious or ethnic groups in post-violence societies are politically organised and have certain demands, usually relating to non-discrimination or greater recognition of their differences. These groups deem such demands to be necessary because they perceive their identities to be distinct and, in many cases, diametrically opposed to each other.[38] This is what Miller calls 'rival nationalities': especially during, or immediately before and after violence has erupted, the groups see themselves as having an antagonistic relationship, partly due to the fact that they define their identity as that which the other is not.[39] Of course, not every society manifests its group divisions violently; examples from the UK/Scotland and Canada/Quebec testify to this. However, where violence does break out, the defining group characteristic becomes the most dominant aspect of a member's identity, groups tend to act cohesively on almost all political issues and, as a result, the conflicts that arise between them are usually zero-sum in nature. Finally, since political threats are not easily distinguished from personal ones, group membership in post-violence societies determines not only who people vote for, but also who they socialise with and marry, who they work with or employ and, ultimately, who they are afraid of and distrust.

[36] Ramsbotham et al (n 15) 313–15.

[37] Harry Anastasiou, *Nationalism, Ethnic Conflict, and the Quest for Peace in Cyprus: Volume One: The Impasse of Ethnonationalism* (Syracuse, Syracuse University Press, 2008) 93–100.

[38] Margaret Moore, 'Globalization, Cosmopolitanism and Minority Nationalism' in Michael Keating and John McGarry (eds), *Minority Nationalism and the Changing International Order* (Oxford, Oxford University Press, 2001) 44.

[39] David Miller, 'Nationality in Divided Societies' in Alain G Gagnon and James Tully (eds), *Multinational Democracies* (Cambridge, Cambridge University Press, 2001) 303.

The label 'post-violence society' is not without its problems, not least the fact that it implies that the signing of a ceasefire agreement, or a comprehensive peace settlement, marks the end of violent hostilities and the creation of a secure society.[40] In fact, it should be acknowledged from the outset that the label 'post-violence' can sometimes be a misnomer, since it is possible for the violent death count to remain high, or even increase, shortly after the official termination of the war.[41] The term is nevertheless useful because it signifies a new state of affairs whereby the previously warring parties commit, albeit often lukewarmly, to resolve their differences in a non-violent manner.

B. Selecting the Four Case Studies

Unlike most comparative works on post-violence societies, which stay within the exclusive ambit of political sciences,[42] this study examines the peacebuilding effect of human rights as *legal* tools. At the same time, it accepts that 'maintaining the disciplinary divide between comparative constitutional law and other closely-related disciplines that study the same set of phenomena does not make sense'.[43] Consequently, it situates the legal analysis of the success or failure of human rights to resolve conflicts within a broader understanding of the prevalent conditions and dynamics in post-violence societies. In light of this, each chapter engages with different disciplines: Chapter 2 relies on peace studies literature, while Chapter 3 draws from conflict resolution, legal, political science and sociological arguments. Chapter 4 focuses on a legal analysis; Chapter 5 on legal and political science literature and Chapter 6 reaches conclusions that are of interest to sociologists. Finally, Chapter 7 brings the different disciplines together and links the arguments made in the previous chapters to peace studies.

In undertaking this interdisciplinary analysis, the study takes heed of Hirschl's insightful critique that legal scholars, of whom this author is one, generally fail to adopt a rigorous methodological approach, thus resulting in undertheorised conclusions and cherry-picking of the most convenient

[40] Pierre du Toit, *South Africa's Brittle Peace: The Problem of Post-settlement Violence* (Basingstoke, Palgrave, 2001).

[41] Geneva Declaration Secretariat, *Global Burden of Armed Violence* (Geneva, Geneva Declaration on Armed Violence and Development, 2008) 49–63.

[42] See, eg, Sumantra Bose, *Contested Lands: Israel-Palestine, Kashmir, Bosnia, Cyprus and Sri Lanka* (Cambridge, MA, Harvard University Press, 2007); Donald Horowitz, *Ethnic Groups in Conflict*, 2nd edn (Berkeley, University of California Press, 1985). Rare examples of legal analysis include Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford, Oxford University Press, 2004); Yash Ghai (ed), *Autonomy and Ethnicity* (Cambridge, Cambridge University Press, 2000); and Bell (n 5).

[43] Ran Hirschl, 'Editorial: From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 *International Journal of Constitutional Law* 1, 11.

case studies.[44] This resonates with criticisms from another direction, namely that the peacebuilding literature overly relies on single case studies that tend to produce lists of 'dos' and 'don'ts', without much explanation of how these were derived beyond descriptive observations of what worked and what did not.[45] In response to these critiques, the four case studies have been carefully selected by taking into account both their similarities and differences. On the one hand, all of them have experienced communal violence, the consequences of which they are still in the process of addressing by adopting liberal peacebuilding strategies with a strong emphasis on human rights. On the other hand, these similar human rights policies have been applied in very different contexts, thus allowing us to assess how such differences impact on their effectiveness as peacebuilding tools. Comparisons between the case studies allow for the drawing of generalisable conclusions and developing a theoretical framework on the relationship between human rights and peace. In turn, such conclusions make the analysis not only relevant to the four post-violence societies that are being compared, but also to other contexts with similar characteristics.[46] This is particularly fruitful in light of the fact that some of these societies may be difficult to research directly, either due to the volatile conditions on the ground or because the need for a swift response after the eruption of violence often makes the carrying out of in-depth research more difficult.

Arguments have been made in the literature that the success of a peacebuilding operation can be affected by the post-violence society's population size,[47] types of divisions,[48] relative size of the groups within it,[49] prevailing socio-economic conditions,[50] the intensity and duration of past violence,[51] the extent of the international peacebuilding intervention[52] and whether there has

[44] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125.

[45] Betts Fetherston, 'Peacekeeping, Conflict Resolution and Peacebuilding: A Reconsideration of Theoretical Frameworks' (2000) 7 *International Peacekeeping* 190, 191.

[46] Tood Landman, *Issues & Methods in Comparative Politics: An Introduction* (New York, Routledge, 2000) 10.

[47] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, Yale University Press, 1977) 161.

[48] Stephen Cornell and Douglas Hartmann, *Ethnicity and Race: Making Identities in a Changing World* (Thousand Oaks, Pine Forge Press, 2007); Miller (n 39); Stephan Wolff, 'Conceptualising Conflict Management and Settlement: Perspectives on Successes and Failures in Europe, Africa and Asia' in Ulrich Schneckener and Stephan Wolff (eds), *Managing and Settling Ethnic Conflicts* (London, Hurst & Co Publishers, 2004).

[49] Benjamin Reilly, 'Electoral Systems for Divided Societies' (2002) 13 *Journal of Democracy* 156, 168.

[50] Lijphart (n 47) 161; Davis A James, 'A Formal Interpretation of the Theory of Relative Deprivation' (1959) 22 *Sociometry* 280.

[51] Chaim D Kaufmann, 'When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century' (1998) 23 *International Security* 120.

[52] Michael Barnett and Christoph Zurcher, 'The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood' in Paris and Sisk (eds) (n 30) Timothy D Sisk, 'Pathways of the Political: Electoral Processes after Civil War' in Paris and Sisk (eds) (n 30).

been a signing of a comprehensive peace settlement.[53] The four case studies face commonalities and differences among them in relation to all these factors. For instance, while Cyprus (1.5 million), NI (1.8 million) and BiH (3.5 million) are relatively small, SA has a population of 56 million. Moreover, each differs in terms of the types of divisions it faces, with NI being divided along religious lines (Protestants and Catholics), SA along racial lines (between blacks, whites, coloureds and Indians, but also facing divisions among different tribal groups) and BiH and Cyprus being characterised by ethnic divisions (Bosniacs, Serbs and Croats in BiH and GCs and TCs in Cyprus). The groups also differ in relation to their relative size in their respective societies, as they are fairly equal in NI and (to a lesser extent) BiH, but quite different in Cyprus and SA. Specifically, Protestants and Catholics are divided by a 48:45 population ratio,[54] while Bosniacs, Serbs and Croats make up approximately 43, 31 and 17 per cent of the Bosnian people respectively.[55] Conversely, about 8 in 10 Cypriots are estimated to be GC and 2 in 10 to be TC.[56] In SA, 80 per cent are black; coloured and white people* make up 9 per cent of the population each, and Asians comprise approximately 2 per cent.[57] Finally, groups vary in terms of the relative socio-economic security that each enjoys, since (group) inequality prevails in all four societies.[58]

Further to the background conditions that distinguish each of the case studies, they also differ in terms of the intensity of violence that they have experienced. In Cyprus, the violence erupted during two high-intensity, very short periods between 1963 and 1964 (with violence mostly being targeted towards TCs)

[53] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge, Cambridge University Press, 2011).

[54] Northern Ireland Statistics and Research Agency, *Census 2011: Key Statistics for Northern Ireland* (Belfast, Northern Ireland Statistics and Research Agency, 2012) 3.

[55] 'Ethnic Composition of Bosnia-Herzegovina Population, by Municipalities and Settlements, 1991', Zavod za statistiku Bosne i Hercegovine, Bilten no 234, Sarajevo, 1991, cited in Sabrina P Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to the Fall of Milosević*, 4th edn (Boulder, Westview Press, 2002) 241. Most of the remaining 9 per cent described itself as 'Yugoslav', a category that is today obsolete.

