

# Policy & Practice Brief

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## Making Deals for Peace: The Peace and Justice Dilemma

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Conflict mediators must constantly balance issues of peace and justice when designing peace agreements. This paper probes how peace and justice, two distinct but interrelated concepts, interact within the African peacebuilding context. Examining the different manifestations of peace and justice in post-conflict environments provides policymakers and stakeholders alike with frameworks for future peace agreements. Regional and international actors can help facilitate and promote justice in a post-conflict environment given that they remain cognisant to its local context as well as their own institutional limitations. Sifting through complexities of peace and justice not only furthers our understanding of the peace process, but also enhances our capacities to prevent such conflicts.



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### Introduction

Violent conflicts, whether inter or intra-state, end in one of three ways: through an agreement on the terms of surrender, a partial agreement, or with a full peace agreement.<sup>2</sup> Over the years, disputing parties have often stipulated to political compromises in order to resolve violent conflicts. These compromises or agreements are commonly referred to as peace agreements and are intended to regulate or resolve basic incompatibilities and contentions between

warring parties. To meaningfully resolve conflict, peace agreements must include more than the simple intention to cease hostilities and should engage with the root causes of the conflict. These agreements must also enshrine amenable ways in which the parties can resolve their disagreements as well as embody a formula for future cooperation.<sup>3</sup> Sequencing different aspects of the peace processes raises significant challenges. Difficult choices must be made as to which

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aspects are given priority and precedence over others. In most cases of violent conflict there are instances where issues of retributive justice are temporarily set aside so as to first ensure that peace prevails. Prioritising tasks is a pertinent role that the mediator and the disputing parties must play. Sometimes the mediator is compelled to dialogue and possibly make agreements with individuals responsible for war crimes and human rights violations in order to establish peace.<sup>4</sup> Mediators in any context must be willing to grapple with this dilemma in order to ensure that the objectives of mediation and peace agreements are realised.

*Both justice and reconciliation are fundamental and significant to ensuring successful post-conflict reconstruction.*

In post-conflict environments it is a reality that peace without justice is only symbolic peace. Often there are deliberate efforts to suppress violent episodic memories and for the domestic and international communities to embrace the principles of amnesty. According to Melander, peace agreements that contain amnesty provisions are more likely to succeed.<sup>5</sup> However, it is imperative to note that a cessation of violence is not invariably equivalent to the achievement of peace. While notions of amnesty may logically fit in the context of post-conflict states, local populations will be hard pressed to trust in governments if they feel that their injustices have not been redressed.<sup>6</sup> Both justice and reconciliation are fundamental and significant to ensuring successful post-conflict reconstruction. This is especially true for communities that have been repeatedly marginalised by war - a case in point is the northern Uganda community that has been victim to the conflict between the government and the Lord's Resistance Army (LRA). In such societies there is an urgent need to marry issues of justice and peace to find a logical and reasonable solution that sets these communities free from fear and want. Transitional justice can be criticised for focusing too much on human rights violations; while consequential, these injustices overshadow the conflicts' root causes. There is a need in post-conflict settings to address justice holistically and in an integrated manner so as to encompass all the injustices that have been suffered by war-affected populations.

## Understanding Post-Conflict Justice

During mediation processes the mediator is often faced with the dilemma of whether to pursue justice at the expense of peace. In most instances the demands for justice can contradict the conditions necessary to maintain a cessation of hostilities. At the time of mediation the urgency to end violence and save lives often compels the mediator to place issues of justice at the periphery of the mediation effort. Justice and reconciliation have therefore always been seen as competing objectives in the peacemaking process, while

negotiation is seen as the solution to ensure an end to conflict.<sup>7</sup> It is instances such as these that see the granting of amnesty in peace processes, evident in Sierra Leone, Liberia and Uganda. Whilst this seems to be the common practice, such processes can very often perpetuate a culture of impunity as well as ignore claims for justice that may cause dissatisfaction amongst aggrieved groups and undermine any hope of achieving a sustainable positive peace. Peace agreements that grant amnesties to individuals who are deemed to be criminals can at times be detrimental to post-war stability and reconciliation and therein lies the greatest dilemma of any mediator aiming to achieve sustainable peace.

