From Transitional Justice to Dealing with the Past: The Role of Norms in International Peace Mediation

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Publisher
swisspeace is a practice-oriented peace research institute. It analyses the causes of violent conflicts and develops strategies for their peaceful transformation. swisspeace aims to contribute to the improvement of conflict prevention and conflict transformation.

About the Project
This publication is part of a research project initiated by NOREF and swisspeace exploring how the growing framework of legal and social norms influences mediation practice. The research involved interviews with more than 20 mediators and mediation experts. The general results were published in a report and a policy brief available on www.swisspeace.ch. In addition, the project resulted in four Essential publications analyzing how specific norms – inclusivity, gender, democracy and transitional justice – influence international mediation processes. The work of swisspeace in the framework of this project was in part covered through the Mediation Support Project (a joint initiative by swisspeace and the Center for Security Studies, ETH Zurich, funded by the Swiss Federal Department of Foreign Affairs).

Essential series
With its Essential series, swisspeace offers expert advice and guidance for practitioners on various topics in civilian peacebuilding. A full publication list can be found on www.swisspeace.org/publications.

Cover picture
Weathered Post, Paul Schadler

Acknowledgements
The author thanks Sara Hellmüller for her guidance and Marco Mezzera, David Lanz and Julia Palmiano-Federer for their comments on this publication’s earlier versions. Special thanks go to Elisabeth Baumgartner, Lisa Ott and Julie Bernath for their valuable inputs on Dealing with the Past concepts and issues.
“(J)ustice is an important part of building and sustaining peace. A culture of impunity and a legacy of past crimes that go unaddressed can only erode the peace.”

Secretary General Ban Ki Moon during his visit to Sudan in September 2007

Many governments, civil society and peacebuilding actors forward that peace after years of violent conflict cannot be sustained without addressing the grievances and calls for justice by victims, their families and societies as a whole. Transitional justice, defined as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and receive reconciliation,” has been argued as essential in the full recovery and rebuilding of a divided society.

Recognizing the value of incorporating transitional justice principles and mechanisms as early as possible, organizations such as the United Nations (UN) and the European Union (EU) see mediation processes as an important opportunity to begin a discussion on transitional justice. The UN has published guidelines for their mandated mediators to work within the bounds of international law and has issued instructions to uphold the organization’s position against amnesties for the most serious international crimes. In its “Concept Paper on Strengthening Mediation and Dialogue Capacities,” the EU has stated its resolve to promote transitional justice in its own mediation and mediation support missions. States engaged in international peace mediation, such as Switzerland and Norway, have also advocated for transitional justice in the peace processes they support and have developed respective approaches. Based on this trend, this normative framework progressively defines the parameters of peace negotiations.

This growing international appreciation for transitional justice, however, has at times been met with caution from mediation practitioners. The counter-argument posits that the desire to promote justice clashes with the mediators’ primary mandate, which is to secure the conflict parties’ engagement in the peace process and to support them in negotiating the immediate cessation of hostilities. In many cases, actors at the negotiating table are suspected of international crimes and thus discussions about punitive measures may discourage them from engaging in negotiations and stopping the war if doing so may result in criminal investigations and prosecutions.

This points to dilemmas reflecting an earlier debate on peace versus justice. This debate was premised on the view that peace and justice are conflicting goals entailing practical difficulties in promoting transitional justice in international peace mediation. However, transitional justice scholars and practitioners have moved away from this dichotomy and point to the need for a broader conception of transitional justice to identify elements that can especially complement specific aspects of mediation processes. This broader conception of transitional justice is encapsulated in the concept of Dealing with the Past used by the Swiss Federal Department of Foreign Affairs (FDFA) and swisspeace that is based on the 1997 set of Principles against Impunity drafted by UN Special Rapporteur Louis Joinet. It proposes that transitional justice measures should have the long-term objective to establish a culture of accountability, rule of law and reconciliation. Coupled with this broader conception, a closer examination of mediation processes sheds light on

8 For more on the peace vs justice debate, see the reading list at the end of this Essential.
opportunities and challenges, therefore minimizing the
dichotomization between peace and justice.

This Essential has four parts. It first proposes an
analytical framework for categorizing both social
and legal norms in mediation to gain greater clarity on
how norms interplay with one another in mediation
processes. Second, it discusses a broader conceptual-
ization of transitional justice composed of four interre-
lated principles as captured in the Dealing with
the Past approach. Third, in applying the analytical
framework to Dealing with the Past, it identifies
opportunities for complementarity between Dealing
with the Past principles and mediation as well as areas
where challenges may be encountered. Fourth and last,
the Essential outlines strategies for promoting Dealing
with the Past in mediation processes.

