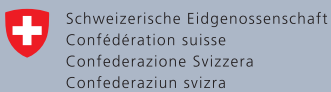


Peace Mediation Essentials

Dealing with the Past in Peace Mediation¹



Federal Department of Foreign Affairs FDFA
Directorate of Political Affairs DP
Political Affairs Division IV – Human Security:
Peace, Human Rights, Humanitarian Policy, Migration

Content

Key Messages

Key Principles

Options for Mediators

Questions for the Mediator

Additional Sources and Links

This document is the result of a collaborative effort. It was written by swisspeace and the Political Division IV of the Swiss Federal Department of Foreign Affairs. It was edited and published by the Mediation Support Project (swisspeace / ETH Zurich CSS) in consultation with the Mediation Support Unit (United Nations Department of Political Affairs).

September 2009

Key Messages

- Dealing with a **legacy of gross human rights violations** is one of the **greatest challenges** facing post-conflict societies. Experience suggests that there is a relationship between the ability to address this legacy in a comprehensive and inclusive manner, including initiatives to address root causes of conflict, and the potential to develop sustainable peace.
- In order to re-establish fundamental trust and accountability in society, there is a **need to acknowledge publicly** the abuses that have taken place, to **hold those responsible** who have planned, ordered, and committed such violations, and to **rehabilitate and compensate victims**.
- Developments in the field of international justice over the past two decades have **changed the normative and legal framework conditions** under which peace agreements are brokered. Mechanisms for dealing with the past have become an integral part of such agreements.
- Many factors will have an influence on **how, when, and to what degree aspects of dealing with the past are introduced by mediators into peace negotiations**. Some of these will be context-specific and concern the circumstances of transition, in particular the balance of power between the negotiating parties; others will depend on the role (proactive vs. passive), the mandate (strong vs. weak), and the objectives (long-term 'positive' peace vs. short-term 'negative' peace) of the mediator.
- In general, mediators are well advised to take an **incremental approach to human rights issues**, concentrating on the immediate delivery of basic human rights. With respect to dealing with the past, this would mean an initial focus on humanitarian concerns, such as the demobilization and reintegration of combatants, the return and resettlement of refugees and IDPs, the release of political prisoners, and the location of missing persons.
- With regard to the issue of **amnesty, mediators have the duty to inform** the negotiating parties about international legal norms which forbid blanket amnesties for war crimes, crimes against humanity, and genocide. This does not infer that everyone in any way responsible will or must be prosecuted; it means that prosecution cannot be blocked legally. Rather than focusing exclusively on criminal sanctions, mediators should point out that a range of non-criminal sanctions (e.g. vetting) and restorative measures (e.g. truth commissions) also exists to address accountability.

¹ Dealing with the past is used here as a technical term to connote a wide range of activities that address serious past human rights abuses and, in some cases, root causes of conflict. It is used in preference to the term 'transitional justice', because transitional justice is often too narrowly identified with judicial mechanisms and because dealing with the past is a long-term process not only limited to a transitional period.

Key Messages (continued)

- In light of the many real tensions and dilemmas associated with dealing with the past, mediators are encouraged to **pursue a holistic approach** when introducing the issue into peace negotiations. The main challenge for mediators is to develop pragmatic options that are both respectful of international norms and standards and responsive to the concerns of the relevant stakeholders, including victim communities. **Compromises between what is *desirable* and what is *feasible* are inevitable.**
- If dealing with the past is introduced in a constructive and creative manner, it can enhance the legitimacy of the peace process, lend credibility to the stance of the negotiating parties, and provide incentives to avoid future human rights abuses. In any case, the **perception that dealing with the past is only about sanctions should be avoided**, as this may produce a backlash and transform concerned parties into spoilers.

Key Principles

A conceptual framework for dealing with the past

Although there is no standard model for dealing with the past, a number of precedents have been established through the work of special rapporteurs and experts of the United Nations on the issues of impunity, reparations, and best practices in transitional justice.² In the following, the so-called 'Joinet/Orentlicher principles' identify four key areas in the struggle against impunity, which provide a comprehensive scheme for dealing with the past.

- **The right to know.** The right to know involves both an *individual right* on the part of victims and their families to learn the truth about what happened to them or their loved ones and a *collective right* on the part of society to know the truth about past events and circumstances which led to gross human rights violations in order to prevent their recurrence in the future. In addition, it involves an *obligation* on the part of the State to undertake measures to preserve collective memory from extinction and so to guard against the development of revisionist arguments.

The most frequently used instrument to ensure this right are extra-judicial commissions of inquiry, so-called *truth commissions*.

