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BUILDING A FUTURE ON PEACE AND JUSTICE
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WORKSHOP 1
SYNTHESIS REPORT

FROM MEDIATION TO SUSTAINABLE PEACE

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Christine Bell, *The 'New Law' of Transitional Justice*

Lars Kirchhoff, *Linking Mediation and Transitional Justice*

Chandra Leka Sriram, *Conflict Mediation and the ICC: Challenges and Options for pursuing peace with justice at the regional level*

This paper will bring together three distinct perspectives on the relationship between internationally brokered political settlements (peace agreements) and emergent norms and practices in the field of transitional justice. In the studies considered, each author brings a particular analytical lens to bear on the subject. Christine Bell argues from a robust understanding of international law, while citing specific cases such as Sierra Leone, Northern Ireland, Cote D'Ivoire, South Africa, and more; Lars Kirchhoff's perspective is that of evolving mediation theory and practice; and Chandra Sriram explores the quandary that contemporary agreements and justice processes are still predominantly 'statist' in scope and definition, whereas many wars spill over state boundaries and jurisdictions, at the same time as the International Criminal Court (ICC) has claimed a new level of action and authority in the international system.

While there is a developing normative framework of hard and soft law to provide some broad standards and parameters for mediators, the current state of legal and practical uncertainties around transitional justice imply both an obligation to combat impunity, and the need for some scope in flexibility in peace negotiations. There exist considerable 'ambiguities and controversies' in the words of Bell, in the discourse and application of what she would term the 'new law' of transitional justice. Kirchhoff explains that the making and implementing of peace agreements involves political manoeuvring and imagination requiring a degree of flexibility. Mediators by definition cannot impose terms, in contrast with arbitrators who can have binding elements.

The reality of negotiation makes it hard to balance the immediate demands of the situation with complex (external) norms and standards. Mediators therefore face the challenge of achieving workable consensus with the greatest possible adherence to international standards, while the standards remain ambiguous and somewhat contradictory. An additional complication is that while accountability and mediation processes are largely state-focused, many conflicts and attendant human rights violations are transboundary and even regionalized. This creates difficulties for traditional political and legal mandates tied largely to territorial states. As Sriram argues, broader dynamics can be missed and state focused solutions may end up neither addressing the true underpinnings of violence, nor the human rights violations. This dilemma may pose a bigger challenge to mediation and accountability than the often-cited justice/peace tension, making holistic peace and justice even more elusive.

This summary will examine the intersecting approaches of international law in national settings, mediation potential and limitations, and regional linkages in war and peace. The challenge is to link treaties and protocol to the grievances, divisions and needs of war-affected populations. There are both moral and functional imperatives in this exploration. A resilient society and sustainable peace are less likely when the bitter contradictions of the abuse of power continue to play out after the signing of a settlement.

The following parameters emerge from the studies considered:

1. The cry in many post Cold War conflict settings of 'no peace without justice' has been heard and is reflected in the new position of accountability in international instruments and in scrutiny brought to bear on negotiated agreements. We can anticipate that peace agreements will be benchmarked against human rights frameworks.

2. There is an acute tension in mediation processes between the immediate and short term goal of cessation of hostilities, and the long term conditions necessary for sustainable peace. As Bell points out, '…those at the negotiating table are likely to be the very leaders and organizers most vulnerable to prosecution under the scheme'. What guidance, if any, should then be offered to the mediator?

3. The internal dynamics of violence often spill over borders in terms of interest and actors, but currently 'statist' solutions do not capture these complexities, whereas the effective jurisdiction of the ICC will need careful and measured development.

4. There is a need for carefully considered innovation, and in particular the building of capacities for legitimate institutional and inter-disciplinary approaches to dealing with the past and meeting grievances.

To this we may add a further dimension. There is growing international consensus that peace agreements must 'deliver' to populations if peace building is to be sustainable. There is acknowledgment that the pursuit of human rights in a given situation may clash with goals of conflict resolution. But the complexities of differing war dynamics and contexts still drive solutions not easily distilled into international uniformity. Moreover, the popular defining terms and needs for what Lederach has called the 'justice gap' after war ends, may also differ for affected populations in their local settings.

