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Negotiating
justice:
Guidance for
mediators

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The Centre for Humanitarian Dialogue (HD Centre) is an independent Swiss Foundation dedicated to helping improve the global response to armed conflict. It attempts to achieve this by mediating between warring parties and providing support to the broader mediation community.

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The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. It assists in the development of integrated, comprehensive, and localized approaches to transitional justice by working closely with organizations and local partners around the world to strengthen this emerging field. Priscilla Hayner is Director of the ICTJ's Peace and Justice Programme and head of the ICTJ Geneva office.

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Introduction

Questions of justice and accountability for past crimes can be a central point of contention in peace negotiations. Recent developments in law and practice have not yet resulted in clarity for mediators on the available policy options. Many mediators continue to see this as one of the most difficult issues they grapple with.

There are a number of recent examples where creative work by mediators has resulted in significant agreements to address past crimes, or at least, importantly, avoided any promise of impunity and preserved the possibility of justice in the future. Peace agreements also increasingly respond to justice challenges through the creation or reform of key institutions. These examples are important and should be closely studied. But a general review of recent practice and interviews with those closest to talks show that a number of issues around two key questions remain unclear. There is confusion about the role of international justice in the context of national peace processes, and there is a general lack of sufficient and clear information on available policy options.

In the rush of pressured negotiations, issues of justice and accountability may at first be seen as a stark choice between either prosecutions for war criminals or broad amnesty. This classic dilemma is sometimes stated as a tension between prioritising an end to violent conflict – after all, a peace must often be drawn with the agreement of the most well-known perpetrators, who often hold significant power – versus prioritising justice and the rule of law, insisting on criminal prosecutions as a non-negotiable component for any successful peace agreement. But this ‘peace versus justice’ dilemma rarely plays out in such a simple manner in the real world. Moreover, framing the issue in this way unnecessarily narrows the policy options. It discounts timing, sequencing and strategy, and unhelpfully limits the mediator’s focus to questions of criminal justice, missing a range of other means to advance accountability for serious crimes in the short or long term.

It is also generally unhelpful to assume that peace and justice are conflicting and separate goals. Peace and justice are of course linked: many mediators recognise the need to address the root causes of the conflict in order to establish a long-term peace, and deep impunity and flagrantly unjust state institutions are among those festering problems that can spark conflict anew. It is true however that peace and justice will be seen to be in direct tension in some contexts or circumstances. Issues of accountability may be sensitive and must be broached with care. Where there are tensions, however, there are often ways to limit potential problems. Better understanding of these options is more likely to lead to a positive outcome.

The mediator may ask – is it not for the parties to decide whether or not to deal with past crimes, or to provide an amnesty? It is true that in many peace processes the mediator’s role will not permit the forceful advocacy of

particular options; this may be especially so on sensitive matters including the question of justice. However, a mediator today cannot easily ignore justice concerns, even where the parties may prefer to. The ascent of the International Criminal Court, the developing policy guidelines of international institutions involved in mediation, and the expectations created through the increasing use and sophistication of notions of 'transitional justice' may all create legal and political constraints.

There is often a clear and vocal public demand to account for crimes of the war, part of a growing public perception that impunity is wrong. Any proposal for immunity for serious crimes will confront immediate questions of legality, and be at risk of violating the state's obligations under international law. The durability of a final peace agreement may be in question if such central issues are left unattended. Mediators representing the UN and governments may be under instructions not to associate themselves with amnesty provisions. All of these and other factors bring issues of accountability to the fore.

This paper intends to provide guidance on the parameters and policy options for justice in the context of peace negotiations, including basic facts of law, guidance on amnesties and international criminal justice, and lessons for incorporating approaches to accountability that are not limited to prosecutions. It is based in part on lessons emerging from recent mediation experiences in a range of country contexts, with a particular focus on Liberia, Sierra Leone, Burundi, and Aceh, Indonesia.¹

¹ The HD Centre's Negotiating Justice project involved case studies in four countries, as well as general research on trends in dealing with justice issues in peace agreements; several meetings with mediators and international lawyers were also held to explore the options and dilemmas. This report represents a synthesis of findings which draws on those four country case studies. All papers are available at <http://www.hdcentre.org/projects/justice-peace-making>.

1

Framing questions of justice

Considerations of justice might focus on two distinct goals. First, justice measures might seek accountability for abuses of the past, which may be done through both judicial and non-judicial means. Second, a justice policy may strengthen institutions or laws to prevent abuses in the future. This may pertain to the reform of judicial institutions and the security forces in particular. A mediator who brings a justice perspective to the table – who understands that accountability will be among the issues that will arise and need to be addressed – may approach a conflict with the following four questions in mind.

