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Managing the Challenges of Integrating Justice Efforts and Peace Processes[1]

1. There are at least three distinct sets of challenges that pertain to the relationship between justice and peace processes. Some of these challenges can be managed, and tensions reduced, through advanced planning and careful crafting of policy options. However, they must be considered and reconsidered within each specific national context, with few presumptions about the best approach. Important differences between national circumstances must be respected, leading to differences in appropriate response.

2. The first issue for consideration is how accountability for serious crimes might be addressed in the course of peace negotiations. There is considerable, though diverse, experience in this arena, and growing recognition that it is possible in various ways and without too much immense difficulty to address both the imperatives of justice and peace. Mediators and human rights professionals have begun to address the question of policy options, timing, and strategy, and to turn to the lessons from past mediation experiences.

3. A second and distinct issue is how international criminal justice efforts may affect ongoing (or intended) peace talks. Investigations, indictments or arrest warrants issued for persons who are relevant to or directly engaged in peace negotiations have raised concerns. The relatively new factor of an independent international prosecutor is perceived by some as potentially destabilizing, and one that of course cannot be controlled by the mediator or by parties to talks. While the engagement of the International Criminal Court has raised these concerns most prominently in recent years, there are important and varied experiences from earlier ad hoc or hybrid courts that also deserve consideration. A related set of challenges, also affecting negotiations, is raised by the threat of arrest of former leaders years after they believed they were awarded protection in agreeing to transition.

4. A third area of tension between justice and peace is found in the years following the conclusion of a peace agreement (or other transition after armed conflict), when resistance to accountability may still be very strong. Measures to hold persons to account have sometimes been met by an implicit or explicit threat against the peace by powerful persons who were implicated in past crimes. The process of effectively continuing to negotiate the terms, progress, and pace of peace implementation often continues for years after a formal transitional agreement is in place.

5. These three challenges – negotiating justice, the impact of international justice, and the implementation of justice – are related but largely distinct.

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A. Negotiating Justice: Options, Timing, and Context

6. By definition, a peace agreement requires the concurrence, and ultimately the compliance, of those persons with the greatest power to sustain (or restrain) the violence. Some of these persons may be implicated in serious abuses, or have held command and control over abusive forces, which may suggest their complicity in crimes through 'command responsibility.' What are the obligations of the mediator, and the limitation on the parties, in relation to justice for these crimes? To what degree has this issue in fact been an impediment to peace?

7. Despite the apparent challenges, the experience of a number of past peace negotiations suggests that concerns for justice can be reasonably incorporated into agreements through careful crafting and an honest consideration of policy options. As we learn more about these past experiences, surprising trends emerge.[2] It should not be assumed, for example, that the parties to talks do not themselves have an interest in justice, and may in fact put forward this demand, speaking for their own constituencies who have been victimized. In other cases, there has been minimal or only cursory attention to past crimes in the course of the talks, or justice elements were agreed to quickly, as other more contentious issues (such as political representation) threatened to derail progress.

8. While processes vary greatly, there seems to be broad agreement within the international community on some basic principles. Many mediators understand that guarantees of impunity are no longer acceptable, even if mediators insist, quite reasonably, that the subject of justice be considered with nuance and grounded within the specific context at hand. The timing and manner of broaching this subject, within an array of complicated and sensitive issues for discussion, must be determined by those closest to the talks.

9. The concerns from the international human rights community have been most focused on the question of criminal justice – and in particular the specific concern that peace agreements do not provide amnesty for serious crimes. This has been further highlighted by the explicit constraint of the United Nations, holding that its representatives cannot condone an amnesty for international crimes (crimes against humanity, war crimes, or genocide) or for gross human rights violations (a broader category of crimes). Amnesties are seen as incompatible with the obligations set out in the Rome Statute, in reference to international crimes, as well as other international treaties that have been ratified by the great majority of states.[3] In some cases, such as in the 2005 Comprehensive Peace Agreement between northern and southern Sudan, and in the 2003 Liberian peace agreement, the resolution to this subject – with initial proposals for amnesty, and counter proposals (in the case of Liberia) for war crimes trials – was to leave the question of amnesty open, in the language of the agreement, allowing the subject to be addressed in the future.[4]

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[2] Detailed case studies that document the negotiations on justice issues can be found in: Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, International Center for Transitional Justice (ICTJ), March 2009; Scott Cunliffe, Eddie Riyadi, Raimondus Arwalembun, and Hendrik Boli Tobi, *Negotiating Peace in Indonesia: Prospects for Building Peace and Upholding Justice in Maluku and Aceh*, Institute for Policy Research and Advocacy, ICTJ, and Initiative for Peacebuilding, June 2009; Warisha Farasat and Priscilla Hayner, *Negotiating Peace in Nepal: Implications for Justice*, ICTJ and Initiative for Peacebuilding, June 2009; Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge*, Centre for Humanitarian Dialogue and ICTJ, December 2007; and Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, Centre for Humanitarian Dialogue and ICTJ, November 2007. All are available at www.ictj.org.

