

2: Mediation and the Prevention of Mass Atrocities

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Mediation as a strategy to prevent mass atrocities faces a host of daunting challenges: one need only look at Syria in 2013 to note that one prominent international mediator, Kofi Annan, resigned in frustration over the lack of international support for his efforts; and the mediator who was appointed to take his place, Lakhdar Brahimi, is on the verge of leaving for the same reason. Is it worth pursuing mediation under these difficult circumstances, or is the use of military force the only way to prevent mass atrocities or to protect civilians from genocide, war crimes, crimes against humanity, and ethnic cleansing?

This chapter analyzes when and how mediation may be effective in the prevention of mass atrocities. It also demonstrates how both the human rights agenda of R2P and the conflict management agenda of mediation can work in an integrated way, but also shows the challenges to such integration.

The responsibility to protect agenda, both the original three-part conception by the International Commission on Intervention and State Sovereignty (ICISS) and the even more emphatic version in the 2005 World Summit decision, is an ambitious and significant one. Its purpose is to protect civilians from grievous harm, driven largely by its grounding in the international conventions on human rights and the prevention and punishment of genocide, as well as international criminal law. Notably, three of the four crimes explicitly identified in the 2005 decision include those prosecuted by the International Criminal Court: genocide, war crimes, and crimes against humanity. The R2P agenda also adds ethnic cleansing to its list of concerns.

To date, R2P has focused its attention on protection rather than prevention, and on using coercive measures such as sanctions and military force to stop state governments from committing mass atrocities that are already in progress. In 2010, the UN Secretary-General, Ban Ki-moon, highlighted the need not only for protection from but also for *prevention* of these crimes: “We...need to understand the different kinds of measures that can be taken to prevent tensions between groups from escalating into genocidal conflicts,” he said.¹

Mediation lends itself to this prevention imperative, as it can be effective on its own or in combination with other approaches to enable contending political actors to back away from violence and find a political solution that addresses grievances and/or settles differences. It can be employed in circumstances where the use of compelling military force by the international community of states is contested or otherwise not a viable

option. The worry of the global South that R2P is a guise for neo-colonial takeover of other countries makes mediation a particularly crucial strategy to understand and use as a first resort for prevention.

However, mediation operates from a different set of assumptions than other R2P strategies that are based on a human rights approach. The distinctions are set out in Table 2.1 below.²

Table 2.1: Comparing Human Rights and Mediation

ISSUES	HUMAN RIGHTS	MEDIATION
treatment of norm violators	name and shame; set no precedent for tolerating bad behavior; use "sticks" to affect change.	include violators in the discussion to appeal to their interests; use "carrots" and "sticks" to change attitudes if possible
conception of justice	individual accountability; punishment/retributive.	fairness in the eyes of the parties; maintain relationships if possible.
theory of social change	define the ends; design means to reach them; impose if necessary.	means matter; outcomes are more sustainable if reached in collaboration with parties.

How might these differing sets of assumptions help or hinder the atrocity prevention agenda? To examine this question, this study first looks at the use of mediation as it might be employed, generically, in the settlement of violent conflict, as well as its strengths and weaknesses as a preventive strategy. It then examines two recent cases in which mediation was used specifically for R2P purposes: in Kenya in 2007-8 where it was considered a success; and in Côte d'Ivoire in 2010-11 where it failed to stop the violence. Based on this comparison, it analyzes the conditions under which mediation could be effective in preventing mass atrocities, and also identifies the challenges in doing so.

Mediation as Conflict Settlement or Prevention

Mediation is a process referred to in the research and policy literature as Assisted Negotiation, in which a "third party" -- often an outsider in relation to the conflict -- is engaged in helping the primary parties in conflict to reassess their alternatives to negotiation, generate more constructive options, and find a formulation for an agreement that meets the disputing parties' interests.³

The strength of such a process is that the parties actively participate in the analysis of the problem and work with the mediator to construct the solution, by talking to each other directly or indirectly through the mediator to design a deal they both/all can accept. A successful deal is one that gives the disputing parties more than they would get without the deal, and creates favorable conditions for the deal to be implemented.

