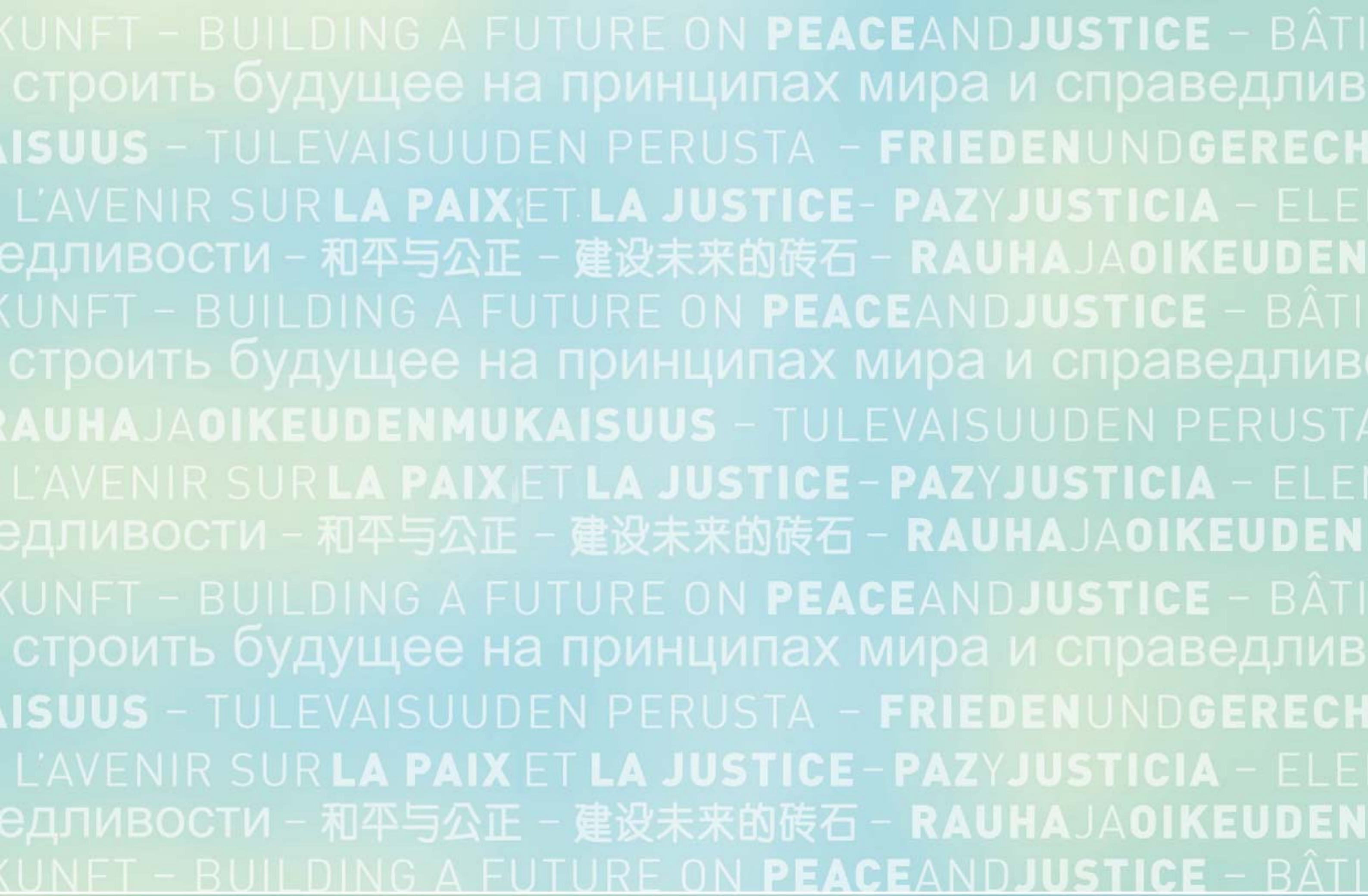

Kristina Thorne

Negotiating Justice

Expert Paper "Workshop 6 – Negotiating Justice"

International conference
Building a Future on Peace and Justice
Nuremberg, 25 – 27 June 2007