1. What has been the nature of abuses in the conflict?

What has been the nature and intensity of the violations? Who committed them? What level of responsibility fell on either side of the conflict? What is the alleged complicity in abuses of the individuals involved in negotiating an agreement? Reporting by numerous independent sources should provide a general overview of this history. Further, do the abuses rise to the level of

‘international crimes’ – in particular, war crimes, crimes against humanity or genocide – which may place legal constraints on the options available? Based on this assessment, what legal obligations or constraints arise?

2. What demands for accountability may arise, and from whom?

What is the likely interest of the parties – are they seeking justice for the crimes they suffered? What positions have been articulated by national civil-society and victims’ groups? Have position papers and policy-guidance notes been prepared by national or international experts or advocates? Are the demands for justice centred on criminal accountability, on reparations for damages, on a non-judicial truth inquiry, or in other areas? What is the history of this country in undertaking such measures in the past, and how familiar is it with the range of options available?

3. Who is well placed to offer policy options?

Outside experts may be well placed to set out specific policy options. Civil society, legal experts, or observers can provide comparative information on experiences elsewhere. Prior independent efforts in the country may have involved broad public consultation on these issues, giving strength to specific proposals and usefully providing input beyond the parties and organised civil-society groups. For example, in Northern Uganda and the Democratic Republic of the Congo (DRC), public opinion surveys on justice have provided a firm basis for policy proposals.

4. What are the options for justice? And what should be done inside the peace negotiations to address these?

Judicial options

The mediator should carefully attend to any proposals for amnesty (addressed in Section 4 below in more detail). Avoiding amnesty is not likely to be sufficient to bring justice, however, particularly if the national judicial system is seen to be weak or politically compromised. What possibility is there for fair and independent justice in the national courts? Is there a possible role for the International Criminal Court, or any other international or foreign court? Is there any possibility that the negotiations will lead to the explicit rejection of abusive practices, perhaps noting a commitment to justice for serious international crimes such as crimes against humanity and war crimes?

The means and specific mechanism for justice measures might be worked out in the future. One possibility is for an initial independent inquiry that could identify any immediate need for a criminal justice response. The Kenya agreement of March 2008, for example, set out a commission of inquiry to identify criminal liability for the post-election violence of the prior two months. Both parties to the accord expressed a strong commitment to the rule of law and accountability for any crimes. The commission report, which concluded six months later, recommended a special tribunal within the Kenyan judicial system or, alternatively, involvement of the International Criminal Court.

Non-judicial options

There are a range of non-judicial policy options, which may be accepted by the negotiating parties.. Procedures to establish the truth, provide reparations for victims, advance community reconciliation, or acknowledge victims through memorials or official apologies might all be considered (and these are further described below). Most of these options are usefully broached and agreed in principle in a peace accord, but details might be left to a broader process of consultation to follow.

Institutional reform

How can reform of the security and judicial sectors be ensured? Would it be possible to screen out from security and other state institutions individuals known for involvement in past atrocities? What treaties or other instruments should the state adhere to in order to strengthen protection mechanisms for the future? Can the mediator put forward specific proposals to signal a clear intention for such reforms? Many of these proposals should be uncontroversial, but including them in the accord gives strength to those interested in instituting such reforms following an agreement.

2 Justice in peace agreements: experience to date

In recent years there has been a marked increase in focus on justice issues, both during peace talks and in the implementation phase of a peace process. There have also been important developments that provide clearer guidance in these areas, in both political and legal spheres. These are seen in guidelines adopted by the UN Secretary-General, in decisions of international or regional courts, in declarations and policy guidance of other international or regional bodies, and in the creation and growing strength of the International Criminal Court.

Envoys appointed by the UN Secretary-General may not be associated with agreements that provide amnesty for war crimes, crimes against humanity or genocide. In some specific cases, the UN has prohibited its staff from collaborating in any way with institutions that have the power to grant amnesty for such crimes. This policy had a direct impact on the peace agreements in Sierra Leone and the DRC, for example, where UN officials made clear they could not sanction an amnesty for serious crimes. In Sierra Leone in 1999, the UN clarified its (then recently established) position late in the talks; the UN representative then added a disclaimer, written next to his signature, stating that the UN would not recognise the amnesty in the accord as applying to serious crimes. In the DRC, UN officials, joined by facilitators from the European Union and the United States, set out clear limitations to

any amnesty, guided by UN policy, the standards set out in the ICC statute, and a broader analysis of international law.

The Americas region, with a strong tradition of regional judicial procedures, has standards on justice that are increasingly well established through the decisions of the Inter-American Court and Inter-American Commission on Human Rights. Decisions of these bodies have overturned or limited national amnesty laws (or other obstacles to justice, such as pardons or statutes of limitation), establishing guidance for future national policies and peace accords. They have also set out requirements for victim reparations and for a revelation of the truth about past human-rights crimes.