[56] Department of Statistics and Research, *Census of Population and Agriculture 1960 (Volume III – Demographic Characteristics)* (Nicosia, Department of Statistics and Research, 1963).

* References to the racial groups in South Africa (black, white, coloured and Indian) are included because they reflect the divisions that the apartheid regime was based on; divisions that remain to a large extent relevant, even today. It is for this reason that post-apartheid legislation and government publications also continue relying on them. See, eg, Broad-Based Black Economic Empowerment Act 53 of 2003, s1 and Commission for Employment Equity, *Annual Report 2015–2016* (Pretoria, Department of Labour, 2016).

[57] Statistics South Africa, *Census 2011: Statistical Release (Revised)* (Pretoria, Statistics South Africa, 2012).

[58] In SA, this is a consequence of apartheid policies, which have not been adequately addressed since democratisation; see Mike Cohen, 'South Africa's Racial Income Inequality Persists, Census Shows' *Bloomberg*, 30 October 2012. In Cyprus, this is, at least partly, due to the UN embargo imposed on the (internationally unrecognised) 'Turkish Republic of Northern Cyprus' and, as a result, on the vast majority of TCs; see United Nations Security Council Resolution 541 (18 November 1983), art 7; United Nations Security Council Resolution 550 (11 May 1984), art 3. In NI, this is because of employment discrimination against Catholics that existed during the Troubles; see Edmund A Aunger, 'Religion and Occupational Class in Northern Ireland' (1975) 7 *Economic and Social Review* 1. Finally, for evidence of inequality in BiH, see Marcelo Bisogno and Alberto Chong, 'Poverty and Inequality in Bosnia and Herzegovina after the Civil War' (2002) 30 *World Development* 61.

and 1974 (with the victims being mainly GCs).[59] The two periods resulted in approximately 2,000 missing persons,[60] 6,000 deaths[61] and 200,000 displaced individuals.[62] This was different from the situation in BiH, where the brutally violent conflict raged continuously between 1992 and 1995, producing approximately 100,000 dead[63] and 2.6 million displaced persons, who amounted to more than half of the pre-war population.[64] The conflicts in NI and SA were different still, since the relatively low-intensity violence lasted for decades in both instances. In NI, the Troubles began in 1968 and officially ended following the signing of the Belfast Agreement in 1998, with a total death toll of about 3,500.[65] In SA, the beginning of the conflict is more difficult to pinpoint, since the violent colonial regime gradually morphed into apartheid,[66] until this was abolished in 1993 with the coming into force of the country's Interim (first democratic) Constitution.[67] Celebrations of SA's 'non-violent transition miracle' are largely inaccurate since in the 1980s and early 1990s, approximately 15,000–25,000 South Africans were killed.[68] Indicatively, 3,706 people were killed between 1993 and 1994; 2,434 between 1994 and 1995 and 1,004 between 1995 and 1996,[69] while during March 1994, when the first election campaign was in full swing, 537 deaths were recorded, an average of 17.3 per day.[70]

Additionally, the four case studies differ in terms of the peacebuilding strategies they have adopted since the reduction/stopping of the violence and the extent to which the international community has been involved in these efforts. Comprehensive peace settlements have been signed for BiH, NI and SA (the Dayton Agreement,[71] the Belfast Agreement and the Final Constitution respectively), but a settlement is still elusive in Cyprus, despite the fact that it has been

[59] Paul Sant Cassia, *Bodies of Evidence: Burial, Memory and the Recovery of Missing Persons in Cyprus* (New York, Berghahn Books, 2005) 35 and 52.

[60] Committee on Missing Persons in Cyprus, *Figures and Statistics of Missing Persons up to 31 March 2019* (Nicosia, Committee of Missing Persons, 2019).

[61] Cassia (n 59) 52.

[62] Global IDP Database, *Profile of Internal Displacement: Cyprus* (Geneva, Norwegian Refugee Council/ Global IDP Project, 2003).

[63] Patrick Ball, Ewa Tabeau and Philip Verwimp, *The Bosnian Book of Dead: Assessment of the Database* (Sussex, Households in Conflict Network, 2007).

[64] OSCE Mission to Bosnia and Herzegovina, *Special Report: Musical Chairs: Property Problems in Bosnia and Herzegovina* (Sarajevo, Organisation for Security and Cooperation in Europe, 1996) 45–46.

[65] CAIN Web Service – Conflict and Politics in Northern Ireland: Violence – Statistics and Other Data on Violence, available at www.cain.ulst.ac.uk/issues/violence/cts/fay98.htm#tables.

[66] David Welsh, *The Rise and Fall of Apartheid* (Charlottesville, University of Virginia Press, 2009).

[67] (Interim) Constitution of the Republic of South Africa Act 200 of 1993.

[68] Adrian Guelke, *South Africa in Transition: The Misunderstood Miracle* (London, IB Tauris, 1999) 45.

[69] James L Gibson and Amanda Gouws, *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (Cambridge, Cambridge University Press, 2003) 18.

[70] Welsh (n 66) 535.

[71] General Framework Agreement, signed on 14 December 1995.

a post-violence society for the longest period of time out of the four.[72] Rather, both sides have been respecting a ceasefire since 1974 and have implemented a number of interim or temporary peacebuilding measures until the ongoing negotiations result in the reaching of a comprehensive settlement.[73] The efforts to produce such a settlement are driven forward by the international community, in the form of the UN, which remains actively involved in the negotiations.[74] International participation was also prevalent during the negotiations of the Dayton Agreement, but the US government, which had played a leading role at the time, has taken a step back and has left the EU and Council of Europe to provide guidance and support during the Agreement's implementation phase.[75] Unlike Cyprus and BiH, which have both experienced heavy-handed international intervention, the peacebuilding processes in the other two case studies have been driven by the SA government on the one hand and the devolved institutions of NI and the UK government on the other. However, it should be noted that the difference in the level of international involvement in the various post-violence societies is only a matter of degree, since both NI and SA have received international funding, which is often conditional on following the donors' agenda and implementing their preferred projects.[76]

These characteristics notwithstanding, what is even more important in terms of assessing the peacebuilding potential of human rights are a series of factors that directly relate to the way in which they have been utilised in the post-violence society. The differences and similarities among the four case studies in relation to each of these factors give rise to endless permutations and provide fertile ground for comparative analysis between them. For example, Chapter 5 argues that one of the factors affecting the ability of human rights to resolve conflicts is whether they are implemented by a body with the necessary independence, power, resources and expertise to undertake this task. NI and SA have responded to conflicts relating to discrimination in the workplace through the enactment of substantively similar laws, which are nevertheless enforced by institutions with very different characteristics. While the NI legislation has successfully addressed discrimination in the workplace, the SA law has not had the same effect. This observation can result in a comparison based on what Hirschl has called 'the most similar cases principle', namely an assessment

[72] Michális Stavrou Michael, *Resolving the Cyprus Conflict: Negotiating History* (New York, Palgrave Macmillan, 2009).

[73] UN Secretary-General, *Report of the Secretary-General on the United Nations Operation in Cyprus,* S/2017/20 (New York, United Nations, 9 January 2017).

[74] For a biannual account of the UN's efforts in this respect, see the reports of the Secretary-General, available at https://www.securitycouncilreport.org/un_documents_type/secretary-generals-reports/?ctype=Cyprus&cbtype=cyprus.

[75] For a chronicle of the negotiations, see Richard Holbrooke, *To End a War* (New York, The Modern Library, 1999). For an overview of the EU's actions in BiH, see www.eubih.eu.

[76] Julie Hearn, *Foreign Aid, Democratisation and Civil Society in Africa: A Study of South Africa, Ghana and Uganda* (Brighton, Institute of Development Studies, 1999).

of two human rights strategies that are generally similar, bar one characteristic, yet have resulted in different outcomes.[77] The hypothesis is that the one difference between them – in this case, the characteristics of the implementing body – is causally related to the different outcome.

Conversely, Chapter 6 argues that an effective communication strategy between the peacebuilders and their target audience is instrumental for inducing social and psychological changes within the post-violence society. BiH and SA have each remedied violently displaced individuals in different ways, but they have both neglected to communicate the symbolic importance of these remedies to the victims. In both instances, the provision of a legal remedy has failed to result in meaningful social and psychological changes. This allows for a comparison based on the 'most different cases principle', whereby two cases which are largely dissimilar, but share a common characteristic and result in the same outcome, are examined.[78] Here, the hypothesis is that the similarity (the common failure to adopt a communication strategy) explains the similar outcome (the inability of the remedies to result in social and psychological changes).