Conférence internationale
Bâtir l'avenir sur la paix et la justice
Nuremberg, 25 – 27 juin 2007

Conferencia internacional
Paz y Justicia – Elementos Conformadores del Futuro
Núremberg, 25 – 27 de junio 2007

Internationale Konferenz
Frieden und Gerechtigkeit – Bausteine der Zukunft
Nürnberg, 25. – 27. Juni 2007

BUILDING A FUTURE ON PEACE AND JUSTICE
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WORKSHOP 6
EXPERT PAPER

NEGOTIATING JUSTICE

Kristina Thorne[1]

1. INTRODUCTION

The Negotiating Justice workshop builds on work undertaken by the Centre for Humanitarian Dialogue with regard to justice issues in peace processes. On the assumption that the foundation of a peace process is laid during the negotiation and early implementation phases of peace agreements, this work aims specifically to provide third party conflict mediators with advice on how to tackle justice issues in a way that responds to the needs of justice and peace in a lasting way. This paper will point to some of the particular issues that face mediators in these phases, and argue that there is a need for more understanding of the context of mediation and for taking a holistic approach to the process, as well as for concrete advice on how to achieve sustainable results on specific issues such as justice.

2. MEDIATION AND JUSTICE

Over the past decade, the world's conflict mediators have been faced with increasing demands for justice and accountability to be addressed in the context of peace processes. The previously prevalent notion that peace could be achieved at any cost is no longer valid. Against the backdrop of a growing international consensus acknowledging the importance of human rights, two developments in particular have contributed to this change in parameters: the creation of the International Criminal Court in 1998, and the decision by the UN in 1999 that its mediators could no longer encourage or endorse peace agreements which granted blanket amnesties. More than anything, these two events have brought home the fact that international standards are a factor in peace processes, and have to be a factor also during the negotiation of peace agreements.

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Peace negotiations are where these issues are most acutely felt. Every peace process involves negotiation, where insisting on the unconditional nature of specific provisions is likely to be difficult. Usually, provisions also cannot simply be imposed. Many mediators will also be wary of attempting to push for specific solutions, for the pragmatic reason that doing so may mean that they will no longer be welcome at the talks. There are numerous examples of mediators facing threats of being sidelined for perceived or real bias, such as in the recently reported case of the LRA demanding a change of mediator and/or location in South Sudan. There are also examples of mediators who have been so successful in pushing for demands – also on justice – in a previous process that their presence will not be welcomed by other conflict parties. Simply educating the mediators or parties about justice demands and international law would not be sufficient in these cases: What is needed is advice to mediators on how to work with nuances to achieve solutions that are acceptable to the parties and also correspond to the greatest possible degree with international standards.

As discussions about justice often seem to focus on accountability, many mediators, too, have come to view 'justice' as backward-looking and controversial. One challenge in engaging with mediators is to demonstrate that the concept of justice includes much more than accountability for human rights violations, and that there are forward-looking issues that also require consideration. The other challenge is to assist them in identifying and approaching future-looking justice issues: relatively little overall attention has been given to how mediators could best deal with issues such as justice sector reform, institutional frameworks or economic and social justice, thus making it difficult to provide concrete advice in this regard.

3. NEGOTIATING JUSTICE

To date, the Negotiating Justice project has commissioned four papers: a comprehensive mapping of justice issues included in peace agreements since 1980; and case-specific studies of how justice issues were dealt with in peace negotiations in Burundi, Sierra Leone and Liberia. This work will be complemented in 2007 with further studies on the Aceh peace process, amnesty provisions and international law, and the concept of reconciliation in the context of mediation. A synthesis report, drawing together key conclusions emerging in the various studies, will be published at the end of the year. Some conclusions are, however, already emerging, and are discussed below.

First, any peace agreement must be seen as part of a process which potentially includes further negotiation and possibly mediation in the implementation phase. Some agreements tend to become 'final' or 'comprehensive', but often the process continues with additional agreements which may or may not partially supplant the original text. The Arusha Agreement for Burundi, signed in August 2000 and the basis for much of that country's transition process, has thus been followed by three further agreements which have added to and sometimes altered the meaning of the original provisions. The 1999 Lome agreement in Sierra Leone came close to breaking down in 2000, only to be reconfirmed six months later as the main pillar of the peace process. Against that background, those working with and around mediators must consider

working on the process as a whole, especially focusing on comprehensive solutions, rather than focusing all their energy on the exact provisions of one single agreement.