Both parties to and mediators of peace talks are now likely to be under considerable pressure to preserve international principles and respect international law in situations of gross abuse by the state or by non-state actors. At the same time, there remain many areas not prescribed by law, and which allow a range of policy options for national actors. These are further explored in Box 1, Tools of justice.

Trends in peace agreements

Recent practice in peace negotiations reflects the quickly maturing field of transitional justice. Certain legal boundaries, particularly on the question of amnesty, have been considerably clarified in recent years. Other areas, such as truth commissions or reparations, are by nature more flexible, but minimum standards or basic guidelines are also taking shape on these topics.

The limitations to amnesties that are prescribed by international law, outlined below, also reflect current state practice in relation to peace agreements, which has changed over time as the legal parameters have become clearer. A study by the HD Centre of peace agreements from 1980 to 2006 show that very few general or ‘blanket’ amnesties – which provide immunity even for serious international crimes – have been included in peace accords since 2000.²

² Leslie Vinjamuri and Aaron P. Boesenecker, *Accountability and peace agreements: mapping trends from 1980–2006*, HD Centre, Geneva, 1 September 2007.

This same study also shows that the great majority of peace agreements address questions of justice or accountability in some manner. The Liberia accord was silent on amnesty, but agreed to a truth commission and to vetting of the police on human-rights grounds. The agreement for Burundi set out intentions for a truth commission, an international commission of inquiry, and a special tribunal (while also including a vague reference to ‘provisional immunities’, which has been criticised for possibly reaching too far). The agreement in Aceh, in the form of a memorandum of understanding, called for a court of human rights and a truth commission. The Sierra Leone accord settled on a victims fund as well as a truth commission – though no reparations programme was implemented for many years thereafter. (As mentioned, the Sierra Leone agreement also included a controversial amnesty.)

In addition to such measures that may be included in the agreement, considerable discussion and developments on justice mechanisms are likely

3 Vinjamuri and Boesenecker, *op. cit.*, p. 29.

to take place in the months or years after a peace agreement is signed. “A great deal of activity concerned with justice and accountability often takes place outside formal peace agreements,” concludes the HD Centre study.³ A hybrid court, the Special Court for Sierra Leone, was first proposed by the Sierra Leone government ten months after it signed a peace agreement with the rebels, and after renewed hostilities erupted, and this court has since put ten people on trial. Burundi has seen intensive discussions on the parameters and inter-relationship of the structures agreed in general terms in the accord, including a UN report proposing changes to the plan. This trend may reflect the desire of the parties to leave some of these difficult issues of accountability for future debate and decision. This also allows the possibility of opening up the discussion to a broader array of stakeholders, including civil-society organisations, victims and substantive experts.

Record of implementation

While peace agreements often meet obstacles to full implementation, the justice components may especially encounter problems: any robust accountability measure may meet political resistance, be slowed down or blocked in the legislature, or continue to be debated over many years with little progress in implementation. If the agreement can include explicit steps and perhaps a clear timeline for implementation, this may strengthen the chances of agreed measures being carried out. Conversely, vague wording, such as agreements for reparations with no specificity or responsibility attached, may contribute to the difficulty in implementation and should generally be avoided.

A review of recent peace agreements suggests that successful implementation of the justice components is determined by the degree to which the following are present:

- clarity in the language of the agreement;
- fundamental agreement on policy between all stakeholders, including but not limited to the parties, which incorporates international best practice and thus encourages international support;
- a proper plan spelling out how these elements can be realised – usually developed in more detail after an agreement is signed – which reflects a realistic projection of human and financial resources; and
- international buy-in to the agreed institutions and processes, leading to the necessary financial assistance and political support to undertake such measures.

Box 1: Tools of justice

The field of ‘transitional justice’ refers to a variety of judicial and non-judicial means of accountability and responding to past crimes. These may be useful in post-conflict contexts (as emphasised here), or in a transition from dictatorship to democracy, or in an established democracy responding to historical wrongs. The implementation of these justice measures may overlap in time, and sometimes it makes sense to sequence them so that one mechanism strengthens and feeds into the next. Rather than choosing between these, a ‘holistic’ approach, incorporating many of the following tools, is generally recommended.

Criminal accountability The record shows that most peace agreements do not include reference to specific prosecutorial initiatives, such as a special tribunal or special prosecutor. National courts are often very weak, lacking in resources, or heavily politicised. Emphasis on strengthening the national courts may be welcome and appropriate, but this is a long-term endeavour and may be insufficient to respond to recent massive atrocities. Parties at a minimum might be encouraged to survey the abuses and recommend appropriate legal measures – a *commission of inquiry*, with powers to investigate and make recommendations may be a useful first step. The question of amnesty, which may be proposed to prevent prosecutions, is addressed in Section 4 below. Meanwhile, mediators cannot control the actions of international prosecutors who may be functioning alongside negotiations (see section 5 below on the International Criminal Court).

