

Juan Mendez. “Justice or Peace? Can We Have Both?”

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Thank you very much Professor Paus for that kind introduction. I also want to thank Mount Holyoke for inviting me to this important conference and as I congratulate you for the idea of having a conference on this topic, I am very honoured to have been invited to be a part of it and I look forward to our discussions tomorrow.

So I'm going to talk about Peace and Justice in conflict and post-conflict situations and I'd like to start by saying that until recently, and I mean by recently the early 90s, the conventional wisdom was that if you had to choose between peace and justice, peace would always trump justice. That the imperative of silencing the arms and putting an end to conflict superseded any considerations about rights of victims and the right to see justice done, and not only that it did that but that it should. Even today, of course, you will find many voices especially at the moment in which you can begin to envision an end to conflict, the pressure to put an end to conflict at the expense of justice to the victims is enormous. And understandably so, war is in itself a major human rights violation, but also the context in which human rights violations happen but also that experience shows that the context even of peace negotiations, even if they don't reach an ultimate peace, is always more beneficial to human rights performance than the context of all out conflict. And so as I said the conception that peace is more important and that therefore all other considerations should give way to peace was until recently the only consideration that now remains a very important consideration.

I will try to suggest that in the 90's especially and up to today there has been a paradigm shift because the international community has come to realize that it is not so simple. It is not just a matter of having peace at all costs, but that justice is a necessary component of a lasting peace.

How did this shift happen in the late 20th century? We can all have different interpretations of the events that led to it but I will start by saying that transitions from dictatorship to democracy and from conflict to peace that were more or less contemporary news with each other starting in Latin America but then moving on to Eastern Europe and then to South Africa and then going on even today yielded some societal experiences by which the civil societies particularly, and I would say victims organizations as well, champion a need to reckon with the legacies of past human rights abuses.. A need to deal with the past as some people have called it, and not only a need but an effective way of doing it and an effective way of coming to terms with the immediate past so that the transition did not leave open wounds in the fabric of society that would render the transition somehow an empty promise to a lot of people who have suffered a lot during the conflict and now had to live with a peace or a transition that did not satisfy their aspirations to justice. At the same time this was the end of the Cold War and so - paradoxically - we had the end of a conflict that threatened to destroy the world as we know it, but the appearance of conflicts regionalized or even localized conflicts that were not contained but were much more bloody and tragic than we had seen during the Cold War. And the international community decided that it had a stake in preventing regional conflict from creating the possibilities of expanded conflict going into borders but beyond that.

Because the international community didn't have too many tools to deal with those localized and regionalized conflicts, one of the pages that they borrowed from societies going through transitions was the need to incorporate justice into the demands to put an end to the

conflict even while the conflict was going on. This is the experience of the former Yugoslavia, for example, with the international community you may say because they didn't have the guts to do something more aggressive to stop the carnage. They did create an international criminal tribunal for the former Yugoslavia with the expectation, perhaps the hope, that the threat of justice would kind of contain the murderous instincts of some of the actors in the former Yugoslavia by threatening with prosecution and justice. This created a resurgence of the ideas from 1945, from the end of World War II, that the international community had a stake in preventing tragic violations, mass atrocities including genocide but also crimes against humanities and even war crimes, and that the best way to do it was to recover the ideas from the end of World War II and the promise of “never again” for the things like the Holocaust by insisting on reckoning with the past by way of accountability, and particularly criminal accountability. And they created ad hoc tribunals like the international criminal tribunal for the former Yugoslavia and then for Rwanda that had significant success.

You may argue whether they had success in stopping the carnage, but they did have success in establishing the principle that international justice could be done and it could be done with significant respect for fundamental principles of due process and fair trial guarantees and that it was not impossible at the international level to conduct trials of this sort. But I would also submit that at least in part though it's not demonstrable with empirical evidence, they also may have had some success in preventing worse abuses that we already saw. An argument for it would be the Dayton Agreement that put an end to the war in the South Balkans because at the Dayton Agreement there wasn't a pressure to dismantle the international tribunal for the former Yugoslavia and to call it off altogether and because the tribunal and the prosecutor refused to be beholden to the political organs of the United Nations and to the powerful states and insisted that while they had a mandate they had to

execute it independently. The result was that the major bad actors in the conflict, Karadzic and Milosevic, were side-lined from the peace agreement. And peace became possible in Dayton because they weren't around to spoil the peace and the fact then that an objective standard like criminal justice was used to side-line those who were an obstacle to peace made peace possible. Obviously there are many interpretations to this episode, but that's mine and that seems to me to speak to the possibilities of justice contributing to peace in ways that perhaps were not envisioned at the time but that had that result.

So we come to the tipping point as I think it is, the 1998 Statute of Rome for the International Criminal Court. And I think it is a tipping point in this creation of a new shift, a new paradigm, in how conflicts are to be resolved in several ways. First we now have a permanent organ credibly put together by 130 states, more or less at this point, that is an ongoing institution that is there to deal with the problems of justice in conflict. Yes, it is going through difficult times and, yes, it is open to challenge. But it is there, and it is an opportunity to prosecute perpetrators of mass atrocities even while they are in full use of their powers that was not there before and that becomes itself a possibility for action by the international community that doesn't depend on the political will of the Security Council to create a new organ whenever it is necessary. But, in addition, the Rome Statute adds clarity and understanding to what crimes are those that trigger the obligation of the international community's response to them by defining especially crimes against humanity. That was a terminology that has been around since Nuremburg; but it did not have, until 1998, a clear treaty-based definition, and now we know what we mean by crimes against humanity. And, of course, genocide and war crimes did have that definition from the late 40's but there wasn't ever a significant institution that could realize the prohibition of genocide and the prohibition of war crimes by means of prosecution and punishment.

Thirdly, because the principle of complementarity that is built into the Statute of Rome establishes clearly that the first responsibility is in the territorial state – that is the state where the atrocities happen - to live up to its obligations and to investigate, prosecute, and punish the perpetrators of mass atrocities and because the jurisdiction of the international criminal court is triggered only after it is determined that the local jurisdiction is unwilling or unable to fulfil those duties, it conversely creates an obligation or actually crystallizes an obligation that we owe to the Statute of Rome for this new situation in international law. And I would say finally that it is a paradigm shift or a tipping point in the paradigm shift because of the states that sign and ratify the Statute of Rome; and as I said there is like 130 of them and at least 20 or 30 more signatories that have not yet ratified; so we're talking about the huge majority of the international community that has pledged to cooperate with each other and with the international criminal court in making sure that there is no impunity for these major crimes. If they are going to live up to that obligation, that means that they have very consciously and very explicitly established the principle that impunity is the worst enemy of peace – not only of justice but also of peace.

This obligation to investigate, prosecute and punish has been written in treaties and now has been authoritatively interpreted by human rights organs of different varieties, international courts, but also treaty bodies of the United Nations. And it's clearly established, for example, in the Convention against Torture and in the customary international law regarding torture that even a single episode of torture elicits from the territorial state an obligation to investigate, prosecute and punish that torture; and when torture is committed as part of a widespread systematic pattern of abuse then it becomes a crime against humanity.

In the case of genocide and of war crimes, both the Genocide Convention of 1948 and the Geneva conventions of 1949 established that there is an obligation not to let the crimes of genocide or the grave breaches of the Geneva Conventions go unpunished. That has been

among us since the 40's but the opportunity to make it a reality starts essentially with the existence of an international criminal court. If there is an obligation to investigate, prosecute and punish, then the corollary of that is that any measure that tends to nullify that obligation is contrary to international law. By that I mean that amnesties and other forms of clemencies that are really occasions for impunity, and that then creates a framework in which when you are in a peace negotiation process you have to offer benefits to both sides but with limits.

You cannot offer a framework of complete impunity for the most serious crimes that they may have committed. For example, in 1999, after the Lome Accord that put an end to the war in Sierra Leone, the United Nations came up with guidelines for mediators that were revised and readopted in 2005 that basically tell UN mediators it does not apply to mediators from other institutions. But UN mediators at least cannot accept and cannot promote peace deals that have the effect of violating fundamental international law principles. That means, for example, that certain amnesties at least, not all amnesties – let me be clear on that - but some amnesties are contrary to international law and cannot be offered in the context of peace negotiations.

Our existing standards have existed since the beginning of the development of the human rights cannon. But they have been more recently authoritatively interpreted, as I said, by several different organs of human rights protection. It is firmly established that amnesties that have the effect of creating impunities for mass atrocities are unacceptable in international law. This is new in two senses. First, international law governs what can happen at a peace negotiation table, and by international law I also mean international human rights law and the laws of war, international humanitarian law as it is sometimes called. They create a framework that peace negotiations have to follow – they cannot ignore them. And in a second sense, they mean that not every kind of peace is acceptable to the international community, or to international law for that matter. But it also means that it is only a framework and not more

than that. It does put limits on what can be offered at the negotiating table but it doesn't solve the problem of how do you achieve both justice and peace.

It does leave room for creativity and adaptations to local cultures, to the circumstances in which the conflict is ongoing or is about to be put to an end. And it does establish some outside limit; but it doesn't tell the whole story about how to reach a peace agreement. The important consideration now in this new framework that I am trying to describe is that peace with justice is most likely to be enduring and lasting and that therefore it is preferable over peace at any cost. Peace at any cost runs a risk of descending into new conflict, and, in fact, there are some studies that show that conflicts are renewed from time to time, and many times they are renewed because the peace agreement is unsatisfactory for a variety of reasons. But, among other reasons, it is unsatisfactory because it has left wounds open in society and aspirations for justice that are not satisfied. And that gives the framework for arguments for new conflict to erupt over and over again.

So how do we deal then with trying to deal with peace and justice simultaneously and particularly with this aspiration that I know everybody who discusses this – those coming from the human rights world like I do but also those coming from the peace conflict resolution realm or even the humanitarian relief areas – we all agree that the most preferable outcome is peace with justice. What we may disagree upon is to what extent we can let aspirations for justice stand in the way of peace making. There I think the first step is to accept that there is a dilemma. I have been talking about a legal framework, but the dilemma does not disappear because the law says there are some limits on what you can offer.

Accepting that there is a dilemma, that peace is more complicated when you insist on justice, is a first step, and I think we should all recognize that. But the fact that it is a dilemma doesn't mean that automatically peace should trump justice or that we are left with this binary

choice of either we want justice or we want peace. We owe it to ourselves, but especially we owe it to the victims and we owe it to the societies that are going to live with the end of the conflict after the conflict ends, to come up with a better, more creative, and richer solution to the urgent need for both peace and justice. We have to come up with solutions that have peace and justice nurture and support and reinforce each other.

So here's where transitional justice enters. I say this because transitional justice is the terminology, not a very adequate one in my mind, but one that has become a term of art that deals with both the legal but also the practical and moral and political considerations that go into how societies deal with legacies of mass atrocities, and especially when they are in the relatively recent past. How you cure the wounds, how you look to the future but not by simply sweeping the past under the rug but by creating conditions in which people who have been fighting each other now can live in peace and can create a society that satisfies all of them in the immediate and in the longer term future as well.

So transitional justice is an evolving standard that has come from interpretations of international human rights law and international humanitarian law. But we must remember that first of all they emerge from societal practices, from the actual way in which societies live through these transitions. The law comes later. It comes as an adaptation and a learning lesson from societal practices that started in Latin America and went on, as I said, to Eastern Europe and to South Africa and now reinvented in many different parts of the world all the time wherever societies are trying to put an end to conflict or to dictatorship and they are trying to build a future where that conflict or that dictatorship is really a thing of the past. It is not going to happen again anytime soon, and you ensure that by making sure that the legacy of abuses does not linger and is not very near the surface and is not about to haunt and create problems for all of us immediately.

The legal standards are important in themselves as well. So even though they have learned their lessons from societal practices, they have also resulted in principles that are accepted and validated by those practices, but also by the most authoritative interpretations of international law. The transitional justice basically says that in the face of a legacy of mass atrocities the territorial state has four major obligations: One is to the truth, that is to examine and discover everything that can be reliably established about what happened and why and to reveal it and disclose it to the public and the victims especially. The second is to justice, which is what I was saying that these crimes are so egregious that they cannot go unpunished, and so the state has an obligation to investigate, prosecute and punish them with utmost regard and respect for principles of fair trial and due process but to effectively prosecute them. The third is reparations. The victims are entitled from the state to reparations for the harm that they have suffered, and it has to be reparations that don't insult their dignity as human beings and particularly that they recognize that if they were second class citizens and that is why they were victimized, now they are first class citizens like everybody else. The reparations are a symbol of that recognition that they are no longer second class citizens. The fourth is institutional reform because the state has an obligation to reform the institutions that have been the vehicle to these human rights violations. I don't mean only the police and the military, I also mean the judiciary, the prosecutor's office, et cetera; and the reform of them is a way of making sure that these episodes don't repeat themselves but also of cleansing the ranks of those institutions so that people who have abused their power in those institutions are no longer in a position to continue to abuse their power and turn them into vehicles and machineries of mass atrocity.

So those are the four obligations, and I stress that they are obligations because they are not choices. They are not choices in the sense that a state can decide to do one but not the other three. For example, pay reparations, but don't expect anything else. On the other hand,

they are independent obligations. So a state that cannot necessarily pay reparations nevertheless has to uncover and discover and disclose the truth and has to try to prosecute whomever they can prosecute, as long as they do it with respect for the rule of law and so on. So they are obligations of means and not of results. So the fact that not the whole truth is known, not everybody is prosecuted that should be prosecuted does not mean that the state does not comply with its obligations as long as it does each one of them in good faith and to the utmost of its abilities.

As you see, I have not mentioned reconciliation. I haven't mentioned it because reconciliation is ultimately the object of the whole exercise and it is also the critical norm. I mean whatever we do in truth, in justice, in reparations, in institutional reform, if it's not going to lead to reconciliation, we should think twice about what we are going to do because that is the reason why we want a new state and a new society is that we want a reconciled society. On the other hand, reconciliation should not be understood as a code for impunity. It is not the kind of excuse for not prosecuting and not admitting the truth that we say "Well, we're looking for reconciliation; so we better not touch this issue. We better look forward and not discuss the past." That is a false kind of reconciliation that, in many parts of the world, has given reconciliation a bad name because it is almost a code word for impunity.

On the other hand, this reconciliation should be well understood – it is reconciliation between warring factions, between ethnic groups that have been confronting each other or political groups that have been confronting each other. But it is not reconciliation between innocent victims and their victimizers. It's not reconciliation between the victim of torture and the torturer. That is a false reconciliation that, as I mentioned before, has given a bad name to the word reconciliation. On the other hand, there are some specific aspects of reconciliation that in some kind of conflicts do enter the picture of transitional justice and should enter the picture of transitional justice. For example, in Darfur, where even if, and we

never got to that point, but even if we prosecuted everybody and we provided a credible narrative for truth telling and we offered reparations and narratives for truth telling, there is still a task to seek reconciliation between the so-called Arab tribes and the so-called African tribes. But those reconciliation talks have to have a very definite content. They should be about return of property, return to homelands and to their villages, agreements about grazing rights and about water rights and about passage rights for cattle. All of that, I would consider part of the reconciliation process, and it would not necessarily be covered by the four legs of transitional justice that I mentioned before. I want to stress that those are specific conflicts that require specific reconciliation measures, and that it is difficult to generalize in other terms.

Other specific ways in which we can incorporate both peace and justice into the peace negotiations: First we have to recognize that all conflicts are very highly idiosyncratic. It is impossible to have a “one size fits all” solution for conflicts everywhere. But I think this framework that I am describing leaves enough room for creativity and local ingenuity and proposals of that sort. Especially if we consider the peace process in its dynamic sense, in a continuum that allows us to understand conflict and the resolution of conflict in stages, and in moments that each one of them requires different objectives and tools as well. If we do that, then it is impossible to say we won’t even start discussing unless you give us justice. That would be the non-starter where some human rights activists can, in fact, be an obstacle to peace because they want an all-or-nothing result, and you can understand why they do it. But the problem is, of course, that they don’t allow the conflict to come to an end so that they can have justice and they can have truth telling and they can have reparations for the victims.

We start by rejecting solutions that close the door on justice for the future. For example, if just for the purpose of coming to a negotiating table an insurgent group demands a complete amnesty even before dropping their weapons, then that is unacceptable because it

makes justice-making a lot more difficult down the road. Conversely, the victims groups and human rights groups should not be in the business of rejecting things like truce or armistice or just cease-fire agreements that at least have the possibility of bringing the peace agreement a step further to the resolution. In other words, what I am saying is that we should be prepared to defer the aspirations for justice to a moment, not only a moment in time but conditions in which justice and truth-telling and reparations are possible within this framework of international law that requires that we are very sincere and serious about the conditions under which we are going to have justice and the conditions about when we are going to have truth and the reparations. If there are no conditions for it because conflict is ongoing and we try to push through solutions of this sort, it's more likely than not that the truth-telling will not be complete, that the justice will be more like scapegoating, and that the reparations will not cover the universal victims that should be covered. So we have to note that we have to create the conditions for transitional justice to operate and the conditions are created by understanding this continuum and these stages of the conflict and of the resolution of the conflict in different ways.

We should realize that truth, reparations and institutional reform can be building blocks towards justice - and I understand justice here in a form of criminal prosecutions – and that it is appropriate to sequence them. It does not necessarily mean that you always sequence them that way, but it is one model that we shouldn't be afraid of exploring. As long as we don't conceive of truth-telling or even of reparations as alternatives to justice, and that is why I was talking about not closing the door on justice for the future. And there are some examples of peace agreements that have dealt with the possibilities of amnesties and have postponed or deferred the decision on amnesty and that, of course, is preferable to providing an amnesty that makes prosecution in the future, if not impossible, at least very difficult to do later on.

Since I have been talking so much about amnesty, let me say that I am not talking about all possible amnesties. I'm not saying that all amnesties are contrary to international law. In fact, there are some amnesties that are not only not contrary to international law but are required by international law. A protocol too of the Geneva Conventions - which is the instrument that deals more specifically with non-international conflicts - actually requires that at the end of an internal conflict, the parties offer each other the broadest and most generous possible amnesty. But what is meant by that is the amnesty for the crime of rising up in arms against a state, the crime of fighting. Now that is a crime in domestic law, and therefore it does require an amnesty at the end, because you can't get people to give up their arms if by giving up their arms they are going to be marched on to jail.

But it is one thing to say that the crime of rebellion or sedition is eminently subject to amnesties, and it is another thing to say that war crimes that are conducted in the course of the rebellion or sedition are also subject to amnesty. The International Commission of the Red Cross - that is the most authoritative interpreter of the Geneva Conventions and of the additional protocols - have made it very clear that amnesty provision excludes amnesty for war crimes, and war crimes can be committed in both international conflict and in domestic conflict as well. When you deliberately kill civilians or when you deliberately torture an enemy prisoner or when you kill an enemy combatant when he/she is hors de combat, that is no longer fighting, those are war crimes and those crimes are not covered by the amnesty protocol too. There can be even for serious mass atrocities, either in war time or in peace time, there can be some mitigation of punishment in exchange, for example, for providing evidence that can lead to the prosecution of people with more responsibility. It is important to figure out what we need to punish is those bearing the highest responsibility for the crimes not the small fish, the people who have made relatively small contributions to it. So it is appropriate to offer those some kind of clemency or mitigation of punishment. We should

not call it amnesty, if they participated in atrocities but offer them some mitigation of responsibility in exchange for the contribution to seeing justice done, as long as, of course, those arrangements are transparent and are not seen as unfair or a form of scapegoating. And finally, of course, we should have clemency on humanitarian grounds even for those who are the most responsible for the worst atrocities. The legal system should be in a position to allow humanitarian considerations to enter in the clemency procedure. But it is one thing to release an elderly and infirm war criminal so that he can spend the last days at home because he is very sick, and it is another one to say we won't prosecute them out of these kinds of concerns.

So let me get to my conclusions. First, we need to aim for the highest delivery of justice that is also consistent with a lasting peace. That is easier said than done, of course. But one way of doing this is giving voice to the victims themselves at the peace negotiations. They have the right to see justice done, and we should not pretend that we can speak for them or that we know what they want. We should consult them. We should actually ask them. We should identify the victims and the victim communities and ask them to tell us what they need and what they want and even beyond that. In many recent conflicts, they have been given a sort of a seat at the negotiating table, not with a decisive role in it but at least to be heard. Because of that, the peace negotiations have been richer and been more fruitful and at least have given better hope for a lasting peace because the victims are heard.

We should realize that the new paradigm that I am talking about makes peace-making more complicated. Undoubtedly, it is more complicated. It is not as easy now to come to a document that everybody signs on the bottom line. But I submit to you that because it is more complicated it also has better chances for a more lasting peace and a durable peace because it consults all the stakeholders and it is not left to the parties that have wreaked havoc in the civilian population and now have absolute control about what benefits they are going to grant

each other. The people who have lived through the conflict, if they have survived, now have a right to say how they are going to live with the peace. And if they are going to live with the peace, it means that we have all recognized that the deal is more complicated now. But it has a better chance of being a better deal, and it gives us better arguments to reject bad deals that are more unacceptable not only to the victims but also to the international community. Finally, I think it goes to show that impunity is itself an obstacle to peace and that unless we remove impunity it is going to be very difficult to get to peace to begin with.

Thank you very much.