This Essential adopts a broad definition of norms as
“collective expectations about proper behavior for a
given identity”\(^\text{11}\) to encompass both legal and social
norms. In this perspective, the wide field of transitional
justice is considered as a normative framework or an
overall approach integrating a set of norms that medi-
tors are expected to promote in mediation processes.
The UN Guidance for Effective Mediation, for example,
mentions that:

Peace agreements should end violence and provide a
platform to achieve sustainable peace, justice, security
and reconciliation. To the extent possible..., they should
both address past wrongs and create a common vision
for the future of the country, taking into account the
differing implications for all segments of society.\(^\text{12}\)

This Essential is based on two premises. First, it does
not only consider legal, but also social norms. Legal norms
are enshrined in legal instruments, such as international
conventions, domestic legislation, customary law and the
general principles of law. Social norms are embedded in
standards, values and practices in a society that may or
may not be codified in the legal system. Second, while
there are robust mechanisms in international law that
make legal norms binding, the way they are addressed
in mediation processes is affected by how they interplay
with other norms in mediation and the conflict context.

To provide clarity on how norms interplay in medi-
tion processes, swisspeace offers an analytical
framework that classifies norms into three categories: (1)
content-related or process-related, (2) settled or
unsettled and (3) definitional or non-definitional. Figure 1
illustrates this analytical framework.
Content-related and process-related norms

Content refers “to what might (and what might not) be negotiated during a mediation process and what will eventually figure in the final peace agreement.”\(^\text{13}\) Process-related norms pertain to the manner, conduct and planning of a mediation process itself. While the conflict parties are expected to take into account the domestic and international legal framework of which they form part, they do have the final authority on the agenda of the discussions, the content of the peace agreement and the norms specifically referred to in its text. Meanwhile, process-related norms broadly fall under the mediators’ influence given their role in designing the format of the mediation.

Settled and unsettled norms

In international relations literature, a norm is considered settled when “it is generally recognized that any attempt to deny it requires special justification.”\(^\text{14}\) They have been “internalized” to a level that they assume a “taken for granted role” and it is considered “normal” to behave in line with the norm.\(^\text{15}\) An indication that a norm is considered settled is the degree of anticipated public condemnation if these norms are ignored. Another indication is the norm’s embeddedness in international instruments (in particular in human rights treaties and international humanitarian law) and customary law. Examples of settled, content-related norms are the prohibition of apartheid, slavery, genocide and torture, which are considered jus cogens norms. An example of settled, process-related norms could be inclusivity in that there is a growing expectation for mediation processes to integrate the views and needs of conflict parties and other stakeholders in the process design and outcomes.\(^\text{16}\)

Meanwhile, unsettled norms are those that can be overridden without needing justification or inciting widespread protest. The object and limitations of these norms are less clear-cut in the international and domestic, legal and social frameworks. An example is economic equality that, inasmuch as important, is not necessarily addressed in all peace talks.

Definitional and non-definitional norms

Lastly, norms that “underpin the very definition of a mediation process”\(^\text{17}\) are categorized in the analytical framework as definitional norms. These norms are considered necessary preconditions for a process to be considered as peace mediation. Examples of definitional, content-related norms are humanitarian norms and particularly its principle of humanity, which entails that “human suffering must be addressed wherever it is found.”\(^\text{18}\) Another example, the peaceful settlement of...
disputes, characterizes every mediation process’ fundamental aspiration to cease hostilities and military action. For definitional, process-related norms, an example is the consent of the parties, without which a process would not be considered as mediation, but a different third-party engagement such as sanctions, high-powered diplomacy or a judicial decision. Most other norms are considered non-definitional in that a mediation process may still be considered as such regardless of their absence in the process.

It is noteworthy that while content-related and process-related norms are more clearly distinguished from each other, settled and unsettled norms as well as definitional and non-definitional norms are subject to on-going debates among mediation practitioners, scholars, the conflict parties and the wider public.