Truth commission A truth commission is a non-judicial inquiry into patterns of human-rights abuses or violations of international humanitarian law. These bodies typically operate for two to three years, and may have powers of subpoena or search and seizure. Experience shows that the commissioners should be appointed through an independent and consultative selection process. A truth commission receives statements from thousands of victims or witnesses, may hold public hearings, and ought to conclude with a public report with recommendations. While close to forty truth commissions have existed to date, each is unique, and must be crafted in response to the national context.

Reparations Providing economic, material, or symbolic reparations to victims or affected communities is often a critical aspect of recovery and advancing reconciliation. The state may also be legally obliged to provide reparations for abuses, especially for the harm done directly by state forces. In some countries, reparations have included educational benefits to the children of those killed, housing, medical, or pension benefits for the families, or direct payments to surviving victims or their families. The benefits might be limited, relative to the harm done, but the act of acknowledgement is itself an important aspect of these programmes. Another symbolic form of recognition is through memorials to important events, persons or periods of history, which have sometimes been agreed in a peace accord.

Reform of the security and judicial sectors Deep institutional reform may be needed in several areas. This should aim to advance prospects for rule of law in the future, but should also take into account the involvement of state institutions, officials or armed forces in serious past human-rights abuses. An agreement between the parties would ideally commit the parties to a system of ‘vetting’ to screen and remove those individuals shown to be complicit in such abuses.

Box 1: Tools of justice (continued)

Demobilisation and integration of ex-combatants Programmes of disarmament, demobilisation and reintegration (DDR) should not further empower those complicit in past atrocities. If criminal accountability is not immediately possible, there should at least be no grant of immunity for serious international crimes. Reintegration into civilian life may also be strained if the receiving community is aware of the former combatant's crimes, and if no accounting for such crimes is planned.⁴

Indigenous or community-based justice Local traditions or processes might be usefully incorporated into national justice and reconciliation policies. These can open a rich avenue for the development of a holistic programme of justice. However, in some places these traditions may raise questions of discrimination or might even include within them abusive practices, and thus should be incorporated with care.

4 For further information, see the HD Centre's Negotiating Disarmament project and publications, at www.hdcentre.org/projects/negotiating-disarmament.

3 | Process and participation

Engaging the public in peace talks

The importance of providing space for civil-society representatives in peace negotiations has been addressed in depth elsewhere. In brief: empirical evidence suggests that involving civil society in peace negotiations makes agreements more sustainable.⁵ In the realm of justice, civil society has brought its voice to the table in a number of ways, including but not limited to direct participation as delegates to the formal talks. Where possible, the mediator should seek broader perspectives on policy options for justice that go beyond the parties. This will strengthen the ultimate agreement, and give it broader legitimacy, and is more likely to gain the support of those whose involvement will be critical for successful implementation.

In Sierra Leone, the international community provided resources for national human-rights leaders to attend the talks. While they were observers rather than delegates, they took part in most of the formal meetings and proved to be a valuable source of information, policy proposals and ultimately advocacy in influencing both the government and armed opposition on key aspects of the accord. The Liberian talks attracted hundreds of activists, including many women from a neighbouring refugee camp, who put constant pressure on the parties to conclude the talks and end the war. A number of civil-society representatives were also granted official delegate status in the formal talks, which was an important balance to the three armed groups, all of whom were known for serious abuses in the war. These independent civil-society participants were critical to the justice elements that came through in the final Liberian agreement, including a truth commission, avoiding an amnesty, and vetting of the security forces on human-rights grounds.

5 Thania Pfaffenholz, Darren Kew and Anthony Wanis, *Civil society and peace negotiations: why, whether and how they could be involved*, Oslo Forum 2006, Centre for Humanitarian Dialogue, available at www.osloforum.org.

Implementation of justice elements of the Burundi agreement has stalled in the years after its 2000 signing. Disagreements over how to implement a call for a special tribunal together with a truth commission have led to a national consultation process, with the UN, the government, and national civil society jointly steering the process. Earlier consultation and inclusion of a broader range of views could have saved time and clarified the intentions of the agreement.

In Aceh, national civil-society organisations had only limited access to the negotiations leading to the final peace agreement. Civil society held some meetings to discuss terms of the accord, but had little opportunity to make direct input or influence the outcome. NGOs reportedly also had limited access to the international monitoring mission responsible for implementing the Helsinki Accord, and remained ‘involved only at the margins’.⁶ The justice language in the Aceh agreement is minimal, and some of the language has been criticised, in particular for missing opportunities to incorporate best practice. As in other contexts, independent expert input might have strengthened this framework.