The challenge in using mediation is the flip side of its strength – because parties must agree to a deal rather than having one imposed on them, they must be convinced that the deal is a better option than other alternatives, including the use of violence. The theory of “ripeness” argues that parties are more likely to seek a settlement when their alternatives are not good and they are incurring costs because of the conflict (political, economic, military) that they can no longer absorb.⁴ Zartman has referred to this as a “hurting stalemate,” and his research showed that settlements are more likely when both/all sides have reached this point. The concept of ripeness as identified by Zartman includes not only the “mutually hurting stalemate” but also the formulation of a viable agreement and the participation of leaders who can deliver the compliance of their constituents.⁵

If these conditions are not present, rewards and/or penalties (“carrots and sticks”) can often change the cost-benefit calculus of parties such that a negotiated agreement is more enticing than the status quo; e.g., sanctions or other coercive measures can be used to increase the costs of non-agreement, or economic assistance can be offered to sweeten a potential deal. Mediators who themselves are able to offer such incentives are called “mediators with muscle,”⁶ and the use of such leverage can “ripen” the conflict for settlement. Mediators without such resources, such as the UN, are sometimes able to “borrow” them from other more powerful actors, such as the United States Government or the European Union. Mediation therefore is sometimes used with other interventions, in tandem or in a sequence with more coercive measures. Mediation can fail if “ripening” is needed and there is no will or ability on the part of outside third parties to accomplish this.

An oft-cited example is that of Bosnia in 1995, when bombing by the North Atlantic Treaty Organization (NATO) and wide-ranging international arms embargoes and sanctions against Serbia were used to change the costs of continued war to the Bosnian Serbs and to Slobodan Milosevic of Serbia. While US assistant secretary of state Richard Holbrooke's mediation efforts brought Milosevic to the negotiating table, the NATO bombing led to Milosevic being willing to make concessions that ultimately led to the 1995 Dayton Accords.⁷

Even when pressure, both positive and negative, is applied, it is not a guarantee of success. One or more of the parties might still prefer the no-deal option if they believe (even if incorrectly) in their strength and ability to ultimately prevail, or if negotiation is perceived to require impossible ideological or reputational compromises. Mediators hope that they can convince the parties otherwise, but it doesn't always work -- witness the lack of progress (as of early 2013), after 23 months of violence and more than 60,000 deaths, in convincing President Assad of Syria that he must step down.⁸

International mediation efforts geared to prevent violence are most often conducted when such violence is thought to be imminent -- referred to as "operational" or "proximate" prevention. According to the report by the Carnegie Commission on the Prevention of Deadly Conflict:

When violence appears imminent, the responsibility for operational prevention falls mainly on those closest to an unfolding crisis. But since the parties in a crisis often cannot find nonviolent solutions on their own, the help of outsiders is necessary in many instances.⁹

The dilemma of using mediation at this crisis moment is that ripeness theory predicts that parties are more likely to seek settlement after they have had the opportunity to test their strength against each other and determine whether they can unilaterally prevail. If they learn that they cannot, they are more open to negotiation. How, then, can mediation work before that test of strength has taken place, and therefore save many lives?

The two cases for analysis are both examples of mediation used for the purpose of operational prevention, and will help to explore that question. The framework for analysis, based on the preceding discussion, is the following:

1. Was there a hurting stalemate at the start of mediation? If not, did the mediator attempt to create one?

This will indicate whether the mediator tried to include all major parties in the negotiation, and whether such parties were motivated to strike a deal.

2. What kind of leverage was available to the mediator? How effective was the mediator in using its leverage?

If motivation to negotiate and strike a deal was absent, sources of leverage could be employed to create motivation or to weaken the opposition to a deal. It will be important to determine whether carrots and/or sticks were used as leverage.

3. Overall, was the mediation successful at preventing mass atrocities?

Success in operational prevention of mass atrocities could be determined by looking at whether levels of violence have decreased, and also at the extent to which perpetrators were held accountable and/or otherwise deterred from committing future atrocities.