While there are important discussions on the need for justice and reconciliation in post-conflict reconstruction and peacebuilding, very little is said on how these concepts relate to each other or what they would mean in practice.<sup>8</sup> There is also limited discussion over the mechanisms and the desired objectives of reconciliation and justice in post-conflict states, beyond the assumption that the same would contribute to peaceful states.<sup>9</sup> There have been contentions that justice is an essential component of reconciliation.<sup>10</sup> When considering any conflict settlement it is important to note that discussions on reconciliation cannot be made without engaging justice. It is only in addressing the injustices that these communities have suffered, through actions of the government and/or rebels, that one can even begin a discussion on reconciliation.

*Peacebuilding must invest deeper not only in resolving conflicts but also in addressing issues of restorative and socio-economic justice.*

It is imperative to note that justice cannot be confined to a legal context. Lederach, for instance, discusses the importance of socio-economic justice as a critical element to guaranteeing peace.<sup>11</sup> In peacebuilding efforts there has been a failure in developing a framework that produces social and economic justice. Peacebuilding must invest deeper not only in resolving conflicts but also in addressing issues of restorative and socio-economic justice. Post-conflict reconstruction and peacebuilding must therefore identify and create structures that will strengthen positive peace and ensure that societies do not relapse into conflict.<sup>12</sup>

## Justice or Peace?

Issues of justice and accountability for past crimes are an essential point of contention in peace negotiations. A case in point is the conflict in northern Uganda, where the failure to achieve a peace agreement has often been attributed to the arrest warrants issued by the International Criminal Court (ICC) for the LRA top leadership. Recent legal developments have also failed to provide clarity on policy options for

mediators when it comes to questions of justice. The African Union's position on the ICC activities and indictments in Sudan and Kenya, and the subsequent call for deferral, also adds to the ambiguity on the relationship between justice and peace.<sup>13</sup>

There is seemingly confusion on the role of international justice in national peace processes. In many instances issues of justice are categorised into retributive justice and amnesty. The adoption and use of amnesty-centred initiatives to foster peacebuilding is indicative of a pragmatism that exists in the international debate on the reconstruction of conflict-torn states and the urgency of the international community to attain peace at all cost. Amnesties are also used as incentives to individuals responsible for heinous crimes. A good illustration of this is the work of the South African Truth and Reconciliation Commission where suspected criminals of the Apartheid era were encouraged to confess their transgressions. However, this ideal position is fraught with concerns over sustainability. For example, there are real concerns over the moral standing of those that have returned after committing inhumane aggressions. Policymakers assume that it is possible for communities to completely block out their painful experiences and embrace those that have irreparably offended them. Agreements for amnesty are generally made between leaders and often ignore consultation with local communities and victims. Whilst reconciliation and restoration is an ideal, one wonders whether this form of restorative justice can ensure contentment amongst those aggrieved so as to break the cycle of conflict.

In most instances restoration, as opposed to retribution, is probably best but one cannot simply conclude amnesty can ensure sustainable peace. Arguments against impunity do logically demand that perpetrators be prosecuted. These arguments and actions that seek for justice at all cost do have pronounced repercussions on local communities that have been victims of war. The main argument seems to be that the need for peace carries higher priority in comparison to retributive justice.

*In order to bridge the gap between peace and justice a social contract between the different stakeholders of peace is required.*

Mani argues for a reparative justice that is based on both legal and psychological conceptions of reparation.<sup>14</sup> This form of justice is empathetic to the suffering of the victim and is flexible in how it responds to the offenders. In order to bridge the gap between peace and justice a social contract between the different stakeholders of peace is required. The local population must be consulted and involved in the conversations and agreements with regard to justice as it is these populations that must live with the aftermath of the decisions made by different stakeholders.<sup>15</sup> Hayner proposes four questions to guide

the mediator's engagement with issues of justice: what has been the nature of abuse in the conflict; what demands of accountability are likely to arise; who is best placed to offer policy options and what are the policy options and which ones will be implemented in the peace negotiations.<sup>16</sup>