V. CONCLUSION

Over the last decade, commentators have assessed the success of peacebuilding operations and have found them wanting. Among the criticisms that have been levelled against existing strategies is the fact that their focus on building institutions and developing the law has not been matched by a concern of how people are affected by, and perceive, these institutions.[79] Consequently, the peace that the liberal recipe gives rise to is 'hollow'[80] and looks more coherent from the outside than the inside.[81] Moreover, current peacebuilding operations have been criticised for adopting excessively uniform policies with little understanding or care that these might not fit the specific contexts of different post-violence societies.[82] A related point is the concern that this, together with the way in which peacebuilding operations are often structured and funded, tends to empower international actors to the detriment of local ones.[83] Finally, allegations have

[77] Hirschl (n 44).
[78] ibid.
[79] Richmond, 'A Post-liberal Peace' (n 15) 569.
[80] Mac Ginty (n 15) 158.
[81] Oliver Richmond, 'UN Peacebuilding Operations and the Dilemma of the Peacebuilding Consensus' (2004) 11 *International Peacekeeping* 83, 91.
[82] Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford, Hart Publishing, 2008).
[83] Severine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (Cambridge, Cambridge University Press, 2014).

been made that the assumptions of liberal peacebuilding, most predominantly the urge to push for democratisation and market liberalisation, have often encouraged rather than successfully reduced violent outbreaks.[84] However, even in the midst of such criticisms, reliance on human rights, as a conflict resolution strategy, has survived unscathed. The need to protect them *in order to build peace* is presented as a matter of common sense, a statement which almost by default does not need to be supported by arguments or empirical evidence. Moreover, while valuable in terms of challenging existing assumptions and practices, these critiques have sometimes been too abstract and negative in their focus, thus failing to identify possible alternative strategies or make constructive suggestions about how such limitations can be addressed.[85] This study seeks to both add to and develop such critiques. On the one hand, it confirms some of the above-mentioned limitations and tailors them specifically to the protection of human rights. It concludes that in a sobering number of instances, human rights could, and should, have done better. On the other hand, it proposes practical recommendations on how best to respond to these limitations. Taking these seriously can make human rights not only popular peacebuilding tools, but also effective ones.

[84] Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge, Cambridge University Press, 2004).

[85] Mac Ginty (n 15) 159. See also Oliver Richmond and Roger Mac Ginty, 'Where Now for the Critique of the Liberal Peace?' (2015) 50 *Cooperation and Conflict* 171.

4

Promoting Objective Peace through Human Rights Adjudication

I. INTRODUCTION

If resolving conflicts is necessary for the promotion of security, justice and reconciliation, one way in which human rights can contribute to the building of peace is by offering guidance to the judiciary as to the best way of doing this. The chapter is concerned with how using human rights in the courtroom can contribute to the resolution of conflicts as empirical phenomena and the promotion of objective peace. It argues that the extent and quality of the guidance provided by the courts, and therefore the effectiveness of human rights as peacebuilding tools, depend on three factors. The first relates to the nature and intractability of the conflict in question and, in particular, whether it is a fundamental or minor one. On the one hand, courts are more reluctant to decide disputes concerning fundamental conflicts and, on the other hand, even in cases where they do get involved, the reasoning and guidance they provide are not always persuasive or conductive to peace. As a result, human rights adjudication can contribute to conflict resolution, but mostly in cases that have to do with minor disagreements as opposed to more fundamental ones.

The second factor affecting the peacebuilding potential of human rights has to do with the type of court that adjudicates the dispute, since domestic and international bodies differ in terms of the sources of their legitimacy, the likelihood that their judgments will be enforced and the types of documents that each can interpret. An assessment of these differences suggests that the best peacebuilding strategy is not to favour one type of court over the other, but to be aware of the strengths and limitations of each, and use them accordingly. More specifically, international courts often pave the way for conflict resolution, with their domestic counterparts utilising that first judgment to make the provision of a remedy, and the promotion of each of the elements of peace, more accessible to the masses within the post-violence society. The final factor that affects the extent to which human rights adjudication can contribute to conflict resolution is the amount of time that has passed since the stopping of the violence and whether this ceasefire has also been followed by the signing of a comprehensive peace settlement. While in the absence of a peace agreement, the passage of time makes the judiciary more reluctant to adjudicate a conflict, the longer the time since the

reaching of a comprehensive settlement between the parties, the more likely are the courts to intervene. Identifying these factors is important because they can provide practical guidance to peacebuilders on the strategies they should adopt in order to ensure that conflicts are resolved as effectively as possible.

II. THE NATURE OF THE CONFLICT BEING ADJUDICATED

This section argues that the extent to which human rights adjudication can provide adequate guidance for conflict resolution and the building of peace depends on the nature of the conflict at hand. In particular, it makes a distinction between fundamental and minor conflicts, and argues that human rights can act as effective peacebuilding tools in the adjudication of the latter, but not the former. Since courts are well suited to address minor conflicts, such as disagreements about the interpretation of a statutory provision, they regularly undertake this task and do so successfully. Conversely, the intractable nature of fundamental conflicts results either in an unwillingness on behalf of the judiciary to adjudicate them or in the provision of guidance that is somehow deficient. Thus, even in cases where courts find cases concerning fundamental conflicts to be admissible, their judgments might be contradictory, fail to address the key issue at the heart of the disagreement or give guidance that is too broad or vague to be meaningful. This observation is significant because it is the mishandling and festering of fundamental conflicts, rather than of more minor disagreements, that most negatively impacts peacebuilding efforts.

A. Distinguishing between Fundamental and Minor Conflicts

A fundamental conflict is one where the parties disagree over issues of value, while a minor one is concerned with disagreements over competing interests.[1] In the former case, the parties experience an incompatibility of positions in terms of what they want to achieve, while in the latter, an in-principle agreement is in place, with the conflict focusing on the means through which the end will materialise.[2] Thus, in post-violence societies, fundamental conflicts tend

[1] Albert O Hirschman, 'Social Conflicts as Pillars of Democratic Market Society' (1994) 22 *Political Theory* 203.

[2] Jacob Kremenyuk, Victor Bercovitch and William Zartman, 'Introduction: The Nature of Conflict and Conflict Resolution' in Jacob Kremenyuk, Victor Bercovitch and William Zartman (eds), *The SAGE Handbook of Conflict Resolution* (London, SAGE Publications, 2008) 6. A superficially similar distinction is made by Aubert, who differentiates between 'consensual' conflicts over interests (where the disputants want the same thing) and 'dissensual' conflicts over values (where they want something different); see Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and of Conflict Resolution' (1963) 7 *Journal of Conflict Resolution* 26. However, he reaches very different conclusions about how each type of conflict can be resolved, so his terminology will not be adopted here.

to arise because the parties have competing visions of the state or how best to deal with the past, which are often completely at odds with each other.[3] More minor conflicts, on the other hand, emerge when the groups have settled on the basic characteristics and structure of a state or on the most suitable ways of addressing past injustices, but are in disagreement on how best to implement their common vision. Fundamental conflicts have been described as 'either/or' or zero-sum, with a 'win' by one party, necessarily being perceived as a 'loss' by the other.[4] This is in contrast to minor conflicts, which can more readily result in a compromise solution, since they are perceived as having less serious implications for the parties' identity survival.[5] Thus, Scheingold is right that:

> [W]hen the stakes are high, conflict is likely to be the most intense and the loser's will to resist likely to be at its strongest. The stakes are probably highest when the rights at issue are inelastic – that is, when victory is directly and totally at the expense of the loser.[6]

Often, fundamental conflicts are so intractable, precisely because the parties disagree on how a balance between the different elements of peace will be struck. For instance, the major disagreement between GCs and TCs as to how best to remedy persons who were displaced during the periods of violence on the island stems from the fact that the former prioritise justice considerations, while the latter are more concerned with security.[7] Whether a conflict is fundamental or minor is often a matter of degree, and depends on the attention it has received in the society in question, the willingness of the different parties to negotiate and any other external factors that might hinder or encourage the reaching of a compromise solution. Generally, however, the more fundamental the conflict, the more likely it is that its lingering presence or mishandling will detrimentally affect peacebuilding efforts. Specifically, if major disagreements remain unresolved, especially for long periods of time, this signifies a significant gap between the views of the parties, which in turn makes the promotion of reconciliation more difficult. In extreme cases, where the parties feel that this gap cannot be overcome, security might also be undermined, either because of the resumption of violence (which results in a lack of objective security) or due to fears among the population that this might happen (thus affecting feelings of subjective security).

While lingering fundamental conflicts are more detrimental to peace, they are also more difficult to resolve through human rights adjudication due to

[3] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge, Cambridge University Press, 2011).

[4] Donald Horowitz, *Ethnic Groups in Conflict*, 2nd edn (Berkeley, University of California Press, 1985) 176.

[5] Hirschman (n 1).

[6] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd edn (Ann Arbor, University of Michigan Press, 2004) 128–29.

[7] For a greater analysis of this, see section II.C below.

three reasons. The first concerns the institutional limitations of the courts when becoming involved in these kinds of disputes. Since major conflicts are complex, controversial and divisive, it is better that they are resolved by the democratically elected and legitimate bodies of the country rather than judges.[8] While a conflict might involve three or four parties, the judiciary can only resolve disputes between two sides and, especially in adversarial systems, exclusively depends on the information each party provides to it.[9] Conversely, the legislature has access to more sources of information and is institutionally and procedurally better-equipped to balance the competing interests of many different stakeholders. Second, as the ensuing examples suggest, fundamental conflicts often concern the very nature of the state or affect the interests of communities and collectives; human rights, with their focus on the individual, cannot adequately capture these considerations and offer guidance for their resolution.[10] The final reason why human rights adjudication best (or only) addresses *some* types of conflicts concerns the remedies that courts can deliver.[11] Although minor conflicts are usually resolved through a statutory re-interpretation, a suggestion for a legislative amendment or change in procedures, addressing fundamental conflicts might require the overhaul of a policy, a complete departure from current operations or even the redefinition of the character of the state. Courts are simply unable to deliver decisions with such wide-ranging implications.