1. 'NO PEACE WITHOUT JUSTICE'

This is a rallying cry with convincing pathos which is heard in many suffering parts of the world, notably present day Israel and Palestine. Bell asserts that analysis and study of peace agreement practice, innovation in post-conflict transition and legal developments have given rise to the new 'law' or international normative practice of transitional justice. She is clear in her interpretation of the same: Blanket amnesties covering serious crimes are not permitted; Some flexibility and discernment is necessary for the re-integration of ex-combatants, with 'DDR' increasingly seen as standard operating procedure necessary for recovery from internal wars; Quasi-legal mechanisms are capable of delivering accountability, given local relevance and acceptability; Emerging levels of international criminal justice offer new avenues of recourse and justice in cases of non-compliance.

Bell suggests that varying interpretations on amnesty may be argued from a basis in human rights law, and demonstrates grey areas and ambiguities in international law. Interestingly, in cases such as Northern Ireland and Aceh, where peace agreements have been made between national governments and rebel armies, there have been functional amnesties in the form of early release from prison and representative entry to political process. These two examples of internal armed conflict may be seen in contrast with Israel and Palestine, where a multi-level plethora of political jurisdictions clash over claims for legitimacy and sovereignty---from Security Council resolutions to the Oslo (or other) Agreement, from counter-claims of offensive or defensive attacks to the withholding of essential services or disagreement on the 'right to return'. Add to this, regional political disagreement on international treaty and law, the claims and fears of diaspora populations globally, and severe political and ideological divisions internally for both Israel and Palestine, and the labyrinth of blockages and complexity for any mediator become clear. Consider also the role and interests of neighbouring countries, and here is regionalization on par with Sriram's argument.

This example is important because it also illustrates a key argument made by Kirchhoff in his analysis of the links between mediation and transitional justice. Reminding us of the 'multiple realities' of mediation (based on the work of Marieke Kleiboer), Kirchhoff goes beyond classic heroic stereotypes of the third party, to list what may be at work in different interventions: Power-Brokerage, Domination, Problem Solving, or Transformation. This is crucial to our understanding. When the argument is expanded, it suggests that where an intervening actor is also an interested party, the mediator also becomes part of the structure of the conflict. In such cases, the question of 'whose' peace and 'whose' justice may be further complicated in the aftermath of settlement.

2. POTENTIAL AND LIMITS OF MEDIATION

We have come a long way since the Dayton Agreement, when a triad of (bitterly divided and oppositional) wartime leadership committed behind closed doors to territorial division and what amounted to a new constitution for Bosnia & Herzegovina, now understood as ethnic partition in exchange for an end to bitter driven by attacks on long suffering civilians. This experience subsequently rendered starkly visible the difficulties of 'implementing' justice, as indeed it seemingly reveals multiple historical truths and little healing. There is growing

understanding that accountability has pragmatic as well as principled arguments in its favour.

Bell captures the change decisively: 'The period in which norms were viewed as marginal was the period when peace agreements briefly seemed to be an end in themselves, and the point at which international actors could walk away. That is no longer the case. Increasingly, the crucial conflict resolution difficulty seems to be implementing the deal rather than 'cutting it'. The UN has stated that nearly half of all peace agreements collapse within five years. Increasingly, difficulties of implementing the rule of law are being seen as key to that failure. The more that mediators and international actors are faced with a role in implementing and sustaining the peace they have negotiated, the more questions of the rule of law, accountable political and legal institutions, and the symbolism of justice, matter.' Indeed it is cumbersome, if not contradictory, to build a culture based on the rule of law when the deal is founded in impunity. Practical arguments as much as shifts in the norms have created a situation in which the choice is increasingly seen as 'how much accountability when' rather than a choice between some and none.

What role, then, may be ascribed to 'the mediator'? Kirchhoff both dissects and expands the manifold functions and possibilities for the third party, also distinguishing carefully between the *power-based approach*, the *rights-based approach*, and the *interest-based approach*. He rightly points to significant overlap in parameters constituting the basic structure of a given mediation: 'One such parameter is the question of *power applied by the mediator*, i.e. the question of how much leverage and control is present during the mediation process. A second parameter is the *depth and direction of the conflict resolution approach*, i.e. the question of the role the underlying causes play and of how the restructuring or transformation of the topics is dealt with. A third parameter concerns the question of which *category and number of participants* are chosen for the mediation process..'

He argues convincingly that the wider interests of the society in question may be factored into the agreement at the high table. Given the willingness or readiness of the parties (and what used to be referred to as 'ripeness' in situation), there is potential in "process design" adapted according to the particular interests elaborated. It may be discussed and negotiated with the parties whether all relevant actors are present, or whether the interests of additional parties might become so relevant that their presence would be necessary. There is utility in starting processes either through 'back channels' or with small groups of participants on 'track two level'; then inviting representatives on a more formal level once an agenda has been clarified. Agreement must leave considerable openings for subsequent developments, such as constitutional process, institutional development, the building of independent judiciaries and parliaments, if and when democratic transition is the envisaged path for the management of disputes, as per 'from bullets to the ballot box' reasoning.

There are caveats for realism about the limits of mediation. Parties allow it when they are either ready or have no other choice. They will also seek naturally to use it to their own ends.

In this sense a division of labour must be recognized within the international system. Milosevic was a party to Dayton, and later found himself in the Hague being prosecuted for war crimes.

The possibility of prosecution must be handled deftly by any intervening third party on a case by case basis. War termination and political processes have given us more than one national office-holder with blood on their hands. Bell's argument is compelling: 'The idea of an international consensus on a prohibition on amnesty should not be assumed. There is a great danger that in trying to tie down this consensus further, it would be tested. Related to this, the need to preserve some flexibility to enable negotiated ends to conflict is a real one. While the law can be charged as being incoherent and inconsistent, this is at present the main way that flexibility is enabled. Reducing this flexibility further could again lead to normative frameworks being rejected more easily.'

Normative frameworks are rejected outright at the present time. Consider attempts to mediate between the LTTE and the Government of Sri Lanka. Bell points out that attempts to pin down more precisely the permissible scope of exceptions or alternative approaches to accountability, would start to be very prescriptive, and 'it is unclear that it is a project that has any coherent possibilities at all'. In stipulating exceptionalism, human rights frameworks as they apply in more normal situations would be weakened. Transitional justice discourses have a contemporary purchase well beyond transitions from violent conflict and are needed in many contexts.

She raises the intriguing possibility that increased normativity could also have some unintended side effects. In particular, it could implicate mediators as well as parties to conflicts. Viewing mediators as themselves 'caught' by amnesty norms (as logically could happen) could lead to two unintended side effects: (a) *Norm-dodging mediators* (b) *Normative-mediator dodging parties*.

Sriram reminds us that the choice is never merely peace or justice. Indeed, what may be and often is agreed in peace processes, or resolved before or after them through bureaucratic processes or informal bargaining, are a range of measures, including, and between, the two extremes on the continuum of widespread prosecution to blanket amnesty. 'These may include limited prosecution, limited or conditional amnesty, vetting or lustration, reform of the judicial or security sectors, reform of the constitution, reparations, and truth commissions. Decisions about accountability are not made in a vacuum, however: given political realities on the ground, options will be circumscribed.' What is agreed in a settlement will take on its own reality according to the power relations in place, and the structures and behaviours unique to the conflict setting in question.

3. Defining Lines of Accountability and Actors

While being cautious (above) about so fixing international standards so as to render them inflexible or impossible in local settings, Bell agrees that the prohibition on blanket amnesty has been important. We see how essential it has been in settings where the nature of the conflict has been closely tied to impunity. To some extent, this explains why jurisprudence from central America most clearly articulates the need for accountability in the form of prosecution, trial and even punishment. In other conflicts silence on the past, or even amnesty, have been important to achieving an end to fighting and human rights abuses. Two types of conflicts have seen this approach as prevalent: conflicts in Africa where both the state and non-state actors often have the appearance of private rather than public actors, and conflicts which only arguably triggered humanitarian law

at all and where prosecution and punishment were let-go but this was seen as part of a process of domestic demobilisation.

Tracking and defining lines of accountability is an exercise tied to a people's experience and history, sometimes immediate and straightforward, sometimes interlinked with vast political or military projects of subordination or abuse. The small and fragile new state of East Timor must live next to its neighbour Indonesia and regenerate the flow of goods, trade and peoples if it is to survive. Its past is linked inexorably with structures, military behaviours and positioning tied to the Suharto regime, which Indonesians managed to peacefully overthrow at the end of the 1990s. Many Indonesians would like a Truth and Reconciliation Commission about that regime and leader, in particular looking back to the gross purges and abuses of the 1960s. International attempts to foster accountability for East Timor and the human rights violations following the referendum for independence are thus tied to (and by) centralised structures and political machinery in Indonesia itself. Similarly for Aceh, lines of accountability will be clear for some victims, convoluted and embedded for others.

The case of Aceh exemplifies the insights afforded by the three studies at hand. Consider the following observations by a former member of the Aceh Monitoring Mission:

> The two peace negotiation teams in Helsinki were well aware of the past atrocities in Aceh, and human suffering and poverty that had become part of the everyday life of Acehnese. This becomes evident in several articles that were included into the Memorandum of Understanding (MoU) to address these problems, and also to create mechanisms to handle them. These include for example Article 2.2. stating that 'a human rights court will be established for Aceh' and the following article 2.3. determining that the Indonesian Commission for Truth and Reconciliation will establish a Truth and Reconciliation Commission for Aceh, and that this TRC will have the tasks to formulate and determine reconciliation measures.
>
> (The)Third part of the MoU concerns amnesty, and outlines government reintegration assistance to those who have participated in GAM activities and amnestied political prisoners, as well as assistance to conflict-affected civilians. While these articles deal mostly with the past, the first part of MoU outlines how justice will best be ensured in Aceh in the future through full political participation, improved economy, the rule of law, and adherence to international covenants of human rights. These issues were then elaborated upon, and given a legal basis in the Law on the Governance of Aceh that was passed in July 2006 by theIndonesian national parliament DPR. Further elaborations will be given through Aceh's provincial regulations Qanun in the years to come. As the processes of justice in Aceh are intertwined with those elsewhere in Indonesia.[i]

To date the formal institutional mechanisms for truth and reconciliation are slow to come in to being. But given new 'democratic space' in the tsunami-affected region, priorities are mainly for recovery and renewal. Acehnese human rights groups maintain archives (and seek to preserve forensic evidence) regarding past atrocities. Legal aid NGOs assist proactively with current competing land claims and ensuring due process for a future built more on rights and just procedures. The agenda for effective decentralisation is key for sustainable peace, with many processes indeed 'intertwined' with the wider polity, as noted above. Aceh also presents an example where a non-state corporate actor has been accused of complicity.

Exon Mobile was unsuccessfully brought to courts in the USA by activists charging the company with human rights abuses in its Aceh operations. In taking the long view of lines of accountability, Sriram touches on corporate actors and 'some multinational corporations in conflict zones, where they knowingly

contract with, or otherwise support, abusive government or rebel forces, in order to conduct business, particularly extractive industries. The involvement of Unocal and other oil companies in Burma/Myanmar, of Talisman oil company and now state-run Chinese oil companies in Sudan, are examples of these. Individual state leaders or officials might face criminal accountability, and individual corporations might face civil liability, but this is fairly infrequent, and seldom part of broader accountability processes for the country affected by the conflict and crimes.[1]

In Sriram's analysis, in one sense all human rights abuses occur at the national level, which is to say, they occur within the borders of an existing state. But she argues that it is frequently the case that while they occurred within the territory of one state, they were promoted or even ordered by individuals, whether state or non-state actors, operating in the territory of another state. (The Government of Indonesia was displeased with the Government of Sweden in that it seemingly hosted a rebel Acehnese government in exile.) Human rights abuses may occur in a "simple" transnational sense: an external actor directed it or was complicit in its commission. Abuses may occur in a more complex or regionalized sense, in the context of regional conflict formations.

In its fullest sense, transnational violations of international human rights or humanitarian law may involve the direction by a foreign government of activities that constitute violations, hence Sriram's example of Charles Taylor's support to the RUF with full knowledge of the abuses they were committing, or Uganda's occupation of part of the DRC and concomitant commission of abuses by its army (and failure to prevent other abuses in territory it occupied) are examples of these.

In conflicts that are regional (often with sustained interventions by the militaries of one or more states into one or more states, or multiple patterns of support to rebels in neighboring states), there may be several sets of actors responsible for human rights violations, and even identifying, much less pursuing, those responsible may be quite difficult. Regional conflicts generate serious abuses of human rights and violations of international humanitarian law both within and across state borders, which means that not only do complex conflict formations have to be resolved, but overlapping and competing claims regarding abuses and accountability will present themselves within and across several countries. However, accountability processes are most frequently focused upon the national state and its actors, which may exempt some culprits from punishment.

Now in principle transcending statist dominance, the ICC may be seen as part of the progressive development of transitional justice, transnational justice, and international criminal accountability since the end of the Second World War, notably advanced by the work of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda. As mentioned by Sriram, there are already critics who argue that the ICC might be seen, not just as a challenge to impunity, but also as a potential challenge or impediment to peace negotiations and agreements, particularly given the court's wide mandate, the lack of recognition of domestic amnesties before the court, as well as the increasing lack of recognition of amnesties by international courts generally.

Finally, against this necessarily macro-level overview of levels in the international system must be placed the profound inter-personal realities for survivors of modern day war. Consider the drugged induced adolescent soldier coerced into killing his own family members in East Timor or Liberia; the women who watched their men being killed by former neighbours mobilized to frenzied violence in Rwanda or Bosnia; the children born (accepted or rejected) after rape of mothers still facing destitution; the families with missing loved ones; the dispossessed who can see their homes or land occupied by what they feel to be illegitimate newcomers. No peace treaty or legal formula or procedure will comprehensively meet the needs of such multitudes. There must be alternative sources of hope and recovery, enabled by more comprehensive interventions and long-term initiatives.

4. BUILDING RESILIENCE, AGENCY AND STRUCTURES OVER TIME

At present international law emphasises the need for clear accountability for the most serious abuses and violations, and points in the direction of a need for accountability more generally. However, it has ambiguities, gaps and incoherencies that leave some room for negotiation, sequencing, and creative approaches. Dealing with the past is important, but surely as a foundation for building a new and sounder future—not as an end in itself. The old adage of 'not just What is done, but How it is done' is a vital when contemplating conditions for a sustainable peace. What Bell calls the 'new law' is, in her words, usefully emerging in a direction of setting standards of participation in transitional justice design, which can be argued to be important not just to those mechanisms, but to requiring the participation of a broader range of actors than military elites in peace processes more generally. This is useful not only to concepts of meaningful democracy, but also for enabling creative locally tailored approaches and broad debate over the connections between means and ends.

It is a key principle, as Bell argues, that 'where new mechanisms are innovated, they should be designed with as much consultation with affected communities as is possible'. If new mechanisms build on traditional justice precedents, there must also be legitimacy in keeping with contemporary more universal aspirations, notably the rights of women and the notion of fair trials. It is intriguing that traditional justice is receiving renewed interest at the same time as renewed emphasis on building the state. Also important are the fields of social and cultural development and the scope that art, literature, education, media, drama and community development have for both reclaiming the past and healing for the future. The safe telling of stories may be a prerequisite for belonging again in society. Where governments elect to control the terms of the story telling, as in Rwanda, only time will tell whether and if social relations indeed recover. All over the world, the very writing of history is a key variable open to scrutiny over time, as new generations question 'whose truth, whose story?'.

In Kirchhoff's words,

> Given that each society consists of a significant number of entities and subsections (the interests of which might be divergent or complementary in character), comments on interest profiles of transitional societies are of a particularly speculative nature. In any event, it is decisive to perceive the society in transition as the bearer of its own and specific interests…….
>
> When eliciting the interests of societies in transition, it is particularly relevant to adequately acknowledge the specific political, cultural and social context in order to avoid

> an attitude of overbearing universalism. If the profile of interests is not carefully analyzed, criticism of transitional justice as a formal, predetermined, almost imperialistic mechanism imposed by the Western world can be more than justified.

In addition to this need for 'fine tuning' on local levels, the huge 21st century laboratory for transitional justice may prove to be regional in scope. Sriram reminds us that in many instances state or rebel leaders who are barely able to reach agreement with each other within state borders may not be able to come to agreements with multiple other states who may also have supported rebel groups. However, the peace agreements for the DRC, while focused upon cessation of fighting, withdrawal of foreign troops, and stabilization of areas of DRC territory, may offer something of a model for a regionalized agreement. So too might the commitments, albeit broad, made in the Contadora and Esquipulas processes in Central America.

Further, international security architecture is increasingly attuned to the regional dimension of conflict, and might provide institutional support for regionalised approaches to peace and justice. The UN system, for example, has developed not just country but also a regional peacebuilding support offices, in the Great Lakes region, and there is a Special Representative of the Secretary-General for West Africa. UNDP has active regional centres in Bangkok and Colombo as part of its regional bureau for Asia and the Pacific, as well as centres for southern Africa and Europe. In Africa, regional organizations such as ECOWAS and IGAD have played growing roles in supporting or mediating peace agreements, or even deploying peacekeeping missions. And the African Court on Human and Peoples' Rights, while pan-African, and focused on state obligations rather than individual criminal accountability, might speculatively offer a neutral venue (with different judges and mandate, to be sure) for regionalized cases. In particular, the Mediation Support Unit, created in response to a recommendation of the UN High Level Panel report, and operating as part of the UN Department of Political Affairs, might promote cooperation with regional organizations. (Sriram)

Given this relatively new international architecture, Bell reminds us of the emerging possibility that should any party evidence lack of commitment to a peace agreement, and in particular return to violence, any compromise on criminal justice would be void and could be reversible through the use of international criminal justice. With this relatively new line of recourse, there is potential for flexibility and effectiveness.

However a word of warning is in order. As the norm and organizational model filters through the international system, there may be a crossroads where the claim and adoption of the model begins to serve other goals – such as a means to international legitimacy, a tool for dealing with domestic political opponents, a rationale for replicating formalised processes that have little bearing on the society as a whole. There will be different motivations for parties, often informed by calculated expediency As has been argued elsewhere, the paradox is that the fact that 'the new law' is a product of an international norm, will increase the chances of it being adopted by more and more states, but for reasons other than the motives of the original advocates:

> International norms and institutional designs do not diffuse linearly; they are filtered, contested, reinterpreted and appropriated, even misused domestically for quite local political purposes. In addition to the outright rejection and acceptance of the international norm - which is in itself a complex process that can involve localization - there also exists a full range of options in-between.' (Subotic .. p48)

Keeping this potential co-option of the transitional justice paradigm in mind, it is useful to conclude here with a reminder of the phrase coined by John Paul Lederach many years ago, that being the 'justice gap'. Lederach reminds us of the many possible entry points for mediation, for dialogue and consensus building to bring actual changes for the better to people's lives – the litmus test for any real 'peace dividend'. To conclude this synthesis of three studies, three valuable perspectives, on mediation and sustainable peace, we may give the last word to him. By doing so, we locate the debate firmly in the ongoing challenge of post-violence transformation:

> A peace accord means that the direct violence line drops significantly, that is, the fighting stops. However, people expect the accords to address the fundamental issues that gave rise to the fighting, the structural violence, and that solutions will be produced on the same timeline as the diminishing curve of direct violence. This rarely, if ever has been the case. It results in what I call the 'justice gap.' The war is over, formal negotiations concluded, and changes have come usually in terms of increased space for political participation. However the expectations for social, economic, religious, and cultural change are rarely achieved, creating a gap between the expectations for peace and what it delivered.
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> The significance of the justice gap in the context of the challenges we face in the 21st Century is to ask ourselves the question where has most peace-building practice, theory, and funding been invested in reference to the overall progression described above? My observation: Much greater investment has been expended in the study and development of methodologies and practice for reducing direct violence than in transforming structural violence. We have focused our lenses more on negotiation and peace accord fashioning between groups and their representatives than in understanding the processes of structural change. The justice gap emerges in part because we have not adequately developed a peace-building framework that reduces direct violence and produces social and economic justice.[2]

'Sustainable Peace' then, is a long term and multi-dimensional project. Mediation and change processes are required at many points other than the high table of political negotiation. At that table, the mediator will need sufficient flexibility to find the common ground on which a fragmented and war-torn society may build both its recovery and an institutional base for preventing injustice in the future.

About the Contributor

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[2] (http://www.gppac.net/documents/pbp/part1/1_justpe.htm)

[i] Leena Avonius, 'Aceh Peace Process and Justice', p.4. Paper prepared for the First International Conference of Aceh and Indian Ocean Studies, organised by the Asia Research Institute, National University of Singapore & the Rehabilitation and Construction Executing Agency for Aceh and Nias (BRR), Banda Aceh Indonesia, 24 -27 February 2007.