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*Strengthening
mediation to deal
with criminal
agendas*

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Executive summary

Mediation suffers from a ‘blind spot’ concerning criminal agendas, and this may lead to unintentional spoiling of peace processes.

The 2011 *Global Burden of Armed Violence* report found that 55,000 fatalities that year were the result of armed conflict – while some 396,000 were the result of criminal agendas and interpersonal violence. Mediators have long experience of working with armed groups in the context of political and ideological disputes. But what are the implications of criminal agendas – efforts to control rents from illegal activities – for the practice of mediation? When are criminal agendas best ignored by mediators? When do criminal agendas risk spoiling peace processes? What can – and should – mediators do to prevent such spoiling?

This Oslo Forum Paper seeks to begin to answer these and related questions. It suggests that mediation may suffer from a ‘blind spot’ concerning criminal agendas, and that this may lead to unintentional spoiling of peace processes. The paper also suggests how mediation might be strengthened to address this blind spot.

Section 1 reviews several cases to show how a lack of attention to criminal agendas during peace processes can lead to different kinds of spoiling. Section 2 looks at cases addressing criminal agendas directly, through negotiation and dialogue. These include gang truces in El Salvador, violence interruption in the US, and community violence reduction in Haiti and Brazil. Some of these involved mediation between groups with criminal agendas, or negotiation between those groups and the state.

Drawing on experience from specific examples, Section 3 offers recommendations on four themes for ensuring that mediation fundamentals are respected, despite the presence of criminal agendas.

A. Preparedness. The challenge for mediators is to determine when criminal agendas threaten the success of peace processes – and what they can do about it. Criminal and political agendas may be difficult to distinguish, and criminal agendas may shift during a negotiation. Mediators can take several steps to be better prepared to deal with criminal agendas. These include: analysis of those agendas (through conflict and stakeholder mapping), creative access to information, selection of appropriate mediators, and making the financial case for dealing with criminal agendas.

B. Consent and inclusive ownership. Mediators should take special care to clarify the desired end-state for a process when criminal agendas are present. Is it simply to reduce violence (while tolerating criminality), or do parties want to resolve criminal agendas conclusively? Different preferences may require consent from different stakeholders over time. Mediators may need to build ‘inclusive enough’ coalitions of stakeholders, undertaking deliberate confidence-building measures before moving on to more ambitious agendas or bringing in more stakeholders. Ignoring the externalised costs of criminal agendas – frequently significant for women and children – is questionable from a rights perspective, and may generate further instability. Mediation dealing with criminal agendas will involve socialisation of economically motivated groups into legitimate economic processes. Public and private economic and financial actors therefore have key roles to play.

C. Impartiality and legal frameworks. What does it mean for a mediator to be ‘impartial’ in a process involving a criminal agenda? Enforcement of the state’s law may risk creating a perception of partiality to the state; but non-enforcement may risk the perception of the mediator as abandoning the protection of human rights. Engaging criminals in dialogue can create problems of moral hazard, including rewarding violence. We should consider a more nuanced approach to legal frameworks for dealing with criminal agendas in peace processes. It would be useful here to apply lessons and tools from transitional justice, such as conditional amnesty, conditional suspension of sentences, reconciliation, institutional reform and lustration. There is some evidence to indicate when amnesties may be most appropriate. Arguably, amnesty for some economic crimes may not be available under existing guidance to mediators, because those crimes may constitute crimes against humanity or war crimes.

D. Coherence and quality implementation. The early institution of monitoring and evaluation within mediation efforts may help to create an evidence base demonstrating the utility of efforts to deal with criminal agendas. This in turn may sustain the consent of stakeholders during the process. Criminal agendas can skew post-conflict elections, and it is important for mediators to prevent elections becoming opportunities for money laundering. Addressing criminal agendas in single areas can lead to the displacement of criminal activity to neighbouring states, local levels of governance, or other markets. Therefore, solutions may need to be multi-level and collaborative.

Section 4 offers some broader conclusions. It suggests a need for both realism about how much mediation can achieve on its own, and optimism about mediation as a catalyst of broader processes of socialisation likely to address criminal agendas over the longer term. It also suggests that these issues may be relevant well beyond peace processes, into contexts of political and economic transition, and national development. ‘Mediation’ of differences with armed groups with criminal agendas may be an increasingly common aspect of statecraft in a transnationalised economy. Further empirical and policy research may be needed to develop common international approaches and coordinating structures. These should allow states to manage their relationships with such groups, without abandoning territorial integrity, electoral legitimacy and human rights.

The paper is by no means conclusive. But, based on the limited evidence currently assembled, it suggests that mediation may yet prove a useful tool for dealing with criminal agendas. Mediation is by no means the *only* tool available for dealing with criminal agendas. Key questions are: when it is a smart tool for dealing with criminal agendas, how that tool can best be used either alone or in combination, and what steps may be needed to allow it to fulfil that potential.

Introduction

Mediators have long experience of working with armed groups in the context of political and ideological disputes. But an increasing proportion of the global burden of armed violence involves not just political, but also criminal agendas – efforts by armed groups to control economic rents from activities that are criminal under national or international law.¹ The 2011 *Global Burden of Armed Violence* report found that 55,000 fatalities that year were the result of armed conflict – while some 396,000 were the result of criminal agendas and interpersonal violence.² Increasingly, political and criminal agendas can be difficult to distinguish, as in recent experiences in Afghanistan, the Balkans and West Africa.

- What are the implications of criminal agendas for the practice of mediation?
- When are criminal agendas best ignored by mediators?
- When, on the contrary, do criminal agendas risk spoiling peace processes?³
- What can – and should – mediators do to prevent such spoiling?
- When will engagement with armed groups or governmental actors with criminal agendas help reduce violence and secure a stable political settlement?
- And when will such engagement stoke further criminal behaviour, risk the integrity of political institutions, betray victims' interests and perhaps even undermine the mediator's own credibility?

Is there any role for non-criminal actors to mediate disputes between armed groups with criminal agendas (including governmental actors), or disputes between such groups and states, humanitarian actors or other non-state groups? Such questions are increasingly pressing for international mediators. There is a growing recognition that both hidden and overt criminal agendas are having a significant impact on not only peace processes, but also global development outcomes.⁴

Technological advances today allow even small, local armed groups to integrate with global criminal markets, giving them access to rents from illicit trade in arms, resources, drugs, people, even credit-card details. Those rents in turn generate political and social power, strengthen criminal organisation, and foster group identity. As a result, criminal agendas can sometimes sustain armed groups whose military and political power makes them serious rivals to states as a source of governing power and normative authority. This ranges from the 'narco-insurgency' of the Knights Templar in Mexico to the armed gangs of the Sahel.⁵

The challenge for mediators is to determine precisely when criminal agendas threaten the success of peace processes – and what they can do about it.

Criminal agendas *within* governmental institutions can also lead to violence, as experiences in Guatemala, Sierra Leone, Liberia and Guinea-Bissau make clear. Peace processes which fail to take criminal agendas into account risk entrenching those agendas within post-conflict political settlements and institutions. This may lead to a return to open armed violence, as in Sierra Leone, or to protracted criminal violence, as in Guatemala. The challenge for mediators is to determine precisely when criminal agendas threaten the success of peace processes – and what they can do about it.

Initially, criminal and political agendas may be difficult to distinguish – as in the current Colombian peace process facilitated by Norway and Cuba, for example. A recent analysis of the approach of the Revolutionary Armed Forces of Colombia (FARC) to this process makes clear that political and criminal agendas can compete within a single organisation.⁶ Sometimes a group's 'political' agenda determines its behaviour, with criminal agendas remaining instrumental and hidden. Sometimes, however, the criminal agenda becomes a central determinant of the group's behaviour, or even an aspect of its culture and identity.

How can a mediator determine whether the criminal agenda is best ignored, or needs to be factored into the mediation process? And if it does need to be included, what can mediators do to deal with criminal agendas? After all, mediators have only limited access to the law enforcement tools traditionally used to tackle criminal behaviour, and perhaps even more limited influence over economic and regulatory tools that might address the availability of criminal rents.

The UN definition of mediation is a process in which 'a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements'.⁷ However, if the conflict in question is between a state and a criminal group over the willingness of that group to break the law, is there any proper role for mediation? Does a 'mediated' outcome,

involving a compromise on enforcement of the law, risk betraying the interests of victims of past criminal activity, rewarding past criminal behaviour, provoking future criminal behaviour and even empowering those with continuing criminal agendas?

This paper seeks to begin to answer to these questions. There is growing acknowledgement that the international peace and security architecture has something of a 'blind spot' regarding criminal violence.⁸ This paper suggests that participants in current mediation efforts may share this blind spot. The paper offers approaches and practical steps to address this, by strengthening mediation to deal with criminal agendas.

SCOPE AND STRUCTURE OF THIS PAPER

Since criminal agendas are usually hidden, they can create powerful, unanticipated currents that risk spoiling peace processes. The first section of this Oslo Forum Paper reviews several cases to show how a lack of attention to criminal agendas during peace processes can lead to different kinds of spoiling:

- return to conflict (Sierra Leone)
- integration of violent clandestine groups into the post-conflict political settlement (Guatemala)
- empowerment of criminal agendas through disarmament, demobilisation and reintegration (DDR) processes (Nigeria and Colombia)
- indirect or secondary violence and integration of criminal agendas into elite military and business activity (Myanmar).