When examining transitional justice in mediation, the tendency is to focus on accountability measures, mainly criminal prosecutions, indictments, arrest warrants, etc. However, a more holistic approach renders visible all the different transitional justice principles under this normative framework. While various typologies and frameworks have been developed, the approach used in this Essential is based on the Principles against Impunity, as first formulated by UN Special Rapporteur Louis Joinet and then revised by independent expert Diane Orentlicher (also referred to as the “Joinet/Orentlicher Principles”). The Joinet/Orentlicher Principles break down transitional justice into four principles with each one operationalized by various instruments. All of them have a certain relevance in mediation processes:

1 Right to Justice. Arguably the most widely known aspect of transitional justice in mediation is its accountability aspect, which is only a part of one principle, the right to justice. It entails the state’s duty to hold accountable those responsible for violations of international humanitarian law and human rights law. International humanitarian, human rights and international criminal law not only prescribe the duty of the state to prosecute and punish international crimes such as crimes against humanity, genocide, war crimes and torture, but also forbids blanket amnesties for these most serious international crimes. Tribunals that are international, national or a hybrid are the main instruments to support this principle.

While blanket amnesties are generally considered inconsistent with international law, other amnesties can be permissible instruments. Article 6(5) of the Additional Protocol II to the Geneva Conventions allows amnesties for humanitarian reasons to “persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or

21 Transitional Justice Institute, The Belfast Guidelines on Amnesty and Accountability (Belfast, Northern Ireland: Transitional Justice Institute, University of Ulster, 2013).
23 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, (30 November 1992). See also the Belfast Guidelines on Amnesty and Accountability, Principle 3: “… carefully designed amnesties combined with selective prosecution strategies can be consistent with a state’s international obligations and can further the legitimate objectives of a state responding to widespread criminal acts,” 24 Bieker and Sisson, “Dealing with the Past in Peace Mediation”; Baumgartner and Siegfried, “Dealing with the Past and Peace Mediation.”


29 Going beyond judicial justice, scholars and practitioners emphasize that each of these principles must be implemented as part of an overall approach and discourage a haphazard and piecemeal selection of one principle and its instruments in isolation. This is because judicial institutions in the wake of violent conflict are often fragile and challenges that ensue from past abuses are too complex to be solved by judicial instruments, such as trials, alone. Going beyond the transitional phase, these instruments in reality take root in the context over a longer period surpassing the immediate post-conflict phase and also have a place even in long-term peaceful societies. For example, serious human rights violations have also been committed in societies considering themselves as governed by rule of law such as in Canada where a truth commission investigated the fate of first nation children forcefully placed in residential schools.


31 “A Conceptual Framework for Dealing with the Past – New Edition;” Brinny Jones, Elisabeth Baumgartner, and Sidonia Gabriel, “A Transformative Approach to Dealing with the Past,” swisspeace Essential (Bern: swisspeace, 2015); Bieker and Sisson, “Dealing with the Past in Peace Mediation.” For more detailed discussion and previous works on Dealing with the Past that guided this Essential, please see the reading list at the end of this Essential.

In this regard, swisspeace and the Swiss FDFA, employ the term, “Dealing with the Past” to operationalize a holistic and long-term approach to transitional justice that aims at establishing a culture of accountability, the rule of law and reconciliation. Based on the Joint/Orentlicher principles, the holistic approach to Dealing with the Past, from here on referred to as DwP, highlights how the different principles and their instruments relate to the victims and perpetrators and how ideally a holistic approach leads to reconciliation in a society. As shown in Figure 2, these principles altogether work towards re-establishing a sense of citizenship among all actors in the long run and the achievement of conflict transformation goals.
Breaking down DwP into its four principles enables a more precise categorization in the analytical framework on norms in mediation. This enables the examination of opportunities and challenges in promoting DwP in different phases of mediation processes. Opportunities arise when DwP instruments can help mediation processes uphold definitional and settled norms, such as consent and inclusivity, respectively. Meanwhile, challenges occur if bringing DwP issues in the negotiations may risk the parties’ withdrawal from negotiations or even exacerbate violence, which run counter to mediation’s definitional norms of consent and humanitarianism.

4.1 DwP as generally content-related, with process-related aspects

DwP may generally be considered as a set of content-related norms as they pertain to the activities that will be undertaken as agreed by the parties in the peace agreement.

4.1.1 DwP as a content-related norm

Within the framework of mediation processes, several content-related aspects of DwP may at first highlight the delicate relationship between transitional justice and another set of norms definitional in mediation, namely humanitarian norms and particularly its principle of humanity. Humanitarian issues are an urgent concern that surfaces in the earliest stages of peace negotiations and remain salient throughout the process.