Mediation in Kenya 2007-8

The violence following the December 27, 2007 Kenyan national elections lasted two months and resulted in over 1,000 deaths and the displacement of more than 500,000 people.¹⁰ Although election violence is not new in Kenya, this far exceeded predictions. As Weiss reports, "Kenya in 2007– 2008 illustrates the logic of R2P 'proximate prevention.' It was less compelling in terms of death levels and forced displacement but compelling enough by conjuring up the fear of another Rwanda while early international action still appeared feasible."¹¹

On December 29, the Election Commission of Kenya (ECK) announced that the ruling Party of National Unity (PNU) had suffered major losses in the Parliament while the opposition party, the Orange Democratic Movement (ODM) had received a plurality. However, on December 30, the Commission announced that the presidential election was won by the incumbent, Mwai Kibaki of the PNU rather than by the opposition candidate, ODM's Raila Odinga..."as delays and irregularities in the count sparked rumors of rigging. The government banned public gatherings and the police confronted street protests with excessive force, killing and wounding hundreds of peaceful demonstrators with live ammunition. Meanwhile, some people took advantage of the lack of law and order to loot, rape, and riot."¹²

Later research uncovered that preparations had been underway beforehand to recruit and arm unemployed youth and gang members, financed by business and political interests.¹³ Warning signs of deep divisions were apparent even before the elections. According to Lindenmayer and Kaye, who compiled an extensive narrative of the case for the International Peace Institute:

The scale of the violence reflected long-held grievances combined with severe poverty: according to the 2004-2008 UN Development Assistance Framework, 56 percent of the population is living in poverty. Control of resources and control of government are perceived as going hand in hand, and given that government has traditionally been controlled by one ethnic group (to the detriment of others), poverty is often aligned with ethnicity. Resentment runs high over land ownership and land use, and is aggravated further by high levels of unemployment, especially among the youth. Violence was conducted, therefore, primarily along ethnic lines, motivated by the endemic sense of marginalization; retaliatory violence made the numbers of dead and injured rise even more.¹⁴

Several unsuccessful mediation efforts ensued, including attempts by Archbishop Desmond Tutu; several former African presidents; the African Union chairman and Ghanaian President, John Kufuor; Ugandan President Museveni; and US Assistant Secretary of State for Africa, Jendayi Frazer. While these failed to bring the parties together, they did not undermine the eventual success of mediation; on the contrary, they laid the groundwork for the AU Panel of Eminent African Personalities that brokered an agreement.¹⁵

The AU Panel of Eminent African Personalities arrived in Nairobi on January 22, 2008, three weeks after the violence began. Their entry was orchestrated by Ghanaian President Kufuor, acting on behalf of the AU, during a two-day visit on January 8-9; he had been called to Kenya by President Kibaki, who was exploring a variety of options for resolving the crisis, hoping to find one that supported his interests. It was Kufuor's idea to appoint Kofi Annan as the AU mediator, along with a panel including Benjamin Mkapa, ex-President of Tanzania and Graça Machel, wife of Nelson Mandela and ex-wife of the late Samora Machel, President of Mozambique. Both political parties, the PNU and the ODM, accepted the proposed Panel¹⁶ and agreed with Annan's requirement that it be the

only mediation effort in which the parties would participate -- no parallel track or alternative mediator would be allowed. This gave the mediation team more legitimacy throughout the process, as other international (i.e., state and intergovernmental) and local civil society actors all supported the Panel's efforts.

In his first two days, Annan was able to get the two principal actors, Kibaki and Odinga, to meet face to face; by the end of the first week, they had agreed to appoint negotiating teams. On January 29, the National Assembly formally opened the talks and agreed to a "road map" that provided terms of reference for the Panel and a set of procedural steps for the talks.

At the start of the mediation process, no hurting stalemate was in evidence. Each side adopted maximalist positions, with Kibaki demanding that Odinga accept the legitimacy of Kibaki's presidency and drop all notions of contesting it, and Odinga in turn requiring Kibaki's resignation and a redo of the national elections. This polarized stance continued throughout the negotiating process -- although the two sides were talking, they remained intensely distrustful of each other and insistent that the "other" had to give way.

However, Annan and the Panel members were able to "ripen" the conflict over the ensuing four weeks, with the use of leverage (discussed below) and the creation of an acceptable formula for settlement. As Lindenmayer and Kaye conclude, "... the parties had no choice: to fail to reach an agreement would have meant trying to explain to the nation, the continent, and the international community how they could justify letting politics get in the way of peace. Furthermore, blood would be on the hands of the two men whose same hands could so easily have picked up a pen to sign an agreement."¹⁷ Left to their own devices, it is clear that the parties would not have reached this outcome or made the calculation that compromise was better than victory.

