Dilemmas and Difficulties in Peace and Justice:

Considerations for Policymakers and Mediators

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May 2011

European Forum for International
Mediation and Dialogue

Background to the paper

The European Forum for International Mediation and Dialogue (mediatEUr), in partnership with the Crisis Management Initiative, is currently implementing a project funded by the Belgian Ministry of Foreign Affairs that seeks to strengthen institutional capacities for peace mediation, including at the EU level.

The *2009 Concept on Strengthening EU Mediation and Dialogue Capacities* states that EU mediators are expected to address human rights violations in peace processes, but it gives no indication for how they may do so. To meet this need, mediatEUr is organising a series of expert meetings that bring together EU policy-makers with transitional justice and mediation experts to generate recommendations for how the EU may strengthen its capacity to further peace and justice.

This paper has been commissioned by mediatEUr as part of this project. In it, peace and justice expert Priscilla Hayner uses real-case examples to identify the emerging trends and dilemmas relating to peace and justice, and to draw out considerations for mediators.

Feedback on the project and on this paper is welcome. Please send your comments to laura.davis@themediateur.eu. The author also welcomes comments at priscilla.hayner@gmail.com.

About the author

Priscilla Hayner is an independent writer and a Senior Advisor to the Centre for Humanitarian Dialogue, based in Geneva. She was co-founder of the International Center for Transitional Justice (ICTJ), and an ICTJ programme director and director of the Geneva office until 2010. She has written widely on justice in peace negotiations, and on truth commissions. The second edition of her book, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, was published in 2010.

About mediatEUr

mediatEUr is a new venture in international peace mediation. Our goal is to promote the peaceful transformation of intra- and inter-state conflicts by using and promoting effective methods of mediation.

mediatEUr brings together a network of proven and qualified mediators and experts. We support professionals and policy makers working in this field with the

latest techniques and proven methodologies, with sound knowledge of the field. We work to help the EU develop its capacities to support successful peacemaking across the world. To find out more, visit www.themediateur.eu.

List of Acronyms

AU	African Union
DRC	Democratic Republic of Congo
EU	European Union
ICC	International Criminal Court
ICTJ	International Centre for Transitional Justice
LURD	Liberians United for Reconciliation and Democracy
RUF	Revolutionary United Front (Sierra Leone)

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Introduction

Questions of justice for serious crimes of war invariably arise in the course of peace talks. Sometimes, justice is defined from the start as a core agenda item for the talks, and even stated as a priority by the negotiating parties. But this may soon lead to unforeseen difficulties as complexities and party interests become clear.

A special mix of factors makes this issue unique in the landscape of difficult issues confronting mediators: the constraints of international law and advances in the accepted norms against impunity; the personal culpability for serious crimes even of persons sitting at the negotiating table; and the intensity of interest by outside observers, including victims. It is likely that the outcome on justice – be it the announcement of a truth commission, a qualified amnesty, or a reparations or vetting programme – will capture immediate public attention and serve as a lightning rod either for accolades or for condemnation of the peace agreement as a whole.

While the potential tensions in negotiating justice are now familiar and have been often discussed, many practical dilemmas remain unresolved. Much focus has been given to the issue of amnesty, and it is now common to find language in peace agreements that excludes serious international crimes (crimes against humanity, war crimes, and genocide) from any amnesty. Meanwhile, factors outside the control of those directly involved in the talks may have the greatest impact in shaping the justice agenda: the direct engagement of the International Criminal Court (ICC), or other international justice mechanisms, have had a considerable impact on several peace negotiation processes.[i]

The European Union now has some initial documents, stated policies, and specific experiences that together could provide guidance to its representatives in relation to peace and justice.[ii] Overall, these comply with international standards. However there is no specific EU 'guidance note' on mediating justice issues, such as exists in the UN context, and not all EU representatives have been clear about institutional parameters in relation to justice.[iii] However, the general intention to respect international law and principles has been seen in the work of many mediators, including states, NGOs, EU representatives, and in most cases, other international and regional organisations.

Many peace agreements of the last ten years have thus included language on justice and combating impunity, and behind-the-scenes accounts show some degree of consistency in the positions of international actors involved in advising and mediating peace processes. The greatest clarity and consistency has been in relation to prohibiting amnesty for serious international crimes. Other justice and

accountability subjects, including reparations, truth inquiries, or measures to screen and remove past abusers from positions of public authority, have been less understood by international mediators and advisors. In some cases unintended mistakes have been made that have resulted in difficulties in implementation.

Mediating Peace and Justice

However, this general record of good intentions and many reasonably good outcomes disguise the complexities and difficulties that often emerge during the process of mediating an agreement (or attempts to mediate which may not result in agreement). When a war has included widespread war crimes or human rights violations, the question of accountability for these crimes may well be fraught.