6 Edward Aspinall, *Peace without justice? The Helsinki Peace Process in Aceh*, HD Centre, Geneva, April 2008, p. 11.

Elsewhere, as in Uganda, civil society and the UN have undertaken surveys that have assessed the views of victims and the broader public on question of justice, including prioritisation and timing. These surveys have taken place even while peace negotiations were underway, feeding into the official discussions. The parties themselves also held public consultations during the period of negotiations. Finally, in Guatemala, a broad coalition of civil-society organisations prepared joint submissions to the talks on a range of issues as the talks progressed. This was some compensation for the fact that they were not officially invited to take part in the talks.

International involvement in accountability

The international community may play an important role in pushing for accountability, as well as providing support for implementation of the justice elements of an agreement. International participants in the talks may be well placed to set out key parameters, especially those reflecting current international law or best practice. However, most decisions regarding justice, especially on non-judicial measures, should ultimately be taken by national actors.

In Sierra Leone and Liberia, the parties sought and received comparative information about truth commissions, and diplomats present at the talks also made important inputs on the question of amnesty. However, the information provided was insufficient or not fully correct; independent expertise would have served the mediators and the parties well. Such independent technical expertise is now available from the UN, international NGOs, and others such as academic experts.

The implementation of the justice components of a peace agreement may also engage the international community directly. For example, a commission

of inquiry or truth commission might have international as well as national members. The UN may lead or advise a process of vetting, as it has in several recent cases. A major effort to reform the judiciary or security sector, implying significant costs, will require international contribution of both resources and expertise. While some ad hoc special tribunals have been created with strong involvement of the international community, such as for Rwanda, Cambodia, Sierra Leone and the former Yugoslavia, the costs associated with such efforts make it unlikely that many similar ad hoc courts will be created in future. There is a greater focus now on the role of the International Criminal Court, addressed in more detail below, as well on models for incorporating international expertise directly into national judicial structures.

4 | Understanding amnesties

Granting immunity from prosecution for the most serious human-rights crimes is likely to be widely criticised in today's world. How the question of amnesty is handled in a peace agreement often receives immediate attention – often more attention than many of the other substantive issues addressed in an agreement. Where serious crimes have taken place, it is likely that the question of amnesty will emerge in the talks in some form, and the outcome will be closely scrutinised by the many observers to the process. Amnesties for serious international crimes raise both legal and political problems, both of which must be considered.

The law is becoming increasingly clear, as outlined in Box 2. International law generally prohibits amnesty for serious international crimes: genocide, war crimes and crimes against humanity. In addition, there may well be legal constraints to amnesty in national law. Over 100 states are party to the ICC and are obliged to prosecute such crimes. Provisions that violate the victims' right to take a case to court will violate many constitutions. This prescription applies equally to other immunity arrangements that may go by other names. In Burundi, the peace agreement granted an undefined 'provisional immunity' to combatants. Years later, still in force, this was feared to be providing broad, de facto amnesty over the long term. Regardless of what such provisions are called, the same restrictions under international law will apply.

A mediator may find that the parties still insist on an amnesty for serious international crimes, regardless of national or international law. In fact, national political actors may well have the legal power to put a broad amnesty in place, through national legislation or decree. In this case, a mediator might consider pushing for clarity on exactly what crimes would be included in such an amnesty, whether it would be limited by political motive or clear political command, or whether there would be any conditions to such a benefit (for example, whether violating other aspects of the accord could void the amnesty). Setting out the exact crimes covered (or, alternatively, what crimes are explicitly excluded) may serve to limit an amnesty. Once the crimes are spelled out, a very broad amnesty may be politically less palatable.

Box 2: What is the law on amnesty?

It is widely considered a violation of international law to provide an amnesty for the most serious international crimes – defined as crimes against humanity, war crimes and genocide. While international law is constantly evolving, this understanding is drawn from the obligations of those states that have signed human-rights treaties, the decisions of international or regional courts, as well as law emerging from long-standing state practice, known as customary international law. The Rome Statute establishing the International Criminal Court, to which 108 states are party, also by implication rejects immunity for these core crimes.

The crimes that must be excluded from any amnesty are defined as follows.

- *Crimes against humanity*: acts such as murder, torture, forced deportation, rape, enforced disappearance, and other serious crimes *that are committed as part of a 'widespread or systematic attack' against a civilian population* (whether in a time of war or peace).
- *War crimes*: serious violations of the 1949 Geneva Conventions (and the two Additional Protocols of 1977), which comprise in part the laws of war (also known generally as 'international humanitarian law'). This includes, for example: attacks on civilians, use of banned weapons, mistreatment of prisoners of war, inhuman or cruel treatment, or the taking of hostages.
- *Genocide*: acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group (based on the Genocide Convention of 1948).