Section 2 looks at cases where negotiation and dialogue have directly addressed criminal agendas. Some of these experiences of gang truces, violence interruption and community violence reduction have involved mediation between groups with criminal agendas, or negotiation between those groups and the state. These experiences offer some insights into how the practice of mediation can adjust to take criminal agendas into account.

Section 3 offers recommendations for ensuring respect for mediation fundamentals despite the presence of criminal agendas. It covers issues related to: preparedness, including mediator selection; consent and inclusive ownership, including sequencing; impartiality and legal frameworks, including amnesty and transitional justice; and coherence and implementation (monitoring and evaluation, elections and balloon effects).

The fourth and final section offers some broader conclusions. It suggests a need for both realism about what mediation alone can achieve, and optimism about the role of mediation as a catalyst of the broader processes of socio-economic transformation (or 'socialisation') likely to address criminal agendas in the longer term. 'Mediation' of differences with armed groups with criminal agendas may be an increasingly common aspect of statecraft in a transnationalised economy.

This paper is by no means conclusive. Due to space constraints, it does not consider some potentially important recent political transitions affected by criminal agendas: Afghanistan, DRC, Haiti, Kosovo, Iraq, Lebanon, Mali, Somalia and Syria, to name just a few. But the paper suggests, based on available evidence, that mediation may yet prove a useful tool for dealing with criminal agendas. Mediation is by no means the only way to deal with criminal agendas. The question is when it is a smart tool for dealing with criminal agendas, and how it can best be used, either alone or in combination with other tools.

1. How do criminal agendas spoil peace processes?

Failure to recognise the criminal agendas of parties to peace processes can have major negative impacts on the effectiveness of those processes. This section reviews five recent cases of such ‘spoiling’ of peace processes by criminal agendas.⁹

A. SIERRA LEONE: RETURN TO CONFLICT

Illicit diamond trafficking played a major role in Sierra Leone’s civil war.¹⁰ That illegal trade, however, also had a significant impact on peace efforts.¹¹ The lack of understanding of how criminal agendas could shape mediation outcomes led to tragic consequences in Sierra Leone.

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This was clearest in the collapse of the Lomé Peace Accord, concluded in 1999 under significant pressure from Britain, Nigeria and the US. A power-sharing agreement, Lomé aimed to secure an end to violence by providing the Revolutionary United Front (RUF) with: a path towards becoming a legitimate political party, amnesty for past non-international crimes, the country’s vice-presidency and control over Sierra Leone’s diamond, gold, energy and power resources. The RUF used its access to the state, afforded by Lomé, to increase its control over diamond trafficking. Problematically, the RUF’s criminal agenda was not well recognised, and nor was the support this criminal agenda bought the RUF from President Charles Taylor in neighbouring Liberia.¹²

Consequently, a situation that appeared ‘ripe’ for mediation because it was a hurting stalemate (a situation in which neither side can win, but neither side wishes to back down) quickly became less ripe.¹³ By inducing the RUF into government and giving it formal control over Sierra Leone’s diamond fields, Lomé gave the RUF access to new criminal rents and resources, which encouraged some within the RUF to go back on the offensive.¹⁴ The RUF quickly began using its new governmental powers to capture illicit diamond trafficking rents. In January 2000, the RUF leader Foday Sankoh declared a moratorium on all formal diamond

mining, cancelled all existing licences, and required new applications through a Commission he chaired under Lomé. This immediately removed the RUF’s legitimate competitors from the diamond industry, while leaving it free to continue clandestine trade through Liberia.¹⁵

The outcome of Lomé may even have been to strengthen criminal influence within the RUF, while reducing the influence of those espousing the normalisation of the RUF as a political party. Fragmentary pressures soon appeared within the RUF, as one key lieutenant known to be close to Taylor left the RUF on the grounds that Sankoh had been too ‘hasty’ to embrace peace, and better pay-offs could be won on the battlefield. In Sierra Leone, the threatened defection of key personnel back to an offensive military alliance with Taylor forced Sankoh back on to the battlefield and out of the political process.¹⁶

By the middle of 2000, the accord was collapsing. UN experts revealed Taylor’s involvement in Sierra Leone diamond trafficking – the source of his apparent leverage as a ‘mediator’ with the RUF. Resistance to the agreement’s amnesty provisions emerged as RUF victims demonstrated outside Sankoh’s Freetown home. At the request of President Kabbah of Sierra Leone, the Security Council created the sanctioning mechanisms the Lomé Peace Accord never included: an international war crimes tribunal for Sierra Leone and a sanctions regime for Liberia. The Lomé agreement was dead, and the country was soon, once again, at war.

B. GUATEMALA: A CRIMINALISED PEACE

Even when a mediated political settlement appears to stick, inattention to criminal agendas during the implementation phase can lead to criminalisation of the peace. This seems to be the lesson from Guatemala, where the 1996 Final Peace Accords ended 36 years of civil war. Today, clandestine armed groups with deep ties to organised crime fuel Guatemala’s sky-high homicide rate (c.39 per 100,000 people) – a rate similar to that during the most fatal years of the recent US occupation of Iraq.¹⁷

Three-and-a-half decades of war in Guatemala forged close ties between military actors and traffickers.¹⁸ The military got access to intelligence, weapons and finance; the traffickers received protection. By promising to bring the military under civilian control, the Final Peace Accords threatened these clandestine networks. The Accords also promised to

Even when a mediated political settlement appears to stick, inattention to criminal agendas during the implementation phase can lead to criminalisation of the peace.

strengthen the state's service-delivery capacity, which could have undermined the power of these clandestine networks within marginalised communities.¹⁹

The networks responded by blocking the implementation of those parts of the Accords that threatened their access to criminal rents, and their power. Police reform efforts faltered as former military actors were given control of the new institutions. Judicial reform efforts also stumbled. The result was corruption, inefficiency and impunity. In 1998 a Catholic bishop heading a truth commission project was killed two days after issuing a report finding the military responsible for 80 per cent of the violence during the war. By 2006, only 2 per cent of homicide cases produced a conviction. And criminal groups had become major political financiers. By 2007, Vice-President Eduardo Stein conceded that criminal groups controlled 6 of the state's 22 departments, sharing power in 3 others.

Some progress has been made against the culture of impunity by the efforts of the International Commission Against Impunity in Guatemala (CICIG) – a subsequent initiative unrelated to the 1990s peace Accords. Yet over the course of the first decade of the 21st century, Guatemala's homicide rate doubled from 20 to almost 40 per 100,000. The proximate cause was the strengthening of Central American drug trafficking and the move by the Mexican drug cartels to ally with Guatemalan groups. But the Mexican groups moved into Guatemala precisely because it had become somewhere they could operate with impunity due to the failed implementation of key parts of the Final Peace Accords.

MINUGUA, a UN mission responsible for verifying implementation of the peace accords did document the criminal networks' expanding power. Its reports helped keep pressure on the Guatemalan government to dismantle these networks. But, ultimately, the Final Peace Accords failed to provide the mandate and leverage to assemble a domestic or international coalition capable of addressing the obvious

criminalisation of Guatemala's peace. In Stedman's terms, there was no 'custodian' tasked with arresting the march of criminal agendas as a spoiler in the peace process.²⁰ The clandestine groups, classic 'greedy' spoilers, simply occupied all the space they could within the process, with little fear of punishment for spoiling the process.

C. NIGER DELTA: CRIMINALISED DDR, ELITE SETTLEMENT – OR BOTH?

Peace dividends can themselves become sources of criminal rents. Allocations of access to those rents can, in some cases, form the basis for a negotiated settlement to violent conflict. But such settlements risk creating moral hazard and being seen to reward violence. Over time, this can create instability, as some actors may choose to defect from a settlement that serves political and criminal elites, and use violence to extort their own criminal peace dividends. This is arguably the lesson from Nigeria's attempted amnesty and programme of disarmament, demobilisation and reintegration (DDR) in the Niger Delta since 2009.

The Niger Delta conflict pits armed groups claiming to represent local communities – notably the Movement for the Emancipation of the Niger Delta (MEND) – against multinational oil companies and federal and state security forces. It long ago spawned violent ancillary criminal activities, including oil theft, piracy and kidnapping. By 2008, the costs of violence had become extremely high: \$US6.3 billion in oil stolen per year, and perhaps \$US28 billion in deliberate underproduction of oil to avoid theft – or lost revenue of some \$US40 million per day.

In mid-2009, President Yar'Adua's government somewhat unexpectedly announced an amnesty and the establishment of a DDR programme.²¹ Delta militants were given 60 days to surrender their weapons and renounce armed struggle, after which they would be eligible for a stipend, vocational training, and employment in local infrastructure projects or guarding the very pipelines they used to attack.²² Oil companies and foreign states were asked to chip in.²³

Trouble emerged quickly. Militant ranks swelled, anticipating hand-outs. The weapons-decommissioning process proved unreliable, with the state's limited audit capacity quickly over-stretched in the impenetrable Delta creeks. Political credit for association with the programme became a prize for regional governors and bureaucrats.²⁴ Funding problems led to stoppages in stipend payments by militant leaders to rank-and-file militants, resulting in rioting and rapes at

militant DDR camps.²⁵ And limited access to places on foreign training courses (in Houston, Seoul, London and South Africa) created further tension in militant ranks.