[3] The principle against amnesty for serious crimes is increasingly framed as an obligation emerging from the Rome Statute, rather than other sources of law. In the 2008 talks in the Democratic Republic of Congo, for example, the European Union provided clear guidance to its mediation representative that Rome Statute crimes could not be amnestied. See *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, *ibid*.

[4] On Liberia, see *Negotiating Peace in Liberia, op cit*.

10. Of course, many appreciate that the question of 'dealing with the past' must extend far beyond legal questions of amnesty or prosecution. While the ICC 'complementarity' principle is critical, the weakness of many national judicial systems makes prosecutions unlikely for the great majority of persons accused of serious crimes, especially in the near term. Prosecutions at the international level, by the ICC or other bodies, are also likely to be few in number, focusing on those most responsible. Thus a criminal justice response can only be part of the answer to widescale and serious crimes.

11. Peace negotiations thus often turn to a range of other justice-related measures, including non-judicial truth seeking such as truth commissions; individual or community-based reparations; or the possibility of vetting the security forces to remove those implicated in past abuses. These can be put in place more quickly and perhaps reach a broader number of victims, as well as accused. But these should be seen as complementary to judicial measures, as they would not in themselves be sufficient to meet the obligations set out in the Rome Statute and elsewhere. What is most important is that such options are able to be considered, and the mediation team has the tools or information at hand to explore or propose a range of possibilities. A reliance on specific technical expertise may be useful: some seemingly simple errors in the language of some accords have led to significant challenges later.

12. It is a mistake however to presume that a peace agreement should address and set out details of all forthcoming justice initiatives. Indeed, some details are best decided after a period of consultation to incorporate victim and broader public interests, which may not be possible within the tight time constraints (and perhaps confidential proceedings) of peace talks, and especially if security conditions are still tenuous. Some of the best examples of peace agreements have included a clear framework or basic principles, while allowing a later process to spell out details after the agreement is signed. Indeed it is common for issues of justice to continue to arise, and to be considered and reconsidered, over many years after a formal end to conflict, as the national circumstances change and there may be more space and interest to undertake new initiatives.

B. International Prosecutions in a Context of Peacemaking

13. The ICC is not the first international court to investigate or submit an arrest warrant against a head of state or other key actors who were actively engaged in, or preparing to take part in, crucial peace negotiations. The ICC arrest warrant for President Omar al-Bashir of Sudan, and the warrants for the central leadership of the Lords Resistance Army for their actions in Uganda, have led to significant concerns. Observers have worried, in both cases, that the threat of arrest against key political actors in fledging peace processes have threatened to derail talks, or make it extremely difficult to reach a signed agreement.

14. However, the ultimate impact of ICC actions on the respective peace processes in Sudan and Uganda remains a subject of debate, with some pointing to positive effects (such as, in Uganda, prompting more serious talks, and encouraging a more robust treatment of justice in the elements of the final proposed peace accord). Many close participants, including key members of the international team closely supporting the mediation, have concluded that the ICC engagement was not the primary reason why the LRA leader, Joseph Kony, ultimately did not sign the accord in Uganda.[5] However, this cannot be discounted as one of the possible factors. Ultimately, the overall impact is still hard to qualify for both Uganda and Sudan, especially as the situations are fluid, with multiple factors coming into play and indeed changing over time.

[5] Interviews by author. See also: Michael Otim and Marieke Wierda, "Uganda: A Case Study on the Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

15. In other cases, international indictments have had a positive effect on a peace process. More serious and lasting peace agreements have become possible when certain senior leaders, known to have played a forceful role in the war's abuses, were removed from the political equation. In both the 2003 peace talks for Liberia and the 1995 talks in Dayton to end the war in the former Yugoslavia, there was considerable worry that indictments of key leaders could upset the possibilities for peace. However in both cases the impact turned out to be positive for the peace process. The indictments of Liberian President Charles Taylor by the Special Court for Sierra Leone, and of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić by the International Criminal Tribunal for the former Yugolavia, were both announced immediately prior to the start of scheduled peace talks. In both cases, participants say, much stronger talks took place, 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.

16. Of course this de facto political impact cannot be the aim of an indictment or arrest warrant, nor the primary concern of a prosecutor. But it is useful to recognize the positive effects that have resulted from indictments that took place in the context of active peace talks. A question that is held open is when, or in what contexts, international justice will have a positive impact on peacemaking efforts, and in what contexts the effect will be seen as detrimental. What must be accepted however is that the impact cannot be said always to be negative.