As noted, the United Nations has established clear guidelines that its representatives cannot support an amnesty for the above crimes. In addition, the United Nations prohibits amnesty for a broader category of crimes, gross human-rights violations, a conclusion based both on treaty law and state practice.

- *Other gross violations of human rights*: this may include, for example, individual acts of torture, extra-judicial execution, slavery, enforced disappearance, systematic racial discrimination, or the deliberate and systematic deprivation of essential food, healthcare or shelter, even when these acts do not rise to the level of the crimes in the above categories.

Granting amnesty for other crimes may be acceptable under international law. In non-international conflict, parties to Protocol II of the Geneva Conventions are encouraged to consider amnesties for crimes such as insurrection or treason, that is crimes arising merely from taking part in the conflict.

Additionally, the mediator might set out the potential ramifications of a blanket amnesty, making note of the following.

- Such an amnesty would have no effect outside the country's borders – either in other countries that may take action under the principle of universal jurisdiction, or by international courts such as the ICC.
- In most jurisdictions, such an amnesty would be an open target for challenge in national courts, and may be overturned. Thus, the legal protection may be limited.

- History shows that donor states may strongly object, and may even refuse to fund the implementation of the accord.
- Those insisting on immunity for crimes such as genocide, mass rape or the massacre of defenceless civilians will lose credibility in the eyes of the international community as well as their national supporters. This could damage their future political prospects if they hope to join the democratic fold.
- A blanket amnesty is certain to be condemned internationally, colouring the reception of the peace agreement generally. The UN in particular is likely to protest strongly any deal which grants immunity for the most serious international crimes.

In fact, the distaste for broad-reaching amnesties has not been lost on the leaders of fighting forces worldwide. Participants in some peace talks, such as in the DRC, have described political dynamics which discouraged commanders from insisting on a blanket amnesty.⁷ Demanding an amnesty for specifically named crimes is perceived as virtually equivalent to admitting to such crimes, facilitators have noted. This is further backed by a general understanding that ICC-related crimes cannot effectively be amnestied in ICC member states, given the government's obligations in relation to any ICC request, for example. For all of these reasons, blanket amnesties in peace agreements are much less common today.

⁷ See Laura Davis and Priscilla Hayner, *Difficult peace, limited justice: ten years of peacemaking in the DRC*, International Center for Transitional Justice, forthcoming early 2009. Available at www.ictj.org.

5 | The International Criminal Court: implications for mediators

The International Criminal Court was created through a treaty agreed at an international conference in Rome in 1998. It came into force as an operational court on 1 July 2002, after 60 states had ratified the treaty, and thus covers crimes that took place after this date (or after the date of ratification for those states that have joined since). Partly due to this restriction on its temporal jurisdiction, the Court has been investigating cases where conflict is either still ongoing or very recent. In many of these situations, mediated peace talks are also underway, thus raising potential difficulties.

The ICC is an independent, international body that cannot be controlled or directly influenced by outsiders, including mediators or any of the negotiating parties. Its actions may be seen as an unwelcome threat, or at least a complication, to a sensitive peace process. Mediators may worry that an international arrest warrant (or the threat of such a warrant) against senior

members of a negotiating party could have a chilling effect on ongoing talks. In some contexts, they may fear a violent reaction from the supporters of those targeted by the Court.

It is difficult to reach firm conclusions regarding the impact of the ICC in actual cases – because it is still playing out. Experience to date, and drawing too on the impact of other international and hybrid courts, suggests that the involvement of non-national prosecutors has been less difficult than initially feared. The engagement by the ICC or other international or hybrid tribunals in the DRC, Liberia and the former Yugoslavia for example, has not resulted in a violent backlash or the damaged peace process that were sometimes feared. The possibility of such a negative backlash should never be taken lightly, but the record on the whole, to date, should give some reassurance to those involved in peace processes in future.

While the ICC raises legitimate challenges, it has also had the effect of deepening the engagement with justice in a number of peace processes, pushing the parties to grapple with accountability issues that may otherwise have been ignored. In Northern Uganda, the arrest warrants issued by the ICC against senior members of the Lord's Resistance Army (LRA) were seen to push the rebels to the peace table, where they engaged in talks more seriously than before. On the other hand, while many close participants have concluded that the ICC engagement was not the reason why the LRA leader, Joseph Kony, ultimately did not sign the agreement, this cannot be discounted as one of the possible factors.