Their two-fold purpose is to investigate patterns of human rights abuse, identifying their root causes in political, social, and economic structures and ideologies, and to recommend measures to rehabilitate victims, to reform State institutions, and, when appropriate, to preserve evidence for the judiciary. The latter often entails documentation and the preservation of archives relating to grave human rights violations.

Knowledge of the truth and
the duty to remember

² See the reports submitted by Theo Van Boven (E/CN.4/Sub.2/1993/8), Louis Joinet (E/CN.4/Sub.2/1997/20/Rev.1), Diane Orentlicher (E/CN.4/2005/102/Add.1), and Cherif Bassiouni (E/CN.4/2000/62).

The right to a fair remedy and the duty to investigate

Individual and collective forms of reparation

Vetting/lustration, institutional reform, and other measures

Main treaty obligations

- **The right to justice.** The right to justice implies that any victim can assert his or her rights and receive a *fair and effective remedy*, including the expectation that the person or persons responsible will be held *accountable* by judicial means and that reparations will be forthcoming. It also entails the obligation on the part of the State to *investigate violations*, to arrest and to prosecute the perpetrators and, if their guilt is established, to punish them.
- **The right to reparation.** The right to reparation entails *individual measures for victims*, including their relatives or dependants, such as: *restitution*, i.e. seeking to restore the victim in his or her previous situation; *compensation* for physical or mental injury, including lost opportunities, physical damage, defamation, and legal aid costs; *rehabilitation*, i.e. medical care, including psychological and psychiatric treatment.
Collective measures of reparation involve symbolic acts, such as annual homage to the victims or public recognition by the State of its responsibility, which help to discharge the duty of remembrance and to restore victims' dignity.
- **The guarantee of non-recurrence.** The guarantee of non-recurrence emphasizes the need to disband non-state armed groups (DDR), to reform security institutions, repeal emergency laws, and to remove officials from office who are implicated in serious human rights violations according to a fair and transparent procedure. It also foresees the reform of state institutions in accordance with the norms of good governance and the rule of law.

Other relevant international norms and standards

- **Treaty obligations.** The main treaty obligations pertaining to the criminal prosecution of genocide, war crimes, and crimes against humanity are as follows³:
 - (i) The 1948 Genocide Convention: State parties are required to investigate and prosecute persons responsible for acts of genocide.
 - (ii) The 1949 Geneva Conventions and the 1977 Additional Protocol 1: State parties are required to prosecute persons responsible for grave breaches or to extradite them to a state that will do so.
 - (iii) The 1984 Convention against Torture: Alleged cases of torture must be investigated and, if the State party has established jurisdiction, it must either extradite the offender or submit the case to its own competent authorities for the purpose of prosecution.
 - (iv) The 1984 Inter-American Convention on Torture and the 1987 Inter-American Convention on Forced Disappearance of Persons have similar provisions.
 - (v) The 1968 Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity holds that the passage of time cannot bar prosecutions for genocide, war crimes, and crimes against humanity.

³ Christine Bell. Negotiating Justice? Human Rights and Peace Agreements. International Council on human Rights. 2006. p. 81-82.

UN Secretary General report on the rule of law and transitional justice

(vi) Other major sources of treaty-based obligations affecting the scope of amnesty are found in general human rights treaties at the international and regional level, including the ICCPR, the American Convention on Human Rights, and the European Convention on Human Rights.

- **UN Secretary General report on the rule of law and transitional justice.** The report of the UN Secretary General on the rule of law and transitional justice was a significant step forward in integrating experience in the field with the theoretical framework provided by international standards.⁴ In that document the Secretary General argues that:
 - transitional justice strategies must be *comprehensive and inclusive in scope and gender-sensitive in character*;
 - they must engage *all relevant actors*, both *state agencies* and *non-governmental organizations*;
 - a single *nationally owned strategic plan* should be drafted;
 - *judicial and non-judicial mechanisms*, with differing levels of *international involvement* (or none at all), with individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof, should be included.

Obligation to prosecute crimes against humanity

International or 'hybrid' tribunals and the International Criminal Court (ICC)

Crimes against humanity are defined by the statutes establishing the international criminal tribunals for Rwanda and the former Yugoslavia, the Special Court for Sierra Leone, and the Rome Statute of the International Criminal Court (ICC). They include crimes such as murder, extermination, enslavement, deportation, imprisonment, torture, and rape. These crimes are understood as acts committed on a widespread or systematic basis and directed against a civilian population. There is an emerging consensus that States are obligated to prosecute crimes against humanity. Moreover, there are assertions of universal jurisdiction in this regard, i.e. that the right exists to prosecute these crimes regardless of where they occurred.⁵

International Criminal Court

The ICC acts on the principle of complementarity and, as such, is a court of last resort, exercising its jurisdiction only when a State party is genuinely unable or unwilling to investigate and prosecute. The prosecutor's office has expressed its intention to focus on those who bear principal responsibility for the gravest crimes, leaving the rest to national courts or other (unspecified) means. Amnesties or pardons in countries that are States parties to the *Rome Statute* covering crimes under the jurisdiction of the ICC may contravene legal obligations under that Statute.⁶

⁴ Report of the UN Secretary General, „The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies“ (S/2004/616).