Opportunities

DwP instruments that focus on victims’ concerns such as the treatment, return and resettlement of refugees and internally-displaced persons (IDPs), the demobilization and rehabilitation of combatants and the location of missing persons may be complementary to fulfilling humanitarian goals that are definitional in mediation.
This holds true for example in the mediation of the Intergovernmental Authority on Development (IGAD) in the conflict in South Sudan, where the protection of civilians and treatment of refugees were discussed along with the issue of humanitarian access in the first two months of the negotiations.

Challenges

However, DwP principles and instruments that focus on perpetrators such as accountability, punitive measures and actual investigations (as part of the “right to justice” and the “right to know”) may risk undermining humanitarian goals. In theory, investigations and prohibiting blanket amnesties may deter groups from committing the worst crimes if they see they will be held account- able for them. Yet, the conflict parties’ fear of judicial retribution at the end of a peace process may instead encourage them to pursue military strategies rather than a political settlement. This is one of the explanations for the Lord’s Resistance Army’s (LRA) series of attacks in Northern Uganda given that this happened after the Office of the Prosecutor of the International Criminal Court (ICC) announced it was considering launching an investigation.

4.1.2 Issues related to the process

While the main aspects of DwP are content-related, certain issues may emerge in the process design of the negotiations. In this regard, the norm of inclusivity in peace mediation may have a mutually reinforcing relationship with DwP principles.

Opportunities

While contingent on the consent of the main conflict parties, the participation of victims, political detainees, the displaced and/or the discussion of their agenda in the discussions allow for a more inclusive mediation process as well as an opportunity to consult on DwP-related expectations and concerns during the mediation. As such, issues on the treatment of refugees, political prisoners and victims of violations of international humanitarian and human rights laws may be salient in process design. In the talks between the Government of Colombia and the FARC, for example, the keen interest to resolve victims’ rights issues reinforced the inclusion of victims’ groups in the peace process.

In the negotiations between the Philippine Government and the Communist Party of the Philippines – New People’s Army – National Democratic Front (CPP-NPA-NDF), the latter’s members insisted on the release of key personalities they claim as political prisoners as precondition for resuming negotiations given their intention to mandate these personalities as their lead negotiators.

Challenges

At the same time, including these groups may affect the overall political dynamics in the negotiations. The Government of South Sudan’s release of the imprisoned members of the Sudan People’s Liberation Movement (SPLM) during the IGAD-led peace negotiations in 2014 is a case in point. Instead of joining the SPLM-In Opposition, these former political prisoners eventually gained a third seat separate from the government and opposition, which altered the dynamics in the negotiations.

4.2 DwP as a settled norm

DwP and its entire legal framework can be considered as a set of settled norms as undermining it in peace agreements often results in condemnation from the international community. Hence, the analysis here will focus on the variation in the degree to which one DwP principle is considered more settled compared to the others. Since DwP specifically hinges on international law, the level of each principle’s “settledness” is based mainly on the extent of codification that existing conventions have accorded the principle and its instruments.

32 Intergovernmental Authority on Development (IGAD), “Agreement on Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People’s Liberation Movement / Army (In Opposition) (SPLM/A IO),” (Addis Ababa, Ethiopia, 2014).


34 Greig and Meernik, “To Prosecute or Not to Prosecute: Civil War Mediation in International Criminal Justice.”


38 Andrew Green, “Released S. Sudan Political Detainees Hope to Jump-Start Peace Talks,” Voice of America, 14 February 2014.

The right to justice is arguably the most settled among the four principles considering that international and domestic frameworks, as well as international human rights and international humanitarian law oblige states to prosecute the most serious international crimes. These conventions include the Four Geneva Conventions, the UN Convention against Torture, the Genocide Convention and parts of other international treaties. The rights and obligations of states to investigate and prosecute international crimes are also enshrined in the jurisprudence of tribunals, starting with the Nuremberg and Tokyo International Military Tribunals established in 1945 up to the ICC established in 2002.

Following the right to justice, the right to reparations and the right to know are also based on well-established frameworks. Many of the conventions that refer to the right to justice also refer to state and criminal responsibility to address damages or recompense. The Convention Against Enforced Disappearance, the European Convention on Human Rights (reparation and just satisfaction in article 41), as well as certain rules of international humanitarian law elaborate on the right to reparation in great detail and a multitude of case law on human rights requests states to compensate. Moreover, the Rome Statute foresees compensations to victims in the form of trust funds for victims and enables ICC judges to order perpetrators of international crimes to repair the harm they inflicted. Nonetheless, while these international instruments firmly establish the duty for reparations, they leave room for a broad range of instruments ranging from symbolic (such as memorials, etc.) to material (recovery programs, resettlement in lands, etc.) reparations.