Access to the programme's pay-offs had become a source of rents and patronage for those who controlled it, within both militant and state ranks. Networks emerged straddling the state–militant divide, which controlled and distributed these rents. Rank-and-file militants were expected to remit a significant portion of their monthly stipend to their former militia commanders.²⁶ A review in 2010 found that 80 per cent of funds went to political consultants and contractors (often those commanders), and only 20 per cent to militants themselves.²⁷ Even the Chairman of the Presidential Amnesty Commission, Kingsley Kuku, recently suggested there was a risk that the DDR programme was becoming 'an alternative government in the Niger Delta region'.²⁸

The question this raises is whether the control and distribution of rents from the DDR process was a perversion of that process, or in fact intended as part of an elite settlement in the region?²⁹ If the latter, then it was fraught with risk. While the programme seemed for a time to reduce large-scale violence, it may have convinced some that the best way to secure a livelihood in the Niger Delta is not through civic participation, but violent extortion. As the legitimacy of the process has eroded, some militants have defected from the DDR process, and violence and bunkering have returned.³⁰

D. MYANMAR: INDIRECT VIOLENCE AND CRIMINALISED MILITARY–BUSINESS TIES

Experiences in Myanmar point to two other ways in which poor handling of criminal agendas can lead to the spoiling of a peace process: through the provocation of indirect violence, and the creation of close ties between military actors and illegal business. The result may be an enduring reduction in overt political violence – but this may come at the costs of creating 'balloon effects' in nearby locales or new markets, or by externalising the costs of violence out of the political system and onto the disenfranchised and politically marginalised.

Myanmar has suffered armed conflict since 1948, in part because of the ready availability of criminal rents in the east and northern highlands from opium and methamphetamine production, gem, jade and timber trafficking, and casinos and brothels servicing neighbouring countries.³¹ Foreign support for local armed groups has fuelled warlords, whom Yangon has long sought to co-opt.³² Starting in the

In Myanmar, the policy of turning a blind eye to militia participation in criminal trades has generated close ties between the state military and criminal entrepreneurs, based on protection and joint ventures.

1960s, pro-government militias were informally licensed to participate in the drugs trade, in return for cooperation against the Communist Party of Burma (CPB).

After the CPB split into several ethnic militias at the end of the Cold War, Yangon used one of these militia commanders and a major drug trafficker as an intermediary to broker a series of ceasefires with secessionist groups in the east of the country in 1989. The underlying bargain was the same in each: reduced violence in return for a licence to engage in any trade – licit or illicit.³³ Unsurprisingly, Burmese drug production doubled. Internationally backed opium-substitution programmes (plus the rise in Afghan opium production) had some effect, but perhaps not as intended: pushed out of opium markets, armed groups competed for control of new markets – jade, timber and methamphetamines.³⁴

The reduction of violence in return for informal license to engage in illicit trade has arguably led to increased stability on Myanmar's periphery. State–crime détente helped the government maintain stability and provided crucial access to foreign exchange revenue for the country as it became increasingly internationally isolated.³⁵ But the effects in the centre are more dubious. The policy of turning a blind eye to militia participation in criminal trades has generated close ties between the state military and criminal entrepreneurs, based on protection and joint ventures.

The Myanmar government's latest round of ceasefires with armed groups may face similar challenges in implementation, as opium and amphetamine production are both rising.³⁶ Militia leaders, their Yangon protectors and foreign business partners all stand to lose if peace impedes the drug trade. Under pressure from China, some armed groups have already taken steps to ban the drug trade.³⁷ However, resulting economic disruption has led to serious food insecurity, in some places requiring WFP to intervene.³⁸ Some current top-down drug-substitution programmes

risk disenfranchising local communities, potentially sowing the seeds of further violence.³⁹ With China's significant disparity between marrying-age males and females, there is a further risk that criminal organisations in Myanmar will turn to human trafficking as a substitute source of revenue. The legitimacy of a peace resting on externalising such high costs onto the marginalised and vulnerable, such as young women trafficked across Myanmar's border regions, has to be questioned.

E. COLOMBIA: DDR AND THE CRIMINALISATION OF POLITICS

In Colombia, a DDR programme negotiated by the state with drug-trafficking paramilitaries may have contributed to their fragmentation into new criminal organisations, and to growing political–criminal ties. Colombian drug trafficking is rooted in the civil conflict beginning in 1948 and known as *La Violencia*. Small landowners displaced by the conflict became involved in marijuana production and trafficking networks. By the 1980s, major trafficking centres had emerged in Medellín and Cali. At the same time, insurgent groups with clear ideological programmes such as the Ejército de Liberación Nacional (ELN) and the Fuerzas Armadas Revolucionarias de Colombia (FARC) developed a kidnapping industry as a means of financial support and territorial control. When these groups began to target drug traffickers for kidnappings, a counter-insurgent military alliance between the military and those traffickers emerged.

By the late 1980s, Colombia was coming under significant pressure from the US to prosecute or extradite leading traffickers such as Pablo Escobar. Escobar's demise in 1993 ushered in a period of fragmentation of the drug-trafficking industry in Colombia. The vertically integrated 'cartels' gave way to smaller, local armed groups, competing for territorial control of local production, some of them with mixed political–criminal agendas. Most prominent among these was the right-wing paramilitary Autodefensas Unidas de Colombia (AUC), 35,000-strong at its peak.

By the early 2000s, the paramilitary groups sought a peace deal with the government. The resulting DDR programme traded limited amnesty and political normalisation for reduced violence, reduced abuse, and confiscation of criminal assets. Implementation proved problematic. Although the agreement was framed by Colombia's Congress as a 'Law of Justice and Peace', critics charge that many paramilitaries eventually received peace without playing their part in delivering justice. The government

struggled to verify who exactly had demobilised, and there were allegations that the system was corrupted. Still, the demobilisation programme did allow the government to focus on military action against the FARC, and overall kidnappings and homicides fell significantly between 2002 and 2006.⁴⁰

In 2006, however, it was revealed that numerous Colombian Congressional figures and municipal politicians had been directly collaborating with the AUC, receiving financial support in return for providing protection to traffickers. By 2012, 139 members of Congress were under investigation, and 5 governors and 32 lawmakers – including a former President of Congress and cousin of President Uribe – had been convicted. By 2008, Colombia was again under pressure to tackle traffickers, and violence rose again.

In November 2012, following a series of government military successes against the FARC and ELN, the government began peace negotiations with FARC in Havana, facilitated by Norway and Cuba. The peace process now faces some of the very same challenges that arose in the government's dealings with the AUC, notably the risks of FARC's fragmentation into factions favouring either political or criminal agendas,⁴¹ and the difficulties of developing a coherent judicial policy for dealing with past FARC criminal activity (including drug trafficking). Even if the Colombian state and FARC can agree an approach to handling past crimes, how can they be assured that this approach will not encounter interference from foreign judicial actors seeking justice for victims?⁴² Without a common international approach to amnesty, any peace agreement between the Colombian state and FARC could be uncertain, or even come unstuck.

2. What can we learn from dealing directly with criminal agendas?

This review of how criminal agendas can complicate peace processes suggests that some actors with criminal agendas behave like quintessential ‘greedy’ spoilers. As Stephen Stedman explained in 1997, ‘greedy’ spoilers do not seek exclusive political authority (like ‘total’ spoilers), nor clearly defined and limited goals (‘limited’ spoilers). Rather, they hold ‘goals that expand or contract based on calculations of costs and risks’.⁴³ Those with criminal agendas in peace processes operate through just such business-like calculations, expanding their power and influence within the political system without seeking formal political responsibility, depending on their perception of costs and risks.⁴⁴ Tackling such agendas, and preventing them spoiling peace processes, thus suggests a need to understand how different management strategies are likely to play out.

Some actors with criminal agendas behave like quintessential ‘greedy’ spoilers.

One source of potential guidance on these questions is recent efforts in the Western Hemisphere aimed at dealing directly with the criminal agendas of armed groups. These use a combination of law enforcement, economic empowerment, and direct dialogue and negotiation. This may prove instructive for thinking about how those with criminal agendas respond to different material incentives and normative frameworks in the context of mediation. These somewhat controversial experiments fall into three baskets: gang truces, violence interruption, and community violence reduction (CVR).

A. GANG TRUCES: BUILDING CONFIDENCE AND MOBILISING ECONOMIC PAY-OFFS

The massive rise in violence between gangs, *maras* and cartels in Central America over the last decade has generated several efforts to negotiate truces and ceasefires. Two key lessons from these experiments relate to the specific nature of confidence-building in the presence of criminal agendas, and the challenges involved in mobilising economic pay-offs without undermining political legitimacy.

Mediators answerable to the El Salvador government, with the involvement of the Catholic Church and later the Organization of the American States (OAS), negotiated a well-

known gang truce in early 2012. This involved negotiations between the leadership of the two major *maras* – MS-13 and Barrio 18 – inside the Salvadoran prison system.⁴⁵ The truce initially seemed to produce a major drop in homicides, across the country. However, those rates have recently begun to rise.⁴⁶ Through phased confidence-building efforts, the truce has evolved into a more complex, multi-stakeholder process involving the establishment of local ‘peace zones’ supported by the *maras*, government and, to some degree, business and social actors.

