

IFP MEDIATION CLUSTER

THE EU AND ADVANCING JUSTICE ISSUES IN MEDIATION

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INITIATIVE FOR PEACEBUILDING



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ABOUT ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocities or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

Cover image: © 1999 Caroline Jacoby, Courtesy of Photoshare. Community meeting in rural Nepal.

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THE EU AND ADVANCING JUSTICE
ISSUES IN MEDIATION

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ACRONYMS

CFSP	Common Foreign and Security Policy
DDR	Disarmament, demobilisation and reintegration
DRC	The Democratic Republic of Congo
EC	European Commission
ESDP	European Security and Defence Policy
EU	European Union
EUSR	European Union Special Representative
ICC	International Criminal Court
IHL	International Humanitarian Law
SSR	Security system (or sector) reform
TRC	Truth and Reconciliation Commission
UN	United Nations

INTRODUCTION

Brokering a positive peace, which may resolve the conflict rather than just putting it on hold, is a challenge. Making provisions for justice for the victims of the conflict is an important way to achieve this. As peace deals are usually agreed between warring parties, often in the aftermath of protracted violent conflict in which all sides may have committed grave human rights violations and other crimes, mediators may have to convince the signatories to go beyond rhetoric and make tangible commitments to justice.

European Union (EU) actors are increasingly involved in peace processes worldwide on a case-by-case basis. Although EU institutions have the potential to contribute to durable peace by promoting justice and human rights in peacemaking, they currently lack the tools and policy framework to do so. In November 2009, the Council of the European Union adopted the *Concept on Strengthening EU Mediation and Dialogue Capacities* as a basis for a more coordinated and focussed approach to mediation, to enhance the EU's ability to play a more active international role in this area.¹

This paper aims to contribute to this process. As part of the Initiative for Peacebuilding (IfP) project, the International Center for Transitional Justice (ICTJ) analysed how justice issues have been handled in four mediation processes in Indonesia (Maluku and Aceh), Nepal and the Democratic Republic of Congo (DRC).² This paper builds on this research by offering a comparison between these case studies, to identify eight key issues that may be relevant to EU mediators, even if the EU was not involved in all of the processes under consideration. The examples cited in this paper are all drawn from these reports.

¹ Doc. 15779/09 II.

² S. Cunliffe, E. Riyadi, R. Arwalembun and H. B. Tobi (June 2009). *Negotiating peace in Indonesia: Prospects for building peace and upholding justice in Maluku and Aceh*. Brussels: Initiative for Peacebuilding (June 2009); W. Farasat and P. Hayner (June 2009). *Negotiating peace in Nepal: Implications for justice*. Brussels: Initiative for Peacebuilding; L. Davis (May 2009). *Small steps, large hurdles: The EU's role in promoting justice in peacemaking in the DRC*. Brussels: Initiative for Peacebuilding. All available at www.ictj.org and www.initiativeforpeacebuilding.eu

PEACE AND JUSTICE

Peace and justice are both critical imperatives in post-conflict situations. Post-conflict societies need to deal with the legacy of systematic and massive human rights abuse; recognising, acknowledging and empowering victims, and (re)affirming their status as fully rights-bearing citizens, are integral to peacebuilding and democratisation processes. Yet too often, brokering (and maintaining) peace and advancing justice and human rights are assumed to work against each other, i.e. seeking one will automatically be to the detriment of the other.

Transitional justice seeks to deal with this very issue.³ It is not in itself a special form of justice, but a set of approaches which seek to bring about justice for victims of massive human rights abuse in extraordinary conditions, usually during transitions from authoritarianism and/or violent conflict to democracy and peace.

Transitional justice includes the following approaches:

- Bringing those responsible for past abuses to account through criminal prosecutions and non-judicial forms of inquiry (such as truth-seeking mechanisms);
- Providing reparations to victims and going some way to satisfying their needs;
- Transforming security systems, making them accountable for past violations and potentially removing human rights abusers from public institutions; and
- Reforming public institutions to prevent the repetition of past violations.

Criminal justice should be considered during peace negotiations, particularly preserving the possibility for justice – even if prosecution of the worst offenders is not possible immediately or in the near future. This means avoiding amnesty for human rights offences in peace agreements and, at a minimum, limiting amnesty to exclude core international crimes e.g. genocide, war crimes and crimes against humanity.

Justice includes and goes beyond a narrow definition of criminal justice: punishing the perpetrators of crimes. Justice also seeks to acknowledge the harms inflicted on the victims – and, crucially, to recognise that this was and remains wrong. Through the range of judicial and non-judicial approaches, transitional justice can help make peace more durable by addressing impunity, establishing a common historical narrative, reforming public institutions to serve the population and protect human rights, and improving civic trust.

But will the parties involved in the conflict agree to any of these measures – or will they refuse any peace agreement (or implementation proposal) that includes them? Those working to advance peace must often consider and balance these dynamics carefully. But a more nuanced approach to justice and peacemaking may significantly reduce these assumed tensions and a range of policy options may be possible.

³ As noted in *Draft document on "Transitional Justice and ESDP" in view of the PSC meeting on 20 June 2006 (doc. 10674/06)*.

KEY ISSUES

Despite the very different contexts in the processes examined, eight common priority issues emerged from the studies.

1. GREATER PRIORITY FOR JUSTICE ISSUES AND PUBLIC DEBATE

Calls for justice may come from the public or from one or more of the parties to the negotiations, yet justice and human rights issues are not necessarily prioritised by the mediators. Surveying public opinion and encouraging public debate on justice issues may open more space for discussion during negotiations.

Mediators need to have a good understanding of the range of justice options (judicial and non-judicial) which may be relevant, including the potential pitfalls, lessons learnt and best practice from elsewhere. The condition of the national justice system may affect justice proposals, yet reliable assessments of the justice system – of both institutional capacity and the legislative basis for pursuing justice effectively – are not routinely available to mediators.

Often mediators representing different institutions form a team; in which case their positions need to be consistent with each other, and with international best practice.

Where the culture of impunity is strong, popular ownership of an agreement, and especially its justice and human rights components, will be vital for implementation: the rule of law is weak and so enforced implementation of the agreement may be difficult. For example, in the case of Maluku, an attachment to the agreement provided for a human rights court and a truth and reconciliation commission (TRC). But remarkably, even several years later, confusion persisted over whether the establishment of these bodies constituted part of the agreement at all. These mechanisms were never implemented.

Whether or not there are civil society participants in negotiations, reaching out to civil society, including human rights defenders and victims, is important for promoting a justice agenda. Civil society may provide a – or in many cases, the only – platform for the views of the public and the victims. It will often be the only way in which women can engage in the negotiations, directly or indirectly.

2. THE INCLUSION OR NON-INCLUSION OF JUSTICE PROVISIONS IS IMPORTANT

Pushing for accountability for past crimes can be very difficult, particularly when violence is ongoing or a ceasefire is fragile. But inclusion of justice issues, even if brief, can keep the door open for future discussions. Amnesties are common in peace agreements, but they should not prevent future prosecution of at least those suspected of genocide, war crimes or crimes against humanity. This would entrench impunity, contravene international legal obligations and could undermine the rule of law.

Inclusion of measures for victims must be proactively sought. Identification and definition of “victims” requires careful consideration to avoid polarising communities, or making the definition so broad as to include everyone or too narrow as to exclude many genuine victims. A gender-sensitive approach is crucial to ensure that discriminatory attitudes towards women are not perpetuated.

3. POSTPONING INSTITUTIONAL REFORM/SECURITY SYSTEM REFORM MAY STYMIE LATER REFORM EFFORTS

Addressing institutional reform, particularly of the security system, to prevent future abuse and to address problems of impunity and corruption is particularly difficult in negotiations. Mediators are often hesitant to press for institutional reform, particularly in security sector reform (SSR) and disarmament, demobilisation and reintegration (DDR) programmes. Yet postponing even discussions of justice-sensitive reform may make reform more difficult in the longer term, especially in a post-election period. A functioning security system is necessary for protecting citizens' rights, but abusive public institutions not only violate citizens' rights directly but may also act as spoilers and prevent effective implementation of peace accords, and particularly justice provisions.

Accurate assessments of the justice sector will make an important contribution to these deliberations – for example, the use of military jurisdictions in Nepal, Indonesia and the DRC for human rights violations further complicates the link between reforms of the different security and justice institutions.

4. TECHNICAL ASSISTANCE SHOULD IMPROVE JUSTICE PROVISIONS

Mediators need technical assistance in the detail of justice provisions, and should be able to benefit from international best practice and lessons learnt. The international legal landscape is constantly developing, and new transitional justice approaches are emerging all the time. In Nepal, for example, there was a very narrow frame of reference for transitional justice, limited mainly to an understanding of a model based on the South African TRC but without a critical understanding of the South African experience. Mediators, parties to the negotiations and civil society actors would benefit from access to detailed comparative analysis identifying strengths and weaknesses of previous experiences from across the world.

Initiatives which are fundamentally compromised – such as the truth commission in the DRC – may be worse than none at all.

Justice provisions should be well-drafted and clear. The Aceh Human Rights Court was agreed to in the Helsinki Memorandum of Understanding, but there was considerable controversy later as to whether it was intended to cover past crimes or not and in the end, trials for past crimes were explicitly excluded from its mandate.

Some transitional justice measures need to be linked – for example, a well-designed reparation programme for victims should draw on the results of judicial or truth-seeking processes. Otherwise, compensation may be seen as a pretext to avoid further reparation or truth-seeking, or may even fuel an escalation of conflict.

But transitional justice measures should not rely too heavily on mechanisms which are yet to be set up: the truth commission agreed for Aceh was delayed because the legal basis of the Indonesian TRC was deemed unconstitutional.

5. ENGAGING WOMEN AND ADDRESSING GENDER ISSUES

Women are consistently under-represented in negotiating or in international mediation teams. But analysis of gendered patterns of abuse and gender-sensitivity in designing transitional justice mechanisms are necessary for their successful implementation. Women must also be engaged as positive agents for change. For example, women's participation in the Maoist forces in Nepal led to greater gender equality more generally in the post-conflict period.

6. MONITOR HUMAN RIGHTS ABUSE DURING NEGOTIATIONS

In situations of ongoing conflict and violence, particularly against civilians, an independent human rights monitor during negotiations and the implementation phase may help reduce ongoing abuse of the population.

7. INCREASE INTERNATIONAL SCRUTINY OR MONITORING OF IMPLEMENTATION

Coherence and coordination between the different EU instruments (and Member States) is important for implementing peace agreements. Timely funding and technical assistance are vital for the full implementation of peace agreements, particularly of the justice provisions. But this is in itself insufficient. Diplomatic pressure from the EU, its Member States and other international partners must be brought to bear if agreements are not fully implemented or not implemented in good faith.

8. ENHANCING CIVIL SOCIETY PARTICIPATION

Civil society, when truly representative of the population and of victims of the conflict and including human rights defenders, can improve the justice component of peace agreements by advocating for justice for human rights violations, and evaluating proposals under negotiation. Yet civil society organisations often lack necessary skills: training and technical assistance provided by international partners (including international NGOs) can greatly enhance civil society contribution to promoting justice, and in monitoring the implementation of justice measures.

CONCLUSION

A comparison between how justice for human rights violations were handled in these four different peace processes identified eight key issues. Some of these refer directly to the role of the mediators, such as bringing justice or gender issues or questions of SSR to the table even if the parties resist. Others refer to the support mediators can draw on: advisors to assist in drafting high-quality, clear provisions to ensure there is no misunderstanding as to what has really been agreed later. Other key issues – such as monitoring human rights during negotiations, international monitoring of implementation of peace agreements, the engagement of civil society in all parts of the peace process, and post-conflict institutional reform – imply engaging many more actors than the mediators and their advisors.

The EU institutions have the potential to contribute to durable peace by promoting justice and human rights in peacemaking. As the range of issues identified in these case studies suggests, this will not be the work of one actor alone. Further research by this project will complement the issues identified in this paper with analysis of EU policy, and recommend ways in which the capacity of the EU to promote justice systematically in peacemaking may be strengthened and gaps in policy closed.⁴

4 L. Davis (2010). *The European Union, transitional justice and peace mediation*. Brussels: IfP.

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