These difficulties are not surprising, given the realities of war and peacemaking. For an abusive head of state to consider departing, or for an armed group to disarm and come in from the bush, their concerns will naturally be focused on their own future and their need for guarantees of safety and security. If there is the threat of justice measures, they will want to know exactly what this includes and how great the risks are. In some well-known cases, arrest warrants had already been released against the very persons negotiating an accord, or against those holding the greatest power in determining whether a final accord would be signed. Charles Taylor in Liberia and Joseph Kony in Uganda both confronted this reality. President Bashir of Sudan faces an arrest warrant from the ICC during ongoing Darfur negotiations. The generalised fear that criminal accountability might catch up with wrongdoers has been perceived as entrenching abusive powers, potentially making change in some contexts much more difficult.

Clearly, such concerns of the negotiating parties can impact the stability and strength of the peace process as a whole. Some observers have concluded that justice measures have complicated and hindered peace. The African Union has repeatedly called for a deferral of the ICC case against President Bashir in Sudan, suggesting that it is an impediment to the Darfur peace process.

On the other hand, agreements have been reached with known rights violators that do not promise impunity and even include proactive measures for justice. Indeed, there are a number of cases where justice has been an opening demand of the very persons who are widely believed to be responsible for atrocities themselves: the Revoluationary United Front (RUF) in Sierra Leone or the Liberians United for Reconciliation and Democracy (LURD) in Liberia, for example. Each party's insistence on bringing their opponents to justice has opened the way for incorporating specific measures of truth and justice (although not always criminal justice) within the final agreement. However, such

agreements are generally only reached after a sensitive discussion about the reach and powers of these initiatives.

The most difficult issue in mediating justice for past crimes might not always be the threat of criminal justice. In peace talks for Darfur several years ago, the most intense negotiations focused on a proposed reparations programme, including the specific amount to be provided. In the Sierra Leone talks, which took place in Togo in 1999, the government first proposed a one-sided truth commission that would only cover RUF crimes. The RUF strongly resisted, refusing to move forward. Once the proposal was revised to include crimes and abuses on all sides, the RUF became quite supportive of a truth investigation: they also had questions about abuses by government forces.

There are other challenges that should be seen as interwoven within broader issues of justice. Questions of gender representation, accountability for sexual crimes, and the ways in which a conflict affected men and women differently should be addressed in the language of agreements, such as in the mandate for a truth commission or the structure of a reparations programme. At the mediation stage, justice agreements might not be fully detailed in all of these aspects, but should at least signal a clear commitment to take these matters into account in the detailed policy design to follow. Other questions should also be given due attention in the justice arena, such as addressing the root causes of conflict found in discriminatory laws or policies, be it on ethnicity, race, or other grounds, and recognizing the impact of the conflict on children and youth.

The policies of third-party states or institutions other than the mediator, which may be involved for example as advisors or donors to the talks, may also be important in determining the final justice arrangements. In the talks relating to North-South Sudan, it was the conditions set by donor states, rather than by the mediator himself, that resulted in the removal of a blanket amnesty from the final accord. The parties came to understand that donor support for implementation of the agreement would be at risk if an amnesty covering international crimes was included. Those institutions that do not play a lead role in a particular mediation context might still fundamentally shape the final outcome.

Continued Tensions After an Agreement

The tensions between justice and peace often continue to play out long after a peace agreement is signed, sometimes capturing significant international attention and concern because of an explicit or implicit threat to the peace. This

can develop in several ways: robust measures of accountability may bring a strong reaction, even quite specific threats, if accused perpetrators believe they can stop justice. This underlying resistance may continue for years. Second, there may be attempts to control or compromise justice initiatives before they are able to gain momentum, sometimes through formalised political procedures. And third, the affected communities themselves may react with anger and even violence in response to blatant impunity and continued denials, especially if the post-war political dispensation includes significant benefits for persons notorious for serious crimes.

Examples abound: in response to the Liberian truth commission's strong recommendations for prosecutions, which included publically listing the names of primary suspects, former warlords joined together for a press conference in which they implicitly threatened to restart the war if prosecutions began. Earlier, at the end of a public hearing of this Liberian commission, it was only the presence of United Nations peacekeeping forces that prevented a mob from attacking an unrepentant rebel leader who flaunted his past deeds. The South African truth commission followed the wishes of local communities in KwaZulu Natal when they asked that no public truth hearings be held there; these small towns feared the consequences of accusations and counter-accusations in fragile contexts that had only recently established community peace. Many observers have suggested that the Kenyan political class, including much of the parliament, has intentionally thwarted efforts at justice: first through strangling the initiative for a Kenyan special tribunal to address post-election violence; then attempting to block ICC jurisdiction in the country; and finally by appointing a chair of the national truth commission that many perceive as compromised. Despite a clear agreement for justice in the Kenyan peace accord of 2008, implementation has been difficult. Meanwhile, Kenyan justice advocates or witnesses to crimes have been threatened or even attacked. Finally, as seen in Peru, El Salvador, Liberia, and elsewhere, many members of truth commissions have received serious death threats, not only during their work, but also sometimes for years after a commission's work has concluded.

Open Questions

As international human rights norms and institutions are strengthened, the dilemmas in the context of peacemaking have become more apparent. Many, and probably most, international mediators do not disagree with the basic parameters of international law and human rights norms, such as avoiding amnesty for international crimes. However, they also appreciate the difficulty this may present. Both those interested in strengthening peace mediation and those concerned with

advancing human rights could usefully grapple further with these quandaries. Some of these issues include:

1. What is the impact of the ICC on a peace mediation process? Should the ICC prosecutor (or others such as the UN Security Council) take into account the progress or prospects of peace mediation before launching an ICC investigation? Is such an assessment too 'political' for a prosecutor to include in his or her ambit? Within the context of the UN Security Council, is there resistance to the possible use of an Article 16 deferral, even if such a deferral would provide an opportunity for national mechanisms to be put in place?[iv]

2. Are the expectations of justice sometimes over-stated? Given that post-war national systems may have limited capacity or credibility on which to build difficult human rights prosecutions, or to implement broad reparations, or to undertake a robust truth inquiry, are the stated international expectations too high? Is enough attention given to building national judicial systems and other capacities, with an appreciation for the considerable time it will take to see results?

3. Is it always necessary to directly address the most difficult issues of accountability in a peace agreement? A number of peace agreements resolve the tension around justice by remaining silent on the question of accountability, leaving this to be addressed in the future. This has the advantage of leaving the door open and avoiding any promise of impunity, and is sometimes seen as a recommended approach. However, the lack of positive commitments on accountability (including vetting and truth-telling) can sometimes lead to more entrenched impunity. This approach was seen in the Afghanistan Bonn Agreement (although the Bonn Agreement was not a peace agreement as such), as well as in the Comprehensive Peace Agreement between North and South Sudan, where the very long and detailed accord included little mention of justice.

4. What are the real options, and constraints, in offering asylum to senior leaders who are thought to be complicit in serious crimes? Depending on how this might be done, arranging a safe haven for perpetrators could well raise both moral and legal questions for anyone engaged in such an arrangement. Given recent developments, it may also be a less attractive option for those perpetrators worried about the potential reach of international law.[v]

   Since the arrest of former Liberian President Charles Taylor in 2006 after two years of asylum in Nigeria, other persons who may be accused of serious crimes have been hesitant to accept an offer of asylum in a foreign country. The Charles Taylor story has at least been considered as a factor in the calculations of Robert Mugabe and Joseph Kony, for example, according to those close to the contexts of Zimbabwe and Uganda. The consequence of the Taylor arrest appears to be a

reality that cannot in effect be changed or denied. It reflects the increasing strength of international justice, not just in principles but in the reach of the law. But it also suggests that the options may be fewer for former rebels and former dictators alike.

5. What might be the impact of perceptions of inconsistency in the justice policies of the international community? While broadly accepting the importance of accountability for serious crimes and the imperative of ending impunity, the international community has not pushed this equally in all contexts. Where there are other security interests at play, international policymakers might not stand by the principles of justice for past crimes. Two such examples are Afghanistan, where truth-seeking, vetting, or prosecutions have not been prioritised, and Libya, where efforts to find a safe haven for President Gaddafi, out of reach of international justice, have been reported. The reasoning and motivations are understandable, but this opens international policymakers to charges of significant inconsistency and inequality in relation to their justice principles.

Suggested Lessons for Mediators

The role of a mediator in relation to justice should be to provide information about options, including an outline of international guidelines and minimal standards. The mediator should also consider how and when she or he might bring in independent expertise to engage the parties or advise the mediation team. This could help to avoid unintended errors and ensure that international legal obligations are respected. Past experience also suggests the following factors for consideration:

Timing: It is unsurprising that the timing of addressing justice issues can greatly impact the outcome of the discussion. Addressing this difficult subject too early risks reaching an agreement on justice that lacks a foundation of trust between the parties: in the case of Guatemala talks in 1994, an early agreement included weak language for a disempowered truth commission, leading to outrage from supporters of the armed opposition and a near breakdown of the talks. Participants agree that a later treatment (in a process that continued for several years) would have greatly benefited from the trust that slowly developed between the parties.[vi]

In contrast, the mediator in the Aceh talks proposed language for a truth commission in virtually the final hour of the last round of talks (after a brief earlier discussion with the parties). There was no resistance to the idea, but the language agreed made a small but important error that has greatly hindered the possibility of establishing a truth commission for Aceh, which has been much-

wanted by victims groups.[vii] The lateness and brevity of this discussion prevented any review of the language.

