



**Report on Wilton Park Conference WPS10/04  
in co-operation with the International Center for Transitional Justice**

**NEGOTIATING JUSTICE:  
THE CHALLENGE OF JUSTICE AND ACCOUNTABILITY  
IN PEACE NEGOTIATIONS**

**Monday 27 – Thursday 30 September 2010**

**Introduction and key points**

1. Issues in relation to accountability differ in each set of peace negotiations. The policy choices available include questions of criminal justice as well as the range of non-criminal approaches to dealing with the past, such as truth commissions, reparations and vetting. Bringing together participants in past peace negotiations – mediators, representatives of negotiating parties, civil society representatives and international advisers – the conference sought to distil lessons from past experiences. Key issues arising included:

- more informal, regular and frank exchange among mediators, between mediators and human rights organisations, and between mediators and the International Criminal Court (ICC) would be beneficial;
- there has been considerable focus on amnesties in peace processes; more attention should be given to an holistic approach to dealing with the past, and particularly thorough institutional reform of the justice and security sectors;
- questions of timing, including when to raise difficult issues such as accountability in a peace process, are important; the options available, and the emergence of local solutions, can change over time;
- justice issues can rarely be dealt with conclusively in a peace agreement; it may at times be necessary to remain silent on an issue to allow for it to be pursued subsequently;

- mediators would be well-served to hear the perspectives of victims and understand how local communities define justice;
- much more research is needed to capture objectively the experience of peace processes, from the perspective of all stakeholders, and to examine dispassionately the sequencing of justice issues.

## **Context**

2. There have been major developments in recent decades in accountability provisions in international law, generally seen as originating in the transition from dictatorship to democracy during the 1980s, especially in Latin America. The question remains how far fragile democracies can push accountability issues without destabilising their own situation? Amnesties became a focal point and were often seen as a necessary price to neutralise military opposition. But under what conditions should amnesties be granted? There has been broad agreement that obligations under international law should be honoured, so there can be no amnesty for war crimes, crimes against humanity, or genocide; on other obligations there is less clarity. International human rights standard-setting bodies have been keenly aware of the sensitivity of these issues for states in transition, and the difficulty of requiring or expecting prosecutions immediately; they have concentrated rather on the need to avoid a promise of impunity through blanket amnesty, thus leaving the door open for accountability in time.

3. In 1999 the United Nations (UN) prepared guidelines for UN peace mediators<sup>1</sup>, aware of a growing disconnect between the outcomes of peace negotiations and provisions of international human rights treaties. The guidelines were subsequently revised in 2005. They require UN representatives to seek guidance from headquarters when demands for amnesty are made, and state that the UN cannot condone amnesties for genocide, war crimes, crimes against humanity and gross violations of human rights (when such violations do not comply with a state's treaty obligations). UN negotiators should be 'normative mediators' and the guidelines provide a conceptual framework. Most other mediation actors outside the UN do not

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<sup>1</sup> Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution, adopted by the Secretary-General.

have similar policies in place. Among some governments, such as the US, there is not felt to be a lack of political will but rather insufficient policy coherence throughout the Administration. How far regional or sub-regional organisations would agree to these guidelines also remains unclear.

### **Examining experiences**

#### **- Sierra Leone: amnesty as a prerequisite to talks?**

4. The circumstances in which the Lomé talks to end civil war in Sierra Leone took place in 1999 were marked by extreme urgency. At the start of the year, rebel forces, the Revolutionary United Front (RUF), which held almost three-quarters of the country, had attacked Freetown, provoking a dire humanitarian situation; further rebel assaults on the capital were feared. Domestic developments in Nigeria presaged an imminent withdrawal of Nigerian peacekeeping forces from Sierra Leone. The government had little military force at its disposal, relying mostly on the Civilian Defence Force (CDF), itself implicated in human rights violations like the RUF although not on the same scale.

