



Mediation and Human Rights

William G. O'Neill

1. Introduction

Many mediators groan when faced with the prospect of raising human rights issues during a negotiation to end a violent conflict. They realize that many of the people facing them across the table or in the tent have probably committed, ordered or tolerated gross violations of human rights or the laws of armed conflict. They know they will receive intense scrutiny and pressure from human rights organizations not to “sacrifice justice” in the pursuit of peace.

Yet ending the conflict is not incompatible with addressing a broad array of human rights concerns. In fact, preventing further human rights abuses is crucial to securing a lasting peace while simultaneously addressing the root causes of the violence. To achieve these goals, mediators should have a broad understanding of human rights that goes beyond ensuring accountability for war crimes, crimes against humanity and human rights violations. Human rights standards and methodology can be useful in many ways to conflict resolution efforts, providing an internationally-agreed set of definitions and rules, and offering objective and rule-based fact-finding processes. Also, “human rights,” properly understood, include a broad array of economic and social rights.

So while ending impunity is important and punishing those most culpable may help prevent any further conflict, human rights offers many more avenues of action and leverage to mediators which create fresh opportunities to engage the belligerents and tie them to a peace process. These opportunities arise both in the mediation process itself and in the various mechanisms growing out of a peace process to insure its implementation.

One reason human rights concerns often appears as a complicating factor is the widespread view that this issue primarily involves criticism of state authorities for their

past behavior. This perception originates in the Amnesty International/Human Rights Watch model of “denouncing abuses” and “naming and shaming” violators with the goal of ending abuses. Public reports documenting horrendous violations like murder, torture, disappearances, and rape and trafficking in women and children have come to characterize what the world thinks is the essence of human rights work. Accusing governments, and increasingly rebel or insurgent movements, of being responsible for violations and demanding that they take action to stop them and to punish the perpetrators is the most visible tactic of the human rights movement. Thus human rights has come to mean for many an adversarial stance against officials, where violations are denounced and demands made for corrective action.

Not unsurprisingly, mediators involved in the delicate matter of ending a war and striking various compromises with often unsavory characters on all sides, do not heartily embrace such an approach. Human rights as public humiliation of alleged offenders clearly has a place, just not very often in the middle of a mediation.

2. Use the Legal Principles and Terminology to De-politicize the Debate

One of the most important tools for mediators who are enmeshed in complex, highly sensitive and often fractious negotiations is to employ human rights terms and concepts whose meaning and contours have attained universal agreement.

For example, the belligerents often accuse the other side of “genocide” and use the term without knowing what it really means. Thanks to the Convention on the Crime of Genocide and the emerging jurisprudence from the international criminal tribunals for the Former Yugoslavia and Rwanda, “genocide” has an extremely precise legal meaning with well-established elements that must be present to qualify killings as genocide. The recent accusations about the Government of Sudan’s behavior in Darfur is a case in point. The term “genocide” has played a determining role in whether talks take place at all, let alone the contents of the talks and any resulting peace agreement.

Similarly, “torture,” “ethnic cleansing,” “disappearances,” “war crimes and crimes against humanity” have legally accepted meanings. Mediators should use these concepts to pinpoint priorities for discussion and resolution, while insisting on a rigorous and impartial application of these principles to the facts on the ground.

How can mediators ensure they have the most reliable facts?

3. The UN’s Treaty Bodies and Special Procedures: One Source of Accurate Information for Mediators

Most countries in the world have ratified one or more of the UN's six principle human rights treaties. They must report periodically to the relevant committees of international experts who oversee adherence to these treaties, the so-called "treaty bodies." In addition, Special Rapporteurs and Working Groups (known as "Special Procedures" in the UN's unique and strange parlance) have also obtained reliable information on the human rights situation of the country involved. Often, the UN's human rights mechanisms have studied these problems in the countries where mediators are working yet mediators rarely incorporate or make references to these studies and their recommendations. This is a lost opportunity; the mediators could use the tested tactic of noting that "the independent experts say you have a problem here, it's not just me or even the other side who says this, so how can we craft a solution to this?" The findings and conclusions of the UN treaty bodies and special procedures could support both the mediation process and any implementation mechanisms created by the peace agreement

4. Human Rights Field Operations: Confidence Building and Protection:

The recent growth of long-term, extensive field operations – led by the UN or regional organisations - has added new dimensions to human rights work. This new type of human rights work supports a peace agreement/mediation setting in a number of ways. First, the human rights officers provide a mediator with time-sensitive, carefully vetted human rights analysis. Second, when properly staffed, resourced and mandated, human rights field presences can prevent further violations. Third, these missions help build institutional safeguards to protect and promote human rights, and insure participation of key elements of civil society to buttress the sustainability of the peace accord. This is crucial since insecurity and on-going human rights violations will undermine confidence in the peace process and could help scuttle any agreement.