B. Outlining the Disparate Approach to Conflict Adjudication

As a result of the factors outlined above, courts have adopted very different approaches when adjudicating minor and fundamental conflicts. In particular, while the adjudication of the former is considered routine, the judiciary often tries to avoid giving any guidance relating to the resolution of the latter, most notably by finding the case inadmissible. Evidence of the judiciary's disparate approach is offered by contrasting two Cypriot right to vote cases heard by the ECtHR, namely *Aziz v Cyprus*[12] and its follow-up case *Erel and Damdelen v Cyprus*.[13] To understand the claims of the parties in the two cases, some background on the complex development of the Cypriot electoral provisions

[8] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2.

[9] Lon Fuller, 'The Forms and Limits of Adjudication' (1978–79) 92 *Harvard Law Review* 353.

[10] Makau W Mutua, 'The Transformation of Africa: A Critique of Rights in Transitional Justice' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford, Hart Publishing, 2016) 92.

[11] Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, 136–37.

[12] *Aziz v Cyprus* App No 69949/01 (ECtHR, 22 September 2004).

[13] *Ali Erel and Mustafa Damdelen v Cyprus* App No 39973/07 (ECtHR, 30 April 2007).

is necessary. The 1960 Republic of Cyprus (RoC or Republic) Constitution provided for executive and legislative elections through two electoral registers – one for GCs and the other for TCs. GCs would vote for 70 per cent of the legislature and the President, while TCs would decide on the composition of 30 per cent of the legislature and the Vice-President.[14] When the TCs withdrew from government in 1963, all their positions remained vacant, thus making the Republic's operation according to the Constitution impossible.[15] In response to this situation, the Supreme Court of Cyprus decided that the doctrine of necessity could be used to interpret the Constitution in such a way so as to allow for the state's continued existence.[16] As a result, the Republic has, since then, been operating with decision-making bodies consisting only of GCs, who are, according to the Constitution, only elected through the GC electoral register. This, coupled with the continuing requirement that TC voters should be registered in their own electoral catalogue, wholly prevented them from exercising their right to vote. In practical terms, since the Turkish invasion of 1974, this has been a problem for a few hundred TCs who have chosen to continue residing in the areas under the control of the RoC and have not moved to the unrecognised 'Turkish Republic of Northern Cyprus' ('TRNC').[17]

Over the years, the GC electoral register came to include those foreigners who had become naturalised, but not TCs. Mr Aziz challenged this situation, arguing that since the Republic had for all intents and purposes a single electoral register, TCs permanently residing in RoC-controlled areas should be included in it as well. The Supreme Court rejected the argument, finding that what prevented TCs from voting was not the law, but the TC community's unilateral decision to abandon their positions in the Republic.[18] The case reached the ECtHR, where this argument was, unsurprisingly, dismissed: the 40-year disenfranchisement of TCs permanently living in the RoC-controlled areas was a violation of Articles 3 of Protocol No 1 (Article 3-1, right to vote) and 14 (freedom from discrimination) of the Convention.[19] Thus, reliance on human rights forced the parties to transform their political positions into legal arguments and paved the way for

[14] Constitution of the RoC, signed on 16 August 1960, art 1 (for the executive) and art 72 (for the legislature).

[15] Nasia Hadjigeorgiou and Nikolas Kyriakou, 'Entrenching Hegemony in Cyprus: The Doctrine of Necessity and the Principle of Bi-communality' in Yaniv Roznai and Richard Albert (eds), *Constitutionalism under Extreme Conditions: Law, Emergency, Exception* (New York, Springer, forthcoming).

[16] *The Attorney-General of the Republic v Mustafa Ibrahim and Others* (1964) CLR 195 (CA) (RoC Supreme Court, 10 November 1964).

[17] The 'TRNC' is the part of the island of Cyprus that is under Turkish occupation and therefore is not under the effective control of the Republic. It declared its independence in 1983, but has not been recognised by any state other than Turkey, in accordance with United Nations Security Council Resolution 544 (15 December 1983).

[18] *Ibrahim Aziz v Ministry of the Interior* (Case No 369/2001) (RoC Supreme Court, 23 May 2001).

[19] *Aziz* (n 12) [38]. Note that the case dealt only with TCs permanently living in the areas controlled by the Republic rather than with TCs generally.

the resolution of the conflict. The question was no longer about which community was to blame for what happened in 1963, but about whether any individual should remain disenfranchised solely on the grounds of their ethnicity. In turn, this change in the terms of reference allowed the Court to resolve the conflict by adopting a reasoning that was politically neutral, objectively persuasive and conductive to a sense of justice.[20] The judgment was swiftly implemented: the applicant and other TCs in a similar position are now included in the Republic's single electoral register, are allowed to vote in all elections and be voted in all elections except the presidential election.[21] Encouraged by the applicant's success in *Aziz*, a group of TCs challenged the electoral law again, arguing that Article 3-1 required not only that they are allowed to vote in the RoC, but also that they are entitled to a separate electoral register through which they could vote for 30 per cent of the legislature and the Vice-President in accordance with the Constitution.[22] This time, referring to Cyprus' wide margin of appreciation, the ECtHR declared the case inadmissible.

The ECtHR adopted radically different approaches in the two cases: the challenge in *Aziz* was not only found to be admissible but also successful, while that in *Erel* was swiftly dismissed as manifestly ill-founded. An explanation for this is that while the two cases seemingly dealt with a same issue, the demands of the applicants were much more at odds with the position of the RoC in *Erel* than in *Aziz*. In other words, while the conflict in *Aziz* was a relatively minor one, the one in *Erel* was of a more fundamental nature. The challenge of the state's structures in *Erel* was based on the belief that Cypriots should not vote as individual citizens, but rather as members of ethnic groups (hence the need for separate electoral registers). This fundamentally contrasted with the GC understanding of the purpose of the state, thus giving rise to a zero-sum, intractable conflict.[23] Conversely, the applicants in *Aziz* agreed with the RoC that individuals should enjoy voting rights because of their status as citizens rather than due to their ethnic group membership. They were merely asking that their ethnic background did not cloud this agreement and affect the rights they should enjoy.

It is therefore not surprising that the ECtHR adopted varying approaches in the two cases. The applicants in *Erel* essentially asked an international court to compel the RoC to fundamentally change its democratic structures: increase the number of Members of Parliament, re-introduce the position of

[20] Ibrahim Aziz, *Ibrahim Aziz v Republic of Cyprus*, Series of Lectures 'The People behind Judicial Decisions' (Nicosia, University of Cyprus, 26 November 2016).

[21] 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 of 2006 (2(I)/2006).

[22] *Erel and Damdelen* (n 13).

[23] On the GC positions with regard to minority rights, see UN Secretary-General, *Report of the Secretary-General on His Mission of Good Offices in Cyprus*, S/2003/398 (New York, United Nations, 1 April 2003) [19].

the Vice-President and create another electoral register.[24] However, a country's democratic structures are deeply affected by a 'wealth of differences, inter alia, in historical development, cultural diversity and political thought'.[25] It is not the place of an international court to set uniform standards on this issue, something that was acknowledged by the ECtHR in *Erel* when it referred to each state's 'considerable latitude in establishing constitutional rules'.[26] Ultimately, resolving such divisive conflicts requires considerably more intervention and guidance than an international court can legitimately engage in.[27] Nevertheless, even a domestic court is likely to have exercised similar judicial restraint. The issue at hand goes to the heart of a state's relationship with its citizens and concerns a question that should be publicly debated and decided not by judges, but by democratically elected and accountable politicians, or even the public itself through a referendum.[28] In any case, the judiciary – domestic or international – can only interpret human rights within a given matrix. It can protect an individual's interests in a specific context, not build the structure of a society from scratch, which is what the applicants in *Erel* sought to achieve.[29] As Scheingold aptly put it:

> Courts can be of some use in [adjudicating conflicts] that apply principally to government agencies and which turn mainly on procedural matters and issues of due process. However, the deeper that it is necessary to penetrate into society, the more undependable courts become.[30]

This disparate approach to the handling of fundamental and minor conflicts is not only a characteristic of the European Court. Rather, it has been manifested in the case law of domestic courts as well, with the SA Constitutional Court acting as a peacebuilding agent when adjudicating minor conflicts, and the judiciary of BiH failing to do so when asked to resolve fundamental conflicts.

[24] Such a conflict tends to be among 'the most testing and intransigent of the challenges because it concerns the fundamental question over which all major political conflicts are in the end waged – who rules?' (Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Cambridge, Polity Press, 2016) 257).

[25] *Hirst v United Kingdom (No 2)* App No 74025/01 (ECtHR, 6 October 2005) [61].

[26] *Erel and Damdelen* (n 13).

[27] Andreas Follesdal, 'Much Ado about Nothing? International Judicial Review of Human Rights in Well Functioning Democracies' in Andreas Follesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge, Cambridge University Press, 2014).

[28] Richard Bellamy, 'The Democratic Qualities of Courts: A Critical Analysis of Three Arguments' (2013) 49 *Representation* 333. For the argument that neither domestic nor international courts are well-suited to address such divisive conflicts, see Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations, or How Human Rights Courts May De-stabilise Power-Sharing Settlement' (2013) 24 *European Journal of International Law* 477, 492.