5. The rebel onslaught on Freetown provided the trigger for popular calls for negotiations between the government and the RUF. Proceedings began by the government, through its National Commission for Democracy and Human Rights, convening a national consultative conference on the peace process comprising political and traditional leaders as well as civil society representatives. The conference, borrowing from the provisions of the earlier Abidjan Peace Accord (APA)<sup>2</sup> proposed a blanket amnesty. Contrary to the APA, however, it called for Foday Sankoh, the RUF leader, to 'go through the due process of law'.

6. Some contend it is misleading to regard a blanket amnesty as a prerequisite to the Lomé talks. Instead, it was essentially 'part and parcel of the system', and accepted as such by society at large. The National Consultative Conference, admittedly guided by a governmental commission, had set the tone, following on from the APA. The delay in the commencement of talks in Lomé was rather due to the situation of Foday Sankoh, who had already been convicted of treason and

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<sup>2</sup> The RUF reneged on the Abidjan Peace Accord of 1996 and it was never implemented.

sentenced to death, and remained in prison awaiting appeal. The RUF required that he be granted special dispensation to attend the peace talks. It is suggested that if the government had not taken the necessary action to provide for Foday Sankoh's release, at least on an interim basis, there would have been no Lomé talks.

7. From the outset, the government had indicated it would use the APA as the frame of reference for any new agreement. As the talks progressed, substantive content of the agreement was drafted by three separate committees. Although a committee dealt with humanitarian, human rights and socio-economic issues, discussion of amnesty was assigned to the political committee. This body was deemed practically impervious to all forms of human rights lobbying, so efforts by activists to moderate the scope of the sweeping amnesty provision were ineffective. The blanket terms of the amnesty led the UN representative to the talks, virtually without warning, to add a disclaimer to the agreement at the signing ceremony. This stated that the amnesty 'shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law'; the implications of the disclaimer were unclear. Despite the unpalatable terms of the amnesty, many in the country felt that in attempting to end conflict and restore peace, it is necessary to weigh the ramifications in terms of costs, benefits and risks. If negative ramifications far outweigh positive outcomes, then amnesty may be necessary until such time as the situation changes to reduce the costs and risks for prosecutions. Arguably this occurred in Sierra Leone when the RUF broke the terms of the Lomé Accord early in 2000, and the government requested the establishment of a hybrid tribunal to pursue criminal justice measures, and the Special Court for Sierra Leone was created.

**- Liberia: negotiating under fire and an indictment of the President**

8. Seven years after conflict ended in Liberia, there has been scant accountability for massive war crimes, and there is a mixed view in Liberia as to the importance of prosecuting perpetrators. A notable feature of the Liberian peace negotiations was the strong presence of civil society, especially women's groups, although often without official recognition in the talks. Civil society's initial emphasis was to exert pressure for an end to the fighting rather than to press for accountability. When they

subsequently tried to draw negotiators' attention to justice issues, to end the culture of impunity and the regular practice of rewarding rebel leaders with senior positions in government, their efforts had little impact. They readily acknowledge their lack of knowledge at the time of the justice policy choices. Once talks concluded, raising accountability issues was not seen as conducive to the demobilisation process then underway. The opposing parties at the negotiations also testify to justice being secondary to the discussion of political arrangements and future distribution of power.

9. The Truth and Reconciliation Commission (TRC) provided for in the peace agreement placed emphasis on reconciliation although it also had a remit to recommend prosecutions, and (limited) amnesties. Some viewed it as a Monrovia-based mechanism, civil society-led but without sufficient local community buy-in. Consultation should have been held with victims prior to the peace negotiations and creation of transitional justice mechanisms to establish what sort of justice victims sought. While the international community is seen to have pressed for prosecutions, recourse to traditional justice mechanisms may have been more appropriate. Greater efforts were needed to familiarise communities with the TRC process, and encourage their engagement with it. The aims of the international community are largely perceived to be at odds with the aspirations of many Liberians, who seek social justice, and the ability to rebuild their lives. The funding provided to justice mechanisms like the TRC would have been better used, in the view of some, for community development. It was recognized that this may be a false juxtaposition, however: donors allocating funding for transitional justice measures may not be prepared to commit the same to social development.