17. A second serious challenge in relation to international courts and peace processes is the threat of arrest and extradition of leaders some time after an agreement for transition is reached. It must be recognized that there has been significant concern, especially in Africa, about the so-called "Charles Taylor effect", which is believed to raise the level of difficulty in reaching future agreements. This does not refer to the indictment of Taylor on the morning of the opening ceremony of the peace talks (which resulted in his departing the talks, held in Ghana, and returning immediately to Liberia). Rather, this refers to the arrest of Charles Taylor, and his transfer to the Special Court for Sierra Leone for trial, just over two years after he was granted asylum in Nigeria. There is a widely held perception that this violated the guarantees given to Taylor, when he agreed to leave Liberia and turn power over to his vice president, thus allowing the Liberian war to come to a final end in August 2003. The informal agreement reached with Taylor reportedly stipulated that he could benefit from asylum under the condition that he would not be engaged in regional or national politics or security developments. But there were consistent and credible reports that he violated this agreement, both through regular communication with former military or militia leaders in Liberia, and, it was alleged, through providing them with direct support. The request to Nigeria for Taylor's extradition, by newly-elected Liberian President Ellen Johnson Sirleaf, was in part motivated by the continued regional worries of destabilization and the negative role that Taylor was seen to be playing.

18. The misunderstanding of this case has reportedly resulted in nervousness in many other contexts, where political or military leaders are hesitant to consider similar promises or arrangements, such as by regional or international organizations, that could facilitate their departure from power. It is true that an amnesty for the most serious crimes is generally considered unacceptable, and if the ICC has jurisdiction there can be little protection from its reach within ICC member states. However, there are arrangements short of amnesty that could contribute to transitions and may help to lessen this quandary. In the great majority of these cases there is no outstanding indictment as there was for Taylor, while there is a de facto urgency for change and transition.

19. There is however a dilemma that lurks uncomfortably behind this idea, evident in the reaction to the Charles Taylor quandary. A mediator might ask: if there is no reliable arrangement that would offer an attractive future, how and why would a strongman agree to

leave power? If the prosecution of all past crimes is pursued without reference to context and impact, is there not a risk of worsening the human rights situation by extending a conflict? More specifically, if an abusive leader steps aside – and for purposes of argument might proceed to play a positive role in transitional affairs and reconciliation efforts – would that not be more important and valuable than threatening him with prison? Human rights advocates point out that changes in international human rights legal norms allow little leeway. With the advent of the ICC and strengthened norms against impunity for those most responsible for serious crimes, guarantees may simply not be possible, at least not in the broader sense. Any national amnesty would have no effect outside the borders of the country or in relation to the ICC, and an asylum deal may or may not hold over time, as the legal and political context changes. It is here that the dilemmas present themselves. The answer is perhaps, somehow, rooted in our understanding of the role, purpose, and intent of human rights accountability. Indeed, many senior rights professionals understand that a maximalist approach – insisting on full justice for all, in the very short term – is perhaps not the most effective. But these dilemmas remain unsolved, and real, and call for further thought and debate.

C. Justice During Peace Implementation

20. Regardless of the content of a peace agreement, resistance to robust justice measures often continues long after a formal transition and end to war. Implementation of justice provisions may be difficult. Independent oversight bodies, such as a United Nations mission in the country, may be pushed to focus considerable attention on the means and processes of accountability, as they can sometimes have a major impact on the political and even security environment. Where truth commissions or criminal justice measures begin to make progress, and especially if they begin to identify individual responsibility, there may be a risk of backlash by those implicated in abuses who still hold significant political or military power.

21. Most recently, these dynamics have been seen in Liberia, with the strong reaction to the 2009 final report of the national Truth and Reconciliation Commission, which named over one hundred persons – many of them in prominent positions of authority still today – and recommended that they be tried or banned from political office. A number of former warlords joined together to publicly reject the report's conclusions, even hinting at restarting the war if they were to be prosecuted. In Kenya, the resistance by officials to set up credible and independent national mechanisms for accountability has been a disappointment to many national and international observers. Many now view the ICC as one of the only possibilities for justice for recent violence – despite the peace agreement in 2008 that included robust language for a full accounting, and despite significant steps shortly after the agreement by an independent commission of inquiry into the post-election violence.[6]

22. Implementation of serious accountability mechanisms often requires a careful balancing act and constant negotiation over the bounds of what is possible, and when. National actors are best placed to make these judgment calls, understanding the de facto constraints – and of course the voice of national actors should extend beyond political leadership to civil society, broadly defined, and those individuals or communities who were most affected by the violence. It is now well understood that circumstances can change, and things that were once impossible can become possible in time. This is seen for example in the remarkable developments of Chile and Argentina, where many hundreds of accused persons have been detained or put on trial in the last few years, for crimes going back some three decades – something that couldn't have been imagined even ten years ago.

[6] The important report of the Kenyan Commission of Inquiry into Post-Election Violence, chaired by Justice Philip Waki, was published in October 2008.

D. Conclusion

23. It may no longer be possible to exclude questions of justice from peace negotiations and post-war transitions, or to simply ignore the broad opposition to the idea of blanket impunity. However, there is still leeway to craft the appropriate justice response, at the appropriate time, when negotiating and implementing peace. Still, there are tensions and dilemmas in the relationship between justice and peacemaking that cannot be easily resolved, and these should be acknowledged. In time, both mediators and justice practitioners may become more adept at foreseeing and successfully managing these difficult challenges.

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