



**BUILDING A FUTURE ON PEACE AND JUSTICE  
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**WORKSHOP 1  
REPORT**

**LINKING MEDIATION AND TRANSITIONAL JUSTICE**

*Lars Kirchhoff*

**ABSTRACT: Linking Mediation and Transitional Justice**

The aim of this paper is to further develop and define the relationship between the challenges of transitional justice and different models of mediation. It will be discussed which mediation styles and techniques should be employed and what role mediation can play both in dealing with the different areas of transitional justice and in designing the larger framework of transition processes. In addition, the paper will offer recommendations on how to elicit and integrate the specific (and potentially conflicting) interests of both the direct parties and the international community during the design of transition processes.

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## 1. INTRODUCTION

The prevalence of the term *mediation* in essays on *transitional justice* implies a close connection between these two concepts. But precisely how may the relationship between transitional justice<sup>1</sup> and mediation<sup>2</sup> be defined, considering that transitional justice consists of a wide range of processes which serve to promote such generic goals as peace, human rights, the rule of law, and reconciliation, while mediation is often perceived as one particular technique to resolve concrete conflicts?

As correctly observed by David Bloomfield, the sophisticated debate on peace and justice implies a whole “series of complex questions which arise when we start to unpack the dense concepts of justice, truth, reconciliation, human rights and peace in a post-violence context.”<sup>3</sup> The fundamental insights that justice is merely one aspect of a many-faceted approach needed to secure enduring peace in a transitional society<sup>4</sup> and that the goals of justice and reconciliation might compete, illustrate an inherent tension that poses a number of abstract moral questions and, at the same time, defines highly practical tasks for all actors involved.

Compromises, resulting from the need to strike the right balance between conflicting interests, are necessary elements of coping with conflict on a societal level in a period of transition. Mediation has a lot to offer in facilitating the tension underlying these bargaining processes because it can help to disentangle the knot of interests and needs in a structured and efficient way. The good news about mediation is that it is internationally recognized as a highly promising instrument to broker peace. Often enough, specific power resources of the mediator render success possible. The bad news is that, in some instances, a mediated peace might be achieved at the cost of compromising justice, often related with another source of power, namely that of the parties, and especially when in the hands of the former perpetrators.

Against that background, one might assume that this paper is about power in mediation, reflecting the status quo on the debate and practice of power-oriented mediation approaches. Instead, the paper will focus on a model of mediation which, in my view, is almost naturally connected with transitional justice: that of interest-based, facilitative mediation. In essence, transitional justice is all about conflicting interests. Therefore a mediation model that offers a social space as well as an elaborated communication structure (and distribution of roles) which helps to elicit and creatively reconcile existing interests should be a primary tool in the area of transitional justice.

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<sup>1</sup> Transitional justice is understood here as comprising the full range of processes and mechanisms associated with a society’s attempt to come to terms with past abuses in order to ensure accountability, serve justice and achieve reconciliation; see *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General (August 2004), UN-Doc. S/2004/616.

<sup>2</sup> In its broadest sense, mediation is understood as a process carried out by an intermediary who actively supports the parties in negotiating an agreement.

<sup>3</sup> David Bloomfield, “Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?” in M6 Bleeker (ed.), *Dealing with the Past and Transitional Justice* (Conference Paper 1/2006, Federal Department of Foreign Affairs), at 57.

<sup>4</sup> Richard Goldstone, “Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals”, *NYU Journal of International Law and Policy* 28 (1996) 485, at 486.

The aim of this paper is to contribute to – and provide an analytical framework for – the further debate on the precise mandate of a mediator in the context of transitional justice and, accordingly, on the roles and techniques that should be used. Instead of focusing on case studies, the paper will consider rather abstract parameters of mediation and transitional justice. It will demonstrate how the model of interest-based, facilitative mediation, exercised with clear references to international law, can meet the various challenges of transitional justice. The paper explains the process of this particular mediation model (2) and suggests areas of operation within the wide field of transitional justice (3). By way of illustration, the paper will briefly discuss which categories of interests tend to be involved as well as why and how they need to be prioritised (4). Finally, conclusions will be presented as well as a number of policy recommendations on how to realize the full potential of mediation in the field of transitional justice (5). A short executive summary will follow (6).

## **2. MEDIATION MODELS AND STYLES: INTEREST-BASED, FACILITATIVE MEDIATION**

### **2.1. A Word on Mediation**

The decision to focus on one particular method – mediation – for the purposes of this study on transitional justice has been taken for a number of reasons. The most obvious one is the practical relevance and frequent occurrence of mediation efforts in conflict as well as post-conflict situations during the post-World War II period. More importantly, substantial interdisciplinary research has been conducted in the field of international mediation<sup>5</sup> in order to structure and categorize its parameters – conflict resolution in general and mediation in particular have developed from an ‘art’ to a veritable ‘science’<sup>6</sup>. Finally, and most decisively, the specific nature of the mediation procedure makes it a useful topical focus in the context of transitional justice: when compared to inquiry, arbitration or other processes, mediation represents a genuinely different procedural approach in the resolution of conflicts: Unlike inquiry, its declared goal is the resolution of the conflict; unlike arbitration, it does not include binding elements. In its very essence, mediation maximizes the autonomy, sovereignty and dignity of the conflict actors involved – aims that are closely connected with those of transitional justice.

### **2.2. Some More Words on Mediation Models**

[A]s long as analysts remain unaware of the existence of the models and their attendant evaluation criteria, they are likely to focus on different sets of indicators while debating the outcomes of one and the same mediation effort. In this case, the scope for confusion between them is large. This changes when they make explicit their ways of looking. Misunderstandings and confusion will give way to clear-cut differences in perspective and normative debates become more transparent.<sup>7</sup>

For a scholar in the field of international mediation, it is surprising to note to which degree commentators neglect the existence of different analytical models

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<sup>5</sup> For an overview see Jacob Bercovitch, “Introduction: Putting Mediation in Context”, in Jacob Bercovitch (ed.), *Studies in International Mediation: essays in honor of Jeffrey Z. Rubin*, Basingstoke et al.: Palgrave Macmillan (2002), at 4.

<sup>6</sup> Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy* (henceforth *Dispute Processing*), Aldershot: Ashgate Publishing (2003), at xxi; stressing that conflict resolution involves both behavioral (art) and cognitive (science) components.