A model for mediators to consider is the first UN human rights field operation which deployed to El Salvador in 1991. As a result of talks mediated by the UN, both sides to the conflict agreed that the UN could send 120 civilians to monitor, investigate and report on any violations of international human rights or humanitarian laws. The UN's mediators cleverly exploited the belief held by each side that objective, impartial reporting would reveal the other side to be the more frequent violator of international law.¹ This was before the parties had agreed to a cease-fire and before the completion of the San Jose Peace Accords

Once deployed, the human rights officers of ONUSAL enjoyed broad powers to investigate alleged violations, visit prisons and police stations, interview witnesses and victims, travel anywhere in the country, establish offices wherever they deemed it necessary for their work and to report on the human rights situation. This included making recommendations to both the authorities and the insurgents in the FMLN to correct behavior or problems uncovered by the human rights officers.

¹ A similar dynamic appears to be at work in Nepal right now where both the King and the Maoists have welcomed, the former somewhat grudgingly, international human rights officers to monitor the behavior of all sides to the on-going conflict there which has killed more than 12,000 people in the last ten years.

The mere presence of the human rights officers helped to deter abuses and to give confidence to the population. It also made the belligerents much more aware of the consequences of violating international law and forced them to address seriously the problem of impunity for the first time. Protection of civilians became a positive outcome that had a real and concrete impact on the lives of Salvadorans.

5. Human Rights Field Operations: Diagnosing the Problem while Promoting Institutional Reform

ONUSAL was the first of what has now become a growth area in human rights work. Many human rights field operations, most sponsored by the UN but others by the OSCE, EU, AU and OAS, now pepper the globe.² Their distinguishing characteristics, when compared to international NGOs and the UN's own human rights work from 1945-1991 when the UN was predominantly concerned with standard-setting and supporting the work of the Human Rights Commission, are:

- on-going presence of dozens of human rights officers, in some cases years, in all areas of the country; not short periodic visits carried out by visiting experts;
- broad mandates to investigate violations wherever they may have occurred, intervene immediately and continually with those responsible until obtaining a resolution of the problem;
- authority to make recommendations for institutional reform to prevent further violations with the capacity to follow-up to insure such reforms actually take root;
- authority and resources to assist in institution-building and enhancing capacity of state institutions to protect and promote human rights; and
- close interaction with non-governmental organizations, civil society in general, so that they can act as a watch-dog and counter-balance to state power in the years to come.

The “traditional” aspects of these field operations’ approach to human rights- monitoring and reporting- should be attractive to mediators for several reasons. First, a broad on-the-ground and continuing presence of human rights officers will give the mediators an excellent and reliable analysis of the situation, who is serious about the peace agreement and who is not. Mediators can then act accordingly with the relevant interlocutor and

² The OAS and UN jointly sponsored the International Civilian Mission in Haiti from 1993 to 2001. Other major human rights field operations, past and present, include Cambodia, Guatemala, Rwanda, Angola, Bosnia-Herzegovina, Macedonia, Kosovo, East Timor, Afghanistan, DRC, Cote d’Ivoire, Sierra Leone, Liberia, Burundi, Sudan/Darfur, Nepal.

also inform other interested parties (the Secretary-General, the “Group of Friends”- now common in many peace negotiation settings, NATO, EU, AU etc.) about the reality on the ground.

Perhaps equally compelling for the mediator and his/her national counterparts is the human rights operations’ authority and capacity to help reform key institutions charged with promoting and protecting human rights. This is very different from traditional human rights NGO work and even from the UN’s own “technical cooperation” programs which have usually been highly technical, planned from a distance for countries at peace and often at a high level of abstraction and, frankly, not very effective.

Human rights field operations, because they are in the country for such extended periods and with such broad mandates, can perform an in-depth and comprehensive diagnosis of what ails a country’s judicial system, police force, military, intelligence services, prison system, public administration and other core government agencies central to people’s enjoyment of human rights.

With such information, the mediator can offer the promise of targeted assistance to key governmental institutions which should make the human rights agenda more attractive to the national participants in the peace process. Mediators can then better exploit the unique moment surrounding a peace agreement where a breakdown of existing power relationships that often have allowed for interference in the judiciary, police violence and corruption, abuses in prisons and other systemic rights violations presents new chances for change. Mediators should seize this moment aggressively because it won’t last long and may not come again soon, while the consequences for human rights is enormous.

6. Human Rights: More than Civil and Political Rights

For far too long human rights has been identified overwhelmingly, even in the UN system, with classic civil and political rights. The right to life, physical integrity, freedom from arbitrary arrest and detention, fair trials, free speech, freedom of thought and religion, the right to assembly and association: these have comprised the focus of both the UN’s and even international NGOs’ activities and advocacy.

Almost like the proverbial step-child, forlorn and forgotten, economic, social and cultural rights remained as second-class citizens. Even a label commonly applied to them- “second generation rights” – underscored this lower status.

The right to food, shelter, health care, education, and clean water are especially important in states devastated by war. Many people have been forced to flee their homes. Their social networks are gone; survival literally depends on international assistance in many cases. Diseases, land mines, exposure to the elements and no income mean that thousands of people are at risk.