10. The unsealing of the indictment by the Sierra Leone Special Court against President Charles Taylor at the outset of the Liberian peace talks removed him both from the negotiations and a future role in government. It thus strengthened the peace process, and is generally seen to have facilitated the negotiations. Whether it contributes to the current perception among African leaders that international tribunals focus prosecutions disproportionately on African heads of state is a moot point. There is broader concern at the financial cost involved in conducting the case

against him. It is also recognized that Taylor's extradition and arrest two years later, from his place of asylum in Nigeria, may make similar negotiations more difficult in the future.

11. With little discussion of amnesty provisions during the negotiations, the Accra Comprehensive Peace Agreement left open this question for decision by the future government. Given the brutality which occurred during the war, a blanket amnesty was unacceptable to public opinion, both inside and outside the country. The TRC option, while little understood among parties to the agreement, was deemed sufficient provision for accountability issues.

**- Democratic Republic of Congo (DRC): an illusive peace**

12. Since the mid 1990s, resource-rich DRC has been plagued by cycles of war, followed by ceasefires and peace negotiations, with well over five million people estimated to have died as a result. Conflict has invariably included local, provincial, national and international actors; mediation efforts have concentrated largely on national and international issues, with insufficient attention to the root causes of conflict. While there have been efforts to advance accountability, and strong calls for this from civil society, these have to-date brought very limited justice. A climate of impunity still predominates.

13. Peace agreements reached since 2002 have regularly included amnesty. While these have been in accordance with international standards, some question their actual impact of excluding serious crimes from the amnesties, since there have been no attempts to prosecute international crimes nationally. The domestic judicial system remains chronically weak. The Sun City Accord of 2002, an inclusive peace process involving belligerents, political opposition and civil society, established a Truth and Reconciliation Commission and called for an international criminal court for the DRC, but this had little practical impact. The truth commission included in its membership individuals from warring parties who were believed to be personally responsible for serious human rights violations, so was flawed from the outset; the authorities took no further action to advance the creation of an international tribunal.

14. The DRC was, however, an early party to the Rome Statute which established the International Criminal Court (ICC), ratifying the treaty in 2002. As a result of domestic and international pressure, it made a self-referral of the situation in Ituri, a region in the east of the country, in 2004. Between 2006 and 2008 three former militia leaders in Ituri were arrested and transferred at the ICC's request to The Hague. An arrest warrant for a fourth militia leader, Bosco Ntaganda, was unsealed in April 2008, at a time when he was considered a key figure for the stability of a ceasefire agreement recently reached in Goma. While his case is not unique, it illustrates well the dilemma that arises when a peace negotiation and its aftermath depends to a large extent on a purported war criminal. Is a 'compromised peace' better than the alternative of continuing conflict? Can an indictment essentially scupper a peace process? Some argue that those involved in mediating peace negotiations will invariably raise a political obstacle to pursuing a criminal prosecution against one of the parties involved. Rather than seeing a static collusion between principles and political resistance, it is suggested that the relationship between justice and peace is a dynamic one which is constantly evolving. More evidence-based information is needed of when and how a peace process has been dependent on a war criminal, and what conditions change to enable moving ahead with justice issues. There are informal, case-specific exchanges between the ICC and UN, for example, but such communication needs to be more structured and consistent. A case-driven study on timing or sequencing of justice issues would be useful for both mediators and prosecuting authorities.

15. The ICC's efforts in DRC have been criticised as too focused on the Ituri region, not directed at perpetrators at the highest level nor abuses by government forces, as well as failing to bring charges which address the most egregious crimes. It is also argued it had the unexpected consequence of making it more difficult to remove child soldiers from armed groups, since the indictment of one militia leader on charges of recruitment and use of child soldiers made others unwilling to include children when their forces presented themselves for demobilisation programmes. Conversely, the inclusion of sexual violence in ICC warrants is a welcome development.

### **- Uganda: negotiating under ICC indictment**

16. The quest for peace in northern Uganda came under particular scrutiny when Uganda became the first case to be investigated by the ICC in 2004. Concern was expressed both internationally and locally that this would make a settlement with the Lord's Resistance Army (LRA) more difficult. An amnesty put in place in 2000 had encouraged a number of ex-LRA fighters to abandon rebellion and be re-integrated in their communities. Peace talks in Juba, mediated by the Government of Southern Sudan, ended after more than two years in 2008 but the LRA leader, Joseph Kony, failed to sign the final peace agreement.