<sup>7</sup> Marieke Kleiboer, *The Multiple Realities of International Mediation* (henceforth *Multiple Realities*), Boulder: Lynne Rienner Publishers (1998), at 192.

of mediation and, instead, claim that the observed differences simply follow from the concrete case and, in particular, have their source in the respective personalities of the intermediaries.<sup>8</sup> This approach of ‘personalizing’ mediation is closely related to the perception of mediation as a secret, personal ‘art’ – a view that is emphatically rejected in this paper. The mere fact that in international affairs most actors never have to reveal what they do<sup>9</sup> and which particular form of mediation they practice does not refute the existence of different models in the first place. For those unfamiliar with such categorization, three authors and their respective approaches shall briefly be presented.<sup>10</sup>

### 2.2.1. Touval / Zartman

Touval and Zartman, as further elaborated in a joint empirical study on mediating international crises<sup>11</sup>, differentiate between three concepts of mediation: the mediator as *facilitator*, the mediator as *formulator*, and the mediator as *manipulator*. This typology is based on the classification of three mediator strategies which are categorized on an ascending level of involvement.<sup>12</sup>

**Facilitation:** In facilitative mediation, the mediator primarily serves as a channel of communication. He focuses on the process, organizes the logistics, collects information, delivers messages between parties if face-to-face communication is not possible, and gathers the parties’ concessions to help them create a package deal. The facilitative mediator declines to make substantive contributions to the solution, but ensures constructive dialogue between the disputants.

**Formulation:** Unlike the facilitative mediator, the mediator as formulator is required to enter into the substance of the conflict. She makes substantive contributions to the resolution process, including the development and proposal of new resolution options. At the same time, the mediator as formulator is not in a position to push the conflict actors to endorse any particular outcome, or even to advocate the outcome favoured by her.

**Manipulation:** The manipulative mediator has all the powers of the formulator and, in addition, he uses his position and leverage to manipulate the parties into agreement. He assumes the maximum degree of involvement by applying his power, influence and persuasion, eventually becoming a veritable party to the conflict, making use of his capacity to add or subtract benefits to or from the solution (and the parties).

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<sup>8</sup> Deborah M. Kolb / Eileen Babbitt, “Mediation Practice on the Home Front: Implications for Global Conflict Resolution”, in John A. Vasquez / Sanford Jaffe / James Turner Johnson / Linda Stamatou (eds.), *Beyond Confrontation: Learning Conflict Resolution in the Post Cold War Era*, Ann Arbor: University of Michigan Press (1995), 63-86, at 63-64.

<sup>9</sup> Thomas Princen, *Intermediaries in International Conflict* (henceforth *Intermediaries*), Princeton: Princeton University Press (1992), at 29.

<sup>10</sup> For a more detailed analysis of mediation categories and models, see *Constructive Interventions* by this author (forthcoming).

<sup>11</sup> Jonathan Wilkenfeld / Kathlee Young / Victor Asal / David Quinn, “Mediating International Crises”, *Journal of Conflict Resolution* (2003), 279-301.

<sup>12</sup> See also Saadia Touval / William Zartman, “International Mediation in the Post-Cold War Era”, in Chester A. Crocker / Fen Osler Hampson / Pamela Aall (eds.), *Turbulent Peace – The Challenges of Managing International Conflict* (henceforth *Turbulent Peace*), Washington, D.C.: United States Institute of Peace Press (2001), 427-443, at 435.

When the obstacle to agreement is the seemingly paltry size of the outcome, the mediator must persuade the parties of his vision of a solution; he must then take measures to make the solution attractive, enhancing its value by adding benefits to its outcome and presenting it in such a way as to overcome imbalances that may have prevented one of the parties from subscribing to it. The mediator may have to go so far as to improve the absolute attractiveness of the resolution by increasing the unattractiveness of continued conflict.<sup>13</sup>

### 2.2.2. *Marieke Kleiboer*

Throughout her excellent study analyzing the various ‘realities’ of mediation in the international context, Marieke Kleiboer<sup>14</sup> differentiates between a number of forms of international mediation, being complementary rather than competing in nature. These include the *power-brokerage model*, the *domination model*, the *political problem-solving model*, and the *transformative model*. For each of the paradigms, Kleiboer generates a theoretical ideal type, adopting each model’s jargon and linguistic style.

**Power-Brokerage:** According to what Kleiboer calls the power-brokerage model, the arena of international politics is characterized as essentially conflictual, with interests clashing as a result of a competition for scarce resources. In this world of actors seeking to safeguard their interests in a rather anarchical environment, the rational pursuit of own interests is the primary justification for all action. With conflict being inherent to the system, the elimination of the underlying causes of conflict is an impossible task. The implications of these general perceptions for mediation are far-reaching: The process of a particular conflict is not analyzed as for its own dynamics, but as a mere reflection of the general power structure of the international system and the actors’ positions within it. The crucial resources for a mediator are power and the skills to enforce her strategies and ideas through promised rewards or sanctions.

**Domination:** According to the domination model, international conflict is endemic to the international system. It has led to institutionalized inequalities and dependencies between central and peripheral forces within and between actors. As no mediator can possibly have the necessary economic or political power required to force structural changes, international mediation is seen as a form of domination, “a practice initiated or supported by powers from the center to suppress peripheries and protect and maintain the international economic and political status quo”.<sup>15</sup>

**Problem-Solving:** According to the problem-solving model, international conflict is a contingent result of dynamics in the interplay between actors. This approach is based on a more constructive perception of conflict: Conflict arises when actors experience or perceive incompatibilities between their respective goals and values. This approach to mediation recognizes the theoretical possibility of conflict resolution – there is no prima-facie reason why a complete resolution of a conflict should be impossible. The mediator’s role can be played by any well-informed, established actor with sufficient knowledge of the personalities and belief systems of the parties.

**Transformative:** According to the line of thought underlying the transformative (restructuring relationships) model of international mediation,

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<sup>13</sup> Touval / Zartman, in Crocker / Hampson / Aall (eds.) *Turbulent Peace* (cited above), at 436.

<sup>14</sup> Kleiboer, *Multiple Realities* (cited above), at 186.

<sup>15</sup> Kleiboer, *Multiple Realities* (cited above), at 188.

conflict is regarded as a “result of the frustration of basic human needs in institutional arrangements perceived by some groups to be unequal, unjust, or illegitimate”.<sup>16</sup> Conflict is perceived more positively, as an opportunity to transform the political arena so as to increase the satisfaction of all discontent parties and to restructure or even transform the relationships involved.

### 2.2.3. Conny Peck

Another useful categorization within the field of conflict resolution – and resulting international mediation models – can be gleaned from the work of Conny Peck. The essential categories she uses are the *power-based approach*, the *rights-based approach*, and the *interest-based approach*.<sup>17</sup>

**Power-Based:** In the *power-based* approach, the conflict and its resolution process is essentially characterized by the attempt to determine who is most powerful. Power relevant to the conflict resolution can be exercised both by the original actors to a conflict and by those who serve as intermediaries during the process of resolution.