[29] Galanter (n 11) 137, noting that 'courts cannot address problems by devising new regulatory or administrative machinery (and have no taxing and spending powers to support it); courts are limited to solutions compatible with the existing institutional framework'.

[30] Scheingold (n 6) 130.

Arguably, the distinction in the types of conflicts the courts in the two countries were asked to adjudicate, and the response of the judiciary in each, is not accidental. The SA judiciary was able to contribute to peacebuilding efforts because the conflicts it was faced with were minor ones, and it was therefore well-equipped to resolve them. In turn, this had become possible because most fundamental disagreements had already been addressed during the negotiations leading to the adoption of the Interim and Final Constitutions.[31] Conversely, the Dayton negotiations for BiH had been less effective in resolving such disagreements, which were then left to be handled by domestic institutions, including the judiciary.[32] An example of a fundamental conflict in BiH arose when the Human Rights Chamber, a hybrid court that had temporarily been established by the Dayton Agreement, was asked to address the systemic and country-wide problem of discrimination in the workplace.[33] During the war in BiH, people of the 'wrong' ethnic group[34] were either fired or provisionally put on waiting lists for employment, with the promise that they would return to their jobs after the war.[35] When this promise did not materialise, thus resulting in ethnically homogenous workplaces, applicants sought to challenge the state of affairs as discriminatory. On many occasions, judges found cases relating to this fundamental conflict inadmissible by reasoning that they did not have jurisdiction, since the dismissal or placing of the applicant on the waiting list had taken place during the war and before the establishment of the judicial body that was hearing the dispute.[36]

Conversely, the SA Constitutional Court has been both more willing to adjudicate and more successful in resolving the (minor) conflicts it has been faced with. One example of this is *New National Party v Government of South Africa*, a case concerning a minor disagreement as to what documents could be used for identification purposes during the country's second democratic elections.[37] According to the Electoral Act No 73 of 1998, acceptable forms of ID only included documents published under the Identification Acts No 72 of 1986

[31] Adrian Guelke, 'South Africa: The Long View on Political Transition' (2009) 15 *Nationalism & Ethnic Politics* 417.

[32] Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Leiden, Martinus Nijhoff Publishers, 2005).

[33] The Human Rights Chamber was made up of seven domestic and seven international judges, and ceased operating on 31 December 2003. For more information, see General Framework Agreement for Peace in BiH, signed on 14 December 1995, Annex 6, Chapter 2, Part C.

[34] In other words, those who were in the minority ethnic group in the part of the country in which they were living.

[35] For a description of this practice, see *Zahirović v Bosnia and Herzegovina and Federation of Bosnia and Herzegovina* (CH/97/67) (Human Rights Chamber, 8 July 1999) [1].

[36] Sheri P Rosenberg, 'Promoting Equality after Genocide' (2008) 16 *Tulane Journal of International and Comparative Law* 329, 371.

[37] *New National Party v Government of South Africa* (CCT 9/99) (SA Constitutional Court, 13 April 1999).

and No 68 of 1997 or the Electoral Act itself. This left about 10 per cent of the population unable to vote and resulted in a challenge of the legislation as being incompatible with the right to political participation, protected under section 19 of the Constitution. Essentially, the case was about determining the rationale of the law in question and assessing whether its provisions reasonably limited section 19. No other body was better suited to carry out this task than the judiciary, which explains the Constitutional Court's success in resolving the conflict. Delivering a well-reasoned judgment, the majority held that practically speaking, the new identification documents were necessary because the 10 per cent of the population who had older forms of ID could have been in possession of one of seven different documents, thus considerably confusing the situation at the poll.[38] Moreover, the 1997 Electoral Act had been passed long enough before the elections, leaving those who wanted to vote six months within which to apply for the necessary document.[39] Finally, the Court considered the symbolic value of the older documents, which had been issued during apartheid and reflected the race of the person in possession of them. They were a reminder of SA's shameful past, which was personally offensive to many people and inappropriate for signalling the beginning of democracy in the country.[40] Thus, by relying on the right to political participation, the Court decisively resolved the conflict and offered a clear set of arguments as to why the use of specific forms of ID was necessary in the post-apartheid era. In doing that, it stressed that it was no longer acceptable to rely on racially discriminatory documents and contributed to a sense of justice and reconciliation in the country.[41]

The SA Constitutional Court further promoted peacebuilding efforts when it addressed minor conflicts concerning forced displacement by relying on the right to property.[42] The right under section 25 of the SA Constitution prima facie protects not the original owner, but the secondary occupier of the property (that is, the person who acquired the property under apartheid law). While starting from the premise that the current occupant is protected from the arbitrary deprivation of his or her property,[43] the right also allows its expropriation for public interest purposes.[44] '[T]he nation's commitment to land reform', which was considered necessary due to the forced displacement practices carried out

[38] ibid [33].
[39] ibid [40].
[40] ibid [35].
[41] ibid [19]–[20].
[42] Whether a conflict is fundamental or minor does not depend on the specific right it relates to, but on how conflicting the demands between the parties are and its consequent intractability. It is therefore possible that a conflict relating to the right to property in Cyprus is fundamental, while one framed in the same terms in SA is a minor one.
[43] SA Constitution, s 25(1).
[44] ibid s 25(2).

during apartheid, is explicitly mentioned as such an interest.[45] Section 25(7) makes specific reference to the remedying of apartheid injustices when it states that:

> A person or *community* dispossessed of property after 19 June 1913 *as a result of* past *racially discriminatory laws or practices* is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (Emphasis added)

It is the interpretation of this subsection that has resulted in several minor conflicts, which the Constitutional Court has been called to adjudicate. In particular, there have been disagreements about what is the exact meaning of the phrases 'community', 'as a result of' and 'racially discriminatory laws or practices', all of which affect the number of people labelled as victims and who are entitled to a remedy. In turn, the provision of a remedy, especially in light of the vast socio-economic differences in the country[46] and the psychological significance of this issue for black SAs,[47] is likely to influence the promotion of justice and reconciliation.[48] Finally, arguments have been made that unless forced displacement in SA is effectively remedied, 'the tinderbox of historical land injustice may, with the right spark, ignite in a critical political conflagration engulfing the entire country', thus undermining security.[49] Therefore, the resolution of these conflicts has a direct impact on each of the elements of peace.

In relation to the first disagreement, the Court adopted a broad interpretation of the term 'community' as 'a sufficiently cohesive group of persons', with 'some element of commonality between the claiming community and the community as it was at the point of dispossession'.[50] It acknowledged that this definition is relatively easy to satisfy, but justified its decision by pointing to the fact that the displacement, and the consequent scattering of the people, did not only have adverse economic consequences for them, but also weakened the bonds holding the community together in the first place.[51] A similarly broad interpretation was given to the phrase 'as a result of': the Court pointed out that apartheid laws allowing land dispossession were a labyrinth of different

[45] ibid s 25(4).

[46] In 2011, SA had the highest Gini coefficient, indicating socio-economic inequality, in the world (Gini Index, World Bank estimate, www.indexmundi.com/facts/indicators/SI.POV.GINI/rankings).

[47] James L Gibson, *Overcoming Historical Injustices: Land Reconciliation in South Africa* (Cambridge, Cambridge University Press, 2009) 40.

[48] Bernadette Atuahene, 'Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa' (2011) 45 *Law and Society Review* 955.

[49] Gibson (n 47) 218.

[50] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (PTY) Ltd* (CCT 69/06) (SA Constitutional Court, 6 June 2007) [39].

[51] ibid [42].

statutes preventing non-whites from owning land and that 'often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act'.[52] Consequently, the phrase 'as a result of' was held to mean 'as a consequence of' rather than 'solely as a consequence of'.[53] White landowners might have terminated the tenancy rights of the displaced community for commercial reasons, but this only became possible due to, and was therefore a result of, the matrix of racially discriminatory laws that existed in the country at the time. The judiciary adopted a broad interpretation of these phrases by considering the declared purpose of the law, namely to offer redress to as many victims of the violation of the right as possible.[54]

Finally, the right to property provided guidance on and helped the Court resolve the conflict about the meaning of the phrase 'racially discriminatory laws and practices'. This became an issue in *Alexkor v Richtersveld Community*, in which the appellant, Alexkor, argued that the Richtersveld Community should not be entitled to a remedy because it was removed from its land not by one of the statutes directly forcing black displacement, but by the Precious Stones Act No 44 of 1927.[55] The Court, rejecting the argument, started its analysis by referring to the need 'to provide redress to those individuals and communities who were dispossessed of their land rights'.[56] It pointed out that while the motive of the Precious Stones Act might not have been racially discriminatory, its consequences were, because it made a distinction between registered owners of the land and those who had indigenous law ownership. Registered owners were allowed to continue having access to the land and share its mineral wealth with the government; conversely, indigenous law owners were simply excluded from the land when the government exploited their resources without compensating them in any way.[57] Bearing in mind that indigenous law ownership was the main way in which black communities held land in SA and that these rights were not recognised or protected by the law, the legislation was inherently racially discriminatory through its consequences, even though it did not seek to achieve 'the (then) ideal of spatial apartheid'.[58] As in the other cases addressing minor conflicts, the Court was both willing and able to resolve the disagreement by adopting familiar strategies of statutory interpretation. Its reliance on human rights arguments supported and further legitimised the reasoning and outcome of the decision, and made positive contributions towards peacebuilding efforts in the country.