Annan and the other Panel members brought considerable personal stature to their mediation work; as "eminent African personalities," they had years of political experience, moral standing, and deep personal relationships on the continent and internationally. They drew upon these strengths -- referred to in the literature as "referent power"¹⁸ -- at crucial moments to convince the Kenyan leaders to back away from their extreme demands for the sake of the country. For example, Lindenmayer and Kaye report that Annan was able to get Kibaki and Odinga to shake hands publicly on January 24th, the first break in the tensions since the violence began in late December, by convincing them that "...this was an extraordinary situation which needed an extraordinary solution, starting with a commitment from the leaders to work together."¹⁹

To augment the personal leverage of the panel, Annan strategically called upon others who could exert influence with the feuding party leaders. For example, UN Secretary Ban Ki-moon arrived in Nairobi on February 1, after giving an address at the AU Headquarters in Addis Ababa the previous day calling on all African leaders to support peacemaking efforts in Kenya. In Nairobi, Ban met with Kibaki and Odinga and urged them to put the interests of the Kenyan people above self-interest.

The US Government also weighed in at various crucial points during the mediation process. For example, a government statement issued during the UNSG's visit to Kenya contained a veiled threat about an "external solution" being needed.²⁰ This spurred action on the Road Map proposed by Annan, with agreements being reached soon thereafter on two of the salient issues. Again on February 18, Secretary of State Condoleezza Rice arrived in Nairobi soon after President Bush began his African tour, stating to the press that "... as long as the crisis remained unresolved, Kenya could never enjoy 'business as usual' with the United States."²¹ Until the final agreement was reached, the US government continued to say publicly that unilateral US action (of an unspecified nature) remained a possibility if the parties were not able to find a political solution. Once there was an agreement, the US pledged \$30 million to assure its implementation.

Annan also relied on pressure from the African Union and many African leaders to convince Kibaki and Odinga to reach an accommodation. In addition to continuous coaxing from the other Panel members, Mrs. Machel and President Mkapa, the African Union was united behind the mediation process. And in the final push for agreement, when Annan suspended the talks between appointed delegates and brought the leaders themselves together, he brought in President Kikwete of Tanzania, a highly respected head of state and one whose country had adopted a power-sharing agreement similar to the one being discussed for Kenya. This allowed Kibaki and Odinga to frame their compromises in a face-saving way, in keeping with the desire for African solutions to African problems.

One last aspect of leverage was also crucial -- that coming from the ground-up organizing of Kenyan civil society. A group calling itself the Concerned Citizens for Peace (CCP) began forming as soon as the violence began. Even before the AU Panel arrived, the CCP reached out to schools, churches, businesses, and the media to forestall the incitement to violence.²² They continued to coordinate with Annan during the mediation process, to help convey the public's support for a peaceful solution to the leadership and to reassure the public that its leaders were listening.

The result was indeed the operational prevention of further violence, and a power-sharing arrangement that held until recent elections in 2012. However, as many analysts indicated and as Annan himself acknowledged, this did not address the underlying grievances in the society, which are still festering.²³ The mediated agreement did set up several ad hoc bodies to address the underlying issues of discrimination, impunity, and constitutional reform. But the government has been slow to act on the recommendations from these bodies. The good news is that Kofi Annan himself made good on a promise to submit names of those responsible for the post-election violence to the ICC, in the event that the government did not take action.²⁴ The ICC has recently delivered indictments on four persons. The 2012 elections in Kenya were less violent than in 2007 and the loser, Prime Minister Raila Odinga, accepted the Supreme Court's ruling that the election results should stand. The bad news is that the new president and vice president, although now sworn into office, are two of those indicted by the ICC for crimes against humanity.

Mediation in Côte D'Ivoire in 2010

The 2010-11 violence in Cote d'Ivoire was the most recent episode in a decade-long power struggle between supporters of two rival political leaders, Laurent Gbagbo and Allassane Ouattara. Gbagbo came to power in 2000, in an election that explicitly excluded Ouattara from running because of newly-passed and extremely exclusionary citizenship laws.²⁵ These elections also reflected an emerging split between the predominantly Muslim north (Ouattara is Muslim) and the largely Christian south. In 2002, violence erupted with an armed insurgency against the government and Ouattara (whom some accused of instigating the insurgents) fleeing for his life.²⁶ The Economic Community of West African States (ECOWAS) brokered a cease-fire, but killings continued and hundreds of thousands were displaced. In 2003, President Gbagbo signed a power-sharing agreement with rebel groups, but violence persisted. In 2004, the UN Security Council authorized a peacekeeping mission under Chapter VII of the UN Charter, to monitor the ceasefire, oversee demobilization/ demilitarization/ reintegration of combatants, and assist French and ECOWAS troops in maintaining law and order.²⁷ The mandate of the UN Operation in Cote d'Ivoire (UNOCI) was renewed numerous times from 2004 until the present day.