**Rights-Based:** In the *rights-based* approach, the central feature is the determination of who is entitled to certain rights or who is right according to a specified standard. International law is the standard most commonly used. Rights-based approaches to conflict resolution are not necessarily confined to adjudicative tribunals; instead, the application of rights-based standards can occur in arbitrations, mediations and negotiations.

**Interest-Based:** *Interest-based* approaches to conflict resolution focus on the identification and creative response to the essential interests underlying a given scenario. *Interest-based* approaches attempt to reconcile the existing interests by creating solutions which will bridge the different perceptions and aspirations of the parties in a way satisfactory to all.

### 2.2.4. Observations

This short portrayal of different models of categorizing mediation suffices to illustrate the wide range of the spectrum. Significant overlaps as to the question of which parameters constitute the basic structure of a mediation model can be observed. One such parameter is the question of *power applied by the mediator*, i.e. the question of how much leverage and control is present during the mediation process. A second parameter is the *depth and direction of the conflict resolution approach*, i.e. the question of the role the underlying causes play and of how the restructuring or transformation of the topics is dealt with. A third parameter concerns the question of which *category and number of participants* are chosen for the mediation process, an aspect closely connected with the mediation model in operation.

What is the relevance for the practical purpose of this paper? Each presented model contains the “seeds for a set of policy recommendations to policymakers

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<sup>16</sup> Kleiboer, *Multiple Realities* (cited above), at 188.

<sup>17</sup> Conny Peck, *The United Nations as a Dispute Settlement System* (henceforth *The United Nations*), The Hague et al.: Kluwer Law International (1996), at 10.

and (potential) mediators”.<sup>18</sup> If no clear decision is taken for or against a particular mediation approach, the resulting randomness will undermine the efficiency of the process. One recommendation to potential mediators results from the existence of a ‘proportionality principle’: the bigger the power and control element on either side of those involved in a mediation, the less likely it is that deeper, underlying interests and causes will be addressed during the mediation process. Pressure of any kind hampers, rather than encourages, the articulation of interests, which are the building blocks for holistic solutions. As worthwhile as power in the hands of an intermediary may be, for example, to silence guns, as detrimental this very same power can be when it comes to re-establishing trust and restructuring a society.

Another recommendation concerns the question of whether the mediator should enter into the substance of the conflict. As exemplified especially in the categorization of Touval and Zartman, the difference between the mediator as *facilitator* and the mediator as *formulator/manipulator* is significant, especially with regard to the expectations and the ensuing behaviour of the parties. In a context where the authenticity of the conflict parties’ perspectives serves as the main safeguard for the sustainability of an agreement, the mediator should leave the complete responsibility for the substance of the solution in the hands of the parties (as long as this path is compatible with the legal cornerstones of the international arena).

### **2.3. Mediation and Transitional Justice**

This paper argues that different mediation models – each of which deserves a prominent role in international politics – can deal with the specific challenges within the field of transitional justice to widely varying degrees. What is needed in this context is a mechanism that encourages and supports the process of acknowledgment and healing, and, at the same time, proves to be result-oriented. The adequate mediation model must offer a structure that manages to prioritize conflicting interests, including those of the international community, without suppressing the articulation of diverging motivations of actors who might otherwise sabotage the process.

The author is convinced that, in this specific context, one model of intermediary action is particularly suited to realize the full potential of mediation. Speaking in the terminology of Conny Peck, the basis of the mediation approach in transition processes should be interest-oriented; essential elements of rights-based approaches should be integrated to define the legal limits of mediated agreements, while power and manipulation elements should be categorically excluded. Therefore, while fully acknowledging the role of other mediation models within the contingency model of international conflict resolution, the next part of this paper will be dedicated to the explanation and application of interest-based, facilitative mediation to the context investigated.

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<sup>18</sup> Kleiboer, *Multiple Realities* (cited above), at 198.

## 2.4. Model of Interest-Based, Facilitative Mediation

A comprehensive introduction to what a mediator working with this model actually does would include the description of possible phase models<sup>19</sup>, roles and techniques used by the mediator. This short paper can only provide a definition of the concepts of focus on interests and on the potential of options as well as of facilitative style.

### 2.4.1. Focus on Interests

The heart of the process of interest-based mediation is dedicated exclusively to eliciting and formulating interests. The definition of the term interest<sup>20</sup> includes, in addition to legally recognized interests, moral, ideological, economic, religious, regional, political interests, or a combination of these. Investing substantial time and energy to systematically explore the individual interests underlying the positions formulated by the parties is one of the essential distinguishing marks between the mediation model examined in this paper and more power-oriented mediation models. The difficulty and the eminence of the exploration of interests, in an effort to develop empathy for all actors involved, can be illustrated by an interview taken from the *International Herald Tribune*, conducted with chief Israeli and Palestinian negotiators.

Disengaging Israelis and Arabs from the West bank touched so many deep-seated passions, taboos and paranoia on each side – religious, cultural, historical, psychological – that pragmatism was not enough, said Mr. Savir. (...) Gradually the sparring gave way to understanding. Abu Alaa and his team came to understand that Israel's obsession with security was not just a negotiating tactic, and they learned to appreciate the domestic political pressure on Mr. Rabin. Mr. Savir and the Israelis began to understand the importance to the Arabs of maintaining dignity and to appreciate the humiliation of occupation. 'Everything that was security for us was dignity for them', Mr. Savir said, summarizing many a dispute.<sup>21</sup>

The mediator has to assure that the interests of all relevant actors are carefully analyzed so that for each of them, a comprehensive profile of interests can be elaborated. The resulting profiles of interests are likely to include, for example, a sophisticated combination of personal or strategic interests (with regard to economic or security issues), governance interests (for example to support norms related to transparency and good governance), and humanitarian interests (including ethical imperatives for action). Later in this paper, a matrix of possible interests in scenarios of transitional justice will be elaborated (see part 4).

### 2.4.2. Focus on the Potential of Options

The multiplicity of interrelated topics to be dealt with in post-conflict societies highlights the significance of value creation and issue linkages during transition processes. The creative stages of a mediation provide a useful procedural space for this task: Once the parties have stated their concrete positions, ascertained

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<sup>19</sup> An example for a phase model can be found at Christopher Mitchell, "The Process and Stages of Mediation: Two Sudanese cases", in David Smock (ed.), *Making War and Waging Peace*, Washington: United States Institute of Peace (1993), 139-159.

<sup>20</sup> As formulated in the *Dictionnaire de la Terminologie du Droit International*: Terme désignant ce qui affecte matériellement ou moralement une personne physique ou juridique, l'avantage matériel or morale que présente pour elle une action ou une abstention, le maintien ou le changement d'une situation; *Dictionnaire de la terminologie du droit international*, Paris: Sirey (1960), at 342.