17. While the arrest warrants are generally seen as a complicating factor for the talks, most acknowledge that the indictments were not the single cause of the ultimate failure of the negotiations, which was due to a combination of elements. Yet the talks took place over a protracted period, allowing the negotiation teams to work through a number of issues and indeed sign five preliminary agreements, including on accountability for human rights crimes. Some would argue the ICC action appeared to create a momentum for the talks. The LRA leadership, ill-informed about the ICC and its procedures, sought to use the negotiations as an opportunity to rid themselves of the ICC warrants, but once Joseph Kony realised his expectations could not be met through the talks he began to disengage from the peace process.

18. There is a strong argument that ICC involvement in Uganda had a major impact on the content of the accountability and reconciliation components of the proposed peace agreement. The negotiators were forced to think creatively about what would be accepted internationally and nationally on accountability, although the final proposal to use the national criminal justice system as an alternative to the ICC was an insufficient incentive to the LRA. Accountability of the LRA is not, however, the only issue; there is some concern that the responsibility of the government for abuses has not been examined, and a more balanced approach is needed. People in the north want victims to have a central place in accountability measures, with their views and anxieties addressed.

### **- Darfur: the challenge of reparations**

19. Conflict in Darfur gained international attention in 2003 although there had already been violence in the region for a few years; some would argue it is not civil conflict but 'criminal enterprise' conducted by Janjaweed proxies and other militia allied with them. Massive forcible displacement has been used as a war strategy. Providing for reparations in a peace settlement as an aspect of justice is intended not only to compensate individual victims, but is also important for the nation to promote reconciliation on an equitable basis.

20. The need for reparations was acknowledged in the report of the International Commission of Inquiry on Darfur, established by the UN in 2004. While the Security Council (SC) accepted the Commission's recommendation to refer the situation in Darfur to the ICC, it did not take up the proposals for reparations. The ill-fated Darfur Peace Agreement of 2006 contained provision for a compensation fund for the 'war-affected' based to large extent on traditional grievance mechanisms. Negotiated between the armed protagonists, the provisions for compensation were seen as a poor reflection of the needs of the victims, particularly the internally displaced.

21. The questions associated with reparations are complex: how to categorise, or define, victims; how to shape the measures to provide redress, for example through collective or community-based action or individual response; what documentation or level of proof will be required. Engagement with victims is seen as essential to determine some of these issues. Since 2009, under the auspices of the African Union (AU) and UN, a parallel civil society track has been running alongside the government-rebel discussions. Could a separate protocol to a peace agreement be negotiated specifically to cover justice and reparation issues, at which there would be civil society and victims' representation?

22. The SC's referral of Darfur to the ICC was seen initially as a bold move, recognising the threat to peace and security this situation constitutes and that criminal justice is an appropriate measure for restoring peace in Sudan. Some question, however, whether it remains a positive factor, especially with the lack of enforcement of the arrest warrants issued to date, including for the head of state. Or is it more of an impediment to peace negotiations? In response, it is pointed out that

the peace process is hardly hobbled by the indictments, given the other challenges associated with Sudan such as the forthcoming referendum on whether the south of the country secedes. The international community tends only to be able to focus on one issue in Sudan at a time, some comment, and for the moment it is the referendum. Additionally, there was no peace process in July 2008 when the warrant of arrest for President Bashir was announced. Both AU and UN mediators had resigned, and the ICC action in calling for the arrest of the Sudanese President gave new impetus to negotiations. There is also strong support among some of the victims, in particular those currently taking refuge in Chad, for retributive measures to be pursued.