The conventions detailing the right to know have mainly focused on the state obligation to address disappearances such as in Protocol I of the Geneva Conventions (in articles 32, 33 and 34), and the International Convention for the Protection of All Persons from Enforced Disappearance. The legal support for the right to know in relation to other human rights violations apart from enforced disappearances varies more than the support for the first two principles and has been mostly subdued as part of judicial investigation and adjudication under the right to justice. Nonetheless, the strength of the principle is its widespread use in various contexts such as the Truth and Reconciliation Commission of South Africa and the German Federal Commissioner for Records of the State Security Service of the former German Democratic Republic as well as in contributing to transition, reconciliation and conflict transformation for example in Liberia and Guatemala.

Lastly, partly due its broad scope, the guarantee of non-recurrence is least specified in international and human rights law compared to other aspects of DwP. Disarmament, Demobilization and Reintegration (DDR), Security Sector Reforms (SSR) and judicial reforms are not as clearly stipulated or robustly developed in conventions compared to the other principles’ instruments. Moreover, it could be argued that the lack of justice reform plans will not be criticized as much as an agreement allowing blanket amnesties or the lack of judicial independence or international courts establishment. Nonetheless, the guarantee of non-recurrence and its instruments are widely operationalized in the design of post-conflict political institutions formulated in power-sharing and comprehensive peace agreements. Moreover, this principle and its instruments enjoy the support from the international donor community that fuels much of the momentum for these reforms.

Opportunities

As a settled norm, DwP may complement the peace process in two ways. First, the legal conventions outline principles and broad frameworks that could guide the discussions and the design for the institutions in the final
Applying the Analytical Framework

peace agreement. The different models of implementation in other contexts may also be examples of how to balance DwP and other issues in mediation. These can make drafting the agreement more efficient. Second, as these principles enjoy widespread support from the international donor community, the explicit inclusion of these principles and instruments in the peace agenda may encourage further international support for the overall peace process.

Challenges

Conversely, the legal references may at the same time be a challenge as these may leave less room to accommodate the contextual nuances and the local community’s own conception of justice. This is in line with the criticism that as it develops, DwP is drawing from “rather technocratic, toolbox and recipe-like approach to transitional justice characterized by a strong focus on legalism” to the detriment of local experiences and priorities of the population supposedly benefiting from these efforts.55

Lastly, the relative lack of conventions in implementing the guarantee of non-recurrence has made possible the resilience and resurgence of officials convicted of gross human rights violations. This is because the lead negotiators, being the main conflict parties and at the same time often human rights violators, usually have a seat in the transitional government. This is the case with Jean-Pierre Bemba in DR Congo who was still in the transitional government before he was sentenced to 18 years of imprisonment by the ICC.56

4.3 DwP as a non-definitional norm

According to several mediators interviewed in the swisspeace-NOREF report on norms in mediation,57 a mediation process can still be considered as such without the adoption of DwP instruments and hence DwP principles are considered non-definitional. However, international tribunals and the ICC do not accept an amnesty clause in a peace agreement as barring prosecutions. Also, domestic courts have upheld the prohibition of amnesties for grave crimes, as in Argentina.58 As discussed earlier, the UN and the EU consider blanket amnesties for the most serious crimes as the “red line” that parties must not cross. Several of the interviewed mediators for the swisspeace-NOREF project59 expressed that amnesty for such crimes is their own red line and the parties’ insistence on blanket amnesties is grounds for them to abdicate their mediator role.

Opportunities

Effectively integrating DwP in mediation processes depends on its relationship with definitional norms such as the peaceful settlement of disputes. DwP instruments that forward the two principles of guarantee of non-recurrence and the right to know especially provide long-term means to peacefully resolve disputes after signing the peace agreement. Even during the negotiations, reaching an agreement on establishing truth commissions, human rights dispute settlement institutions, monitoring missions, etc. allows for long-term issues to be tabled in the future or in other mechanisms. For example, one of the first substantive points of the 1990 San José Agreement in El Salvador was the establishment of the UN Observer Mission in El Salvador (ONUSAL). ONUSAL supported the mediation process by contributing to de-escalating the conflict because its monitoring of compliance with the terms of the agreement deterred further human rights violations and fostered confidence among the negotiating parties.60