Presidential elections scheduled to take place in 2005 were postponed several times, and a renewed commitment to a transitional power-sharing arrangement was negotiated in 2007 between President Gbagbo and the leader of the opposition Forces Nouvelle (FN), Guillaume Soro. According to the International Crisis Group, this "Ouagadougou Agreement," negotiated under the auspices of Burkina Faso's President Blaise Compaoré and with the help of President Thabo Mbeki of South Africa, was " ...more a deal between two sides looking for an escape route that protects their own interests than a compromise which guarantees lasting peace. It does not break with the political practices that led to war in the first place."²⁸

The much-anticipated elections finally took place in October 2010, but neither incumbent president Gbagbo or opposition candidate Ouattara got over 50% of the vote. The run-off took place in November 2010, and the Electoral Commission plus most reliable sources pronounced Ouattara the winner:

There is no doubt Ouattara won the run-off. The candidate of the Union of Houphouetists for Democracy and Peace (Rassemblement des Houphouétistes pour la démocratie et la paix, RHDP) had a greater than 350,000-vote margin over Gbagbo's The Presidential Majority (La majorité présidentielle, LMP) in a credible election certified by the UN, as provided for in the agreement Gbagbo himself signed in 2005 and that several UN Security Council resolutions confirmed. In an attempt to reverse the result, however, the Constitutional Council – the country's highest court but entirely controlled by the Gbagbo camp – claimed to have discovered widespread violence and fraud – largely imaginary – in seven departments of the northern and central regions where Gbagbo had received less than 10 per cent of the votes in the first round. It thus

cancelled more than 660,000 second-round votes, enough to raise his total from 45.5 per cent to 51.4 per cent.²⁹

Gbagbo claimed victory and refused to step down; violence between the supporters of Gbagbo and Ouattara spiked, and President Compaoré again tried to mediate an agreement but to no avail. In early December, ECOWAS recognized Ouattara as the winner and called on Gbagbo to honor the results of the election. When Gbagbo ignored their request, ECOWAS sent a high-level delegation to Abidjan to try and resolve the stand-off. They also threatened the "use of legitimate force" if a diplomatic solution could not be reached.³⁰

The African Union also acted quickly in late 2010, suspending Cote d'Ivoire's membership and sending Thabo Mbeki to mediate. Mbeki's efforts were followed by similar interventions of Presidents Thomas Yayi Boni of Benin, Pedro Pires of Cape Verde and Ernest Bai Koroma of Sierra Leone, as well as Prime Minister Raila Odinga of Kenya and former President Olusegun Obasanjo of Nigeria. None of these were successful.

Francis Deng, the Special Adviser to the UN Secretary-General for the Prevention of Genocide, and Edward Luck, the Special Adviser on the Responsibility to Protect, held a press conference on 19 January 2011 in which they recommended "urgent steps" be taken, "...in line with the responsibility to protect, to avert the risk of genocide and ensure the protection of all those at risk of mass atrocities."³¹

On 28 January 2011, the AU Peace and Security Council (PSC) recognized "...Mr. Alassane Dramane Ouattara as the President- Elect from the presidential election held on 28 November 2010, on the basis of the results as certified by the Special Representative of the Secretary- General of the United Nations in conformity with resolution 1765 of 16 July 2007 and the different agreements signed by the Ivorian parties and endorsed by ECOWAS, AU and the United Nations."³²

The PSC also appointed a 5-person High Level Panel, representing all regions of the continent, in order to resolve the crisis. Its terms of reference were the following:

" the Panel is mandated to evaluate the situation and formulate, on the basis of the relevant decisions of the AU and ECOWAS, an overall political solution, the Panel will conclude its work within a period not exceeding one month and its conclusions, which will be endorsed by Council, will be binding on all the Ivorian parties with which these conclusions would have been negotiated;"³³