## The Blessing or Imposition of the International Criminal Court

The engagement of the ICC in Africa has been fraught with debate and criticism. The court has been largely incapable of fulfilling its mandate, failing to complete a trial since its inception in 2003. It is important to note that the ICC is often called upon or referred to cases where there is doubt that local institutions of justice are capable of executing justice in a particular matter or on a particular individual. The ICC takes up cases either through an invitation from member communities, the unanimous approval from the UN Security Council, or from the recommendation of the ICC's Pre-Trial Chamber composed of six judges. Opponents of the ICC have called for a more indigenous approach to justice. The provisions of the ICC, however, provide that any national alternative to the ICC would need to involve credible, impartial and independent investigations and prosecution.<sup>17</sup>

The UN principles specify that a right to justice means prompt, thorough, independent and impartial investigations and appropriate measures in respect to the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished. Article 17 of the Rome Statute provides that any national alternative must involve a state genuinely able and willing to conduct a thorough investigation as well as an independent and impartial prosecution of the accused. The Rome Statute also provides that the investigation and prosecution must not be undertaken to shield a person from criminal responsibility, nor be conducted in a way that is inconsistent with intent to bring a person to justice.

A legitimate concern for parties who have chosen to trust a mediator is whether this person can be compelled to testify before the ICC; while highly unlikely, this has yet to be tested.<sup>18</sup> Another significant concern is whether a mediator can continue to negotiate with someone who has been the subject of an ICC arrest warrant. The LRA case is a clear illustration that the mediator can interact and engage with individuals who are the subjects of an international arrest warrant. Sudan is another case where an individual indicted by the ICC is a major player in conversations of peace. President Omar al-Bashir, a signatory to the 2005 Comprehensive Peace Agreement (CPA), has faced an ICC arrest warrant since March 2009. One question for further exploration is the validity of the CPA following Bashir's criminal case and whether certain provisions should be changed to reflect the outstanding warrant.

These questions do raise legitimate concern over the interconnectedness of the principles of justice and peace. While the position of the ICC is legally right, surveys in particular conflicts such as Uganda show that civilians want the war to end before deciding what they need to do for justice.<sup>19</sup> Civilians are more concerned with the struggle to survive than they are with the form of justice. In a survey carried out by the International Center for Transitional Justice (ICTJ), northern Ugandans were asked about their immediate needs. The respondents did not rank justice as the major concern; they were more concerned with the lack of food and the need for peace.<sup>20</sup> This does not mean that they did not desire justice, only that the need for food and peace was far more pressing than that for justice. For instance, in Kenya the primary need of internally displaced persons (IDPs) is not justice but homes and socio-economic reprieve. It is interesting that in this case it is mostly the middle class who is adamant in calling for justice through the ICC.

It is important to note that though justice is not the primary concern to local communities emerging from conflict, its significance to other stakeholders makes it a necessary point of discussion in analysing how peace is achieved in a post-conflict country. The process of peacebuilding has brought with it the presence, assistance and legitimacy of the international community. While human security obligations, coded in the Responsibility to Protect (R2P) mandate<sup>21</sup>, permit international intervention and assistance in post-conflict situations, the consequent dilemma becomes that of drawing boundaries over their engagement in the discourse of peace. If a particular post-conflict community has been the recipient of international help then international bodies such as the ICC and the UN see themselves as rightly placed to demand justice and in some cases issue indictments. The discussion over the nature of peace after war cannot exclude the opinion of the international community. The problem with this position, however, is that local desires for more pressing socio-economic dimensions can easily take second place to the pursuit of legal justice.