Challenges

At the same time, it could also be argued that premature discussions of these long-term mechanisms may shrink the room for reconciliation in the timeframe of the media-
tion process by inciting the dynamics it aims to avoid in the first place. Further, parties may pay only lip service to these mechanisms, trials, truth commissions, etc. While there can be peaceful short-term agreement to these instruments, the lack of political will and details on fulfilling these commitments may compromise justice in the long-term. For example, despite agreeing to establish these institutions, the delayed formation of the Nepalese Truth and Reconciliation Commission, the non-implementation of DwP mechanisms under the 2000 Arusha Peace and Reconciliation Agreement in Burundi and the short timeframe of 60 days for filing criminal complaints ascribed in Argentina’s amnesty law (Ley de Punto Final) have in effect resulted in, at least temporal, de facto impunity. In Guatemala, the weakness, negligence and corruption of the national justice system has provided impunity to the perpetrators of genocide, including the dictator Jose Efrain Rios Montt, who was convicted for genocide by a domestic court in 2013 but whose conviction was annulled by the Constitutional Court after.

DwP also has a delicate relationship with consent, another definitional norm. First, amnesties can be seen as a double-edged sword. The prospects of obtaining amnesties may motivate conflict parties’ consent to the mediation process, but as previously discussed, the prohibition of blanket amnesties may deter their commanders from joining. Second, reparations and justice reforms could earn the consent and support of victims, political detainees and other sectors formerly marginalized, while these same reforms may discourage the elites who benefitted from the previous system and continue to hold key positions in society.

The analytical framework of norms in mediation helps to examine and dissect how DwP principles interplay with other norms in the mediation process. It shifts the focus from the dichotomous peace vs justice debate premising on two conflicting goals, towards understanding the debate in terms of which elements complement particular aspects of mediation processes as well as which elements need to be dealt with more carefully. In this light, the following strategies are not only relevant considerations for the mediator, but also for practitioners of DwP in planning their efforts.

5.1 Timing and sequencing DwP issues

DwP issues that are relevant in the design of the peace process may be encountered as early as in the pre-negotiation phase, depending on the envisioned participants in the peace talks. These issues include releasing political prisoners, treatment of refugees and IDPs as well as providing conditional amnesties to prospective negotiators. However, discussing such issues need to be managed well to build and maintain trust between the mediator and the main conflict parties and also to control how such inclusion affects more controversial issues such as these group’s negotiating status, punitive measures, etc. that may alter the dynamics in the process as discussed in 4.1.2.

In terms of content, depending on the parties’ commitment and other factors, practitioners have an option to organize the discussion in terms of easiest issues first hardest issues first, or through sub-committees, among other ways. Many of the interviewed mediators recommended to have easiest issues first in sequencing the four DwP principles. Based on the Analytical Framework on Norms in Mediation, this may entail starting with DwP principles that complement definitional norms such as consent that includes monitoring, fact-finding (both mainly under the right to truth), exchange of detainees and reparations. DwP issues that support humanitarian concerns may also be entry points.
In principle, the general aim of the easiest issues first process design is increasing the momentum of the mediation and trust among parties. Moreover, it is an opportunity to cultivate an initial appreciation of DwP that can aid in addressing harder DwP issues. For this momentum to build, the linkages among the four principles and the importance of a holistic approach need to be communicated effectively.

Another useful approach is establishing a dedicated sub-committee that designs proposals for the later consideration of the main parties even while there is not yet enough willingness from the main peace table. The technical sub-committee on victims in Colombia and the Working Group on Normalization in the Philippines between the Philippine Government and the Moro Islamic Liberation Front both provided inputs on DwP, many of which were later incorporated as an annex in their respective framework agreements.

5.2 Flexibility and creativity in designing solutions

The different levels of codification of the four DwP principles point to areas with clear implementation mechanisms and areas where more creativity can be applied. Nonetheless, the mediators interviewed stated that these international statutes must not be the sole determining factor in designing the instruments for a specific context.

