

## BOOK REVIEW

*LEGAL NORMATIVITY IN THE RESOLUTION OF INTERNAL ARMED CONFLICT* BY PHILIPP KASTNER (CAMBRIDGE UNIVERSITY PRESS, 2015) 230 PAGES. PRICE GBP 72.00 (HARDCOVER) ISBN 9781107107564.

Negotiated transitions from armed conflict to peace ever increasingly attract the attention of international actors, including international law scholars. With the ongoing peace processes in Colombia, the Middle East (Israel–Palestine), Myanmar, the Philippines, South Sudan, Syria, Ukraine, Yemen and others, the topic is never absent from the news agenda and references to international law, values of the international community and requirements of international justice abound. Such references are made in relation to various issues, ranging from the setting of the peace table to the substantive components of peace agreements. In Syria, for instance, certain armed groups have been disqualified from a new round of peace talks initiated by Russia, Iran and Turkey, as they have been classified as terrorist groups. In Colombia, in addition to the unsurprisingly heated discussion about the compliance of the peace agreement between the government and the Revolutionary Armed Forces of Colombia – People’s Army (‘FARC’) with the requirements of transitional justice, even the rather formalistic question of the legal status of the peace agreement led to intense debates among the public, as well as in legal circles. The United Nations and several other international actors have called for local ownership, inclusivity and participation of women, all of which are deemed to reflect international standards or values, in at least some of these peace processes.

As part of its attempts to facilitate the practice of internationalised peacemaking, a new and comprehensive peace agreement database, Language of Peace, has been recently launched at the UN.<sup>1</sup> The main aim is to enable the negotiating parties and mediators involved in peace processes around the world to draw lessons from previous peace agreements. Yet, there is also a theoretical aspect to the project, exploring and potentially developing the congruence between the practice of peacemaking and international law.<sup>2</sup>

This legal-normative approach to peacemaking now has a decade-long history in international law, which was developed in a comprehensive manner for the first time in Christine Bell’s seminal study on peace agreements, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*.<sup>3</sup> The past decade saw, in surprisingly few numbers though, legal studies which have dealt with the issues

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<sup>1</sup> United Nations Department of Political Affairs and University of Cambridge, *Language of Peace* <<http://www.languageofpeace.org>> archived at <<https://perma.cc/VD72-3XTP?type=image>>.

<sup>2</sup> Marc Weller et al, ‘Identifying the Language of Peace: Developing the Practical and Theoretical Framework of Peace-Making’ on *EJIL:Talk!* (4 January 2017) <<http://www.ejiltalk.org/identifying-the-language-of-peace-developing-the-practical-and-theoretical-framework-of-peace-making/>> archived at <<https://perma.cc/6C8G-JPJZ>>.

<sup>3</sup> Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008).

of the legal status of peace agreements, the theory of the relationship between peacemaking and international law and the legality of certain substantive components of peace agreements. Except for the studies on the inclusion of women in peace negotiations, the emphasis has predominantly been on the external features of peacemaking and the contents of the resultant peace agreements.

Philipp Kastner's *Legal Normativity in the Resolution of Internal Armed Conflict* takes a different approach and opens the door into a substantive study of the process-related norms of peacemaking.<sup>4</sup> Instead of an outcome-based focus in practice and scholarship, which is often accompanied by a perception of law as a prescriptive and monolithic body of rules, Kastner advocates an emancipatory potential of law in peacemaking through processual norms that would facilitate the conclusion of an agreement and contribute to 'procedural justice'.