In the Democratic Republic of the Congo, the arrest of rebel leaders by the ICC on charges of recruitment and use of child soldiers made it clear to all armed groups, for the first time, that these actions were crimes and that they could be held to account. For child-rights advocates trying to reduce the abuses against children in the Congo war, the educational impact of these ICC arrests was considerable. (Ironically, however, it seemed also to make commanders reluctant to bring children to demobilisation sites, thus making demobilisation of child soldiers more difficult.)⁸ In the context of continued conflict, the actions of the ICC and other tribunals do affect the behaviour of warring groups.

Peace agreements are sometimes made possible precisely by removing spoilers from the bargaining table. An international indictment can have this affect, as in Liberia with the indictment of President Charles Taylor by the Special Court for Sierra Leone, and also in the Dayton talks for the former Yugoslavia, where Bosnian Serb leaders Radovan Karadzic and Ratko Mladic were prevented from participating in the peace talks because of indictments by the International Criminal Tribunal for the former Yugoslavia. In both cases, the talks became much more serious, and a deeper political agreement became possible, because these key leaders were effectively prevented from playing a part in the discussion. Their influence after the negotiations was also much reduced.

8 Davis and Hayner, *op cit*.

However, there are other cases, where the final result is not yet clear, which raise the question of whether the impact of international court action might have made a peace agreement more difficult. In Sudan, the impact of the ICC is still playing out, especially since the ICC prosecutor's request for an arrest warrant against Sudanese President Omar al-Bashir. The arrest of Charles Taylor after two years in exile in Nigeria, at the behest of the Special Court for Sierra Leone, has affected the calculations of leaders elsewhere. Other heads of state, such as Robert Mugabe in Zimbabwe, have mentioned the Taylor case as explicitly limiting their own options for leaving power.

The reach of the ICC

It is not expected that the ICC will handle a large number of cases, but that it will target the most serious abusers in particular contexts. Since late 2008, the ICC has been actively engaged in four locations – Uganda, the Central African Republic, the DRC, and Darfur, Sudan – and has been monitoring several other countries for possible future involvement. It has issued arrest warrants against a total of twelve people (two of whom have since died) and currently has five in custody in The Hague. The prosecutor's request for an arrest warrant against Sudanese President Bashir is expected to be decided by the pre-trial chamber in early 2009. The first ICC trial began in early February 2009 against an accused warlord from Eastern Congo.

The ICC has no enforcement arm, and instead relies on the cooperation of states to detain suspects and transfer them to The Hague for trial. ICC member states carry specific obligations to arrest those persons within their jurisdiction at the request of the Court.

Mediators and the ICC

Several questions relating to the ICC may be of particular interest to mediators and facilitators of peace processes, as detailed below and in Box 3.

Might a mediator or international observer of talks be compelled or subpoenaed to testify before the ICC? Mediators may be concerned for their ability to do their work well, and to engage the trust of the parties, if they might be compelled to testify or provide information later about seemingly confidential discussions. For example, the prosecutor may want to assess how much an accused person knew about the extent of the conflict and ongoing violations, in order to show command responsibility. Although this question has yet to be tested in any case before the ICC, it is unlikely that a mediator could be compelled to testify or otherwise provide information to the ICC. The Court has limited powers generally to compel testimony or subpoena information, as its investigations are largely based on a regime of voluntary cooperation.

Can a mediator continue negotiations with someone who is the subject of an ICC arrest warrant? Legally, yes. An arrest warrant provides no restrictions on others who may be in contact with the person (unless they have the power to affect an

arrest). Such contact has continued in some contexts, such as with the head of the Lord's Resistance Army, Joseph Kony. Politically, of course, mediators may find it difficult to continue to engage with persons subject to an international arrest warrant for serious international crimes.

Box 3: Can an ICC arrest warrant, once issued, be withdrawn?

A situation may arise in which a person subject to an arrest warrant of the ICC asks that this warrant be lifted as a condition for further talks, or as a condition for signing a final accord. The actions of the ICC cannot be controlled by a mediator, and he or she would have little power here. According to the Rome Statute, there are three ways in which an ICC arrest warrant, its investigations or even an ongoing trial can be suspended.

- The Court may make a determination that a state has met the 'complementarity' test, if the state can show that it is able and willing genuinely to investigate or try these crimes in a national court.
- The UN Security Council may pass a resolution that provides a one-year deferral of action on the case by the ICC, in order to facilitate the Security Council's role in advancing peace and security. Based on Article 16 of the Rome Statute, such a deferral would lapse after one year unless re-authorised by the Security Council.
- The prosecutor may decide that it is not in the 'interests of justice' to take a case forward to trial. (Where an investigation has already been opened, this decision must be reviewed by the pre-trial chamber.) It is understood that this would be decided only in exceptional cases, and will rely on factors such as the gravity of the crime, the interests of victims, age or infirmity of the accused, and his or her alleged role in the crime.