[52] ibid [66].
[53] ibid [69].
[54] ibid [42].
[55] *Alexkor Ltd and Another v the Richtersveld Community and Others* (CCT 19/03) (SA Constitutional Court, 14 October 2003).
[56] ibid [98].
[57] ibid [89].
[58] ibid [97].

C. The Dangers of Resolving Fundamental Conflicts in the Courtroom

The examples discussed so far have been concerned with situations where the judiciary's lack of guidance stemmed from its unwillingness to become involved in the resolution of the fundamental conflict in the first place. Nevertheless, even on those rare occasions that a court addresses a fundamental conflict directly, the guidance it provides for its resolution is still likely to be deficient. Donald and Mottershaw are right in arguing that: 'The impact of a legal decision may depend upon the extent to which it clearly articulates a discrete principle with broad potential application.'[59] Simply put, in cases of fundamental conflicts, courts find it very difficult to articulate such discrete principles in a way that balances the considerations of security, justice and reconciliation. Perhaps the clearest illustration of this stems from an analysis of the Cypriot right to property cases, in which the ECtHR dealt with the divisive question of how best to remedy forced displacement. The right to property is protected under Article 23 and section 36 of the RoC and 'TRNC' Constitutions respectively, and is also safeguarded by Article 1 of Protocol No 1 (Article 1-1) of the European Convention. Rather exceptionally, GC applications relating to this issue had, until recently, been decided by the ECtHR directly, without being subject to the requirement of exhausting domestic remedies, because the 'TRNC' law offered no remedy at all for the violation of the rights of GCs to property.[60]

The first right to property case concerning the Cypriot conflict to reach the ECtHR was *Loizidou v Turkey*, where the Court found a violation of Article 1-1.[61] The (GC) applicant owned a house in the occupied part of Cyprus and argued that the presence of Turkish troops, and the fact that they prevented her from accessing and enjoying it, violated her right to property.[62] The majority of the Court agreed, finding that Turkey was in effective control of the northern part of Cyprus and therefore was responsible for any violations that were taking place there.[63] Conversely, the minority in *Loizidou* expressed serious reservations about whether the ECtHR should become involved in the adjudication of such a zero-sum conflict. Judge Jambreg, for example, pointed out that:

> The 'political nature' of the present case is in my view rather related to the place of the courts in general, and of the Strasbourg mechanism in particular, in the scheme of the division and separation of powers. There, the courts have a different role to play, than, eg the legislative and executive bodies. Courts are adjudicating in individual and concrete cases according to prescribed legal standards. They are ill-equipped

[59] Alice Donald and Elizabeth Mottershaw, 'Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK' (2009) 1 *Journal of Human Rights Practice* 339, 356.

[60] For an analysis of this argument, see *Demopoulos and Others v Turkey* App No 46113/99 (ECtHR, 1 March 2010) [50]–[129].

[61] *Loizidou v Turkey (Merits)* App No 15318/89 (ECtHR, 18 December 1996).

[62] ibid [58].

[63] ibid [64].

> to deal with large-scale and complex issues which as a rule call for normative action and legal reform.[64]

Echoing these concerns, Judge Pettiti noted that:

> [T]he whole problem of the two communities … has more to do with politics and diplomacy than with European judicial scrutiny based on the isolated case of Mrs Loizidou and her rights under Protocol No 1.[65]

Confirming the minority's concerns, over the years approximately 1,400 cases with similar facts flooded the European Court, which kept reaffirming the majority's decision in *Loizidou*.[66] This state of affairs, with the Court almost mechanically finding a violation of Article 1-1, changed in *Demopoulos v Turkey*, a case with essentially identical facts to *Loizidou*. In *Demopoulos*, Turkey accepted responsibility for the violation of GC property rights and sought to offer a remedy by establishing the Immovable Property Commission (IPC). The Court examined the IPC's power to offer restitution, compensation or exchange of properties to the applicants and declared that it provided effective legal remedies, which barred further legal action from GC applicants to the ECtHR.[67] As a result, applicants who are currently seeking a remedy for the violation of their property rights must apply to the IPC and only after exhausting all legal remedies within the 'TRNC' can they apply to the ECtHR.[68] Thus, *Demopoulos* brings the Cyprus cases into line with other decisions of the ECtHR on forced displacement, in which the Court has altogether avoided the adjudication of such zero-sum conflicts.[69]

[64] ibid, Dissenting Opinion by Judge Jambreg [7].

[65] ibid, Dissenting Opinion by Judge Pettiti. Similar concerns have also been raised in the literature; see, eg, Thomas Allen, 'Restitution and Transitional Justice in the European Court of Human Rights' (2007) 13 *Columbia Journal of European Law* 1, 27.

[66] 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' (2010) 35 *European Law Review* 720, 725.

[67] *Demopoulos* (n 60) [114]–[119].

[68] Nasia Hadjigeorgiou, 'Remedying Displacement in Frozen Conflicts: Lessons from the Case of Cyprus' (2016) 18 *Cambridge Yearbook of European Legal Studies* 152; Nasia Hadjigeorgiou, 'Joannou v Turkey: An Important Legal Development and a Missed Opportunity' (2018) 2 *European Human Rights Law Review* 168.

[69] Tom Allen and Benedict Douglas, 'Closing the Door on Restitution: The European Court of Human Rights' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge, Cambridge University Press, 2011). Further confirming the position that the Court's decision to adjudicate a fundamental conflict in *Loizidou* was exceptional is a comparison between it and *Blecić v Croatia* App No 59532/00 (ECtHR, 8 March 2006). *Blecić* concerned Croatian laws that allowed the domestic judiciary to terminate specially protected tenancies during the war, on the ground that the tenants had been absent for more than six months without good reason. The applicant argued that the termination violated her right to property, but the Grand Chamber found the case inadmissible. In stark contrast to *Loizidou*, the Court declined to consider the broader context in which this dispute occurred, and its reasoning does not disclose the slightest hint that terminations of this type were often part of a larger campaign of ethnic cleansing. For an analysis of the judgment, see Allen, (n 65) 14–15.

Loizidou is one of the rare instances in which the ECtHR allowed itself to become involved in the resolution of a fundamental disagreement. It is also an illustration of the dangers, in terms of undermining peace, that can materialise when this has not been done successfully. Arguably, despite the ECtHR's assessment that the Cyprus problem 'should have been resolved by all parties assuming full responsibility for finding a solution on a political level', its case law on the right to property has in fact hindered the successful outcome of the negotiations.[70] One of the major hurdles to reaching a comprehensive peace settlement is the dispute between the two sides as to what the right to property requires. On the one hand, GCs consider the 1974 Turkish invasion of the island to be the root of the displacement problem. Their preferred remedy is restitution, since this will take them back to the pre-1974 situation as much as possible and promote justice.[71] On the other hand, most TCs see the events of 1974 not as an illegal invasion, but as a necessary intervention for the protection of their endangered ethnic identity from the GC majority.[72] They consider the current state of affairs, with the two populations largely segregated and therefore unable to undermine each other's sense of security, as the best alternative. They argue that GCs should recognise the realities on the ground and accept that the only realistic remedies to the displacement problem are compensation and exchange of properties.[73] These different remedies envisioned by the two communities are not the result of different interpretations of the law; rather, they stem from diametrically opposed visions of what a peaceful Cyprus should look like, thus explaining the unwillingness of the two sides to compromise their positions.

The ECtHR's involvement in the adjudication of this fundamental conflict has done little to bridge these positions and promote a successful outcome in the negotiations. On the contrary, it has hardened the respective positions of the parties since each has selectively read the Court's case law as only confirming its own point of view. For instance, after *Loizidou* had been decided in the applicant's favour, many GCs assumed that the ECtHR had confirmed their long-standing position that all displaced persons should return to their homes and that nothing short of restitution of *all* properties could satisfy the European Court's standards.[74] The Court had insisted that it 'does not consider

[70] *Demopoulos* (n 60) [85].

[71] UN Secretary-General, *Report of the Secretary-General on His Mission of Good Offices in Cyprus* (1 April 2003) [107].

[72] The 'TRNC' Constitution makes reference in its preamble to 'bitter experiences [the TC people] had undergone until the year 1974 when the Peace Operation, which was carried out by the Heroic Turkish Armed Forces by virtue of the Motherland's natural, historical and legal right of guarantorship emanating from Agreements, provided to the Turkish Cypriots the means of living in peace, security and liberty'.

[73] Ayla Gürel and Kudret Özersay, *The Politics of Property in Cyprus: Conflicting Appeals to 'Bizonality' and 'Human Rights' by the Two Cypriot Communities*, 3/2006 (Nicosia, PRIO Cyprus Centre, 2006).