Creativity and flexibility are thus important in balancing the interests of parties and stakeholders as well as making sure that measures are consistent with international law. These traits are warranted especially when the mediation process only includes elites or has resulted in an agreement that challenges international law. Civil society organizations without direct access to the peace process may form innovative working groups on DwP that work in parallel to the main peace table, such as the Transitional Justice Working Group in Zimbabwe.66 The appendix to the signature of the Special Representative of the Secretary-General in the Lomé Agreement in Sierra Leone is an example for mediators. Since the signed agreement contained provisions that granted amnesty for a then suspected war criminal, the appendix was issued to uphold the understanding that the amnesty provisions are not applicable to international crimes, crimes against humanity, war crimes and other serious violations of international humanitarian law.67 This was later followed by the establishment of an international tribunal, the Special Court for Sierra Leone, which pursued prosecution for these most serious crimes.68

5.3 Local Engagement and Localization

The DwP holistic approach notes that the ultimate goal is not operationalizing these instruments per se, but most importantly, achieving conflict transformation. Whereas creativity and flexibility are most relevant in balancing interests, a comprehensive grasp of the local environment is important for designing and implementing DwP projects that are sustainable and effectively lead to long-term goals.

Although not a substitute for prosecutions for the most serious crimes and especially not intended for the main perpetrators, local processes that encapsulate the society’s conception of justice and reparations may already exist and could serve as a basis to construct localized instruments for promoting DwP. The Zimbabwean practice of ngozi (avenging spirits) requires the murderer to acknowledge and atone in a manner acceptable to the community in order to avoid the return for vengeance of the victim’s spirit. The spiritual dimension, coupled with the belief on the need to restore balance in the community, may guide in understanding the local community’s concept of justice and reconciliation.69 Moreover, the Gacaca system in Rwanda, based on the longstanding Gacaca community justice system, facilitate community reconciliation after the 1994 genocide.70 While institutional models and best practices from other

70 Rubli, “Transitional Justice: Justice by Bureaucratic Means?”
countries can serve as useful references, it is important to ensure that the design and direction of these reforms are also embedded in local values, led by local actors and sensitive to the local realities rather than a “toolbox” approach.

5.4 Communication and Coordination on DwP Issues

Several DwP issues are salient when the mediator communicates with different actors in the peace process. Among the mediator, the conflict parties and the mandate-giver, clarifications on the organizational policy regarding DwP and defining scenarios and options will be beneficial for the mediators to obtain a better idea of their areas of manoeuvre as well as the organizational “red line.”

Meanwhile, communication between the mediator and the main conflict parties is crucial to temper expectations on amnesties. It may involve determining DwP-related concerns that impede or motivate the parties’ participation and whether these impediments and motivations are well-grounded. Considerations prior to the talks could include examining which limited amnesties (if any) could be applied to certain prospective negotiators to encourage their participation, as well as knowing early if some parties aspire for blanket amnesties. Timely research and communication on these allow for realistic engagement with the parties from the very beginning.

Furthermore, reforms under the guarantee of non-recurrence and reparations may be levied through support from possible donors, states, non-government organizations and agencies. The meetings with donors (if they occur) can be opportunities to point the realities on the ground and genuinely examine the compatibility of prospective donors’ interests with local priorities.

For coordination between the mediation team and DwP practitioners, the mediator may invite experts and consultants, design a process that includes human rights victims and provide space for discussing these issues. However, the mediators interviewed for the swisspeace-NOREF report emphasized that the main conflict parties, not the mediator, have the final authority in deciding if and how DwP will be incorporated in the peace agreement and in guaranteeing its implementation. DwP practitioners’ efforts are thus most effective when focused on working with and convincing the negotiating parties given the definitional norm of consent.

Lastly, in all communications, mediation processes serve as a viable entry point for the promotion of the four principles and instruments early on. However, as the DwP approach shows, the full institutionalization of these instruments and achieving their end goal go beyond the immediate conflict resolution phase to the longer-term conflict transformation phase and hence beyond the timespan of the mediation process. Bearing this long-term timeframe in mind helps temper expectations on what instruments can be effectively introduced in the mediation process.

In place of a conclusion, the last part of this Essential features a table laying out the flow from categorizing DwP principles to strategies for mediators and DwP practitioners in promoting DwP in mediation.
### Summary

#### Category

**DwP principles in the categorization**

- The principles and instruments of DwP are content-related norms.

- While not an exhaustive list, the following DwP instruments complement humanitarian norms that are often in the contents of the agreement:
  - Treatment of refugees and IDPs;
  - Demobilizing and rehabilitating combatants;
  - Location of missing persons; and
  - Monitoring compliance to international humanitarian and human rights laws.

- DwP also have several aspects that could be process-related.