<sup>21</sup> *International Herald Tribune*, September 29th, 1995, p. 1; More details of the interview can be found in Peck, *The United Nations* (cited above), at 39.

information and identified underlying interests, the mediator supports the process of developing options. In doing so, it is vital to explore the full range of possibilities with the direct involvement of the parties who are affected by the proposals. The mediator needs to counteract the tendency of any party to discard valuable options simply because they spontaneously consider them to be ultimately unacceptable. To avoid this, it is best for the parties first to collect multiple options without evaluating them. By deferring judgment on any option to a later stage, the invention of more creative solutions is encouraged. While creativity should be the guiding principle in generating options, caution should be exercised when actually choosing the most suitable ones among them. For the context of transitional justice, the limits of flexibility when choosing options will be examined below (see 4.3.).

#### 2.4.3. *Facilitative Style*

The facilitative style of mediation implies that the mediator neither uses power techniques nor evaluates the scenario according to her own values and preferences. Facilitation as understood in this paper, however, does not keep the mediator from formulating, along with the parties, resolution options<sup>22</sup>, as long as she does not try to convince the parties of the merits of her own proposals.

#### 2.4.4. *Resulting Mediator Roles and Techniques*

The spectrum of adequate mediator roles and techniques depends on the respective model of mediation. The following compilation of aspects is specific to the interest-based mediation model.<sup>23</sup>

**Process Chairman:** Within the interest-based, facilitative mediation model, the mediator has full process control but no outcome control. By exercising process control, the mediator can change the dynamics through reconfiguring the structure of the bargain, he can control the pace and formality of meetings as well as the physical environment in which the process takes place. He establishes the protocol, suggests procedures, controls the timing and structures the agenda.

**Communication Facilitator:** In his role as facilitator of communication, the mediator identifies issues and gathers information, helps to clarify facts, to provide missing information and thereby to determine whether or not sufficient bargaining space exists.

**Formulator of Interests:** Given the high relevance of interests in this model of mediation, both eliciting and formulating these interests is one of the most crucial functions of the mediator.<sup>24</sup> Eliciting interests as well as accurately

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<sup>22</sup> In order to avoid misunderstandings: facilitative mediation as understood here includes elements from both facilitation and formulation in accordance with the model by Zartman and Touval described above.

<sup>23</sup> For further elaboration on some of these roles, see P. Terrence Hopmann, *The Negotiation Process and Resolution of International Conflicts* (henceforth *The Negotiation Process*), Columbia: University of South Carolina Press (1996), at 230-234.

<sup>24</sup> For the practical aspects of this task, see Horst Eidenmüller, "Interessen verstehen und gewichten", in Christian Duve / Horst Eidenmüller / Andreas Hacke, *Mediation in der Wirtschaft*, Köln: Otto Schmidt Verlag (2003), 155-174.

formulating those interests under conditions of conflict pressure can be highly sensitive and challenging tasks.

**Facilitator of Cognitive Change:** The study *Barriers to Conflict Resolution*<sup>25</sup> identifies cognitive barriers as a valuable explanation why negotiations fail so often – even where some of the possible options would obviously serve the disputants’ goals. Especially post-violence peace-building means “dealing with a complex area of human activity which by its very nature involves a degree of confused, illogical and contradictory thinking and behaviour”<sup>26</sup> and therefore underlines the role of the intermediary as facilitator of cognitive change. Above all, it requires a substantial cognitive change for the parties of transition processes to quit the pattern of perceiving one another as enemies<sup>27</sup> and to instead view each other as partners faced with the task to jointly rebuild a society. The interactive nature of mediation provides an excellent framework for dealing with these cognitive barriers.

**Agent of Reality:** This role is most important in situations where stalemate is caused more by different or wrong perceptions of the same issues or other psychological factors, rather than by conflicts of interests. A mediator can help to dissolve psychological distancing, such as stereotyping, scapegoating and partisan perceptions, and ensure that all actors have a more rational perception of the threat or value potential of a given scenario. He can also be supportive in separating negotiable from non-negotiable issues, a point which will be further elaborated under 4.3.

**Provider of Creativity:** Another essential role of the mediator is that of supporting parties in the generation and subsequent selection of options during the process of finding the proper solution. The application of brainstorming methods, the creation of an atmosphere where it is possible to develop ideas without instantaneously committing to them, is a role genuinely attributed to the mediator. It can also be his task to suggest ways of creating more space for bargaining, i.e. through possible issue linkages.<sup>28</sup>

#### 2.4.5. Model-Specific Limits of the Mediator’s Role

In order to ensure the clear communication of the mediation model under investigation, it is essential to mention which roles and techniques the mediator should actually *not* employ when applying this model.

**Integrating Own Interests:** The tendency of many international mediators to – explicitly or implicitly – integrate own interests into the process can pose a threat to the mediation success. The fact that the mediator articulates own interests can easily lead to the perception of one or more parties that the mediator is biased and favours one specific solution. Combined with the fact that he might use his process control to emphasize his own interests, he loses his greatest asset – the trust of the parties in his impartiality.

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<sup>25</sup> Kenneth J. Arrow et al. (eds.), *Barriers to Conflict Resolution*, New York: W. W. Norton (1995).

<sup>26</sup> David Bloomfield, “Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?” in M6 Bleeker (ed.), *Dealing with the Past and Transitional Justice* (Conference Paper 1/2006, Federal Department of Foreign Affairs), at 59

<sup>27</sup> Hopmann, *The Negotiation Process* (cited above), at 234.

<sup>28</sup> Hopmann, *The Negotiation Process* (cited above), at 231.

**Representing (Absent) Parties:** Parties absent from the negotiating table pose another challenge to interest-based, facilitative mediation processes. In the very moment where the mediator starts to speak for one particular actor, absent or present, the clarity of role central to the performance of the mediator's task is endangered.

**Rewarding and Sanctioning:** Both positive and negative stimuli presented by the mediator – in other words carrots as well as sticks – involve the danger that parties feel manipulated into agreement. Of course, assets in the form of money or economic support will be distributed in many post-conflict processes, but these resources should not be closely connected with the person of the mediator.

### **3. AREAS OF APPLICATION**

Evidently, in transition processes, intermediary action in general and mediation initiatives in particular can have many forms – reaching from short mediated conversations between victims and perpetrators to comprehensive design processes for institutional reforms with the involvement of dozens of actors. With regard to interest-based, facilitative mediation in transition processes, two concrete areas of application are illustrated in the following: that of mediating particular elements of rebuilding a society, and that of designing the overall framework of intervention.