### **The role of mediators and place for justice issues in mediation**

23. There is a range of actors involved in mediation, which can be defined in three broad categories: international organisations, including the UN and regional organisations such as the African Union; states (Norway and Switzerland in particular, although countries such as the USA, Turkey, South Africa and Qatar are also active, and in some instances countries join together as groups of 'friends' or 'neighbours' of a peace process); and non-governmental organisations. Each can bring specific advantages. Non-governmental organisations may operate better under the radar, and be less threatening to a governmental party, but they have limitations if an agreement needs complex implementation. States can have drawing power and resources but may also have difficulty in sustaining a role over the longer-term implementation stage. The UN is on a pinnacle of its own given the Secretary-General's responsibility to ensure respect for international law developed under UN auspices. Not all actors are 'normative mediators', and some express concern that parties to a conflict may 'forum shop'. Has the UN become a less attractive mediator by setting expectations higher than parties to a conflict may want? Some believe the UN should be the first entity to be approached, not the last resort; it has structures to support mediation, and long-standing experience. At the same time, it cannot do everything. There could be more exchange and discussion with those involved in mediation who place less or little emphasis on normative principles. Others suggest such mediators may not be without values, but see the role and strategy of mediation differently than the normative basis defined by the UN's guidelines.

24. Mediators inevitably deal with constant balance of power calculations, which can at best seize a transformative moment. Their absolute priority is to stop war and the suffering created by it, and in this respect their work is in support of human rights. They will often privately inform the parties to a negotiation that justice issues will need to be addressed; it is suggested there should be expert advice to all parties at the outset about the provisions of international criminal law, and the limitations to amnesties, but without an over-emphasis on sanctions. The range of non-criminal options for promoting accountability, including vetting, truth commissions and institutional reform should also be introduced. The term 'transitional justice' is perhaps too technical or sometimes misunderstood, and terms such as reconciliation, good governance and enhancing the rule of law might be more easily understood and appreciated. There is no one approach in mediation which will fit all situations, and options for justice and accountability may well be generated locally. Mediators should not impose justice, but make space for it in the negotiating process, aiming to achieve as much as is feasible. Peace agreements are unlikely to be conclusive on justice issues, but by adequate recognition of the need for accountability an agreement can signal the possibility of addressing these issues in greater depth subsequently.

25. Too much focus may have been given to amnesties in mediation processes. An amnesty worded in full conformity with international legal standards may not result in justice. Adequate capacity at the national level is needed to prosecute war crimes. Institutional reform of the justice and security sectors is important, but it is often very difficult to achieve. Amnesties can be revisited or become invalid in time. They may be reversed at the national level, and will usually not be recognised by third countries.

26. The Rome Statute has framed a new environment in which mediators operate. While some see it as a constraint, others argue it also provides opportunities, including marginalising hardliners, changing the rules of the game so that killing civilians is no longer a passport to the negotiating table, and clarifying what is non-negotiable. Mediators, it is argued, will need to choose their interlocutors accordingly, excluding those indicted by the court (which will only deal with a small number of cases covering the most serious crimes). Yet the ICC, to maintain its

credibility, is in need of strong governmental support to enforce its warrants. There are significant countries which have not ratified the Rome Statute. While the ICC prosecutor is opposed to sequencing its action in conjunction with peace processes, many observers suggest that timing can be all-important. More informal communication, both between the ICC and the Security Council, and the ICC prosecutor and actors on the ground in a conflict situation that is under investigation, would be beneficial despite the sensitivity which may surround such exchanges.

27. Including civil society in peace processes, including women and traditional leaders, often provides the opportunity for justice and accountability issues to be raised. At the same time civil society groups may not be adequately informed about the range of options in transitional justice. International organisations, or donors, may need to provide assistance to these groups to enable them to obtain this expertise, as well as cover the expenses which may be associated with taking part in peace talks, as has been very usefully done in the past. Organising civil society participation can be complicated. How can the unbiased selection of civil society representatives be assured? Most importantly, mediators need to be exposed to the views of victims, and what sort of accountability and justice they seek.

## **Conclusion**

28. Useful lessons can be learned from looking at past experience, but it is rare to have detailed studies which capture experiences from the perspectives of all the parties involved in a peace process, including the views of victims. Further research is needed to improve understanding of how peace negotiations have been undermined, what is the interplay between judicial and political processes, and how information is best shared.

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