6

Justice in peace negotiations: emerging lessons and best practice

Peace agreements reached in a wide range of circumstances have included positive and proactive elements to advance justice, sometimes when least expected. In contrast, other agreements have been lacking in this area, failing to include key elements to ensure justice or perhaps unintentionally including language that weakens or complicates the prospects for justice. Only in retrospect has it become clear that further attention to these matters could have greatly strengthened this aspect of such agreements.

The inclusion or exclusion of justice elements in an accord does not seem to be determined primarily by political constraints of inflexible positions of the negotiating parties. Of course the positions of the parties are key, but even where negotiators are ambivalent or initially resistant, much can be achieved through a proactive mediator, access to expertise on justice issues, and openness in the process to incorporate expert input.

How to promote justice in peace agreements

The following points should be kept in mind in order to reach the strongest possible agreement in relation to justice issues.

1. Understand justice as a broad concept that extends beyond amnesty or criminal prosecutions.

- The possibility of prosecution for serious crimes should be preserved, but the discussion on justice should extend well beyond the question of amnesty or the possibility of criminal accountability.
- If the amnesty issue is raised, consider acceptable models that exclude serious crimes and, perhaps, explicitly identify what crimes would be covered (such as insurrection or treason).
- Consider complementary, non-judicial means to account for the past, including truth-seeking, a commitment to victim reparations, and vetting of the security forces.
- Keep a long-term perspective. Recognising that justice initiatives may develop over time, aim to keep options open in the agreement, avoiding inappropriate immunities, and set out principles for further development after the agreement is signed. Justice initiatives might not develop immediately. It may also be necessary to consider stages of justice, with early initiatives leading to others later.

2. Focus on institutional or legal reforms that will help to prevent future human-rights abuses.

- A functioning, independent judiciary, as well as reformed police and security services, may need priority attention.
- These may require long-term attention for fundamental change. But by signalling these intentions in the accord, these reforms are likely to be addressed earlier and with more rigour by both the government and the international and donor community.

3. Provide clear guidance on critical issues.

- The mediator should be clear in advising on the demands and limits of international law, and use expert input where necessary.
- The mediator should also be clear in pointing to established best practice, urging the parties not to adopt models that have proved flawed elsewhere, such as institutions that will be compromised by their membership or the process for their appointment, lack of independence, or insufficient time and powers to complete the work.

How to approach controversial issues

A strategic approach to controversial issues has proved most effective. Experience in relation to justice issues suggests the following lessons on timing and specificity.

1. Timing: When to approach the justice question?

- This is partly determined by the specific context, but a mediator can foresee and predict.
- If accountability issues are addressed too early, the parties may not yet have built sufficient trust, which may result in an unnecessarily limited agreement on controversial issues.
- During the later part of talks, the momentum that has developed and the pressure to conclude may assist in reaching agreement.
- If the parties have not put these elements on the agenda, the mediator may choose to raise them eventually. This can include asking for the insertion of international principles, or justice-sensitive and victim-centred initiatives, that may not be a priority for the parties but would considerably strengthen the agreement overall.

2. Specificity: How detailed should the justice components be?

- This is delicate. Some plans require close policy, legal, and even financial analysis, which is often not possible during the course of peace talks. However, clauses that outline general aims and lack any specificity risk being ignored in the implementation stage, or falling to the bottom of a priority list.
- It is thus recommended that justice provisions of an agreement outline clear principles and policy goals, with as much detail as is necessary on

both process and intended result in order to help ensure implementation. A clear commitment from the state or from other actors should be reflected, with a timeline or specific deadlines for action, if appropriate.

- On some subjects, such as detailed aspects of a truth commission's mandate, it is important to allow for a later process of public consultation in the design, and such a process should be foreseen. For purposes of public ownership as well as allowing a process to get the terms of reference right, great detail should be avoided in these areas. But again, the main principles and policy commitment should be clearly set out within a peace agreement.

Conclusion

Conventional wisdom too often assumes irreconcilable differences between the demands of justice and the need for peace. There will be tensions, especially with regard to that component of justice that deals with criminal accountability for past crimes. Securing justice ought to look forward as well as to the past, but even when addressing serious crimes of the past, recent practice shows that there are ways to secure both justice and peace.

Mediators play an increasingly important role in setting the agenda and influencing the specific content of peace agreements. While much will depend on the negotiating parties, the mediator and his or her team can better equip themselves to offer sound advice and input in order to ensure stronger attention to justice issues in peace agreements. There is growing support for the need to end impunity for the most serious international crimes, and growing opposition to broad-based amnesty clauses. Together these create an environment in which the credibility of the mediation effort will depend, at least in part, on the degree to which they have addressed these challenging issues.