Addressing these as human rights issues, and not as “charity” or “fulfilling people’s needs” has constituted an important shift in the way the UN and major non-governmental organizations analyze and respond to humanitarian emergencies and development challenges. Including programs and policies that address economic, social and cultural rights should be part of the peace negotiator’s “tool kit.” By raising these issues in the negotiations, the mediator demonstrates to the parties that s/he grasps the complexities of the conflict, its causes which often include systematic discrimination resulting in the denial of economic, social and cultural rights to identifiable groups in the host society.

The mediator should use analyses and findings from the growing jurisprudence of the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Special Rapporteurs on Education, Right to Food, Right to Health Care, Right to Clean Water and Violence against Women. Their studies often diagram the contours of discrimination, its effect on the population’s ability to enjoy their rights and recommendations to improve their situation. These reports provide concrete, impartial and objective benchmarks to assess the parties’ subsequent commitment to the implementation of any peace agreement. This is especially true for situations where there may not be a follow-on human rights field operation or peacekeeping mission. The mediator will be relying almost solely on national institutions (governmental and non-governmental) and UN agencies, funds and departments, along with international NGOs, to implement or follow human rights issues.³ These entities have developed sophisticated “measures” and “performance indicators” allowing a mediator to gauge the behavior of the parties.

The so-called “human rights-based approach” and “mainstreaming human rights” in humanitarian and development work result directly from the Secretary-General’s UN reform program launched in 1997 and reinforced in his recent report **“In Larger Freedom.”**⁴ These reforms require incorporating human rights principles, standards, processes and accountability/assessment mechanisms into all the UN’s work, including peace negotiations and mediation. But this should mean incorporating all human rights, civil and political as well as economic, social and cultural. Mediators should be ready to identify creative ways to address economic, social and cultural rights issues in the peace accord process. This is right for its own sake but may also make it slightly easier or less contentious to take on the thornier and often more sensitive civil and political rights issues if the parties see that all rights violations are being addressed.

International human rights law in turn has recently identified the responsibilities of the World Bank, IMF and all donors to uphold economic, social and cultural rights in their programming. The Committee on Economic, Social and Cultural Rights, the body charged with upholding respect for these rights and developing jurisprudence to identify their exact contour, has held in recent General Comments that when a state does not have the resources to make progress in respecting rights, then international assistance must be

³ See, William G. O’Neill, **“An Introduction to the Concept of the Rights-Based Approach to Development: A Paper for InterAction,”** (December 2002), available at <http://www.interaction.org>

⁴ **In Larger Freedom: Towards Democracy, Development and Human Rights for All**, Report of the Secretary-General, UN Doc. A/59/2005, March 21, 2005.

provided and tailored to help them reach this goal. Most if not all of the states subject to a UN-sponsored peace negotiation will fit into this category of being unable to provide for the enjoyment of basic rights. Mediators should be aware of this and try to shape or influence the assistance provided by the donors consistent with the Committee's commentary.

The point is that such an approach gives the mediator further leverage in identifying, designing and evaluating international aid packages which can support the peace process.

7. Participation as a Human Right

A keystone of the human rights-based approach is meaningful participation by a broad segment of civil society. If nothing else, the human rights-based approach means that one must include the various stakeholders in the process of identifying problems and solutions. Participation is meaningful only when the participants have power to decide, to act and to identify priorities; if they don't, then participation is often mere window-dressing that provides a veneer of consultation without real consequences.

One study has shown that peace agreements with greater civil society participation in the deliberations (religious and voluntary organizations, women's groups, trade unions etc.) have more effective human rights provisions than those agreements which were primarily comprised of international actors and a local political elite.⁵ Negotiations that include significant participation from civil society are more likely also to craft effective and sustainable human rights provisions. "In a divided community civic society plays a crucial role in mediating the positions of political elites...Civic society can supplement an impoverished political sector with a narrow focus."⁶

Thus promoting meaningful participation in a peace process achieves two goals simultaneously: it is a way of advancing human rights by enhancing the quality of the process while yielding a superior product as a result.

8. Sequencing: the Mediator's Art

The different approaches to incorporating human rights into the mediation process involved in peace accords are not mutually exclusive, either/or choices. The suggestion to highlight the "forward-looking institutional reform" aspect of human rights does not preclude at some point needing to focus on the justice-peace dilemma. Likewise, pointing out the necessity for participation and addressing economic, social and cultural rights does not mean that mediators ignore civil and political rights.

Rather, it is up to the mediator to decide what sequence will work best: is it better to tackle some of the less confrontational or controversial human rights issues first, to build

⁵ Christine Bell, **Peace Agreements and Human Rights** (Oxford Univ. Press 2000), p. 231.

⁶ *Id.* at p. 316

trust and momentum and then face the sensitive problems, or vice-versa? This is where the skill of the mediator and his/her judgment and insights, as much art as science, are put to the test. The purpose of this paper has been to identify an array of human rights issues and approaches comprising a human rights agenda that is much broader than has traditionally been recognized. The mediator must choose the best ways to raise and include human rights in a mediation process whose overall goal is to end the conflict, prevent further rights violations and lay the groundwork for sustainable peace and human development.