The notion of 'procedural justice' gains special significance in the resolution of internal armed conflict. In the introductory chapter 1, Kastner explores the distinctive features of the latter as they have evolved in the post-Cold War era. As opposed to interstate peacemaking, peace processes following internal armed conflicts present challenges to traditional understandings of the role of law in conflict resolution due to the mixture of state and non-state parties involved, the transitional yet constitutional character of the peace settlements and the internationalisation of peacemaking through the involvement of external actors. The last-mentioned has specifically contributed to the normativisation of conflict resolution as external actors have often acted as norm-promoters.<sup>5</sup> In these settings, according to Kastner, approaching 'peace' and 'peacemaking' as processes instead of completed projects and tracing the use and creation of legal norms in the discourses of the relevant actors become crucial. Making the case for the necessity and originality of his study, Kastner argues that the existing peace and conflict studies and international law literature, the former by ignoring the normative dynamics of conflict resolution and the latter by focusing on prescriptive norms and outcome documents, have fallen short of combining the analysis of resultant peace agreements with an analysis of the role and creation of legal normativity in the process.<sup>6</sup>

In chapter 2, Kastner proceeds to address the question of why a study of peace negotiations and the discursive use of international legal norms therein, instead of the texts of peace agreements, are more amenable to revealing the true potential of international legal normativity in peacemaking.<sup>7</sup> First, he surveys the 'hard references' to international law and international standards in peace agreements. Such references, which have become more common following the Cold War, pertain to issues of human rights, transitional justice, return of refugees, and participation and protection of women. Yet, there is no uniform practice across peace processes. For example, the Israeli–Palestinian peace

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<sup>4</sup> Philipp Kastner, *Legal Normativity in the Resolution of Internal Armed Conflict* (Cambridge University Press, 2015).

<sup>5</sup> *Ibid* 5.

<sup>6</sup> *Ibid* 15, 23.

<sup>7</sup> In the descriptive parts of this review, the terms 'legal-normative', 'international legal norms' etc are used in the senses the author uses them.

agreements do not refer to international human rights instruments,<sup>8</sup> and most references do not have a substantial impact in practice.<sup>9</sup> Moreover, the referenced international law often does not provide precise guidance as to the issue at stake or lacks normative stability. Peace negotiations, on the other hand, see ‘strategic uses’ of international legal norms by peace negotiators and international actors at varying degrees regardless of whether such discursive arguments materialise into a normative agreement that forms the basis of a peace agreement provision. For Kastner, the negotiation process becomes a realm of norm contestation and generation, which is context-specific yet in a mutually evolving relationship with both international legal norms and other peace negotiations. Conflict parties, for instance, use international legal norms, as they perceive them, to legitimise their position or de-legitimise their opponents. Peace mediators also make use of norms, though more cautiously, as bargaining chips or to delineate legitimate bargaining zones. When used constructively, therefore, international legal norms may transform peace negotiations into sites of normative deliberation which may facilitate the attainment of peace in the specific episode and contribute to the formation of a ‘normative wheel’<sup>10</sup> that would make peacemaking more efficient and procedurally fair in other episodes.

After introducing his theoretical approach to peace negotiations and the rationale behind the study thereof, Kastner identifies three areas in which legal normativity in conflict resolution crystallises: mediation, involvement of civil society in peace negotiations and negotiation of transitional justice. Chapters 3, 4 and 5 explore these areas, respectively.

Chapter 3 provides the most comprehensive account of mediation of internal conflict resolution in international legal scholarship so far. The chapter departs from the argument that, in the post-Cold War era, the epistemic community of mediators have started to internalise a normative framework that they attempt to bring to the peace negotiation table. Such attempts may vary from facilitation by a neutral mediation of decision-making by conflict parties to interventionism, for example that of Richard Holbrooke in the Bosnian peace process, which may even call for use of force to bring about peace.<sup>11</sup> According to Kastner, whatever modalities are employed in mediation, contrary to the implications of its mainstream definitions, its legitimacy does not necessarily depend on the impartiality and neutrality of the mediator.<sup>12</sup> These standards do not reflect universally accepted norms. Instead, the legitimacy of mediation can be assessed by whether it aims to achieve equality of arms between negotiators during negotiations and fair results.<sup>13</sup> Mediators would do so by adopting norm-based conduct and ensuring that process-related norms are given consideration in peace negotiations. Lastly, as to the question of the normative basis of mediation, Kastner recognises that, as a rule, any type of mediation finds its normative basis in the consent of the peace negotiators.<sup>14</sup> However, Kastner briefly mentions that

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<sup>8</sup> Kastner, above n 4, 48.

<sup>9</sup> *Ibid* 61, 67.

<sup>10</sup> See *ibid* 129.

<sup>11</sup> *Ibid* 117–20.

<sup>12</sup> *Ibid* 106.

<sup>13</sup> *Ibid* 118.

<sup>14</sup> *Ibid* 90.

on the end of potential mediators, unlike on the receiving end, practice suggests a shift from consensual involvement to an emerging duty to offer mediation linked to the concept of the Responsibility to Protect.<sup>15</sup>

In chapter 4, Kastner argues that a procedural norm of civil society participation in peace negotiations has emerged. Participation of civil society, or the inclusivity of peace negotiations in a more general sense, is one of the central themes of the contemporary practice, advocacy and scholarship of peacemaking. Picking up on this considerable normative agreement, Kastner argues that the participation of civil society in peace negotiations would contribute to the effectiveness and democratic legitimacy of the process.<sup>16</sup> As to the latter, it may compensate the lack of democratic approval of a peace agreement, if the latter proves impossible or difficult in the immediate post-conflict phase.<sup>17</sup> Similarly to chapter 3, this chapter incorporates the findings of peace and conflict studies into the discussion and makes reference to various examples from case studies. These contribute to the nuanced stance of Kastner regarding civil society participation. He acknowledges that a democratic deficit is inherent in what we commonly refer to as civil society today, that not all civil society actors have irenic agendas and that resolution of some conflicts may require the partial exclusion of civil society.<sup>18</sup> Thus, deftly avoiding over-generalised, romanticised and prescriptive formulations, the chapter makes a balanced normative argument for the inclusion of civil society in negotiations.

Moving to a (at times, notoriously) contentious item of peace negotiation agendas, Kastner zeroes in on the issue of transitional justice in chapter 5 and manages to develop a novel perspective that goes beyond the somewhat worn-out 'peace versus justice' debate. The existing international legal norms delineate the legitimate bargaining zone in dealing with the legacy of the conflict, the 'outer limit' of which is demarcated by the prohibition of amnesties for war crimes, crimes against humanity and genocide.<sup>19</sup> This zone, according to Kastner, may accommodate non-criminal conceptions of justice, various transitional justice mechanisms, and context-specific solutions that are shaped by the ways transitional justice norms are internalised by conflict parties.<sup>20</sup> Yet, there is an 'emerging normative claim' that peace negotiators have an obligation to negotiate transitional justice and incorporate it into their agreement. Kastner argues that a peace agreement like the *Comprehensive Peace Agreement of Sudan*, which was silent on the question of transitional justice, would hardly be deemed legitimate today.<sup>21</sup> Even though the necessity of addressing the quest for transitional justice in post-conflict transitions has indeed become an area of increasing normative agreement, the step from the prohibition of amnesties for customary international crimes to an obligation to set up transitional justice mechanisms may require further normative stabilisation. International law,

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<sup>15</sup> Ibid 101.

<sup>16</sup> Ibid 142–3.

<sup>17</sup> Ibid 142.

<sup>18</sup> Ibid 153–4.

<sup>19</sup> Ibid 161.

<sup>20</sup> Ibid 169–70.

<sup>21</sup> Ibid 166–7.

institutions and actors would not accept explicit divergence from the prohibition of amnesties but may still tolerate silence.

The selection of the three areas of mediation, civil society participation and negotiating transitional justice has an empirical basis; as the author claims, they correspond to ‘normative trends’.<sup>22</sup> As admitted by the author, however, the selection also hints at both the author’s theoretical approach and normative agenda.<sup>23</sup> In approaching peace negotiations, Kastner adopts a ‘socio-legal and pluralistic understanding of law’ with an actor- and ‘process-oriented’ approach.<sup>24</sup> Accordingly, the role of international legal norms is independent of their positive legal status or purported objective legal contents. It is the perception and employment of the norms, ie their ‘internalisation’, by actors involved in peace negotiations that attach a normative status to them. Yet, this is not a process of one-sided absorption. Every peace process generates its own ‘legal-normative framework’ in interaction with international legal norms, and these legal-normative frameworks cumulatively form a ‘normative wheel’ for other peace processes.

One may caution against Kastner’s approach to peace negotiations as sites of norm generation for the reasons that a purely legal-normative lens runs the risk of overlooking the political and power dynamics of a peace process and that all normativities at play may not be translated into legal normativity. Nevertheless, Kastner puts forward a compelling theory of sources of legal normativity, one that challenges the state-centric and prescriptive conceptions of international law, in that it approaches peace negotiations as generators of particular legal-normative frameworks, whose normativity relies on their internalisation by the actors of the relevant particular process. Yet, this theory may not be as convincing when the argument slides from the descriptive to the normative and from the particular to the general. Further clarification is needed as to the relationship between the ‘normative wheel’ and the framework generated in a particular peace negotiation, specifically as to what would happen when the latter diverges from the former. This may sound like a misaddressed question, as Kastner repeatedly highlights the open, processual and interactional nature of legal norms. Yet the question stands, as he ultimately determines not only ‘normative trends’ in peace negotiations but also ‘emerging obligations’ of peacemakers. Similarly, the references of Kastner to ‘protective norms and fundamental values of concern to the global community’,<sup>25</sup> which seemingly outrank the normativity generated by peace negotiators, raise questions as to what these values are, whether a homogenous global community exists and what normative force these norms bear over other norms and why.

Even though Kastner casts ‘a sense of self-suspicion’<sup>26</sup> by admitting that he is not merely an observer of the norm generation but that his ‘focus on certain

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<sup>22</sup> Ibid 3.

<sup>23</sup> Ibid 30.

<sup>24</sup> Ibid 1–2.

<sup>25</sup> Ibid 124.

<sup>26</sup> I borrow the phrase from Mariano Croce and Marco Goldoni, ‘A Sense of Self-Suspicion: Global Legal Pluralism and the Claim to Legal Authority’ (2015) 8 *Ethics & Global Politics* 1.

norms is inevitably subjective and influenced by certain beliefs',<sup>27</sup> throughout the book, he maintains that the emergence of these norms are empirically supported and not constructed to be faithful to these beliefs. Then, as the strength of the argument both at the descriptive and normative levels partially relies on the accuracy of the 'trends', and leaving aside the potential positivist objection to the value of the practice of peace negotiations as sources of international law, one should look at the practice of peacemaking closely to test them. For example, does the practice bear out an emerging obligation of ensuring civil society involvement in peace negotiations? Is there a discernible trend as to the emergence of a duty to offer mediation? The answers, at least to this reviewer, are not clearly in the affirmative yet and would require broader and deeper empirical inquiry. Therefore, borrowing Tilmann Altwicker and Oliver Diggelmann's words, in Kastner's study '[t]rend-statements ... reach beyond the evidence gathered', and 'trend-talk' becomes a tool of prophesying emancipation in/through (international) legal normativity.<sup>28</sup> In any case, the question of to what extent peace negotiations are susceptible to emancipatory roles of law requires further scrutiny.

To conclude, *Legal Normativity in the Resolution of Internal Armed Conflict* is a skilfully written and theoretically refreshing book that offers a perceptive account of the role of legal normativity in transitions from conflict to peace. Two features of the study, regarding the breadth of case studies and cross-disciplinary lessons, may be reiterated here. First, the author feeds his analysis by references to ten peace processes, notably not ploddingly. Secondly, the study bridges the emerging field of the 'law of peacemaking' to peace and conflict studies through effective use of the insights provided by the latter, yet manages to preserve its disciplinarity. The book would be of interest to a broad academic audience in the areas of peace and conflict studies, international law, constitutional law, comparative law and legal theory. It would also be a useful read for various domestic and international actors involved in peace processes worldwide in wide-ranging roles.

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<sup>27</sup> Kastner, above n 4, 30.

<sup>28</sup> See Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 *European Journal of International Law* 425, 435.

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