Serious questions remain about whether the truce will lead to a similar reduction in other criminal activities (notably extortion and disappearances), whether it will increase or reduce ties between the *maras* and transnational traffickers, and whether any reductions in crime will endure in the face of public scepticism and limited opportunities for former *maras* members in El Salvador’s legitimate economy.⁴⁷ There remains a danger that the truce may be empowering the *maras* at the expense of less violent civic organisations, or even the state itself – as large parts of the Salvadoran public seem increasingly to believe.⁴⁸

Other Central American governments are also experimenting with this model. In March 2013, the local government in Guadalajara, Mexico announced that gangs involved in a cultural collaboration had agreed a truce.⁴⁹ In May 2013, the Honduras government announced a truce between gangs, induced by promises of jobs and rehabilitation.⁵⁰ Mediators involved in El Salvador are now also working in Honduras.⁵¹

Steven Dudley, a leading observer of these experiments, points to one factor that may make mediation success more likely in Honduras than in El Salvador: the greater unity of the local Catholic Church in supporting such an approach.⁵² The Salvadoran experience suggests that religious institutions such as the Catholic Church may have a unique legitimacy to engage with groups with overt criminal agendas, because of the trust and confidence they enjoy with both state and ‘criminal’ parties to the mediation. Both sides may see such leaders as advocates of ‘impartial’ values, whereas a mediator with even a foreign governmental or political background, may be seen as biased towards the enforcement of state law.

This may have important implications for thinking about mediator selection, specifically which mediators will be seen as ‘impartial’. The willingness of *maras* in Honduras and Guatemala to engage with OAS mediators suggests that in certain circumstances intergovernmental mediators will enjoy the parties’ confidence. But, as usual, context is

It is very difficult to mobilise and sustain the economic transformation required to resolve a criminal agenda permanently – without losing social support for the process.

key: armed groups with criminal agendas may view even outwardly similar institutions differently, and vice versa. In Latin America, for example, some religious groups (notably Pentecostal) are broadly opposed to the truce model, even as others support it. Conversely, the legitimacy of the Catholic Church within criminal organisations varies across the region; in some places, the Church is viewed as too close to the state to play an effective role as a mediator.⁵³

The other major lesson from the gang-truce experiments is that it is very difficult to mobilise and sustain the economic transformation required to resolve a criminal agenda permanently – without losing social support for the process.

This lesson emerges clearly from the fate of a less-well known truce in Belize that came into effect in September 2011, before the El Salvador negotiations appear to have commenced. Like the Salvadoran truce, the Belize truce had immediate positive effects – just 9 homicides in the first 100 days, a big drop. A new government agency, Restore Belize, took a role in directly mediating disputes between the small street gangs in Belize City, and aimed to develop literacy, apprenticeship and employment schemes for 200 people from the 13 gangs involved.

With funding from the US and UK, Restore Belize trained 62 mediators and 26 community-dialogue leaders to handle local disputes. But the cost of these programmes – \$20,000 per week – proved politically unsustainable. When violence predictably flared again in April 2012, the press in Belize began to criticise the government's spending on the project. With echoes of the criminal capture of DDR in the Niger Delta, Jeremy McDermott of *InSight Crime* suggests that the project may in fact 'have actually strengthened some of the gangs, which better organised themselves to take advantage of the government subsidies.' And it may not have been very effective: 2012 turned out to be the deadliest year in Belize on record. By December 2012, with over \$1 million spent, the money had run out, and the project was shuttered.⁵⁴

This raises serious questions about the sustainability of such an approach, and how local programmes like this can ever hope to scale up to national level. As Vanda Felbab-Brown has made clear, 'the inability to deliver legal employment is what has plagued' such demobilisation efforts around the world. 'If the government fails to quickly deliver lasting employment opportunities, many demobilised fighters go back to violent conflict or violent criminality.'⁵⁵

B. VIOLENCE INTERRUPTION: CREDIBLE MESSAGING TO ACHIEVE SOCIALISATION

A somewhat different approach has emerged in the United States in recent years. Known as violence interruption, or violence disruption, it is based not solely on economic pay-offs but on a larger, coordinated effort to re-socialise gang members and achieve normative change. This approach emerged from interventions targeting urban armed gangs and involving researchers, police and social and community workers, starting in Boston in the 1990s and then spreading around the country with Federal funding support. One key lesson from these experiments seems to be the importance, and possibility, of interrupting or even reversing the normalisation of criminal violence, through credible counter-messaging. The key is finding out which messages – and which messengers – are credible with different audiences.⁵⁶

Evidence from these North American experiments suggests that sustained interruption of the normalisation of criminal violence within urban armed gangs has two prerequisites. First, state and social agencies need to send a coordinated signal that:

- a) their priority is interrupting violence, even above reducing non-violent crime
- b) they are committed to assisting those who abstain from violence to access socio-economic services and civic life, through engagement with social support services and community groups.

In US interventions such as Operation Ceasefire, these messages have been communicated through direct interaction with and messaging to gang leaders. State government actors effectively serve as guarantors of gangs' unilateral 'ceasefires' by promising cooperative gangs protection from hostile, non-cooperative gangs – and signalling a willingness to forego prosecution for past crimes. The focus on violence disruption has often come with a deliberate silence – or at least strategically ambiguous messaging – by government agencies on questions of

gangs' non-violent participation in criminal activity such as the drug trade. This, and the provision of effective amnesty for past violence, has inevitably raised questions about legitimacy and legality.

Success in such an approach also seems to turn significantly on the credibility of a threat of prosecution if gang members are unwilling to cooperate. Inter-agency coordination can throw up numerous obstacles to implementation. Attempts to adopt a similar approach through the pacification programme in the Brazilian *favelas* show that weak pre-existing law enforcement capacity is likely to provide an ineffective deterrent. Focused deterrence, selective targeting and sequencing can, however, as the Brookings Institution's Vanda Felbab-Brown has explained, 'enable overwhelmed law enforcement institutions to overcome under-resourcing problems'.⁵⁷

The second condition that must be met for this message to appear credible is that it must be conveyed beyond gang leaders, to the rank and file, by other credible messengers. Evidence from Chicago and Los Angeles, based on epidemiological models of norm transmission, suggests that the best 'interrupters' are often members of these armed groups' existing social networks, such as current or former gang members. They have the groups' trust, and can effectively intervene at moments of crisis by convincing individuals not to use violence to resolve disputes.⁵⁸ Women seem to play a particularly important role here, as custodians of non-violent norms relating to family and community.

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The violence-interruption experiments also suggest what might be needed to sustain public support for negotiated outcomes to criminal agendas. Efforts in the US suggest that public support can be maintained through careful cultivation and deployment of scientific evidence that such interventions work. Careful monitoring and evaluation of these American projects has pointed to a significant positive impact on homicide rates in areas where such programming occurs.⁵⁹ This evidence has also allowed researchers and practitioners to sustain political and financial support for such initiatives in the face of initial community scepticism.

C. COMMUNITY VIOLENCE REDUCTION: HARNESSING SOCIAL CAPITAL

A third approach to dealing with overt criminal agendas has emerged in Brazil and Haiti, particularly through the work of Brazilian NGO, Viva Rio, drawing on experience from Boston's Ceasefire project. This work also relates to the broader 'Armed Violence Reduction' movement.⁶⁰ The approach taken in Viva Rio's work in Haiti since 2007, supported by Norway, Canada and the local UN peacekeeping mission (MINUSTAH), combines direct dialogue with (and sometimes between) gangs with efforts to integrate gang members into civic life, through community-based programming.⁶¹ Key to this approach, the gang structures themselves – not government agencies or new bespoke mechanisms – frequently provide the means for delivery of socio-economic and welfare programming. Armed groups themselves become the vectors of socialisation.

The Haiti project 'combined direct gang mediation with rain harvesting, water collection and distribution, sanitation and hygiene activities, solid waste and sewer management, education for at-risk youth, women's health promotion, and recreation activities'.⁶² The organisations delivering these activities and services were built from structures previously involved in kidnapping, extortion and robbery. Methods of incentivising gang cooperation were innovative, if controversial. For example, sustained reductions in homicidal violence within a community entitled gang leaders to tickets in a lottery for goods or bursaries they could disburse to their supporters, or to a community party. The aim was to retain the social capital of the gangs, while integrating them into legitimate civic and economic life. As Robert Muggah puts it, 'Instead of marginalising gangs, they explicitly brought [them] into an iterative process of negotiation, dialogue, and ultimately self-regulation'.⁶³

3. Strengthening mediation to improve response to criminal agendas

What are the key lessons for mediators from these experiences? This section presents some practical recommendations.

The Western Hemisphere experiments outlined in Section 2 above suggest that Stephen Stedman's contention that 'greedy' spoilers can often be managed only through long-term strategies of 'socialisation' may hold true for those with criminal agendas. Stedman explained that '[g]reedy spoilers can be accommodated in peace processes if their limited goals are met and high costs constrain them from making added demands.'⁶⁴ However 'the greedy spoiler requires a long-term strategy of socialization' – the use of material and intellectual resources to 'establish a set of norms for acceptable behaviour' by parties within the process – combined with coercion to constrain their exit from the process.⁶⁵ Gang truces, violence interruption and community violence reduction initiatives all suggest particular modalities for applying such a strategy in the context of criminal agendas – from involving former gang members or religious actors in messaging efforts, to offering credible economic dividends for violence reduction.

Section 3 of this paper uses these insights to suggest practical steps that might strengthen mediation to improve responses to criminal agendas. Existing UN Guidance for Effective Mediation identifies certain 'mediation fundamentals that require consideration for an effective process'. This part of the paper reflects on how to address these fundamentals in the presence of criminal agendas. Four sets of issues are considered: preparedness, consent and inclusive ownership, impartiality and legal frameworks, and coherence and quality implementation.

A. PREPAREDNESS

As the Sierra Leone case makes clear, criminal agendas can significantly affect the 'ripeness' of a situation for mediation. If the mediation strategy delivers one party access to (hidden) criminal rents, a situation that appears to offer a hurting stalemate may be unravelled. Alternatively, if a peace process seems to reward those who engage in violence with significant criminal or other economic dividends, there is a risk of incentivising extortion and turning DDR processes into protection rackets, as was arguably the case in the Niger Delta.

Being prepared for a mediation process thus requires constant attention to the interests in different criminal rents of parties including governmental elements. National power-

sharing arrangements and negotiated political settlements may be affected significantly by the effect of governmental responsibilities on different groups' access to criminal rents. Similarly, mediation dealing with humanitarian access may be approached differently by two groups with different criminal agendas: one focused on extorting humanitarian convoys may welcome humanitarian access; another operating local protection rackets and extorting populations for access to scarce resources may oppose it.

The Colombia, Niger Delta and Sierra Leone experiences all also suggest that peace efforts can create fragmentary pressures for armed groups where different factions have different criminal and/or political agendas. The profit motive can radically undermine discipline and internal cohesion in armed groups. As the American political theorist Samuel Huntington put it some forty years ago: 'The criminalization of political violence is more prevalent than the politicization of criminal violence.'⁶⁶ The problem for mediators is that this can make it difficult to identify reliable mediation partners, and to prevent the emergence of criminalised spoilers, as we have seen with the emergence of criminalised IRA and unionist splinter groups since the adoption of the Good Friday Agreement in Northern Ireland.⁶⁷ Without solid, and continuing, preparation that identifies the pressures such criminal agendas create, mediators may be blindsided.

Mediators should take four steps to prepare themselves better to deal with criminal agendas.

i. Analyse parties' evolving criminal agendas

Well-prepared mediation teams will incorporate analysis of parties' possible criminal agendas into their initial and ongoing planning processes, notably conflict and stakeholder mapping. The Security Council has several times encouraged the UN Secretariat to incorporate analysis of criminal activities into its conflict analysis and mission-planning processes.⁶⁸ Integrating consideration of criminal agendas into these processes may require specialists in criminal network analysis, plus experts on the informal and illicit economic activities of the specific parties to the mediation.

Analytical techniques could resemble those used in policing and organised-crime threat assessments.⁶⁹ But there is also a case for the development of *new* techniques that integrate analysis of illicit economic activity and clandestine social networks into existing methodologies of conflict mapping.⁷⁰ Such analyses should not be a one-off process

undertaken before mediation, and then shelved. Parties' criminal agendas – and structures – should be subject to continuous review throughout the mediation process. Mediators should also analyse their own impact on parties' criminal agendas. Examples from the Niger Delta, Belize and Colombia show that DDR programmes can become sources of corrupt patronage. This lesson applies equally to mediation and political negotiation, as seen in the patronage associated with participation in Somali peace negotiations over the last decade.

ii. Think creatively about information sources

Analytical expertise is worth little without relevant information: 'rubbish in, rubbish out'. Mediators may need to innovate in the types and sources of information that will help them understand parties' criminal agendas. The Guatemala case suggests that UN human rights reporting may in some cases be useful. UN panels of experts are also increasingly useful as sources of information about criminal organisation.⁷¹ In Haiti and the US, public health and crime-perception survey data have helped reveal patterns of gang violence and criminal agendas, and macro-economic data can help reveal shifts in criminal markets. In Los Angeles, a cooperative police–community taskforce has provided detailed information.⁷² And in Haiti, the UN mission even ran a network of paid informants.⁷³

Open-source media can reveal much, but supporting states may be able to provide even more detailed data – if they look in the right places. Relevant information may be available within not only foreign ministries, but also defence ministries, tax agencies, customs and border services, financial regulatory bodies, immigration services, trade ministries and policing agencies. States may need to develop mechanisms for identifying and collating this information across government, and protocols and safeguards allowing the secure sharing of such information with mediation teams.

iii. Select a mediator all parties can trust

Mediators whom groups with criminal agendas will trust may have different profiles from those who mediate ostensibly political disputes. Appeals by mediators to respect the law may not get very far, since the criminal group may see itself as poorly served by that law – or even opposed to it. Likewise, appeals to criminals' profit motives may be equally problematic: continued participation in criminal activity may simply be more lucrative than any alternative economic pay-offs that the mediator can mobilise. Appeals

to non-commercial and non-legal values that both parties to a conflict share – such as religious or traditional values – may have more success.

Mediators who have to deal with criminal agendas may therefore benefit from status or association with the specific trust network respected by the group with the criminal agenda. Enduring criminal organisations typically mobilise the shared social capital found in families, clans, shared childhood experiences, shared prison time, or religious belief.⁷⁴ For example the Italian *mafia*, Russian *maffiya* and some Mexican criminal 'cartels' adapt Christian symbols of authority and doctrine as part of their own criminal cultures.⁷⁵ As the Central American and US cases show, mediators with significant connections to those non-state trust systems have proven to be credible messengers and to enjoy significant confidence from groups with criminal agendas.

However, both the Sierra Leone and Myanmar cases suggest that it may be unwise to select a mediator who has ongoing operational or business ties to the group in question. This can lead to significant complications. In Mali, previous governments' reliance on military agents with social connections to kidnapping networks as mediators contributed significantly to the criminalisation of the military and its collapse of morale and effectiveness, which in turn arguably opened the door to rebel advances.⁷⁶ Such pitfalls can be guarded against through effective due diligence in the selection of a mediator. Social network analysis may prove useful to identify hidden criminal influences,⁷⁷ and may have important applications in contemporary contexts from West Africa to central Asia.

iv. Make the business case for dealing with criminal agendas

Sustained support for addressing criminal agendas may require arguments based on economic and financial evidence. This can help to secure both state and private-sector support for the long-term socio-economic transformation that may be needed to keep spoiler criminal agendas at bay. The costs of failing to address criminal violence include those of: security and dispute resolution, infrastructure repair and medical expenses; lost productivity, investment and growth; reduced sales and tax revenues and increased borrowing; increased labour-market volatility and tax burdens; insurance; and corruption and theft. These costs are currently considered difficult to enumerate, so donor support for further research

into appropriate measurement methodologies may be necessary.⁷⁸ Methodologies developed in related fields, such as measurement of the costs to business arising from community-level conflict, or the use of household surveys, may also prove effective.⁷⁹

B. CONSENT AND INCLUSIVE OWNERSHIP

i. Clarify the desired end-state

As Teresa Whitfield has noted, '[a] realistic consideration of what an end state, or the lack of it, might look like should be a necessary element of any strategy for engagement' from the outset.⁸⁰ Are the parties involved willing to participate in a mediation process that will lead to abandoning *any* criminal agenda they may hold? Or are they willing to consider negotiating only an outcome that reduces violence but leaves them continued access to criminal rents?

Sections 1 and 2 of this paper suggest that negotiations with groups with criminal agendas are more likely to lead to a trade-off – swapping violence reduction for amnesty, pay-offs or even continued criminal activity – rather than to a complete resolution of the criminal agenda. They also suggest, however, that such compromise agreements can both: 1) externalise the costs of structural violence and criminal activity onto disenfranchised and marginalised groups, notably women and children; and 2) prove unstable over time.⁸¹

If the goal of mediation is a reduction of violence, then consent of those who control criminal violence is crucial. 'Track I' mediation may appear appropriate. Yet Track I mediation may also create pressures to 'get a deal', and expose leaders to pressures from the rank-and-file that complicate the task of securing a durable mediated outcome. Too much scrutiny may work against confidence-building. So a focus on violence reduction as the goal of mediation may argue for development of a leadership pact with limited visibility, such as the deal in the early phase of the El Salvador process.

However, if the mediation goal is to reduce the power of a group by removing its access to criminal rents, then other stakeholders may need to be engaged. The required agreement may not be between two armed groups, or between an armed group and the state. Rather, it may be a deal between criminal actors and society.

If the mediation goal is to reduce the power of a group by removing its access to criminal rents, the required agreement may be a deal between criminal actors and society.

The outcome may not simply be the creation of a political settlement, but an adjustment to the social contract, and the economic structures built on it.⁸² This may require a more inclusive and ambitious approach to dealing with criminal agendas, based more squarely on 'socialisation'. As Teresa Whitfield points out, such transformative goals may also bring into play 'strategies and public policies distinct from those [traditionally] pursued in political mediation'.⁸³ Mediation may be both necessary and on its own insufficient to get to the desired end-state.

ii. Sequence engagement to account for shifting criminal rents and agendas

Dealing effectively with criminal agendas over the course of a peace process requires careful management of shifting interests in the illicit political economy. As criminal rents and their control changes, so may the cast of stakeholders that needs to be included in the mediation. This points to a need for sequencing, based on an understanding of how criminal rents are shifting, and how this may affect power balances within the peace process – and even within a specific armed group. Different stakeholders may need to be engaged, and the scope of issues on the table altered, to build confidence and maintain an 'inclusive enough' coalition to move the process forward.⁸⁴

As the UN Guidance notes, '[c]onsent may sometimes be given incrementally, limited at first to the discussion of specific issues before accepting a more comprehensive mediation process'.⁸⁵ Mediation processes dealing with criminal agendas may need to expand carefully from an initial focus on the reduction of violence associated with criminal activity to a later discussion of broader goals of socio-economic transformation, as confidence builds between the parties.⁸⁶ At each stage, consent may need to be secured from new groups.

iii. Do not ignore the costs of criminal violence for women and children

Women and children should be engaged early in mediation, so that the true social costs of criminal violence are factored in, and to develop broader social trust in the mediation process. In the current gang-truce process in El Salvador, for example, mediators have deliberately worked with gang members' families to help cultivate support for the truce throughout both the gangs' formal hierarchies and their broader circles of affiliation and support.⁸⁷ Mediations that do not factor women and children's interests into assessments of criminal agendas risk understating the true costs of those agendas, and, as in Myanmar and the Niger Delta, creating elite settlements which may prove unstable over time as social support for the process wanes.

iv. Work with economic and financial-sector actors

Whereas classical mediation may involve socialisation of politically motivated armed groups into legitimate political processes, mediation dealing with criminal agendas will involve socialisation of economically motivated groups into legitimate economic processes. Economic and financial-sector actors therefore have key roles to play. Banks and financial-sector institutions will be key providers of information about criminal activity – and key partners in creating leverage over those activities, including in the context of conditional amnesty programmes (discussed further in C(iii) below).

Local and foreign business partners may also prove important: in the Sahel, for example, cigarette manufacturers and distributors may have important leverage, since smuggling cigarettes into the Maghreb provides an important source of revenue for armed groups in the region.⁸⁸ The Western Hemisphere cases and some others, such as the Niger Delta DDR programme, also make clear that local private sectors – and foreign development partners, both bilateral and multilateral – will have important roles to play in underwriting alternative livelihood programming. This can provide young people with meaningful alternative life paths, away from the grip of criminal organisations and agendas.⁸⁹

C. IMPARTIALITY AND LEGAL FRAMEWORKS

The UN Guidance for Effective Mediation states that '[i]mpartiality is a cornerstone of mediation – if a mediation process is perceived to be biased, this can undermine meaningful progress'. Yet as the Guidance goes on to point out, '[i]mpartiality is not synonymous with neutrality, as a

mediator... is typically mandated to uphold certain universal principles and values'. This poses particular challenges in dealing with criminal agendas. If the mediator supports the enforcement of the state's criminal law, she may appear to be associating herself with the state. However, if she supports an outcome that does not enforce the state's criminal law, she may appear to be associating herself with the non-state armed group, at the expense of the state and victims of crime. The mediation community should take three steps to strengthen mediation in response to these challenges.

i. Normalise engagement

Some stakeholders may believe that any engagement with armed groups with criminal agendas lends legitimacy to criminal behaviour and risks creating moral hazard. They may even take steps to prevent such engagement. The United States, for example, has criminalised the provision of material support to designated transnational criminal organisations, including one (MS-13) that is currently participating in the gang truce processes in Central America.⁹⁰ Yet analogous provisions criminalising material support to designated 'terrorist' organisations have had a chilling effect on a range of humanitarian, peacemaking and peacebuilding activities.⁹¹ Mediators may need to consider how the application of such measures to groups with criminal agendas may affect their ability to deliver an effective and impartial mediation process. In some cases, such measures may make it impossible to deliver such a process.

The logic of mediation with criminal groups is the same as the logic behind plea-bargaining: that ends justify the means.

States should be encouraged to recognise that it is the *ban* on engagement with actors involved in criminal activity – rather than a policy of engagement – which is abnormal. Many states, including the US, themselves not only engage such groups, but even negotiate with criminals – not only in the cases mentioned in Section 2 of this paper, but even more routinely in the process of plea-bargaining.⁹² The logic of mediation with criminal groups is the same as the logic behind plea-bargaining: that the ends (the integrity and effectiveness of the legal system) justify the means (the discretionary and conditional waiver of the application of the law in its full force to every single case).

In 2001, the US federal criminal system dealt with some 120,000 cases; 94% of the resulting convictions relied on plea bargains.⁹³ Negotiation thus forms a central basis for the enforcement of federal criminal law and addressing criminal agendas within the US. It remains unclear why it should not, similarly, form the basis for addressing criminal agendas elsewhere. Peacekeepers have been dealing with organised armed groups with criminal agendas for decades,⁹⁴ and encounters between humanitarian actors and criminal gangs are becoming more frequent with the advance of poorly governed urbanisation.⁹⁵ Banning mediators and others involved in conflict resolution and humanitarian action from engagement with such groups simply condemns entire populations to be ruled by them.

ii. Use the tools of transitional justice

Normalisation of engagement does not mean that mediation should always be seen as a solution to criminal agendas. In some cases, there may not be a reliable counterpart who can make a negotiated agreement stick. If criminal violence is not the result of organisational strategy, but rather of 'disorganised crime' involving individual responses to market incentives,⁹⁶ mediation may simply prove futile. And even where there *is* a reliable negotiating partner, mediation may not be wise. It may end up unwittingly immunising actors for past criminal behaviour, without offering victims effective remedy or preventing future abuse. Here, further thinking is needed about how to apply the lessons of transitional justice – which deals with atrocity crimes – to the broader field of economic criminal agendas.

A first step would involve clarifying when international norms relating to amnesty *already* cover economic criminal agendas. There is today international consensus – reflected in the UN Guide for Effective Mediation – that mediators 'cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, including sexual and gender-based violence', while 'amnesties for other crimes ... may be considered'. States and mediators may, therefore, need to work with law-enforcement bodies – including the International Criminal Court – to clarify exactly which types of economic criminal activity already fall within the limitations on amnesty, so that greater certainty can be offered to negotiating parties.

Organised violence aimed at extracting criminal rents – as in eastern DRC, Mexico and Colombia – could, if committed as part of a widespread or systematic attack

Normalisation of engagement does not mean that mediation should always be seen as a solution to criminal agendas.

against a civilian population, potentially already constitute a crime against humanity – and thus amnesty would be off the table.⁹⁷ Alternatively, some criminal violence may be of such a scale that it rises beyond 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. If this then gives rise to armed conflict, this may trigger the applicability of norms relating to war crimes – again complicating amnesty.⁹⁸ Determining when this is the case depends on the intensity of the violence and the degree of organisation of the parties.⁹⁹

Scholars increasingly consider that gang and other 'criminal' violence may rise to this level – at least in some situations in Latin America.¹⁰⁰ In those cases, armed groups involved in criminal activity may in fact have become parties to a conflict, and consequently be subject to universal jurisdiction relating to violations of international humanitarian law (IHL) during non-international armed conflicts. This would include attacks on civilians, pillage, rape, sexual slavery, enforced prostitution, use of child soldiers, or physical mutilation.¹⁰¹

The application of existing international criminal law to this conduct may also have implications relating to superior (or command) responsibility. Where a commander is potentially criminally liable for the conduct of his subordinates, access to amnesties may need to be limited to those below a certain threshold in the chain of command. Given the non-hierarchical, networked nature of many criminal enterprises, this may require careful application of social network analysis to identify informal influence and leadership roles within criminal networks.¹⁰²

As well as legal questions, difficult policy questions arise in consideration of amnesty for economic crimes. Any amnesty policy risks alienating the victims of criminal violence, not only violating their right to a remedy,¹⁰³ but also undermining social support for the peace process, as the Sierra Leone case shows. Further, it may incentivise more crime or violence. The International Crisis Group has described how another agreement reached in January 2003

at a meeting outside Paris, aiming to end Côte d'Ivoire's civil war, appeared to reward criminal behaviour. That agreement provides new 'incentives to rebels to attack mostly civilian targets in order to gain a place at the negotiating table, where they can claim a portion of the nation's political and economic spoils'.¹⁰⁴

iii. Make amnesties effective

Amnesties should thus be approached with special care in the context of economic criminal agendas. Further detailed research is needed to identify when amnesties 'work', and how they can best be combined with other tools – such as truth and reconciliation processes, or suspension of sentences. A review of the very limited existing literature¹⁰⁵ points to three main hypotheses.

Amnesties for organised crime appear particularly successful where they offer clear *economic* pay-offs, especially a clear path for the transfer of financial capital from illicit to formal sector, such as a 'tax holiday'.

1. There should be clear benefits to those with criminal agendas from participation in amnesty programmes. Immunity may be a benefit in itself, but since the need for an amnesty programme suggests that the group with the criminal agenda has been relatively successful in resisting state pressure and thus become immune in fact if not in law, other benefits may be necessary to induce cooperation. One interesting possibility may be to pursue prosecution, but then suspend the application of sentences conditional on good behaviour, as has occurred in some Latin American cases. Amnesties for organised crime appear particularly successful where they offer clear *economic* pay-offs, especially a clear path for the transfer of financial capital from illicit to formal sector, such as a 'tax holiday'. This should, however, be subject to defined procedures for lustration, remediation of rights abuses, and taxation, or it may risk violating victims' rights and losing social support. One important aspect of such pay-offs may be legal reform to ensure that property rights from legitimate business activity are more secure, fungible

and transferable to heirs than are illicit profits. This may require reform of corporate and tax law, and police reform to reduce police corruption and informal expropriation.

- 2. There must be clear costs for non-participation in the amnesty programme.** These must be time-limited, and accompanied by credible threats of punishment in the case of non-participation. Investigative, prosecutorial and judicial capacity may therefore need significant bolstering. Applicants for amnesty should be required to provide information about past and ongoing criminal activity, to facilitate prosecution of non-participants. Incentives should also be created for banks, police forces, government officials, insiders or other relevant social actors to monitor and report post-amnesty criminal activity.
- 3. Amnesties should aim to harness rather than destroy groups' social capital.** The limited evidence available seems to indicate that this approach is more likely to be more successful. The Western Hemisphere cases (Section 2) hint that this might be achieved using group structures as the basis for new, legitimate business and social enterprises. This may help to protect group identity, while also facilitating the transformation of organisational culture away from criminal violence to participation in the legitimate political economy – a process related to Stedman's notion of 'socialisation'. Yet, as the Niger Delta case shows, monetisation of DDR programming has to date worked in the opposite direction.¹⁰⁶ This raises important questions about whether conditional cash transfers – used increasingly in Latin America to encourage behavioural change – might be a more effective mechanism for inducing defection from criminal agendas.

Another key question that needs further thought is how the victims of criminal violence can receive effective remedies. This is complicated by questions of whether violence perpetrated by criminal groups can amount to formal human rights violations. Some states argue that only states are bound by human rights law. Other states and scholars have for over twenty years considered the need to codify certain principles that bind all armed groups in all situations. It may be possible to draw on this scholarship as a basis for identifying the 'rights' that civilians enjoy in the face of criminal violence, even when perpetrated by states.¹⁰⁷

Finally, there is a need to consider how transitional justice processes might be applied to criminal agendas held and implemented by state actors. This might allow the use

Armed groups can spoil and even capture implementation when that improves their control of criminal rents. A growing economic pie promising a larger share for all may forestall such problems.

of transitional justice tools, such as truth, reconciliation, lustration or institutional reform to address not only the violence perpetrated by non-state armed groups, but also the underlying state violations that create the space for the emergence of criminal agendas in the first place. This might include violations of civil and political rights (for example during detention), or social and economic rights (for example through marginalisation of the communities in which armed groups and gangs operate).

Mediation outcomes that establish transitional processes for addressing and remedying not only the direct harms caused by criminal violence, but also the social and economic rights abuses generating that violence, may help to renew the legitimacy of the state. This seems likely to make the state's law more effective, and in turn begin to reduce the willingness of some citizens to pursue criminal agendas. In the process, concerns about moral hazard resulting from engagement with criminal groups may also diminish, since the result of this engagement may no longer be viewed as accruing narrowly to those who engage in violence, but rather being distributed more widely through society.

D. COHERENCE AND QUALITY IMPLEMENTATION

Mediation involving criminal agendas can face particular challenges during implementation because of the large number of political, economic and social actors that must be engaged. The cases reviewed in Sections 1 and 2 above suggest that armed groups can spoil and even capture implementation when that improves their control of criminal rents – a pattern also identified in post-communist constitutional transitions.¹⁰⁸ A criminalised war economy can all too easily become a criminalised post-conflict economy. A growing economic pie promising a larger share for all may forestall such problems. This in turn is likely to depend on coherent and quality implementation of a mediated

settlement – and perhaps ongoing mediation to address disputes arising during implementation. Three particular steps may be helpful.

i. Monitor and evaluate

There is growing recognition that objective independent monitoring and evaluation of efforts to change armed groups' behaviour is feasible.¹⁰⁹ Such monitoring and evaluation can have five major positive effects:

1. helping to sustain public and donor support for effective but controversial engagement with groups with criminal agendas
2. making specific projects more effective, as they are adjusted mid-stream
3. increasing coherence among disparate programming backed by different donors and stakeholders, as a shared evidence base helps mobilise resources around what is working
4. through aggregated lessons, enabling improved design for future projects
5. fostering a community of professional mediators and project leaders working on mediations involving criminal agendas, facilitating effective implementation.

ii. Protect post-conflict elections from turning into laundering opportunities

Existing post-conflict political strategies, with their heavy emphasis on the electoral legitimacy of post-conflict governing actors, may unwittingly assist criminal agendas. A rush to elections can create incentives for political actors to find funds and to disregard the provenance of those funds, as well as to work with those with organisational capacity and the ability to corrupt and coerce rivals. In the post-conflict context, this often means war profiteers and criminal organisations.¹¹⁰ Post-conflict elections thus provide a golden opportunity for those with criminal agendas to launder war profits *and* at the same time, buy future political access and protection.

This points to a need to consider policy coherence around post-conflict and transitional elections. A discussion among those involved in setting strategy for post-conflict recovery situations is needed to consider how to protect elections from becoming laundering opportunities. Factors to consider include: vetting and lustration of candidates; campaign

finance reform; asset disclosure; fostering investigative journalism; engaging political parties to protect against criminal infiltration; and civil society awareness raising.¹¹¹

iii. Counter balloon effects by working on multiple levels

Criminal rents are often extracted by transnational networks from transnational flows. Improvements in state regulatory capacity or efforts to tackle criminal agendas in one area may simply displace those agendas to another area – a ‘balloon effect’. These other areas could be a neighbouring state, a lower level of government, or a different market. Historically, for example, reductions in coca cultivation in Peru and Bolivia have led to an increase in Colombia – and there is now some evidence of this trend reversing. The disruption of trafficking in northern Mali through successful peace efforts may lead to the displacement of trafficking – and armed violence – to Niger, Mauritania and Algeria.

Solutions may need to be correspondingly transnational and multi-level. For example, engagement with neighbouring countries during implementation may help to prevent displacement of criminal activity to those countries. This could involve, for example, facilitating coordinated law enforcement activities, or price and tariff harmonisation to prevent smuggling.

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It is also important to ensure that crime displacement does not result from policy incoherence *within* a country. Historical evidence suggests that crime is organised wherever spending and protection power resides – in centralised states, at the centre; and in federal states, locally. Current post-conflict peacebuilding strategies, such as in Afghanistan, Somalia and Libya, tend to encourage localisation of the spending and security powers, in pursuit of increased local legitimacy. The danger here is that criminal agendas might emerge locally and, as in Colombia, lead to local-level political–

criminal pacts. The result (as in Bosnia, and possibly now in Somalia and Afghanistan) may be the exacerbation of fault-lines in the political authority of the state, and damage to the longer-term peace process. Mediators may have a role to play in addressing these risks, both through mediation design and through implementation arrangements.

Foreign states and private-sector actors may have a role to play in offering armed groups pay-offs from participation in a peace process (as in the Niger Delta). Or, they may ensure effective punishment for non-participation – as in the role of companies and states in removing armed groups in eastern DRC from international resource-supply chains. Similarly, diasporas may play an important part in implementation, especially when they are a source of significant remittances. As with the Tamil Tigers in Sri Lanka, armed groups may extract criminal rents by force or fraud from diaspora communities.¹¹² Mediators may need to engage directly with diaspora communities to understand the agendas sustained by such transnational financial flows, how they may affect parties’ negotiating strategies, and how changes in these flows may affect consent.

4. Conclusion: mediation as a catalyst for broader socialisation

Armed groups with criminal agendas increasingly use their control of criminal rents to develop military, political and social power. This paper has argued that mediators who ignore this relationship between criminal rents and agendas, on the one hand, and political and military power, on the other, risk seeing their peace process spoiled. Evidence from the limited number of cases reviewed suggests that this spoiling can take a variety of forms.

Given the ease with which even local armed groups now tap into global illicit markets, the task of negotiating and dealing with criminal agendas may require reframing: from an extraordinary crisis requiring exceptional mediated solutions to a matter of course for states dealing with armed actors. 'Mediation' with armed groups that have criminal agendas may become an essential aspect of contemporary statecraft. The transnational character of the contemporary global economy makes this task particularly complex, however. The relations that states must manage are with local groups embedded in transnational networks.

'Mediation' with armed groups that have criminal agendas may become an essential aspect of contemporary statecraft.

Therefore, the lessons here may also apply beyond the traditional scope of peace processes – to those situations of constitutional and economic transition, and indeed national development, affected by criminal agendas. The process of negotiating with and managing criminal agendas seems likely to confront states and communities well beyond conflict-affected contexts. 'Mediation' may thus be not just a practice for professional mediators, but also a mode of statecraft – a way to bind people into civic life and the legitimate economy, and keep them out of the orbit of criminal agendas.

If that proves true, the importance of a strengthened common approach will only rise. Significant normative discussion and practical innovation is needed to identify how states and other international actors can manage relationships with non-state actors whose legitimacy is based on control of the dividends of criminal agendas, rather than state sovereignty, electoral legitimacy or respect for human rights. Should we

'normalise' engagement with such groups? How do we 'manage' those relationships without abandoning respect for territorial integrity, democracy or human rights?

The task of the mediator in such a complex context becomes one of aligning the strategic incentives of a diverse range of local, national and foreign actors towards a sustainable and inclusive political and economic settlement, with the influence of criminal rents and agendas minimised. It is essentially a catalytic role, rather than one of direct action. That is perhaps true of much mediation, but the scope of socio-economic issues touched by criminal agendas implies that this role will go well beyond classical facilitation of inter-party political talks. The mediator must become a facilitator with access to and influence over a range of players, encouraging them to realise a common vision of their future, with a non-violent framework for managing their differences.

This paper suggests some steps by which mediation may be developed in this direction, without necessarily either abandoning existing mediation fundamentals, or placing unrealistic expectations on mediators. The paper suggests: first, simply recognising the importance of criminal agendas for mediation outcomes; second, planning for their impacts on mediation processes; and, only then, third, assembling the instruments and leverage needed to contain that impact. The paper suggests a series of practical steps for mediators to strengthen mediation to deal with criminal agendas, relating to preparedness, consent and inclusive ownership, impartiality and legal frameworks, and coherence and implementation. Significantly more work will be needed to determine the right mix of policies and leverage, under different circumstances, to induce those with criminal agendas to participate in the peace process and not spoil it.

The practical role of mediators as facilitators or catalysts of broader socio-economic transformation follows the theoretical recognition that, in Stephen Stedman's terms, those with criminal agendas are 'greedy spoilers', developing their approach to a peace process on the basis of cost-benefit calculations. As Stedman explained in his seminal 1997 article, the only long-term solution to such spoilers is socialisation: finding the right mix of normative reframing and material incentives to induce them to stay inside the process, and punish them for leaving it. Since mediators do not control all of the normative levers and material incentives needed, their role is at best facilitative.

Exactly which normative framing and material incentives will ‘work’ to induce individuals and groups to abandon criminal agendas for legitimate civic and economic processes will depend heavily on context. The specific rents available to the armed group with the criminal agenda are especially important here. If those rents arise from agricultural production requiring significant labour inputs, then the group may have strong incentives for military autonomy and popular control, which may require incentives and framing targeted at a large social group. If the rents arise from trafficking activities (without production), controlled by a narrow elite group with little popular participation, then different kinds of reframing and material incentives may be needed.¹¹³

The policy mix and tools used, and even the approach to mediation, may need to change over time – as the political economy evolves, new criminal rents emerge, and different armed groups and actors within those groups grow powerful. This suggests a need for continuous monitoring of criminal agendas in peace processes, and during broader transitional contexts. Mediators will be able to achieve this only if they take active steps to procure the necessary information and expertise to identify these shifting agendas. This could include outreach to a wide range of stakeholders, including police forces, foreign financial actors, and perpetrators’ families.

Although the specific mix of policies and tools may vary in each case, these conclusions point to a need for mediators, donors and the wider international community to think about a common approach based on mediation, law enforcement and other tools. Significant further empirical and policy research is needed to identify how transitional justice tools, economic policy and strategic messaging can be coordinated and marshalled to prevent criminal agendas spoiling peace processes. Many – if not most – of these tools lie beyond the reach of mediators, so consideration is needed of how strategies for containing criminal agendas and preventing them spoiling peace processes can best be coordinated, often in institutionally complex environments.

Control of the different tools needed is likely to lie in very different hands. Economic leverage lies with the IFIs, private-sector and bilateral partners. Law-enforcement leverage lies with local police forces, some foreign police actors, and even some external judicial actors. Normative leverage may lie not only in obvious places such as the UN Security Council, but also in religious institutions, or local family networks. What

common policy frameworks and institutional arrangements could allow more effective coordination of this leverage? Where does mediation fit within those arrangements?

Finally, although we remain in the early days of thinking through the role of mediation in dealing with criminal agendas, this paper suggests a need for a healthy dose of realism. Mediation may have an important role to play in helping to identify common ground between parties in conflict, but when one of those parties’ agendas is precisely to continue flouting the law and manipulating formal political settlements for its own benefit, the ground for negotiated solutions may turn out to be very narrow. It may only be through the application of other more normative and coercive tools, going well beyond the traditional toolkit of mediators, that the necessary additional common ground can ultimately be carved out and criminal agendas effectively managed.

Endnotes

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- 97 Examples of conduct which might fall within the jurisdiction *ratione materiae* of the ICC are: murder (Art. 7(1)(a) of the Rome Statute); enslavement (Art. 7(1)(c)); imprisonment or other severe deprivation of liberty (Art. 7(1)(e)); torture (Art. 7(1)(f)); rape, sexual slavery, enforced prostitution, other forms of sexual violence (Art. 7(1)(g)); enforced disappearances (Art. 7(1)(i)); and other inhumane acts (Art. 7(1)(k)). One key question may be whether Art. 7 of the Rome Statute is limited in application to states and political organizations. The reference to 'political organizations' in Art. 7(2)(i) could be read expansively to apply to all of Art. 7; or more narrowly, to deal only with enforced disappearances. Even if it is read expansively, however, an objective determination by a court might find that some organisations that are labelled as 'criminal' in fact seek to develop substantial power over the political institutions and processes of the state, and that their conduct, as a result, may be subject to these provisions.
- 98 See especially Michael T. Wotherspoon, 'Mexico's drug war, international jurisprudence, and the role of non-international armed conflict status', *Journal of International Humanitarian Legal Studies* 3, 2012, pp.291–321.
- 99 See ICTY, *Prosecutor v. Tadic*, Case No. IT-94-I-AR 72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. For explanation of how to determine 'intensity', see ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgment, 3 April 2008, para. 49 (mentioning the number, duration and intensity of individual confrontations; weapons and munitions used; participants; casualties; destruction; civilians displaced; and the involvement of external actors such as the UN Security Council); and see Decision on the Merits, *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, 18 November 1997, para. 154. On 'organization', see *Haridinaj* para. 60 (mentioning command structure; disciplinary arrangements; headquarters; territorial control; recruiting and materiel supply arrangements; military planning capabilities; unified military strategy and tactics; and unified external relations).
- 100 See, for example, the recent work by the HASOW project considering the experience and legal characterisation of humanitarian situations other than war in the Western Hemisphere: Athena R. Kolbe, 'Revisiting Haiti's Gangs and Organized Violence', HASOW Discussion Paper 4, June 2013, available at www.hasow.org; Bernal Franco and Navas Caputo, 2013, op. cit.
- 101 See Rome Statute Arts 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi), 8(2)(e)(vii), 8(2)(e)(xi).
- 102 See Jörg Raab and H.B. Milward, 'Dark networks as problems', *Journal of Public Admin Research & Theory* 13(4), 2003, pp.413–439.
- 103 See United Nations, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', UN Doc. A/RES/60/147, 16 December 2005.
- 104 International Crisis Group, 'Liberia and Sierra Leone: rebuilding failed states', *Africa Report* 87, Freetown/Brussels, 8 December 2004, pp.21–22.
- 105 The summary that follows builds on Igor V. Dubinsky, 'How bad boys turn good: the role of law in transforming criminal organizations into legitimate entities by making rehabilitation an economic necessity', *DePaul Business & Commercial Law Journal* 5(2), (2007), pp.379–246; Wennmann, 2013, op. cit.
- 106 And see further Sigrid Willibald, 'Does money work? Cash transfers to ex-combatants in DDR Processes'. London: ODI, 2006.
- 107 See for example the 'Turku Declaration of Minimum Humanitarian Standards', *American Journal of International Law* 85, 1991, p.377.
- 108 See Joel S. Hellman, 'Winners take all: the politics of partial reform in postcommunist transitions', *World Politics* 50(2), 1998, pp.203–234. See also Christine Cheng, 'Private and public interests: Informal actors, informal influence, and economic order after war', in Mats Berdal and Dominik Zaum (eds), *Political Economy of Statebuilding: Power after Peace*. Abingdon/New York: Routledge, 2013, pp.62–78.
- 109 See for example The Urban Institute, 2011, op. cit.; Naureen Chowdhury Fink, Peter Romaniuk and Rafia Barakat, 'Evaluating Counter Violent Extremism Programming: Practice and Progress', Center on Global Counterterrorism Cooperation, September 2013; Geneva Call, 'Burma/ Myanmar Project Field Evaluation Report', August 2010.
- 110 Cheng, 2013, op. cit., p.73.
- 111 See Camino Kavanagh et al., 'Getting Smart and Scaling Up: Responding to the Impact of Organized Crime on Governance in Developing Countries', (New York: NYU Center on International Cooperation), June 2013. See also the work of International IDEA's programme on *Protecting Legitimacy in Politics*.
- 112 J. La, 'Forced remittances in Canada's Tamil enclaves', *Peace Review* 16(3), September 2004, pp.379–385.
- 113 See Cockayne, 2013, op. cit.

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