In the justice and peace debate there is growing concern that the ICC mainly targets African states, further eroding the legitimacy and moral standing of the court. However, this does not necessarily imply that Africans unequivocally reject the ICC as 61 percent of Kenyans want the ICC to proceed with the criminal case the court is currently prosecuting against six Kenyan political officials for their involvement in the 2007/2008 post-election conflict.<sup>22</sup> In addition, two prominent Gambian lawyers, Fatou Bensouda and Hassan Jallow, head a short-list of replacements for ICC Chief Prosecutor Luis Moreno-Ocampo, who is expected to step down in 2012.<sup>23</sup> Whilst there are questions about why the ICC has not opened formal cases against other states such as Colombia, the Palestinian Territories or Mexico, one must not forget that the court did not force itself on Africa, as half of the countries currently engaged with the ICC (Uganda, DRC and the Central African Republic) requested the institution's assistance. It is also important to note that due to the way the cases are referred to the ICC,

it is probably easier for the court to intervene in African countries as opposed to other nations that may hold strategic relationships with key Security Council members. Further, the ICC is unlikely to gain significant diplomatic traction without the unanimous support of the Security Council, as it has no military power to unilaterally enforce its arrest warrants and extradite senior political officials, let alone sitting heads of state. While the United States has supported the court's investigation into and charges against Libyan leader Muammar Gaddafi, it is unlikely to provide either ground troops or unwavering support.

## Important Considerations in the Peace and Justice Debate

- **Definition of Justice:** It is imperative that the international community establishes what it means by the word justice. While the concepts of justice and peace are universal, over the years their use has been fluid and there is a need to establish a proper definition based on a particular context.<sup>24</sup> Whilst making an argument for justice in peacemaking and peacebuilding activities, it is essential that all aspects of justice – legal, social and economic – are taken into consideration. Legalistic justice may be easier to pursue as the success of such endeavour can be immediately quantified in a guilty/not guilty verdict. It is imperative that socio-economic aspects of justice should not take second place. The reality of states and communities emerging from conflict is that there is a great need for economic opportunity and protection to survive, and a desire for social acceptance and union that reinforces a community. The perception that the international community is more interested in legalistic justice can often cripple the peace process. Therefore, any conversation of justice must also address the nuances of the state of socio-economic life.

- **Understanding the Complex Dynamics of Justice:** Often the realities of post-war states are not so black and white since perpetrators of heinous crimes may also be victims themselves. In most conflicts, crime is committed by both sides and there must be a willingness to engage justice in all directions and apply it to all parties of the conflict. A good illustration of this is the recent violence in Côte d'Ivoire, where militias loyal to Laurent Gbagbo and Alassane Ouattara have both been accused of mass atrocities.<sup>25</sup> Another example pertains to children who are accused of committing atrocious human rights violations. What is their criminal responsibility to these crimes? After the Rwandan genocide, locals were of the opinion that if children were able to kill, they were able to discriminate between two ethnic communities and therefore should be held to the same punishments as their adult counterparts.<sup>26</sup> In Uganda and Sierra Leone, however, children were viewed as victims of rebel groups and therefore could not be regarded as criminals or responsible for war crimes. The complexity of who is the victim and who is the aggressor is an issue that must be taken into careful consideration.

- **Victim Centred Justice:** In recent debates over the need for justice there have been arguments that justice in the west is considered in retributive terms, while in the African culture,

justice is aimed at healing and reconciliation. The later form of justice has a dual objective of reintegrating the offender as well as healing the victim. Mere granting of amnesty can easily be viewed as a top-down approach in which victims might feel unacknowledged and their plight unappreciated.<sup>27</sup> A system that is perpetrator-driven is poorly equipped to deal with the needs of victims, and to address their trauma.<sup>28</sup> It is these limitations to the pursuit of justice that inform a pragmatic view, which proposes a mid-point between blanket amnesties and widespread prosecutions, where victims would be acknowledged and themes of peace, justice and reconciliation be promoted simultaneously. The restorative form of justice is seemingly the ideal pursuit in post-conflict societies.

- **Constituency for Justice:** The question of who is asking for justice is an important one. Demands for justice must never be the responsibility of external communities, but instead should be owned by the local population. The international community can support this demand, but must never drive it as such action weakens and cripples legitimate concerns and the pursuit of solutions by local populations.