[74] Elena Katselli-Proukaki, 'The Right of Displaced Persons to Property and to Return Home after Demopoulos' (2014) 14 *Human Rights Law Review* 701.

it necessary, let alone desirable … to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC"'.[75] Despite this, most GCs have understood *Loizidou* to mean that the property issue is a matter of rectifying an illegal situation, a task that can only be achieved through full compliance with international law.[76] This has, in turn, resulted in an unwillingness among the majority of GCs to approve of a solution that does not allow restitution in the majority of cases.[77] On the other hand, the *Demopoulos* line of cases has also created very few incentives for TCs to resolve the conflict. In *Xenides-Arestis v Turkey*, a case that preceded *Demopoulos* and in which it was held for the first time that the IPC could in principle be an effective domestic remedy, the Court pointed out that the possibility of restitution should exist for the applicants.[78] Nevertheless, it was subsequently stated in *Demopoulos* that it is within the discretion of each state what remedy it will provide, since 'property is a material commodity which can be valued and compensated for in monetary terms'.[79] As a result of *Demopoulos*, almost all the cases that have been decided by the IPC so far have been settled through compensation.[80] However, if the IPC provides the opportunity to the 'TRNC' to resolve the overwhelming majority of claims through *its* preferred remedy, this removes any incentive from the TC side to negotiate an agreement, which is likely to require the return of considerable areas of land back to GCs.[81]

Thus, the ECtHR's handling of this fundamental conflict has undermined the possibility of reaching a comprehensive peace settlement.[82] In turn, this has had detrimental consequences on each of the elements of peace: while there has been no serious violence in Cyprus since the 1974 Turkish invasion, there are still thousands of Turkish troops stationed there, which Turkey uses as a threat against the RoC in order to influence its decisions on issues of national importance.[83] In addition to undermining security, the ongoing, unsuccessful

[75] *Loizidou* (n 61) [45].

[76] Loukis G Loucaides, 'Is the European Court of Human Rights Still a Principled Court of Human Rights after the *Demopoulos* Case?' (2011) 24 *Leiden Journal of International Law* 435.

[77] Alexandros Lordos and Erol Kaymak, *Public Opinion and the Property Issue: Quantitative Findings,* Cyprus 2015: Research and Dialogue for a Sustainable Future (Cyprus, Interpeace, 2010) 7.

[78] *Xenides-Arestis v Turkey* App No 46347/99 (ECtHR, 14 March 2005).

[79] *Demopoulos* (n 60) [115].

[80] Presidency of Immovable Property Commission, *Monthly Bulletin* (Nicosia, Immovable Property Commission, April 2019), available at www.tamk.gov.ct.tr/dokuman/istatistik_nisan19ing.pdf.

[81] For an outline of what it is being proposed with regard to the remedying of refugees and the return of properties in a comprehensive peace settlement, see UN Secretary-General, *Report of the Secretary-General on His Mission of Good Offices in Cyprus* (1 April 2003) [109]–[111].

[82] This is despite the fact that the ECtHR addressed this concern directly and held that 'it was not persuaded by the argument that it would undermine political discussions concerning the Cyprus problem' (*Loizidou v Turkey (Article 50)* App No 15318/89 (28 July 1998) [26]).

[83] The UN Secretary-General has described 'the northern part of the island [as] one of the most highly militarized areas in the world in terms of the ratio between numbers of troops and civilian population' (UN Secretary-General, *Report of the UN Secretary-General to the Security Council on the UN Operation in Cyprus,* S/1994/680 (New York, United Nations, 7 June 1994) [28]). As an example of Turkish interference with RoC national security issues, see the threats that if Cyprus continues

negotiations keep reminding Cypriots of both communities that the injustices of the 1960s and 1970s continue until today and that a solution to the problem will be a compromise where their preferred form of justice will not be fully protected. Finally, the current status quo also undermines reconciliation since each side portrays the other as making maximalist demands and being solely to blame for the lack of a peace agreement.[84] The unsuccessful resolution of this conflict has also had indirect negative consequences for peace; it has created conditions for nationalist rhetoric to flourish, demonised the idea of inter-ethnic cooperation and contributed to electoral disillusionment, none of which helps promote the three elements.[85]

The judiciary's inability to provide guidance that meaningfully contributes to the resolution of fundamental conflicts, even when it does become involved in their adjudication, is also evident from the handling of the BiH workplace discrimination cases briefly mentioned in the previous section. While the BiH Human Rights Chamber has found many such cases to be inadmissible, on other occasions it has overcome the *rationae temporis* argument[86] by referring to the existence of a continuous violation, since the applicants have remained unremedied until after the conclusion of the war and the establishment of the new Dayton institutions.[87] However, the lack of a consistent approach and the resulting contradictory case law has done little to encourage a universal strategy of non-discrimination in the workplace and promote a sense of justice among the victims.[88]

Moreover, the Human Rights Chamber's failure to offer guidance for the resolution of the conflict has also been compounded by its unwillingness to

with natural gas exploitation, 'Turkey will absolutely retaliate' (Statement by the Turkish Deputy Prime Minister, cited in Ayla Gürel, Fiona Mullen and Harry Tzimitras, *The Cyprus Hydrocarbons Issue: Context, Positions and Future Scenarios*, 1/2013 (Nicosia, PRIO Cyprus Centre, 2012) 62). Such threats continue to be made today.

[84] See, eg, the UN Secretary-General Special Adviser in Cyprus, encouraging the parties to avoid the 'blame game' following (yet another) collapse of the negotiations: 'Not the Time for "Blame Game," Urges UN Special Advisor on Cyprus' (18 July 2017), available at www.un.org/apps/news/story.asp?NewsID=57209#.Wf7R8baQ3BI.

[85] For an overview of the political state of affairs in the two communities and the impact of this on their willingness to reach a political compromise and promote reconciliation, see Maria Ioannou, Giorgos Filippou and Alexandros Lordos, 'The Cyprus Score: Finding New Ways to Resolve a Frozen Conflict' in Tabitha Morgan (ed), *Predicting Peace: The Social Cohesion and Reconciliation Index as a Tool for Conflict Transformation*, 2nd edn (Cyprus, UNDP-Action for Cooperation and Trust, 2015).

[86] In other words, the argument that it does not have temporal jurisdiction because the violations of human rights took place before it had been established.

[87] See, eg, *Zahirović* (n 35); *Rajić v the Federation of Bosnia and Herzegovina* (CH/97/50) (Human Rights Chamber, 8 April 2000); *Mitrović v Federation of Bosnia and Herzegovina* (CH/98/948) (Human Rights Chamber, 6 September 2002).

[88] For a statistical analysis of the levels of social cohesion, reconciliation and political integration in BiH, see Maria Ioannou, Nicolas Jarraud and Alexandros Lordos, 'The Bosnia Score: Measuring Peace in a Multi-ethnic Society' in Morgan (ed) (n 82).

address what is at the heart of this fundamental disagreement by refusing to find a violation of the right to non-discrimination in cases where it had already found the violation of another right.[89] An illustration of this is the case of *Zahirović v BiH and Federation of BiH*, in which a Bosniac bus conductor had been put on the employment waiting list during the war.[90] By the end of the war, a number of Croats had been hired by the state company, with the applicant remaining, without good reason, still without a job. Evidence was presented in court that this was just one example of a pattern of discrimination against Bosniacs, which the Croat-controlled authorities – including the local judiciary – in the area in question had left largely unchallenged.[91] This state of affairs, the applicant contended, constituted discrimination in his enjoyment of his right to work, and since he had been unable to challenge it in court, a violation of the right to fair trial and of a separate count of freedom from discrimination. The Human Rights Chamber, finding a violation of freedom from discrimination in the workplace and the right to fair trial,[92] held that it was unnecessary to examine the question of discrimination by the judiciary separately.[93] Yet, this unwillingness to find an additional violation is regrettable because the judiciary's discriminatory practices were part of a well-thought-out strategy to continue pursuing the ethnic cleansing objectives of the war through other means.[94] By stopping itself from identifying the root of the problem and acknowledging that the violation of the right to fair trial was itself a consequence of discrimination, the Court indirectly endorsed the continuation of this practice and undermined each of the elements of peace.

The discriminatory practices that the Human Rights Chamber failed to condemn are but one example of the continuing ethnic cleansing policies that exist in BiH. Bosnians are being treated differently on grounds of religion and ethnicity in almost all areas of life, including the provision of housing,[95] social services[96] and education.[97] Such discriminatory policies have significant

[89] This approach reflects the ECtHR's methodology in freedom from discrimination cases, especially in the 1990s; since then, its methodology has become more protective of the right. See Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 6th edn (Oxford, Oxford University Press, 2014) 572–73.

[90] *Zahirović* (n 35).

[91] ibid [137]. Similarly, in *D.M. v the Federation of Bosnia and Herzegovina* (CH/98/756) (Human Rights Chamber, 12 May 1999) [73], which was also concerned with discrimination in Canton 10, the Chamber noted that even 'the respondent party … conceded that there [was] "a problem" in the Court system in Canton 10 "in respect of both efficiency and independence".'

[92] *Zahirović* (n 35) [130] and [139] respectively.

[93] ibid [140].

[94] Rosenberg (n 36) 363.

[95] European Commission against Racism and Intolerance, *ECRI Report on Bosnia and Herzegovina (Fifth Monitoring Cycle)*, CRI(2017)2 (Strasbourg, Council of Europe, 6 December 2016) [61].

[96] ibid [63].

[97] ibid [54]–[55].

detrimental effects on peacebuilding efforts, and the judges' inability to fully challenge them has further compromised attempts to promote justice and reconciliation.[98] At the same time, and especially in the short term, it has undermined feelings of security among members of the 'wrong' ethnic group in different parts of the country. For instance, making reference to discriminatory practices, such as racist crimes and the use of hate speech that go unpunished by the authorities, the European Commission against Racism and Intolerance (ECRI) argued that these have resulted in feelings of insecurity among minority returnees.[99] While a finding of discrimination by the judiciary would not have automatically addressed these problems, it would have sent out the message that such practices are no longer acceptable.