#### **3.1. Mediating Peace and Justice**

In an effort to roughly sketch some areas where interest-based, facilitative mediation can make a significant contribution in transition processes, and being fully aware of the discussions surrounding the “catch-all phrase”<sup>29</sup> reconciliation, this expression can nevertheless serve as the adequate umbrella term for the larger process of rebuilding relationships between actors alienated by violence. According to Bloomfield, in the context of transitional justice processes, reconciliation has the following ingredients:<sup>30</sup>

- A justice process that punishes past violence and deters future repetition; justice that is built on human rights principles, democratic practice, and international legal norms; and social justice in the distribution of social goods that promises fairness for all in the future.
- A process of acknowledging experiences, uncovering unknown events, giving voice to the previously unheard, and addressing interpretations of history, often referred to as truth-seeking or truth-finding.
- A process of healing, whereby victims repair their lives by coming to terms with their suffering.
- A process of reparation through real and/or symbolic compensation for loss.

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<sup>29</sup> Mō Bleeker, “Challenges to the Implementation of Transitional Justice” in Mō Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 162, stressing that due to its religious connotations, it is essential to define a precise, context-specific meaning.

<sup>30</sup> David Bloomfield, “Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?” in Mō Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 62.

Against that background, also paying tribute to the observation that there exists “increasing consensus around a view which holds that transitional justice has four main pillars: establishing the facts, justice, reparations, and institutional reforms”<sup>31</sup>, the possible roles of mediation in processes of transition can be described as follows.

### 3.1.1. *Role of Mediation in the Justice Process*

It is an essential task within the field of transitional justice to mediate between the differing and potentially conflicting aspects of a wider concept of justice.<sup>32</sup> This wider concept of justice contains but is not limited to retributive justice (focusing on the offender), restorative justice (focusing on the victim), moral and social justice (focusing on shared concepts of fairness), and distributive justice (focusing on the fair sharing of goods). While the application of some of these facets of justice can be subject to individual bargaining processes, other components are non-negotiable. A mediator can make a substantial contribution to the peace process by disentangling these elements and clarifying which weight or priority should be attributed to the respective elements of justice during the various periods of a transition process.

### 3.1.2. *Role of Mediation in Establishing Facts*

Truth-finding cannot be mediated. Therefore, the process of mediation can only be of indirect help during the task of uncovering past events. The eminent task of establishing facts is much better served under the auspices of truth commissions. In addition, the activities of international criminal tribunals must be embedded in the overall strategy of truth-finding. Only as a second step, when it comes to the acknowledgement of experiences and the interpretation of the subjective perception of history, mediation processes can be supportive. The interactive character and the direct contact with the perceptions, underlying interests, and suggested options of the involved parties can significantly facilitate the necessary step of acknowledging the possibility of different perceptions of the same facts and events.

### 3.1.3. *Role of Mediation in Determining Reparations*

Additional processes of balancing and interest-based bargaining in which mediators can be highly useful are those concerning questions of reparation. One essential challenge in the practice of providing reparations to victims is that the task of repairing harm cannot be fulfilled in a collective fashion, but, rather, is an individualistic undertaking. The adequate provision of benefits demands a systematic and transparent exploration of the interest structure of the actors on behalf of which reparation measures are taken. Two additional aspects complicate things: First, the “impossibility of compensating victims in proportion to the harm they have suffered”<sup>33</sup>, and second, the pressure to award reparations in a systematic fashion which lives up to standards of fairness in the eyes of all actors involved, including those victims that cannot be compensated but

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<sup>31</sup> Mô Bleeker, “Challenges to the Implementation of Transitional Justice” in Mo Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 161.

<sup>32</sup> David Bloomfield, “Strategies for Reconciliation: Are Justice and Peacebuilding Complementary or Contradictory?” in Mô Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 60.

<sup>33</sup> See Pablo de Greiff, “Reparations and the Role of International Cooperation” in Mô Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 51, referring to Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford: Oxford University Press (2006).

nevertheless strive for a measure of recognition. Reconciling these interests is a task that can efficiently be approached through mediation processes. Insights gained in domestic judicial systems in the context of victim-offender-mediation<sup>34</sup> prove that determining the adequate reparation from the range of possible material and symbolic benefits can only be done on a case-by-case basis. As pointed out by de Greiff<sup>35</sup>, in order to avoid the impression that reparations constitute the currency with which the state tries to buy the silence of victims, open, deliberative, and participatory processes must be designed. The suggestion is to design these processes, including the coordination of individual reparation measures in the overall reparation program, according to the interest-based approach introduced above.

#### 3.1.4. *Role of Mediation in the Process of Healing*

Every process of healing is, by definition, highly individual; even the widespread assumption that it takes considerable time until a healing process is accomplished does not necessarily apply to all cases. Unlike formal mechanisms such as trials, an informal mechanism such as mediation depends on the direct contact between the involved actors, often including emotional responses and non-verbal manifestations which can accelerate healing processes significantly. Unlike power-based mediation techniques (which, due to the possible effect of feeling *manipulated into* rather than *autonomously elaborating* an agreement, might even increase the impression of victimization), mediation practiced in the facilitative style allows all participants to uphold their sovereignty and dignity – or even re-establish it through the participation in the autonomous act of decision-making. Mediation itself can, therefore, be a significant building-block in the healing process.

#### 3.1.5. *Role of Mediation in Institutional Reforms*

Finally, interest-based mediation can support the process of institutional reform. After the loss of confidence in the functioning of authorities and institutions in the aftermath of conflict, mediation techniques can be useful when integrating the potentially conflicting interests of various society actors into one process of institutional design.

### **3.2. Mediating the Framework of Intervention**

In addition, mediation can be used for elaborating the framework of intervention. The fields of coordinating the actors and ‘designing’ the adequate process in cooperation with those primarily affected by its results – instead of this decisive course of action being determined from the outside – bear great promise for the success of the transition.

#### 3.2.1. *Coordinating the Actors*

The country-specific context has a crucial impact on attempts of designing transitional justice programs. Relevant factors include the regime’s and the

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<sup>34</sup> For a recent contribution see See Mark Umbreit, Robert Coates, and Betty Vos, “Victim Offender Mediation: Evidence-Based Practice Over Three Decades”, in Michael Moffit / Robert Bordone (eds.), *The Handbook of Conflict Resolution*, San Francisco: Jossey Bass (2005), 455-470.