However, AU intervention efforts ran into difficulties; there was dissent within the Panel itself about how the crisis should be settled, with some favoring a power-sharing arrangement such as that brokered in Kenya and others saying that Ouattara alone was the legally elected president.³⁴ On 4 March, the Panel "...issued a proposal that called for the

formation of a government of national unity while an “honorable exit was found for incumbent president Laurent Gbagbo”; however Gbagbo rejected calls to step down and invited the Panel to reconsider its position on the political crisis.”³⁵

A commentary offered by the Institute for Security Studies in Pretoria highlighted the weaknesses of the AU mediation process:

Indeed, critics have dubbed the Panel a ‘paper tiger operation’ suggesting yet another unproductive diplomatic effort by the AU. The one-month extension of the mandate of the Panel has been seen as prolonging the agony of the citizens, in light of the alarming deterioration of the security situation in the country.

President Jacob Zuma’s implicit but deafening deviation from AU/ECOWAS collective resolutions; President Jakaya Kikwete’s unequivocal call for Gbagbo’s immediate resignation; Chad’s President Idriss Deby’s anti imperial rhetoric sympathetic to Gbagbo - all pointed to a perceived lack of common ground on the task at hand. This is notwithstanding a clear mandate from the AU that they formulate their proposals on the basis of prevailing AU and ECOWAS declarations as well as UN Secretary-General Ban Ki-moon’s five principles that should guide the Panel’s work. Notably, these principles include “the imperative to focus on the peaceful and honourable exit of Laurent Gbagbo; the formation of a national unity government by the UN-certified winner of the 28 November Ivorian presidential polls; and concrete action to lift the siege on the Golf Hotel where Ouattara is being blockaded by the Gbagbo forces.”³⁶

Over the next two months, the United Nations took several steps to bolster the AU efforts. The Secretary General and the UN Security Council renewed the mandate of UNOCI, authorized additional troops from the UN mission in Liberia to be transferred to UNOCI, and imposed sanctions against Laurent Gbagbo, his wife, and several of his close associates.³⁷

The AU once again tried to assert its control over the crisis when it met on 9-10 March 2011. At the conclusion of that meeting, the Peace and Security Council issued another communique in which it “...Reaffirms all its previous decisions on the post- electoral crisis facing Côte d’Ivoire since the second round of the presidential election, on 28 November 2010, recognizing the election of Mr. Alassane Dramane Ouattara as the President of the Republic of Côte d’Ivoire...” and appointed a high representative to implement the Council’s decision.³⁸ And also once again, Gbagbo dismissed the AU’s findings, and even Ouattara rejected the intervention because he did not trust the representative who was appointed.³⁹

On 28 March 2011, military forces supporting Ouattara began a country-wide offensive; mass atrocities were reported, with hundreds killed and thousands displaced. On 11 April,

with the assistance of UNOCI and French troops, Gbagbo was taken by force and arrested, bringing the crisis to a close.

As could be expected, the conditions leading to the violence still present worrying challenges to stability. According to a 2012 International Crisis Group report, "...security sector reform has been slow, political dialogue is stalled, the ruling coalition appears weak, violent discourses have returned, coup plots have been devised and uncovered and there is a clear lack of political will to promote national reconciliation."⁴⁰ However, Laurent Gbagbo has been indicted by the ICC for crimes against humanity, and is in custody in The Hague; his wife has also recently been indicted.

Mediation as operational prevention

These cases provide a useful comparison because of their similarities as well as their differences. Both countries are in Africa, so are subject to the same set of international and regional agreements on human rights and governance. This includes, among others, the African Charter on Human Rights and Peoples and the commitment to a continent-wide Peace and Security Council within the AU to encourage collective responsibility for accomplishing the goals of peace and security.

In both states, violence occurred in the aftermath of contested elections, in which political parties had aligned along ethnic and tribal lines historically as well as recently fraught with discrimination and distrust. Such divisions dominated national politics, and candidates for office played upon such differences to garner support and votes. In both states, violence had occurred previously around elections, so it was not unexpected when it occurred.

And in both, political leaders from the region and the world attempted to mediate very quickly after violence erupted. The African Union charter of 2000, in fact, contains a key principle that distinguishes it from the Organization of African Unity, its predecessor: "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity...." However, in both cases, the leaders initially resisted mediation, and many efforts in the first weeks of crisis were rebuffed. In neither case were atrocities prevented completely, as the ICC indictments clearly demonstrate.