⁵ Chistine Bell. Ob. Cit. p. 82.

⁶ In accordance with the principle *ne bis in idem*, however, if a pardon were granted following proceedings and a conviction in a national court, the ICC would not try that person again unless the proceedings were aimed at shielding the person from criminal responsibility.

Blanket amnesties
not permissible

Limited amnesty
for selected groups

Constraints pertaining to Amnesty

With regard to the issue of amnesty, mediators are faced with a number of constraints as defined by international treaties, international human rights law, and customary international law. Outside of these constraints, limited amnesty is permissible under certain conditions.

- **The obligation to prosecute.** The *obligation to prosecute* may result directly from *international treaties*, such as the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. As for the Geneva Conventions, the obligation to prosecute is stated expressly with respect to crimes that constitute 'grave breaches', as specified in the Conventions. Further, *international human rights law*, such as the ICCPR, the ICESCR Optional Protocol⁷, or the American Convention on Human Rights, accord to victims of gross human rights violations *the right to an effective remedy* for the breaches they have suffered. Finally, *customary international law* with regard to crimes against humanity and war crimes or duties arising from the implementation of the Rome Statute may set forth an obligation for the State and the international community to prosecute perpetrators.

In light of the above, blanket amnesties to absolve individuals of responsibility for genocide, war crimes, and crimes against humanity, including torture, enforced disappearance, extra-judicial execution, slavery, and rape, are not permissible under international law. The United Nations will not acknowledge peace agreements containing such amnesties nor will such amnesties prevent subsequent prosecution by United Nations-created or -assisted tribunals.

- **Permissible amnesties.** Apart from blanket amnesties, some form of limited amnesty for selected groups may be necessary for humanitarian reasons. Examples include combatants who should be demobilized and reintegrated into their communities; prisoners of war and civilian detainees who should be released from detention; and conscientious objectors and deserters who may have sought asylum abroad. Article 6(5) of the Additional Protocol II of the Geneva Conventions foresees such an amnesty at the end of hostilities, which is limited to those individuals, including combatants, who have not violated international law.

Any decision to grant limited amnesty should respect the following conditions:

- amnesty should only be considered in circumstances in which such measures do not violate obligations arising under international law;
- amnesty policies should be linked to non-judicial mechanisms of accountability, for example truth commissions or vetting, to discourage impunity and strengthen the rule of law;
- amnesty for less serious offenders and those lower down in the chain of command is more appropriate as a measure when criminal proceedings are foreseen for the most serious perpetrators and when combined with other non-judicial measures;
- amnesty policies should include provisions for the individual adjudication of claims, where appropriate.

⁷ The Optional Protocol to the ICESCR, adopted in December 2008 by the UN General Assembly, will not enter into force until it has been ratified by ten UN member states.

Options for Mediators

Holistic approach and inter-linkages

It is crucial for the parties to be informed about dealing with the past from a *holistic* perspective and to understand the *linkages* that may exist between particular measures. The conceptual framework for dealing with the past and the diagram in Appendix 1 provide guidelines in developing this approach.

Opportunities:

- | | |
|-------------------------------|---|
| Flexibility | <ul style="list-style-type: none"> ■ A holistic approach will provide mediators and parties at the table with more <i>flexibility</i> to adapt measures to the specific circumstances, priorities, and interests of the negotiating parties. This, in turn, will enable the concerned parties to focus on when and how specific issues should be pursued and in which combination. |
| Pragmatism | <ul style="list-style-type: none"> ■ By drawing attention to possible linkages, the issue of accountability can be addressed from both a pragmatic and a principled perspective. This approach might foresee criminal prosecution for the most serious offenders, while introducing restorative measures for those further down in the chain of responsibility, including amnesty at the lowest level. |
| Combination of mechanisms | <ul style="list-style-type: none"> ■ Mediators can recommend a combination of mechanisms that join the normative commitment to accountability with the immediate goal of sustaining a cease-fire and the long-term goal of developing the constitutional commitments to the rule of law that are central to the peace agreement. |
| Enhanced legitimacy | <ul style="list-style-type: none"> ■ From the perspective of self-interest, a holistic approach that includes both retributive and restorative measures can also enhance the legitimacy of the negotiating parties with their own constituencies. |
| Focus on criminal sanctions | <h4>Challenges:</h4> <ul style="list-style-type: none"> ■ The circumstances may sometimes not be favourable to a holistic approach. For example, the ICC might intervene if the crimes committed are egregious, and if the State is not willing to prosecute. The focus on criminal sanctions could then dominate the agenda on dealing with the past to the exclusion of additional restorative measures. This is especially true given that those at the negotiating table are likely to be the very leaders and authorities most vulnerable to prosecution. |
| Non-state actors | <ul style="list-style-type: none"> ■ Under international law, the State has the primary duty to protect human rights, whereas non-state actors are a more limited subject in this regard. It is therefore not always possible to address human rights violations committed by non-state actors in the same way as abuses attributable to the State. |
| Social acceptance of measures | <ul style="list-style-type: none"> ■ The social dynamics and symbolic value of retributive and restorative measures are quite different. The level of social acceptance of the different measures should be taken into consideration as well as their relative effectiveness as instruments and their potential impact on the conflict („do no harm“). |

Context-specific

No one size fits all. It is crucial that dealing with the past measures are informed by the context, the local culture and traditions, as well as the needs of concerned constituencies and the responses that society is developing.

Opportunities:

- Know the context
Mediators should be well informed about past human rights abuses in order to identify openings and frame measures for dealing with the past.
- Experience of other countries
Ideally, national consultations concerning the peace process would include specific consultations on dealing with the past with the purpose of identifying options and their consequences. These consultations could also include exchanges with foreign experts and exposure to other countries which have engaged in a similar process of dealing with the past.
- Adapt to local setting
Mediators should be aware of the need to adapt mechanisms to local culture and traditions, paying particular attention to existing structures and local expertise.

Challenges:

- Access to civil society
As representatives of civil society are often not involved directly in negotiations, mediators will need to explore possibilities to gain access to their voices and concerns.
- Institutional capacity and political will
The successful implementation of specific measures will depend on the institutional capacity within a given society and the degree of political will that exists among the parties. This will inform the options that mediators develop in the short-term and in the long-term for dealing with the past. Specific issues to be kept in mind concern the need to reform the security sector as well as judicial and educational institutions.

Timing and sequencing

The question is not whether dealing with the past should be pursued, but rather when, with which mechanisms, under which conditions, and at which time. Consequently, adequate *agenda-setting* with realistic priorities at the proper moment, including difficult issues such as accountability and impunity, is a sensitive task for any mediator.

Opportunities:

- Entry points
A relevant entry point for mediators is the linkage of dealing with the past with priority humanitarian concerns, on which some level of consensus between the negotiating parties can be expected. These concerns include the fate of missing persons, the demobilization and reintegration of combatants, the return and resettlement of refugees and internally displaced persons, and the release and rehabilitation of prisoners of war and political prisoners.⁸
- Support for humanitarian issues
Social pressure in connection with humanitarian issues strengthens the case of the mediator in making the linkage with dealing with the past and adds to the legitimacy of the peace process.
- Strategic sequencing
By developing a sequence of measures in connection with a short-, mid- and long-term strategy for dealing with the past, mediators can enhance the impact of the peace process in terms of conflict transformation.

⁸ Example: an initial proposal might link the right to know with the right to reparations by introducing a commission of inquiry to investigate the effect of human rights violations on different sectors of society and thereby establish categories for reparations.

Spoilers

Challenges:

- Dealing with the past can be perceived as a threat if the debate on accountability focuses only on criminal sanctions. This would provide a platform for spoilers, particularly if the sanctions are disproportionate to one party or the other.

Setting priorities

- The current normative framework excludes the choice between some accountability or none as an option. The pertinent question is rather how much accountability can be achieved when. This presents the mediator with the clear, if challenging task of setting priorities regarding accountability and introducing linkages between retributive and restorative measures.

Implementation

- Accountability mechanisms can result in *de facto* amnesty if they are implemented ineffectively. This might provide an incentive for certain parties not to take their commitments seriously.

Timing risks

- The introduction of specific topics too early in the negotiation process could prove to be counter-productive for the concerned parties. A focus on reparations, for example, could lead to a competition among victim communities and thus weaken the peace constituency.

Destruction of evidence

- By tabling the question of dealing with the past, mediators should be aware of the danger that pertinent evidence pertaining to these issues might be destroyed by the negotiating parties.

Inclusion

The concerns addressed by dealing with the past are shared by a range of state and non-state actors. The inclusion of these actors and their viewpoints in the negotiation process will strengthen the legitimacy of the peace agreement and, in turn, enhance its implementation capabilities.

Opportunities:

Involvement of victims

- As a general principle, mediators can underline the importance of the involvement of *all relevant stakeholders* during the peace negotiations in a formal or informal way. In particular, they should emphasize the necessity of the involvement of victims and of the organizations that advocate on their behalf.

Involvement of civil society

- The introduction of human rights-based reform under the guarantee of non-recurrence provides mediators with a strong argument to involve civil society actors in the negotiations, both on grounds of principle (it is right to do so) and on pragmatic grounds (it will lead to better reform).

Designing the process of inclusion

- Mediators may play a role in designing the processes through which relevant stakeholders can debate and outline the elements of a national strategy to deal with the past in the implementation phase.

Challenges:

Limitations to inclusion

- The framework of the negotiations may place clear limitations on the involvement of civil society actors and other relevant stakeholders.

Lack of leverage

- The mediator may lack the leverage to argue for the inclusion of voices outside those belonging to the negotiating parties, nor is it necessarily within the mandate of the mediator to do so.

Inclusion may impede progress

- Under certain circumstances, the inclusion of civil society and other stakeholders may be an impediment to progress due to a lack of consensus regarding dealing with the past.

Victim-sensitive approach

A victim-sensitive approach to dealing with the past will be determinant for the legitimacy and sustainability of the peace process. Victims have generally not had a platform in peace negotiations.

Opportunities:

- Victims before perpetrators

 - When devising a negotiating strategy on dealing with the past, mediators should inform themselves about the concerns of victim communities. The negotiation strategy should prioritize the interests and needs of victims before those of perpetrators.
- Truth-seeking and reparation

 - Mediators should give special attention to the feasibility of truth-seeking mechanisms and reparation programs, as victims are often regarded as their intended beneficiaries. Such initiatives raise expectations and, if successful, can play a crucial role in terms of the rehabilitation of victim communities and hence contribute to the long-term goal of reconciliation.
- Consulting victims

 - Victim communities should be informed and consulted in connection with measures concerning the right to justice, especially if such measures include provisions of amnesty.

Challenges:

- Access, representation

 - Mediators may only have limited contact with victim communities. Even then, the question of legitimacy may be raised, i.e. who has the right to represent victims?
- Competition among victims

 - As different victims have different social bases, there will inevitably be some form of competition among victims for recognition and participation in the peace process.
- Defining victimhood

 - Although there are internationally recognized definitions of victimhood, in certain circumstances it may be difficult to distinguish between victims and perpetrators. Child soldiers are one example; refugees from among the combatant community are another. Mediators will have to adjust their strategy to take this grey zone into account.
- Reintegrating combatants

 - The reintegration of former combatants poses a particular challenge. Not only do they often reintegrate into communities that they have victimized, but they may also be the recipients of benefits that victim communities do not receive.

Gender

The gender dimension of dealing with the past is crucial at all levels. There has been a paradigm shift in international jurisdiction on the subject of sexual violence, in particular violence against women. The Rome Statute of the ICC recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as crimes against humanity.

Opportunities:

- Dignity and privacy

 - In fulfilling obligations with respect to the right to know and the right to justice, the mediator should inform the negotiating parties of the obligation of the State to protect the dignity and privacy of victims and witnesses, in particular when the crimes involve sexual or gender violence.

Women in peace-building

- Particular attention should be given to the role of women in peace-building in accordance with UN resolution 1325.

Children's rights

- Specific measures dealing with children as victims or perpetrators should be linked, where appropriate, with international standards and corresponding national legislation concerning the rights of children.

Challenges:

Lack of gender sensitivity

- A fundamental understanding of gender as a transversal issue may be lacking among the negotiating parties. In such a case, mediators will have to develop a gender analysis as part of the strategy for dealing with the past.

Addressing trauma

- The need to address the traumatic damage done to male and female identities (forced recruitment, sexual abuses suffered and committed) should be taken into consideration when developing proposals for reparation and reform programs. The psycho-social accompaniment of victim communities and former combatants requires a long-term commitment.

Ownership

Dealing with the past initiatives should be *nationally led and owned*. This fosters their legitimacy and sustainability. The imposition of external models must be avoided. Nevertheless, mediators can be supportive in providing access to experiences in other contexts, including exchanges about best practices and lessons learned.

Opportunities:

National and local

- Mediators should encourage the negotiating parties to consider the impact of dealing with the past measures on the national and local levels from the perspective of ownership.

Bottom-up mechanisms

- Local-level, bottom-up mechanisms can reflect a country's diverse make-up and experience of conflict and provide crucial precursors or extensions for wider-scale national initiatives.

Shared values

- When introducing international human rights standards, mediators can identify shared values for divided societies.

Cross-community forums

- Restorative mechanisms for dealing with the past may offer important cross-community forums to initiate or further the process of reconciliation.

Challenges:

Accountability

- Introducing dealing with the past may call into question the ownership of the process because the issue of accountability is on the agenda, possibly against the will of the parties.

Time constraints

- Time constraints with respect to the negotiations may be in contradiction with the spirit of ownership, both in general and specifically with regard to dealing with the past.

Public awareness

- Without public awareness and educational initiatives and some form of public consultation, the public understanding and ownership of measures to deal with the past cannot be guaranteed.

Neglecting the local dimension

- Under the pressure of the negotiation agenda, the local dimension of dealing with the past initiatives may be neglected to the detriment of the legitimacy, acceptance, and sustainability of the peace negotiations.

Oversight mechanisms

The creation of oversight mechanisms to monitor the implementation of peace agreements is a crucial element in any mediation process. Given the complexity of the matter, special attention needs to be paid to the implementation framework for dealing with the past.

Opportunities:

- Feasibility
Mediators should ensure that the measures agreed upon are feasible, that the expected results are clearly identified, and that mechanisms are in place to respond in case agreements are violated or not implemented.
- Independent body
Mediators might consider including the option of creating an independent body (a liaison office, for example) in the peace agreement. Its task would be to coordinate or monitor the implementation of a national strategy for dealing with the past.
- Cost effectiveness
With respect to the financial implications of dealing with the past initiatives, mediators can draw the attention of the negotiating parties and donor communities to the cost effectiveness of different retributive and restorative options.

Challenges:

- Role of mediators in question
There may be no role previewed for mediators during the implementation phase.
- Expectations vs. results
Mediators should strike a balance between encouragement and caution regarding the implementation phase. Even in the best of cases, expectations regarding the effectiveness of dealing with the past measures may far exceed their capacity to deliver results.
- Estimating costs
The financial implications of specific measures are difficult to calculate and therefore the question of the full extent of their implementation must remain open.

Questions for the Mediator

General questions

- How will your mandate as a mediator and mediation style (proactive vs. passive) influence your approach to dealing with the past?
- In the mediation team, is there anyone responsible for accountability and impunity issues?
- How can you make sure that dealing with the past is integrated as a cross-cutting issue in the mediation process?
- How will you deal with possible resistance on the part of the concerned parties to address the issue of past abuses ?
- Did you define any „red lines“ when you as a mediator would have to withdraw from the negotiations?
- If the ICC were to intervene in connection with the issue of accountability, how would this affect the negotiation strategy for dealing with the past?

Pre-negotiation phase

Tasks for the mediator:

- to include dealing with the past on the agenda for negotiations;
- to explain the substance of a principled approach to dealing with the past;
- to inform the negotiating parties that this is the agenda item that will address a range of accountability issues all along the process;
- to ensure that the concerned parties understand the difference between restorative and retributive justice and with respect to the latter that prosecutorial discretion exists in certain circumstances even when amnesties are not permitted.

Questions for the mediator:

- What is the nature of the human rights violations to be addressed and their relationship to the conflict? Are they core issues? Symptoms? Root causes?
- Can mediation contribute to preventing human rights violations at this stage of the process?
- Is there any political will to address dealing with the past at this stage? On the part of which stakeholders and why?
- Is there any major opposition regarding dealing with the past that might threaten the peace process? On the part of which stakeholders and why?
- Who is accused of being responsible for the most severe violations? Which sanctions are foreseen for such cases according to international law?
- According to public opinion, what are the main priorities in the field of dealing with the past?
- Can you introduce this issue constructively with the concerned parties? What are the main obstacles and opportunities?
- What about victims? Are there ways to make the voices of the victims heard?
- Can/should parties be exposed to experiences of dealing with the past in other countries?
- Is there any specific issue that you could use as an entry point to launch the negotiations on dealing with the past?

Negotiation phase

Tasks for the mediator:

- to ensure that dealing with the past issues are addressed in a consistent and coherent way to the extent possible during the negotiation phase;
- to include - at a minimum - an agreement in principle on dealing with the past in the peace agreement and to refer its implementation and details to an annex/commission/committee;
- to ensure that any mechanism created for dealing with the past has a clear mandate and provisions for implementation and monitoring and procedures in place in case of non-compliance.

Questions for the mediator:

- What kind of dealing with the past provisions should the peace agreement include, general ones or very precise ones?
- Which issues should be mentioned in the peace agreement in light of the Joinet/Orentlicher principles? Are there any priorities?
- What could be the best combination and sequence of measures, given the context and the relations among the negotiating parties?
- What legal standards should be used? How will they apply to the different parties to the conflict?
- Is there any common incentive among the negotiating parties to address dealing with the past?
- Are there any specific issues of interest to the parties that could be put on the agenda?
- What are the potential consequences of any dealing with the past mechanisms on specific groups?
- How can mediators create conditions to ensure the fairness and effectiveness of dealing with the past measures?
- How would mediators deal with a situation in which parties express their intention to agree on an impermissible amnesty? What could be the consequences?

Implementation phase⁹*Tasks for those persons or entities responsible for monitoring:*

- to ensure that the previewed mechanisms are implemented in a transparent and accountable manner;
- to verify that sufficient financial resources are available for the measures foreseen;
- to ascertain whether the combination of short-, mid-, and long-term goals is realistic and reinforces the whole peace process.
- to facilitate a dialogue among relevant stakeholders, including state and non-state actors, regarding the decision-making and implementation of dealing with the past measures;
- to re-negotiate elements of the implementation, if necessary.

Questions for those persons or entities responsible for monitoring:

- Which monitoring tools are being used to assess the implementation of dealing with the past measures?
- Who is in charge of coordinating and monitoring dealing with the past measures? To whom are they accountable? The negotiating parties? The Parliament? The international community?
- Based on the results achieved so far, is there a need to reschedule the implementation?

⁹ Although mediators are often not present at this stage, there is a growing consensus about the need for facilitation during the implementation process.

Additional Sources & Links

UN documents

UN Secretary General Report. *The rule of law and transitional justice in conflict and post-conflict societies* (S/2004/616*). 23 August 2004. [Download](#).

Cherif Bassiouni. *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (E/CN.4/2000/62). [Download](#).

Theo van Boven. *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law* (E/CN.4/Sub.2/1996/17). [Download](#).

Louis Joinet. *Revised final report. Question of the impunity of perpetrators of human rights violations (civil and political)* (E/CN.4/Sub.2/1997/20. E/CN.4/Sub.2/1997/20/Rev.1). [Download](#).

Diane Orentlicher. *Report of the independent expert to update the set of principles to combat impunity. Addendum. Updated set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1). [Download](#).

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147, March 21, 2006). [Download](#).

Office of the UN High Commissioner for Human Rights. Rule-of-law tools for post-conflict states:

Truth commissions (HR/PUB/06/1). 2006. [Download](#).

Mapping the justice sector (HR/PUB/06/2). 2006. [Download](#).

Monitoring legal systems (HR/PUB/06/3). 2006. [Download](#).

Prosecution initiatives (HR/PUB/06/4). 2006. [Download](#).

Vetting: an operational framework (HR/PUB/06/5). 2006. [Download](#).

Reparations programmes (HR/PUB/08/1). 2008. [Download](#).

The legacy of hybrid courts (HR/PUB/08/2). 2008. [Download](#).

The Nuremberg Declaration on Peace and Justice (A/62/885). June 2008 [Download](#).

Other documents

M. Cherif Bassiouni et al., eds. 2008. The Chicago Principles on Post-Conflict Justice. The International Human Rights Law Institute: Chicago.

IDEA Handbook. Reconciliation after violent conflict. 2003. [Download](#).

Christine Bell. 2006. Negotiating Justice? Human Rights and Peace Agreements. International Council on Human Rights: Geneva. [Download](#).

Kai Ambos, Judith Large, Marieke Wierda, eds. 2009. Building a Future on Peace and Justice. Studies on Transitional Justice, Peace, and Development: The Nuremberg Declaration on Peace and Justice. Springer: Berlin and Heidelberg.

Priscilla Hayner. 2009. Negotiating Justice: Guidance for Mediators. Centre for Humanitarian Dialogue and International Center for Transitional Justice: Geneva. [Download](#).

Human Rights Watch. 2009. Selling Justice Short. Why Accountability Matters for Peace. [Download](#).

Websites

Swiss Federal Department of Foreign Affairs (FDFA):
Dealing with the Past homepage.

<http://www.eda.admin.ch/eda/de/home/topics/peasec/peac/confre/depast.html>

swisspeace: Dealing with the Past homepage.

<http://www.swisspeace.ch/typo3/en/peacebuilding-activities/koff/topics/dealing-with-the-past/index.html>

United States Institute of Peace (USIP)

<http://www.usip.org/ruleoflaw/>

International Center for Transitional Justice (ICTJ)

<http://www.ictj.org>

International Institute for Democracy and Electoral Assistance (IDEA)

<http://www.idea.int>

Crisis Management Initiative (CMI)

<http://www.cmi.fi>

International Criminal Tribunal for the former Yugoslavia (ICTY)

<http://www.icty.org>

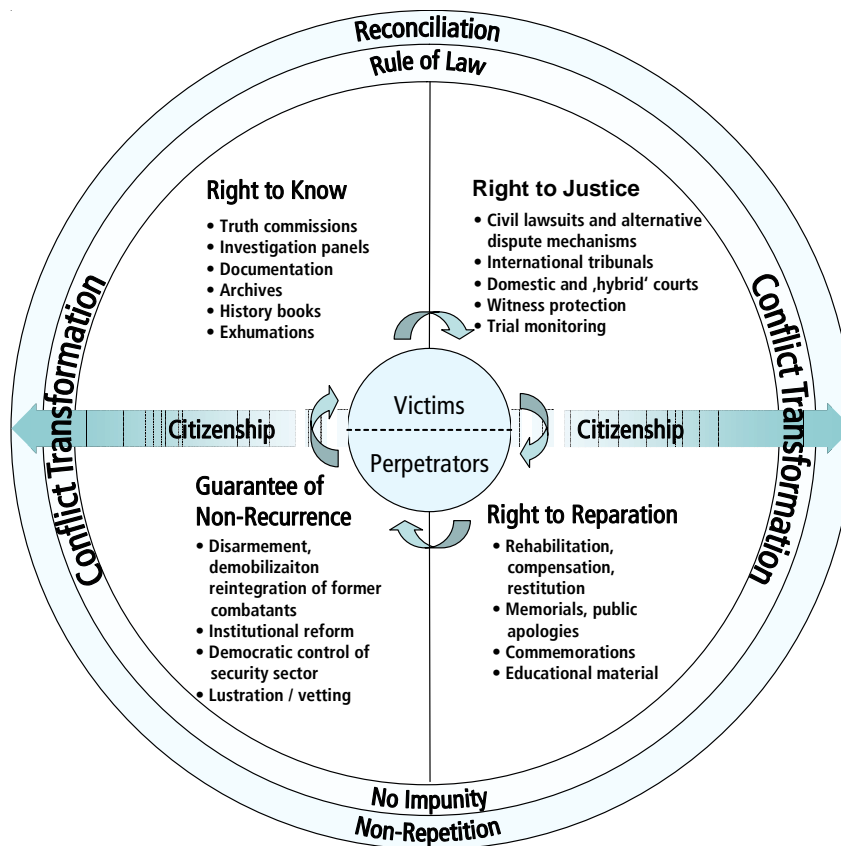
International Criminal Tribunal for Rwanda (ICTR)

<http://www.icttr.org>

International Criminal Court (ICC)

<http://www.icc-cpi.int>

Appendix: Dealing with the Past and Conflict Transformation



FDFA/swisspeace 2006, inspired by the Joinet/Orentlicher principles

When working with this diagram, note that:

- Focal groups, represented in the innermost circle, are *individual victims and perpetrators*,
- It offers a *holistic approach*, i.e. it addresses, from four complementary angles, different elements related to dealing with the past.
- It combines specific *restorative and retributive measures*.
- It simultaneously focuses on *rights of individuals* and on corresponding *duties of the State*.
- It combines *individual rights and duties* with *collective ones*.
- Its topics and mechanisms are *inter-linked and inter-related*.
- It is an *operational working tool* that can be used, for instance, for the mapping of on-going and/or new initiatives related to dealing with the past.

Finally, this conceptual framework for dealing with the past describes a long-term political and social process of conflict transformation in post-conflict societies, focusing on the struggle against impunity and on *strengthening the rule of law* with the ultimate goal of fostering *reconciliation and non-repetition* in society.

The Mediation Support Project (MSP) aims to enhance peace mediation capacities by focusing on research, training, process support, and networking. The main partner of MSP is the Swiss Federal Department of Foreign Affairs. MSP was founded in 2005 as a joint venture between swisspeace and the Center for Security Studies (CSS) at the ETH Zurich.

Text: Swiss Federal Department of Foreign Affairs and swisspeace
 Layout: Jonas Nakonz
 Publisher: Mediation Support Project
 Sonnenbergstrasse 17
 CH - 3000 Bern 7
 Tel: +41 (0)31 330 12 12
www.swisspeace.ch/mediation
msp@swisspeace.ch