Consultation: The development of justice policies should ideally include input from victims, civil society, and the broader public. Is there a means to engage in consultation in the course of the talks? This took place in Kenya through meetings with human rights NGOs by the mediation team, including the principal mediator, Kofi Annan. In Guatemala, civil society made written submissions to the talks on specific issues, outlining preferred policies. In some contexts, the secrecy of negotiations, or other factors such as location and speed of progress, may prevent such consultation during the course of the process. In this case, certain details might be left unspecified in order to allow public debate at a later time.

Avoid 'quick fixes': A principle of public ownership and engagement should shape the justice policies that are agreed. In this sense, it is not appropriate to finalise some aspects between the parties. Lessons drawn from other countries' experiences may greatly strengthen the agreed policies, and there should be space for such input in time. For example, the details of a reparations programme may well require careful consideration, to avoid the politicisation and frustrations that can easily result if proper planning and procedures are not incorporated. Selecting members of a truth commission should also benefit from a public process, and should not be determined unilaterally by those sitting at the peace table. The desire to 'turn the page' may lead the parties to designate short-term bodies – such as a one-year truth commission – which would be inappropriate.

Implementation: Are there specific procedures, commitments, or timing that can be set out in an agreement to empower the implementation process that will follow? Given the resistance to justice that may continue, or develop anew, it is useful for the mediator to consider the context and the options to strengthen the likelihood that justice agreements will be respected.

Institutional clarity: A mediator can expect issues of justice and accountability to arise in the negotiation process sooner or later, and she or he may benefit from seeking clarity in advance on specific policy questions likely to arise. In the past, EU officials have set out a position in relation to at least one case, Eastern DRC, on the unacceptability of amnesties for serious crimes, based on the EU's support for the Rome Statute of the ICC.

The UN has a written policy for its representatives that covers general principles and policies regarding amnesty, truth seeking, and demobilising and integrating abusive security forces, for example. The most important part of this guidance note is considered to be the proscription on amnesty for international crimes, and

this is now widely known and often cited by relevant UN officials. While the specifics in relation to this proscription do not seem to be consistently and universally understood, technical and legal assistance would be available to clarify these details as needed.[viii] Having a written policy seems to have been quite effective for purposes of institutional consistency. Many other mediating states and international institutions lack such a written policy relating to justice matters, but most have made general statements or have ratified international conventions that would provide guidance in some areas.

Conclusion

Mediators and policymakers working in the context of peace negotiations will have many issues to confront in addressing justice and accountability. This short paper has not covered the broader sweep of related issues, focusing more narrowly on contexts of active peace mediation.

For mediators, the primary challenge is to assist the parties in finding an appropriate path towards a justice policy that is respectful of both victims and international standards. There is considerable room for creativity and careful strategy within these parameters.

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Endnotes

[i] For example, the indictment of Liberian President Charles Taylor by the Special Court for Sierra Leone, which was unsealed on the opening day of the peace negotiations, greatly impacted those talks.

[ii] See the *Concept on Strengthening EU Mediation and Dialogue Capacities* (EU Doc. 15779/09, adopted Nov. 2009) and the Draft document on *Transitional Justice and the ESDP* (EU Doc. 10674/06, 2006).

[iii] The UN Secretary-General first released a justice policy for UN representatives in 1999, which was updated in 2006. This states that the UN will not support amnesties for international crimes or violations of a state's obligations as set out in human rights treaties. This guidance note, *Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution* (1 Dec. 2006), is an internal UN document.

[iv] Article 16 of the ICC Rome Statute grants the UN Security Council the power to halt investigations or prosecutions by the ICC for one year. As of mid-2011, this deferral power has not yet been used, although the African Union has asked that it be considered for the case of Sudanese President Bashir. It was also briefly considered in the context of Uganda.

[v] As this paper went to press, a request for an arrest warrant for President Gaddafi and two other Libyans was announced by the ICC prosecutor. This has raised concerns that a negotiated resolution could be more difficult and the conflict could be prolonged. If the warrants are confirmed, the options for safe haven would be restricted to several dozen non-state parties to the ICC.

[vi] The Guatemalan truth commission in fact ended up being a very strong and effective body, due in large part to its commissioners and very competent staff.

[vii] In Aceh, the agreement stated that an Acehnese truth commission would be a sub-body of the national truth commission for Indonesia. Unfortunately, significant weaknesses in the law creating an Indonesia-wide truth commission resulted in the law being overturned by the Constitutional Court. While Aceh activists have continued to press for a local truth commission, this has been hampered by questions in regards to the foundational agreement, given the lack of a national truth body.

[viii] The UN guidance note on justice was not widely known by UN officials in the immediate years following its release by the Secretary-General in 1999. However, further efforts, and an update and re-release in 2006, brought it to the attention of UN representatives and relevant staff.

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