<sup>35</sup> See Pablo de Greiff, “Reparations and the Role of International Cooperation” in Mô Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 54.

opposition's level of legitimacy, the strength and shape of civil society, and the presence of international actors. During the configuration of the framework of any transitional justice program, any lack of coherence and effective coordination between external players can threaten the success of the process. As actors may duplicate, if not actually undermine each other's efforts, developing an adequate response in post-conflict situations requires a comprehensive act of coordination between governments, nongovernmental organizations, civil society and international organizations. This task may include the weighing and bargaining of priorities and the allocation of money according to conflicting donors' agendas as well as according to urgent needs of the populations or institutions involved. In addition, given the multiplicity of actors interested in the fate of societies in transition, the number of possible intermediaries and the possibility of multi-channel mediations, the sophisticated coordination between these framework actors and their respective motivations is essential. Mediating between those willing to mediate should be done according to an interest-based rather than power-based model.

### *3.2.2. Designing the Process*

The flexibility of the mediation process makes it possible to actively discuss the suggested "process design" with the participants and adapt the design according to the particular interests elaborated. For example, it should be discussed and negotiated with the parties whether all relevant actors are present, or whether the interests of additional parties might become so relevant that their presence would be necessary. Especially in sensitive situations it might be useful to start the transition process with a small group of participants on the track two level and, as a second step, invite representatives on a more formal level once the agenda has been clarified. Another question that has to be discussed is the definition of what will constitute agreement in the absence of pre-defined decision-making rules. Although the basis is the assumption that all decisions require unanimity, other options should be discussed especially in processes involving a large number of parties. Steps of the process have to be sequenced and specific transitional justice mechanisms have to be coordinated.

## **4. ELICITING INTERESTS AND DEFINING PRIORITIES**

The following section of the paper shall illustrate the actual heart of interest-based mediation processes: the spectrum and diversity of interests that have to be taken into account when mediating the tensions between peace and justice in transitional societies.

### **4.1. Matrix of Interests**

A brief delineation of possible profiles of interests underlying mediation processes shall serve three purposes: stressing that interests can be competitive as well as non-competitive in nature, illustrating how flexible the task of eliciting interests must be approached, and explaining how a focus on interests defines the methodological course of action of the mediator. For that reason, interests of the individual victims, the society in transition, the international community, and the former perpetrators are presented.

#### *4.1.1. Interests of the Individual Victims*

I would like to start my short investigation into the possible interest structures and profiles of former victims by putting a question mark behind the statement

that victims “understandably gain a sense of satisfaction when they see their perpetrators punished in the name of society”.<sup>36</sup> This may, but need not necessarily be true. The interests of individual victims show significant differences; acts that trigger satisfaction in one victim might trigger disgust in another person. The exploration of the past can be an essential part of a healing process for one person but result in further victimization in the case of his neighbour.

It can, however, be safely assumed that the following interests will be among those essential to most victims:

- *recognition as bearers of equal rights;*
- *solidifying the status of victims not as victims, but rather as citizens;*
- *reception of some form of reparation (meaning the provision of benefits of whichever nature);*
- *receiving respect for the intimate and personal character of dealing with the status as victim, including the deconstruction of expectations to forgive the perpetrators.*

Interests that may differ significantly (or may be completely absent) include

- *desiring revenge (for example by seeing the perpetrator punished and excluded from societal relationships);*
- *maximizing transparency and knowledge with regard to the own past, e.g. by offering names and precise acts of offenders;*
- *defining the adequate degree of contact with the perpetrator (on a spectrum between establishing a personal encounter or completely avoiding contact).*

#### 4.1.2. *Interests of the Society in Transition*

Given that each society consists of a significant number of entities and subsections (the interests of which might be divergent or complementary in character), comments on interest profiles of transitional societies are of a particularly speculative nature. In any event, it is decisive to perceive the society in transition as the bearer of its own and specific interests. Again, a set of interests likely to be present in transitional societies can be detected.

- *ensuring some form of collective memory of the events with tools of participatory remembrance (from collections of data to monuments and memorial days);*
- *improving community life and rebuilding the social fabric;*
- *strengthening the political will and increasing local ownership;*

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<sup>36</sup> David Bloomfield, “Strategies for Reconciliation” in Mô Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 60.

- *supporting the emergence of a culture of non-violent management of conflicts;*
- *discouraging future human rights violations;*
- *establishing new leadership and working military;*
- *reconstructing trust in institutions;*
- *establishing structures for a smooth functioning of the society, including the suppression of organized crime and prosecution of criminals;*
- *supporting domestic reform constituencies.*

When eliciting the interests of societies in transition, it is particularly relevant to adequately acknowledge the specific political, cultural and social context in order to avoid an attitude of overbearing universalism. If the profile of interests is not carefully analyzed, criticism of transitional justice as a formal, predetermined, almost imperialistic mechanism imposed by the Western world can be more than justified. Examples for these possible, highly individualistic interests include:

- *defining and limiting the role of external players' intervention (for example, confining it to a specific arena);*
- *deciding about the degree of commitment to a democratic future;*
- *defining a new national ethos (which may or may not be in accordance with the general value system of the international community);*
- *establishing respect for the nature and structure of the country's legal system, traditions, and institutions.*

#### 4.1.3. *Interests of the International Community*

As the norms of sovereignty have changed, the perception of what constitutes an international as opposed to a domestic concern has changed as well.<sup>37</sup> The international community – abstractly defined as “an ensemble of rules, procedures and mechanisms designed to protect collective interests, based on a perception of commonly shared values”<sup>38</sup> – has emerged not only as an abstract concept, but as a veritable actor, as an interested third party to international transactions. More concretely, situations exist in which the goals of the international community and the other actors' goals may not be aligned, which illustrates that in transition processes, interests of the international community may be at stake that by far exceed the mere interest in peace as such:

- *shielding the international system from further transaction costs of a conflict;*

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<sup>37</sup> Bruce Cronin, “Multilateral Intervention and the International Community”, in Michael Kerren / Donald Sylvan (eds.), *International Intervention*, London: Frank Cass (2002), at 147.

<sup>38</sup> Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a new Century” (henceforth “Survival of Mankind”), 281 *Recueil des Cours* (2001), at 88.

- *preserving and developing the universally accepted basic norms in the areas of human rights;*
- *supporting the role of ad-hoc criminal tribunals and the International Criminal Court;*
- *holding individuals accountable for serious crimes in order to prevent or at least discourage future human rights violations and to further establish the rule of law;*
- *establishing respect for and trust in the agencies of the international community involved in the process of transitional justice;*
- *creating precedents for future transition processes with the involvement of the international community;*
- *respecting, incorporating and applying international standards for fairness, due process and human rights in the administration of justice;*
- *supporting the emergence of a culture of non-violent management of conflicts;*
- *preserving the close-knit network between the various international actors involved in the processes of transitional justice;*
- *identifying the general role of the United Nations in peace operations.*

#### *4.1.4. Interests of Former Perpetrators*

Due to their considerable relevance during peace negotiations, a fourth group should be prominently mentioned, namely that of the former perpetrators. Interests relevant for this group of actors include:

- *restoring the dignity of the perpetrators<sup>39</sup>;*
- *receiving attention for the intimate and personal character of dealing with the status as perpetrator and the changed status and reputation in society;*
- *ensuring the application of just and fair patterns and mechanisms for allocating guilt and punishment.*

Again, the interest profiles of the perpetrators can differ widely. Some of those more individualistic interests are:

- *determining a suitable degree of transparency and knowledge with regard to the own past (which can mean an interest in systematically exploring one's motives and the fate of the victims of one's actions or in turning the page as fast as possible, leaving the past in complete darkness);*

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<sup>39</sup> Jürg Lindenmann, "Transitional Justice and the International Criminal Court" in Mò Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 133.

- *defining an adequate degree of contact with the victim(s) (again, on a spectrum between establishing a direct encounter or completely avoiding contact);*
- *defining a new status in the society that is compatible with the existing measure of self-esteem as well as with the perceived degree of guilt.*

## **4.2. Observations**

Three observations shall be made. The first regards the fact that, with the exception of the clear-cut universal interests of the international community, profiles of interests have to be analyzed on a case-by-case basis. This underlines the necessity to employ communication and mediation methods which can elicit interests and support individuals and societal actors in formulating their perspective on past events and current preferences. Secondly, it can be observed that the international community has a whole number of genuine interests when being involved in processes of transitional justice, some of which are not shared by any other actor. To make this point more graspable: the individual citizen cannot be expected to understand or even share the interest in fostering the legal foundation of the international community. And thirdly, it becomes evident that, while some interests are compatible or could easily be combined if some creativity is injected in the negotiating process, others are clearly competitive in nature. Therefore, one of the essential questions is how to prioritise these interests.

## **4.3. Prioritising Competing Interests**

Once the specific profiles of interest (including those of the victims and perpetrators, of the society in transition and of the international community) have been elaborated and matching options been generated, two priorities must be closely observed. First, there must be an overriding focus on the interests of the victims as compared to those of the perpetrators, and second, the most fundamental interests of the international community cannot be subject to any deal-making and negotiation – they have an overriding character with regard to all other interests involved.

### *4.3.1. Focus on Victims' Interests*

This principle is largely self-explanatory. In situations where interests of victims and interests of perpetrators collide, those of the victims must prevail. This principle is likely to find application with regard to questions like access to information as well as to the establishment *vel non* of direct contact between victims and perpetrators.

### *4.3.2. Overriding Status of International Community's Interests*

The following, ambivalent statement by Juan Méndez can be seen as quite telling when it comes to defining the status of (international) law:

International law and the practice of states and international organizations provide guidelines to policymakers in framing the questions that a peace process must address. This is not to say that mediators cannot use their own discretion in offering incentives at the negotiating table. The law provides a framework, not a straightjacket. Even so, there

are ethical and legal limits to the pursuit of peace, beyond which peace may be little more than silencing of the guns, without justice.<sup>40</sup>

Although in many respects, international law provides nothing but a framework, in other respects it has started to provide a straightjacket, and this fact is of one of the most remarkable developments in the international legal arena. The international community has given an absolute quality to some fundamental norms, which cannot be subject to derogation. Despite the fact that the roots of fundamental norms of the international legal system can be traced back to natural law<sup>41</sup>, explicit, residual categories for fundamental norms only developed after the Second World War.<sup>42</sup> It is essential for the further development of the idea of an international community that this community is capable of enforcing its most fundamental interests and values. As clarified by Christian Tomuschat:

the litmus test for the fruitfulness of the concept of international community must be whether, impelled by its driving forces, rules, procedures and mechanisms have been established with a view to vindicating and enforcing the common interest recognized by all States. Should nothing of specific legal significance have materialized, we would know that we still find ourselves in the antechamber of politics, waiting for the law to see the light of the day.<sup>43</sup>

For the context of mediation in transitional scenarios this means that some forms of amnesty are simply not an option, and that there is a strict policy against endorsing amnesty in respect to war crimes, genocide, crimes against humanity or gross violations of human rights.<sup>44</sup> Mediation in transitional justice processes has to take place in the shadow of – and with close reference to – the fundamental norms of public international law.

## 5. CONCLUSION AND RECOMMENDATIONS

It is the declared aim of the conference on peace and justice to conceptualize the interplay between the conflict resolution perspective, the justice/human rights perspective and the social, economic and political development perspective. This study illustrates the contribution that one specific field within the large arena of contemporary conflict resolution theory and research can offer – that of international mediation.

In essence, the task of mediators active in transitional justice processes is a twofold one: to help negotiate every single aspect of peace that actually is negotiable with all the creativity and methodological skills possible – and to strictly avoid and counteract negotiations about topics that are *not* negotiable. While power on the side of the mediator is not necessary for the fulfilment of the first task (in fact, pressure hampers rather than encourages the articulation of interests), power in the hands of the mediator can be even detrimental to fulfilling the second task. Only if the mediator bases his authority exclusively on the resources of legitimacy, process expertise and access to information (rather

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<sup>40</sup> Juan Méndez, “Peace, Justice and Prevention: Dilemmas and False Dilemmas” in Mô Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 17.

<sup>41</sup> Alfred Verdross, *Die Quellen des universellen Völkerrechts*, Freiburg: Rombach (1973), at 25.

<sup>42</sup> Stefan Kadelbach, *Zwingendes Völkerrecht*, Berlin: Duncker & Humblot (1992), at 128.

<sup>43</sup> Tomuschat, “Survival of Mankind” (cited above), at 78-79.

<sup>44</sup> See “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, Report of the Secretary-General (August 2004), UN-Doc. S/2004/616, at 9.

than on a system of rewards and coercion), the expectations of the parties will adapt accordingly.

The consequences are that specific models of mediation prove to be more useful than others, and that the selection of intermediaries for transition processes deserves the fullest attention and care of the international community. This short investigation into the linkages and the interplay between mediation (models) and transitional justice arrives at the following conclusions:

**I. Clarity in Terms of Models and Roles in Mediation:** The discussion on transitional justice would benefit from a more precise perception of the significant differences between mediation models. Some commentators and practitioners still understand mediation as a tool of foreign policy-making that is being used especially by powerful intermediaries to impose their own interests. Many others see it as a sophisticated instrument based on the principles of conflict theory and cognitive psychology, used by non-partisan third parties in order to optimize self-determined processes of conflict resolution and decision-making. The blurring of the lines between these two categories of mediation diminishes its reputation and effectiveness.

**II. Focus on Interest-Based Mediation:** In many instances, for ending hostilities, power-based mediation approaches are necessary. However, during the later stages of peace-building, and especially when designing transition processes, only sophisticated efforts of eliciting and observing the essential interests of all actors can ensure durable peace. In the context of transitional justice, interest-based, facilitative mediation with direct reference to the fundamental norms of international law proves to be a valid method for dealing with the tension between peace and justice and the multiple facets thereof.

### III. Selection of Intermediaries

To understand why some parties – governmental or nongovernmental – make better mediators and are able not only to gain entry into a conflict but also to sustain a process of negotiation, we argue that one has to look beyond the kinds of resources and leverage these mediators bring to the table to their status, legitimacy, and broader political relationships with the parties concerned.<sup>45</sup>

When choosing the suitable mediator for processes in the context of transitional justice, two aspects should be observed: First, in order to ensure the self-determination of the parties, mediators should have full legitimacy but no significant power resources at their disposal if they want to engage in an authentic process of interest-based mediation. Second, to ensure neutrality and impartiality, the mediator should not have significant own interests in the substantive issues.

### IV. Integration of the International Community

The international community needs to participate in mediated processes of transitional justice in a rather specific role. As shown above, there exists a whole number of situations where the international community no longer is an external entity, but a *genuine party*. In these instances, taking the role of the mediator

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<sup>45</sup> Chester A. Crocker / Fen Osler Hampson / Pamela Aall, “Rising to the Challenge of Multiparty Mediation”, in Chester A. Crocker / Fen Osler Hampson / Pamela Aall (eds.), *Herding Cats – Multiparty Mediation in a Complex World*, Wahington: United States Institute of Peace Press (1999), 665-698, at 667.

and at the same time adequately representing the genuine interests of the international community would be a contradiction, because it would inevitably lead to role conflicts obstructive to the mediation process. Therefore, where interests of the international community are at stake, it has to be represented at the table – but not in the role of the mediator. Therefore, in these scenarios, a representative of the international community must take part in the mediation process as an additional party to the proceedings.

## **V. Fostering International Legal Order in Transition Processes**

Justice and human rights topics may be seen by certain parties as flexible issues worth compromising. What is needed is a clear commitment to the overriding status of the fundamental rules of the international community, and clear limits to the temptation to use the exceptional nature of the case at hand as an excuse for acting against those minimum standards. A clear communication that any mediator active in transitional justice processes is bound by the core principles embodied in international law will make his work much more easy, transparent and sustainable. In transitional justice processes, flexibility finds its limits where fundamental legal norms are infringed upon. This rule, along with other moral and ethical principles, must be translated into all relevant guidelines for the practice of mediation in the field of transitional justice.

Those who presume to intervene in the lives of others, especially in critical situations of conflict, need to consider very consciously the moral and ethical consequences of their actions.<sup>46</sup>

### **In a nutshell, actors and decision-makers in the field of transitional justice should**

- ***sharpen their perception of the differences between existing mediation models and focus on interest-based, facilitative approaches;***
- ***ensure that sophisticated analyses and subsequent consideration of the interest profiles of all relevant actors are included in the mediation process and its outcome (including, but not limited to, the victims, the society, the perpetrators and the international community), because each category of actors is in a position to sabotage the transition process if its interests are ignored;***
- ***solidify the prohibition of amnesties in cases where fundamental norms of the international community have been violated and communicate ever more clearly that the core elements of the international legal order are not at the disposal of the mediator.***

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<sup>46</sup> Ronald J. Fisher, “Methods of Third-Party Intervention”, in Martina Fischer / David Bloomfield (eds.), *The Berghof Handbook for Conflict Transformation* (henceforth *Handbook for Conflict Transformation*), Online-Version (2004), 1-27, at 14; online version at [http://www.berghof-handbook.net/articles/fisher\\_hb.pdf](http://www.berghof-handbook.net/articles/fisher_hb.pdf), at 22-23.

## 6. EXECUTIVE SUMMARY

- In the international arena, a considerable spectrum and diversity of mediation styles can be observed. Each mediation model contains the seeds for a set of recommendations to policymakers and mediators.
- For the context of transitional justice, the model of interest-based, facilitative mediation, exercised in the shadow of and with clear references to public international law, seems to be particularly useful for mediating the tension between peace and justice inherent in transition processes. The specific role of the intermediary can help to disentangle the knot of personal and collective interests involved in a structured and controlled way.
- Areas for the promising application of this mediation model include such diverse fields as the mediation of possible trade-offs between the various aspects of justice, the precise shape and distribution of adequate reparations, the coordination between the various actors willing to support the transition period, and the overall design of the peace-process.
- In addition, non-power-based mediation processes maximize the autonomy, sovereignty and dignity of the conflict actors involved, aims closely connected with those of transitional justice, and can thereby contribute to the process of healing.
- In the heart of interest-based, facilitative mediation processes, the interests and needs of all relevant actors in post-conflict societies must be carefully analyzed so that for each of them, a comprehensive profile can be elaborated. The character and intensity of the interests of individual victims differ significantly. When eliciting the interests of a specific society in transition, it is particularly relevant to adequately acknowledge the political, cultural and social contexts in order to avoid adopting an overbearing universalism. On the side of the international community, interests may be at stake in transition processes that by far exceed the mere interest in peace as such.
- The rules for prioritising potentially conflicting interests are straightforward: there must be a priority on the interests of the victims as compared to those of the perpetrators, and the most fundamental interests of the international community have priority over all other interests involved. For the context of mediation in transitional scenarios this means that some topics are simply not negotiable, and that there is a strict policy against endorsing amnesties in respect to war crimes, genocide, crimes against humanity or gross violations of human rights.
- All this should result in an ever more sophisticated selection both of the mediators active in the field of transitional justice and, in particular, of the methodological approaches and techniques they apply
- Interest-based, facilitative mediation can, of course, not be the one answer to the fundamental questions arising in the context of transitional justice. But it provides a social space to bring together the relevant actors and enable a productive, joint quest for the specific answers relevant in each individual case. In essence, if transitional justice can be perceived as a “tool for shaping a new

society”<sup>47</sup>, then interest-based mediation can be seen as one essential device to further optimize and sharpen this tool.

### **About the Contributor**

Lars Kirchhoff is the academic director of the Master Program on Mediation and the Forum for Negotiation and Mediation at the European University Viadrina. He specialized in alternative dispute resolution during his postgraduate studies at Yale Law School and at the U.S. District Court of Northern California. In addition to his practical work as a mediator, Lars Kirchhoff is teaching mediation and ADR skills at the German Academy of Judges, Bucerius Law School and the Training Academy for International Diplomats at the German Federal Foreign Office.

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<sup>47</sup> M6 Bleeker, “Challenges to the Implementation of Transitional Justice” in Mo Bleeker (ed.), *Dealing with the Past and Transitional Justice* (cited above), at 160.