### Opportunities

- Issues on the treatment of combatants, political prisoners and refugees may be relevant in deciding who to include in the peace process and how.

- When not managed well, the inclusion of political prisoners, former combatants and refugees may open up issues that may alter the dynamics during the talks.

### Challenges

- Talks of punitive measures and investigations may drive the conflict parties to opt for military means rather than mediation.

- Timing and sequencing: Easy issues first. DwP instruments complementing humanitarian norms may serve as starting points, while more challenging issues may be tabled later when there is greater trust among the parties.

### Strategies for mediators and supporters of DwP

- **Process-related vs Content-related Norms**
  
  Content refers “to what (and what might not) be negotiated during a mediation process and what will eventually figure in the final peace agreement” while process-related norms pertain to the manner, conduct and planning of a mediation process itself.

- **Settled vs Unsettled norms**
  
  Settled norms are norms that have been “internalized” to a level that they assume a “taken for granted role” indicated by the high degree of anticipated public condemnation when these norms are ignored. Unsettled norms can be overridden without needing justification or inciting widespread protest.

- **Localisation**
  
  In the design and implementation, DwP instruments need to also consider pre-existing mechanisms and perspectives on how to deal with the past.

- **Communication and coordination**
  
  It is important to communicate to interested donors what local priorities are and make sure that international support is aligned with it (and not the other way around).

### Legal conventions

- Legal conventions may be viewed as too rigid.

### DwP as a whole

- DwP as a whole is settled given the many international legal conventions supporting it.

### The conventions

- The conventions supporting DwP outline institutional models that can be referred to in drafting the agreement, thereby making the peace process more efficient.

- DWP principles and instruments enjoy the support of the international donor community.

- Implementation of DWP instruments has been criticized as having a top-down, technocratic approach driven mainly by international donor funding.
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<td>Definitional vs Non-definitional Norms</td>
<td>While DwP is a non-definitional norm strictly speaking, the regime on amnesties significantly define the parameters of negotiation.</td>
<td>DwP instruments that support consent, a definitional norm in mediation, are particularly helpful. Reparations and justice reforms could earn the consent of victims, political detainees and other marginalized sectors to the peace talks. Permissible amnesties may encourage the consent of those in non-command roles.</td>
<td>The same reforms, as well as punitive measures and prohibition of blanket amnesties may risk losing the consent of elites who benefitted from the previous system and continue to hold key positions in society.</td>
<td>Communicating to the mandate-giver: Defining scenarios and options helps in knowing the mediation's areas of manoeuvre as well as the organizational “red line,” Communicating to the conflict parties: Timely research and liaison with the parties can help manage expectations on amnesties. Creativity and flexibility: Form mediators, an example is the UN supplement letter in the Lomé Agreement.</td>
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<td>DwP also support the peaceful settlement of disputes definitional in mediation. Institutional reform, truth commissions and post-agreement dispute settlement mechanisms offer a way to table long-term issues in the future and focus on immediately ceasing hostilities.</td>
<td>The process of agreeing to these long-term instruments may incite the same emotions it tries to avoid in the first place. Without the political will, non-implementation of these mechanisms in the future result in de-facto impunity.</td>
<td>Timing and sequencing. Build on easier issues and cultivate an appreciation of a comprehensive approach in order to gain agreement and genuine commitment on more challenging DwP issues.</td>
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Jamie Pring is a PhD candidate at the University of Basel and a PhD fellow of the swisspeace Mediation program. Under the Swiss National Science Foundation research project, “Are Mediators Norm Entrepreneurs? The Role of Norms in International Peace Mediation,” her dissertation examines the role of the mediators mandated by the Inter-Governmental Authority on Development (IGAD) in promoting inclusivity in the South Sudan peace process (2013-2015).

swisspeace
swisspeace is a practice-oriented peace research institute, with headquarters in Bern, Switzerland. It aims to resolve armed conflicts and to enable sustainable conflict transformation.

swisspeace is an associated Institute of the University of Basel and member of the Swiss Academy of Humanities and Social Sciences (SAHS).
www.swisspeace.org

NOREF
NOREF Norwegian Centre for Conflict Resolution is an independent foundation working for the peaceful resolution of armed conflicts. It builds on a long Norwegian tradition of informal diplomacy. NOREF’s workload is divided between so-called track II initiatives and supporting more formalised peace negotiations.
www.noref.no
Further readings

Suggested further readings on Dealing with the Past:


Suggested further readings on the Peace vs Justice Debate:


