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Negotiating Justice to Understand Accountability

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**BUILDING A FUTURE ON PEACE AND JUSTICE
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**WORKSHOP 6
EXPERT PAPER**

NEGOTIATING JUSTICE TO UNDERSTAND ACCOUNTABILITY

Nick Grono & Caroline Flintoft¹

1. INTRODUCTION

Negotiating justice during a peace process requires the balancing of a range of interests, many of which may not be readily reconcilable. Peace talks often bring together parties with capacity to perpetuate the conflict and inflict further suffering. The primary task of mediators is to neutralise the incentives for a return to conflict, and produce a credible and sustainable peace agreement.

This paper attempts to establish a framework for considering these issues. It focuses primarily on African conflicts and peace agreements, for the simple reason that most of the world's ongoing conflicts are taking place in Africa. Accepting that all of the benefits of peace and all of the benefits of justice can't be immediately achieved, it seeks to spell out those benefits, over the short and long term, and from the perspective of local and international actors – so that to the extent there has to be a trade off it can be made with an informed understanding of what may be gained or lost, and by whom.

2. WEIGHING UP PEACE AND JUSTICE

The value of peace is straightforward. For the society subject to the conflict, it means an end to killing and suffering and the removal of an overwhelming obstacle to development. For those not yet victims of the conflict, it removes the risk of becoming so. For the international community, and particularly

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neighbouring regions, peace brings an end to actual or threatened destabilisation, decreases the likelihood of state failure and related dangers.

Justice is also fundamentally important. But, in the context of peace negotiations, it is intended to serve a greater and more diverse range of purposes. This means that the case for justice (or “accountability” as the terms are used more or less interchangeably in this context) is not always as clear-cut as that for peace, rendering it difficult to accept the claim that justice must always be pursued even at the cost of continued conflict.

The strongest argument for that trade-off, and the most common claim on behalf of justice in peace negotiations, is a utilitarian one – that peace is not sustainable in the absence of justice. But the evidence for this is far from unequivocal. There are successful peace processes in which reconciliation was pursued to the exclusion of accountability, for example in Mozambique. And South Africa is called in aid by proponents for and against the “no peace without justice” case.

Priscilla Hayner’s case studies for this workshop look at how the issue was dealt with in peace negotiations in Sierra Leone and Liberia, and provide rich analysis of the dynamics of these processes. While peace agreements these days rarely grant amnesties to leaders responsible for atrocity crimes, they are sometimes given to subordinates, or for crimes other than atrocity crimes. Many agreements ensure implicit impunity by ignoring the issue of justice altogether, or by setting up weak transitional justice mechanisms.

But the entry of the ICC onto the world stage, and the expansion of prosecutions under the principle of universal jurisdiction, have dramatically changed this dynamic.

Mediators can no longer consider their job done if they produce a peace agreement that does not explicitly address justice and accountability issues. But they will constantly struggle with how much accountability is enough and whether – if ever – an exception is warranted. Thus, it is critical to understand the objectives that strong accountability mechanisms are intended to serve; how the international community and war-torn societies are expected to benefit; and how those benefits may vary over time, and perhaps most importantly, across conflicts and societies.

3. THE OBJECTIVES OF ACCOUNTABILITY

While accountability is often used synonymously with “justice”, it is narrower and best used to refer to efforts to operationalise justice norms when negotiating peace after the commission of mass atrocities. It is generally associated with at least six objectives.²

² These objectives have been discussed in various forms by a number of experts in the field, including Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, 2000); Paul R.

The first is retribution. Punishing individuals for the harms they have caused, particularly when their crimes were committed on a massive scale, is intended to re-establish (or establish in the first instance) an equilibrium between victims and perpetrators. It is also expected to channel any desire for revenge through legitimate institutions.

The second is the incapacitation or the purging and removing of disruptive actors from a post-conflict society. In this, it is intended that accountability mechanisms will physically remove those who have committed mass atrocities in a society, rendering them incapable of doing so again or spoiling the peace.

Then there is deterrence. Prosecutions have long been believed to have the power to prevent future atrocities. The argument is that if leaders genuinely believe that they are likely to be prosecuted if they commit atrocity crimes, then this will provide a strong (though not always overwhelming) incentive against such conduct.

Another much-discussed objective of accountability is truth telling or establishing an accurate historical record. This can help prevent the distortion of facts and misuse of historical examples both domestically and internationally, and provide the related benefit of acknowledging victims of crimes and allowing them to state their experiences publicly.

A fifth objective is institutionalisation of human rights norms. Insisting on prosecution of war crimes and atrocity crimes forces states to recognise the legal and moral force of those norms and entrenches them more firmly in international and domestic legal spheres, bureaucratic and military structures, and in the minds of ordinary citizens.

And finally, accountability serves to delegitimise the individuals responsible for atrocity crimes and help dismantle the institutions they created or used for support.

There is obviously a degree of overlap among these accountability objectives. All of them can play a role, to a greater or lesser extent, in ensuring the sustainability of peace. But advocates need to be careful in arguing for accountability on the ground of sustainability alone, as the evidence cuts both ways. And often insistence on robust justice mechanisms will be an obstacle to achieving any peace agreement – rendering arguments about sustainability irrelevant.

Thus it is important to look beyond sustainability to justify the pursuit of accountability when there is a potential trade-off in terms of peace.

Most of the accountability benefits as outlined above in theory accrue to the war-torn society. Hence, in principle, retribution, incapacitation and purging, truth

Williams and Michael P. Scharf, *Peace with Justice?* (Maryland, 2000); Juan Mendez, “Accountability for Past Abuses”, *Human Rights Quarterly* 19 (1997) 255-282.

telling and deligitimisation all predominantly benefit the local actors; with deterrence and the internationalisation of human rights norms being of greater import to the international community more broadly. And, to the extent any or all of these objectives contribute to the sustainability of a peace agreement, then it is the local community that overwhelmingly benefits.

Yet despite this, local actors (and not just the parties to the conflict, but also civil society and local political representatives) in recent peace negotiations have often been vehement in their desire to minimise accountability mechanisms in favour of reconciliation.

So if the international community is to insist on holding perpetrators accountable, it will often have to do so in the face of opposition from local actors. On what grounds can or should the international community insist on accountability in the face of such opposition and at the risk of prolonging the conflict in question?

The best grounds are those that demonstrate the benefits of accountability outweigh the risks of ongoing conflict in that case. It is a utilitarian argument that the potential to prevent a multitude of future atrocity crimes by deterrence and institutionalisation of human rights norms is so important that it should take precedence over the cost of ongoing conflict in a particular case.

4. DO DETERRENCE AND NORM INSTITUTIONALISATION PREVENT ATROCITY CRIMES?

This argument is viable only if they do. But it's understandably difficult to establish their effectiveness to any substantial degree. There are plenty of examples where whatever threat of criminal prosecution there was failed to deter perpetrators of atrocities, and it is difficult to point to cases of successful deterrence.

But this doesn't prove there are none, as the problem may be the same as that which confronts conflict prevention efforts more generally: namely, that it is difficult to establish something that never eventuates. Also, history is of limited benefit when considering these issues, as international institutions and norms are much stronger today.

So, perhaps the more appropriate question at this stage is what are the circumstances in which deterrence is most likely to work? First, it is necessary to understand that the interests of parties to a conflict are different, and this may impact on how effective deterrence may be. A credible threat of prosecution may well be less effective against rebels, at least until the late stages of their rebellion – by which time it is too late for them to ameliorate their conduct to escape prosecution.

In contrast, when it comes to the calculations of those in power, deterrence may have greater immediate effect. If a credible threat of prosecution for future

atrocities exists in the minds of a regime's leadership, then those leaders have something tangible to lose and arguably will weigh that risk when deciding how to respond to a challenge to their authority.

Second, deterrence will be effective only if the threat of prosecution is – as suggested above – sufficiently immediate and credible. Until recently, it was more theoretical than real, as the only vehicles for prosecution were ad hoc international tribunals, or domestic courts.

The advent of the ICC – a permanent tribunal, with the power to initiate its own prosecution – together with growing application of universal jurisdiction, increase the odds of prosecution, and hence the potential impact of deterrence. But in the case of the ICC that will only be the case if the Court can successfully pursue those in power most responsible for atrocities. That in turn will require the international community to support effective prosecutions while ensuring that peace deals can be struck without undercutting the court's long term effectiveness..

5. BALANCING THE ICC'S JUSTICE ROLE WITH PEACE

The Rome Statute gives the Prosecutor of the ICC the power to disregard amnesties granted those most responsible, and to prosecute perpetrators if domestic prosecutions lack credibility.

Without more however, the ICC's strong focus on prosecution could well present a significant obstacle to peace agreements, even in situations where ICC prosecution has little deterrent benefit, and where other objectives of accountability are unlikely to be achieved.

Anticipating this, article 16 of the Rome Statute allows the UN Security Council to defer ICC prosecutions and investigations for twelve months, renewable indefinitely. And article 53 gives the Prosecutor the power to decide not to proceed if it is not in the interests of justice.

Article 16 delimits the appropriate responsibilities of the Security Council and the Prosecutor. The Prosecutor has a justice mandate and should not be required to make the essentially political judgement of whether the prospects of an uncertain peace should take precedence over accountability. If a balancing has to be made – and it should only be considered if major peace benefits are very likely to result – then it should be made by the Security Council.

The Security Council has a peace and security mandate. It can put a prosecution on hold temporarily to allow a peace deal to be implemented. But it should be acutely conscious that indiscriminate exercise of this power in purported pursuit of peace will emasculate the ICC, and undermine efforts to institutionalise deterrence and human rights norms. It should therefore only intervene exceptionally, in those cases where its intervention will not significantly undercut the deterrent impact of the Court. In so doing it will reinforce the lessons of

Milosevic, Taylor and Habre prosecutions, and potentially contribute significantly to the prevention of such state sponsored atrocities.