Second, and following on the first point, solutions to difficult issues can be and often are left open in the agreement. It may be better to only include a brief reference if precise agreement of a provision is not possible. This can be a tacit acknowledgement that time is not ripe for addressing the issue comprehensively, but will nevertheless allow for it to be addressed at a later stage. Whatever the merits for specificity, there is a clear case for ensuring that provisions do not shut the door to potential future efforts at accountability, which is what a general amnesty clause would do. For actors who are not directly involved in talks, there is an opportunity in these situations to remind participants of their international obligations while potentially accepting that provisions may not turn out to be as exact and firm as they would like.

Third, and yet further on the previous point, many of the provisions in agreements fail to be implemented in part or in whole. It would seem that most significantly, provisions are often implemented late or with less devoted resources than would be needed to achieve the envisaged result. This would especially seem to be the case for provisions which do not immediately appear to relate to the stabilisation phase following a conflict. Clauses on justice and rule of law reform are often perceived to fall into this category. The belated creation of a human rights commission as provided for in the Lome agreement for Sierra Leone – six years after that agreement was concluded - is one of many examples, as is the failure to create a commission for judicial reform as provided for in the Arusha agreement for Burundi. This may indicate that our focus should sometimes be less on getting detailed provisions included in the agreement, and more on achieving agreement on the principles governing a transition and on potential areas which will require further discussion in that process. This would provide an opportunity to include and create hooks for later work not only on the 'hard' justice issues that so easily remain the main concerns during negotiations, but also on 'softer' issues such as equality and marginalisation which receive little attention in negotiations or afterwards. At the same time, a focus on principles rather than provisions could potentially remove obstacles to agreement and help the negotiation phase of the process come to a conclusion.

Fourth, no solution fits all and no advice is universal. It is clear that mediating in a complex context with several parties and great international interest is different from mediating in a relatively minor conflict, which may not even register on the international level. Getting processes off the ground is also different from finalising an agreement, or finding solutions immediately after an agreement has been signed. This is to say that 'templates' may be less useful than a clear discussion about all potential solutions and the consequences they entail. An example often mentioned in this context is that of the establishment of some form of Truth and Reconciliation Commission, which often gets discussed in negotiations or included in agreements on the basis of little knowledge beyond the recognition that one happened to take place in South Africa. Alternative means might have provided as

comprehensive a solution to the need for truth, and may have been more appropriate to the case at hand, but failed to be considered.

4. JUSTICE ISSUES AND PEACE PROCESSES

The sections above have dealt with the context of mediation, and with some of the issues facing mediators in peace processes. They are complex and multi-faceted, but in the end, not impossible to work with. Nor is it impossible to find advice on how best to approach these issues. There is, however, a continued need for more accessible information about the various options for solutions in divergent situations, and about specific aspects such as timing/sequencing of various mechanisms, as well as what the consequences of specific provisions may be.

There is also a need for a realistic assessment of how helpful certain justice aspects are to the process as a whole, and at what time in the process they should be brought to bear. This is not only related to the amnesty dilemma, or a resource and focus issue as alluded to above in the context of implementation of provisions. Justice issues are one piece of the puzzle of bringing a violent conflict to a negotiated end and of assisting a society on the path to lasting peace. There may be scope to deal with some of these issues during negotiations, but some may also be best addressed later in the process. Some may also be more appropriately left aside completely. These decisions should not be taken on the assumption that certain aspects of the process are more important or more valuable for society, but should be based on empirical data and informed advice on the matter.

Mediation, then, is about bringing all these pieces together in a way which appeals to the parties, conforms to international standards, and meets the expectations of the international community, legally as well as politically. Juggling these various interests and issues to produce any tangible result – peace – is contingent on correct information and useful advice. On justice specifically, and as discussed above, this information and advice needs to take account of the process as a whole, with an appropriate understanding of the broader context in which the negotiations and the mediation take place. Only then will it achieve the desired result and impact, and – hopefully – contribute to a lasting peace.