- **Premium of Justice:** There is often an assumption that justice will resolve many of the problems that are evident in post-conflict states. The expectations placed on a process of justice far outweigh the results from it, such as the prosecution of those the ICC has charged as responsible for the post-election violence in Kenya. There is an unchecked expectation in some quarters that this process will correct societal injustices, but the reality is that this process, even if successful, will not address some of the urgent needs of aggrieved populations in the country.

- **A Mixed Approach to Justice:** Most conflicts in recent years have taken place in weak states also referred to as failed states or very low-income countries. In most of these states public sector institutions are severely weakened by war, and many have accumulated large debts that further weaken their capacity. There are also numerous political, economic and social security challenges in many of the countries that have undergone civil conflict. Their judicial system has suffered greatly and the capacity to prosecute large numbers of perpetrators is seriously undermined. A recommendation is that in these instances while retributive justice can be exercised on key members or leaders of violence there is a need to embrace a more progressive and indigenous methodology to deal with lesser offenders. This has characterised many of the conflict settlements.

- **Proper and Meaningful Peacebuilding:** The preventive nature of peacebuilding is a critical investment as there must be a proper understanding of the root causes and triggers of conflict. Such an understanding will ensure that injustices that have plagued particular communities are dealt with and future criminal activities and violence are averted. Peacebuilding efforts in this regard must be prioritised.

- **Timing is Everything:** The fact that justice issues have not been addressed at the mediation table is not indicative of neglect but rather that the premium is placed on human life and the ending of violence.<sup>29</sup> A good illustration of this is the peace talks in Mozambique where despite numerous transgressions and crimes, the question of justice was placed aside temporarily to engage in peace talks.<sup>30</sup> Pursuing justice in the midst of a conflict can have severe repercussions for civilians, such as an error made by the ICC in the timing of issuing arrest warrants for those committing violent crimes. Many have argued that it is such actions of the ICC that have negated the signing of the peace agreement with the Lord's Resistance Army. The problem with this action is further compounded by the ICC's lack of enforcement capabilities and its inability to arrest individuals. In northern Uganda the ICC's support and popularity amongst local populations was diminished when it was realised that they would need to depend on the United People Democratic Front (UPDF), the government forces, to make the arrests.<sup>31</sup> This reliance on government forces further undermines the ICC where the government is also considered an aggressor. The ICC needs to involve local structures so as to ensure that its actions do not undermine local peace initiatives and efforts. It is important that the ICC applies law to the existing reality and contextualises the law to fit the current situation. The pursuit of any justice must have a context.

## Conclusion

This brief motivates that in post-conflict situations restorative justice is preferred to retributive justice, but this in itself cannot guarantee peace. Arguments against impunity logically demand that perpetrators are brought to justice, but how can the system punish those who have also been victims of war and mass atrocities? The issue of justice and redress to victims of the grievous acts perpetrated against local communities is evidence of the complex dynamics that characterise the restoration of local communities.

Conversations over the workings of the ICC in countries such as Kenya, Libya and Sudan raise serious controversy. However, if the ICC is unable to fulfil its mandate, how can local populations be expected to hold accused leaders accountable?<sup>32</sup> While this continues to be a challenge, recent events in North Africa, and more specifically in Egypt where the population held its leaders accountable and where different arms of government supported change, are indicative that leadership can and will eventually be tried in The Hague. The ICC has seemingly served local populations well in deterring their leaders and acting as a check on their governance. However, considering the ICC's limited capacity to enforce, one is left to wonder how much it can do to address injustice. If societies are caught up in a vicious cycle of revenge, then will peace ever truly be sustainable without appropriate justice mechanisms being employed?

It is clear that in seeking peace and justice one can never be a substitute for the other. It is imperative that as we pursue and

mediate for peace we must not limit notions of justice to debates over legal justice, but it must be clear that when local populations speak of justice following war, it does include the socio-economic and psychological aspects as well. To the common person who has been the victim of atrocities, justice is bread on the table, security in the homestead and harmony in the community, and it is critical to ensure that one is granted that justice.

## Endnotes

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