D. The Lessons to Draw

The mixed performance of human rights adjudication as a conflict resolution strategy points to three practical recommendations for peacebuilders. First, since it is an ill-suited mechanism for resolving fundamental conflicts, efforts should be made to ensure that these are addressed during the political negotiations leading to the peace agreement.[100] Adopting strategies such as constructive ambiguity, which gloss over disagreements during the negotiating stages and leave them to be handled later on, might indeed assist in the conclusion of the agreement.[101] They should nevertheless be avoided because they achieve this by shifting the task of addressing fundamental conflicts to a later point in time, when political momentum for their resolution might have been lost. In turn, this often pushes peacebuilders to turn to the judiciary, a temptation that, as the preceding analysis suggests, should be avoided.

Related to this is the second practical recommendation, namely that when faced with fundamental conflicts, peacebuilders should always push so that they are resolved by the legislature rather than adjudicated in the courts. The judiciary may have the advantage of being more insulated from the political process and the power relations that push or hinder change, but it is also less well-equipped to introduce institutional changes, re-allocate resources or ensure effective implementation of its decisions.[102] Therefore, in cases concerning fundamental conflicts, the courts might be able to confer the applicant a temporary advantage, but they are usually unable to decisively resolve the disagreement and promote peace. As a result, a more effective use of peacebuilding resources

[98] ibid [53].
[99] ibid [14] and [19].
[100] For the argument that in divided societies there should be political or 'softer' conflict resolution mechanisms than the judicial ones, see Ulrich Schneckener, 'Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation' (2002) 39 *Journal of Peace Research* 203.
[101] Lerner (n 3).
[102] Galanter (n 11) 150.

in such cases would be to focus on lobbying for legislative action rather than rallying behind lawyers. Often, of course, the adjudication of a fundamental conflict is beyond the control of peacebuilders, since the case may be brought to court by an individual applicant. However, even in such cases, peacebuilders may be able to influence individual cases by deciding whether to make submissions as third parties. For example, while GC property cases to the ECtHR were initiated by individuals, in many of them, the applicants received support from the RoC government, which acted as an intervening party in their favour.[103] If the conclusions of this section are taken seriously, the RoC should rethink this strategy and focus its efforts on reaching a political compromise instead.

The final recommendation stemming from this analysis is that since courts can help resolve minor conflicts, they should be strengthened in order to achieve this more effectively. Efforts to empower the institutions that are likely to adjudicate such disputes have started being made in BiH, where, since 2012, the authorities estimate that around 50 per cent of relevant prosecutors and judges have received training on hate crimes and discrimination.[104] While this is a step in the right direction, ideally, similar schemes should have been initiated much earlier during the peacebuilding process. Moreover, increased knowledge of the law is ultimately unhelpful if the judiciary that applies it remains relatively inaccessible to individual applicants. Factors that affect the accessibility of legal institutions include, inter alia, their geographical location,[105] the financial cost involved in the application,[106] any personal risk that the applicant is adopting by resorting to them[107] and the extent to which an individual can navigate the process on his own, instead of relying on a lawyer.[108] Thus, especially when being repeatedly faced with the manifestation of the same minor conflict, peacebuilders should consider changes in the structures and rules of procedures of courts that are likely to hear such disputes. These changes should take into account the fact that, as a general rule, minor conflicts are likely to be brought to court by 'one-shooters' – people with little or no experience of the judicial process – against more experienced 'repeat players'.[109] As a result, proposals could envision the establishment of specialised courts, or even alternative dispute resolution

[103] Nasia Hadjigeorgiou, 'A One-Sided Coin: A Critical Analysis of the Legal Accounts of the Cypriot Conflicts' in Berber Bevernage and Nico Wouters (eds), *The Palgrave Handbook of State-Sponsored History after 1945* (London, Palgrave Macmillan, 2018).

[104] European Commission against Racism and Intolerance (n 95) [46].

[105] Graeme Simpson, Edin Hodžić and Louis Bickford, *Looking Back, Looking Forward: Promoting Dialogue through Truth-Seeking in Bosnia and Herzegovina* (Sarajevo, United Nations Development Programme, 2012) 80.

[106] Peter van der Auweraert, *Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward* (Geneva, International Organization for Migration, 2013) 15.

[107] *Xenides-Arestis* (n 78) section 3(b)(iii).

[108] Anton Kok, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform' (2008) 24 *South African Journal on Human Rights* 445.

[109] Galanter (n 11) 169–70.

mechanisms, such as Ombudspersons.[110] These tend to operate using simpler procedures and evidentiary rules, which make them more readily available to the applicants and result in quicker access to justice.[111] Furthermore, they are likely to encourage the accumulation of knowledge and expertise among their judges or members, which will in turn produce better reasoned and more consistent decisions.

Equally important as the establishment of these institutions is the requirement that they operate within an applicant-friendly framework, which will encourage the swift resolution of minor conflicts. The detrimental consequences to peacebuilding efforts when this consideration is ignored are illustrated through an assessment of the mechanics of the Employment Equity Act No 55 of 1998, which prohibits direct or indirect discrimination against an employee in SA.[112] Responsible for implementing its provisions are the Commission of Conciliation, Mediation and Arbitration and the Labour Courts. The Act provides that in order for a complaint to be heard by a Labour Court, the alleged victim must first make an attempt to resolve the dispute within the company that employs him or her and be able to provide proof that he or she has taken such steps.[113] This is in itself a barrier to adjudication, since applicants are likely to be hesitant to raise their complaints internally if they have already faced indifference or hostility by the very employers they are complaining against. If the dispute is not resolved through this initial step, the applicant has six months from the time the alleged discrimination has taken place to submit his or her complaint to the Commission,[114] and only after conciliation has failed can the dispute be referred to a Labour Court.[115] This long process, which remains the same irrespective of how serious the alleged discrimination or urgent its response is, arguably discourages potential victims from voicing their grievances and undermines feelings of justice.[116]

Even when individual applicants have reached the Labour Court, they can face additional challenges since hiring a lawyer and going through a cumbersome legal process might be too onerous for them, both economically and psychologically.[117] One method of addressing this would be to allow for class

[110] Sharon Gilad, 'Why the Haves Do Not Necessarily Come out Ahead in Informal Dispute Resolution' (2010) 32 *Law and Policy* 283.

[111] Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complaints: Courts and Legal Representation' (2009) 32 *University of New South Wales Law Journal* 699.

[112] Employment Equity Act No 55 of 1998, s 6.

[113] ibid s 10(4)(b).

[114] ibid s 10(2).

[115] ibid s 10(6)(a).

[116] Andries Bezuidenhout et al, *Tracking Progress on the Implementation and Impact of the Employment Equity Act since its Inception*, Research Consortium: Human Science Research Council, Development Policy Research Unit, Sociology of Work Unit (Johannesburg, Research Commissioned by Department of Labour South Africa, 2008) 17.

[117] Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401, 1475.

action lawsuits, which are also more effective than individual applications in dealing with entrenched systems of discrimination, but this is not a possibility that is permitted by the Act.[118] Alternative responses include making legal aid available, and therefore empowering applicants to hire a lawyer, or allowing representation or other forms of assistance by an institutional player, such as an Equality Commission. These strategies can contribute to the more effective adjudication of disputes, since both lawyers and mandated institutions are 'repeat players', who can guide the applicants around the pitfalls of the process. Finally, the remedy that a specialised body can award is important because it signals to potential applicants whether it is worth trying to adjudicate a minor conflict in the first place. Problematically in this regard, the Employment Equity Act creates a complete exemption from liability in cases where employers did what was 'reasonably practicable to eliminate' the discrimination in question.[119] In the majority of cases, instead of disciplining the discriminatory conduct, employers respond to victims' complaints merely by compensating them, a practice that the Labour Court has considered adequate.[120] This is irrespective of the fact that monetary awards are arguably insufficient ways of remedying the loss of a person's dignity and esteem, and especially when these are very small, it is also questionable whether they deter future discriminatory practices.[121] Thus, in order for human rights adjudication to become an effective peacebuilding strategy, consideration must be paid to the structure and powers given to courts, as well as the institutions that can supplement their work.

III. THE TYPE OF COURT ADJUDICATING THE CONFLICT

A. Exploring the Differences between Domestic and International Courts

Peacebuilding reports refer to the need to protect human rights in post-violence societies, but they do not often clarify whether by that, they mean domestic or international protection.[122] Practice on the ground is also mixed: peace agreements are usually accompanied by accession to an array of international human rights treaties, while at the same time, there is an increased focus on the strengthening and professionalisation of the domestic judiciary.[123]

[118] Bezuidenhout et al (n 116) 18.

[119] Employment Equity Act, s 60.

[120] Emma Fergus and Debbie Collier, 'Equality at Work: The Role of the Judiciary in Promoting Transformation' (2014) 30 *South African Journal on Human Rights* 484.

[121] ibid.

[122] See, eg, the generally worded expectation in Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, A/55/305–S/2000/809 (New York, United Nations, 2000) [41] that 'the human rights component of a peace operation is indeed critical to effective peace-building'.

[123] For example, while the Dayton Agreement makes BiH a member of 16 international human rights agreements (BiH Constitution (General Framework Agreement, signed on 14 December 1995, Annex 4), Annex I), there has also been increased attention on the reform of the domestic judiciary