The most relevant difference in terms of assessing the role of mediation in the prevention of mass atrocities is that in Kenya, a mediated political agreement ended the escalating violence while in Cote d'Ivoire it took military force to accomplish that result. At the very least, on the criterion of stopping the killings, mediation was successful in Kenya but not so in Cote d'Ivoire. The following factors offer some explanation for that success:

1. The unity of the mediators

In Kenya, all mediation efforts coalesced not only around the AU but also around Kofi Annan himself. It was one of the conditions under which Annan took the AU appointment -- with assurance that his was the only channel through which mediation would take place. He became the first among equals of the mediation team, providing strong leadership and making sure the third parties were in sync with each other. This accomplished two important mediation tasks: it prevented the parties from playing outsiders against each other or trying to get better terms of settlement through competing channels; and it produced enhanced synergy between the array of outside actors, including the UN, AU, and US who could add leverage to the mediation by both enticements and threats of punishment. At various points when negotiations stalled, Annan could call upon these other third parties to help him either coerce Kibaki and Odinga or sell them on the benefits of a power-sharing deal.

Such unity of effort was not as strong in the Cote d'Ivoire mediation. The Panel appointed by the AU had no single visible leader and on the most important issue -- whether to allow Gbagbo to remain in government -- they disagreed. Even though official AU statements supported the Election Commission decision that Ouattara was the winner, some African leaders on the Panel and elsewhere remained supportive of Gbagbo, in part to affirm solidarity because of increasing concerns about excessive interference of "imperialist" powers in West Africa. This may have allowed Gbagbo to think he could still prevail, politically as well as militarily. He was therefore unwilling to back down even in the face of mounting pressure against him.

2. The power of civil society

The second important factor was the unity and organization of Kenyan civil society. Leaders from many organizations, including the religious and peacebuilding communities, began working together almost immediately to build a constituency for peace. Even though ethnic factions were being armed and prepared to fight even before the elections, the civic peacemakers succeeded in marginalizing those pursuing polarization and violence, and worked in tandem with the official mediation effort to legitimize and strengthen it. Mass atrocities require many people, whether as officials in the state military or recruited from the population, who are willing and able to slaughter members of the "other" group. The Kenyan people rose up against such incitement and compelled their leaders to take the political rather than militant option.

The people of Cote d'Ivoire had recently endured a brutal civil war, and the demobilization agreed to in the 2007 peace settlement was dangerously incomplete. There had not been years of peace, as in Kenya, in which a vibrant civil society could form, and the availability of arms plus the enduring polarization from the previous war fed the escalation. Although the international community sent troops to Cote d'Ivoire (from ECOWAS, France, and the UN missions in the region), the show of force was not enough to convince Gbagbo and his followers to stand down, and there was no organized effort from within to make him doubt his base of support.

5. The possibility of a mutual-gains outcome

The results of the Kenyan elections were inconclusive, with the vote count delayed and wide-spread suspicion that the election had been rigged. The Electoral Commission, who called the election in favor of the incumbent PNU, discredited itself with this action and there was no independent body to provide a counterpoint decision. Under these circumstances, the mediators were open to brokering a power-sharing arrangement and talked the two candidates into accepting this outcome, "for the good of the country." A new position of prime minister was created for Odinga, and an expanded cabinet was formed in which both parties were represented. While this arrangement proved to be very unwieldy for governance purposes, it was a deal that both parties could sell to their followers in a face-saving way, and in which the violent competition for power stopped -- at least in the short run. In addition, the agreement set up accountability procedures to follow the elections, although with mixed results.

Such a power-sharing agreement was never considered in Cote d'Ivoire. The results from all vote counts, both local and international, confirmed that Ouattara won the election. Therefore, the only question for the mediation was when and how Gbagbo would step down, albeit with as much face-saving as possible. This was not enough of a "win" for Gbagbo and so he dug in his heels. To the AU's credit, even though some were not in agreement, it did not waver in its official position that Ouattara was the new president and Gbagbo must go. Thus the mediators had no deal to deliver that both sides were willing to take.

Conclusion

The analysis, while very preliminary, shows that the human rights and mediation approaches can and do work together when mass atrocities are a risk. Under the best of circumstances, as in Kenya, mediation is enhanced by the threat of coercion, but also by appeals to the leaders' values and interests. And where appropriate and possible, an agreement can be brokered that stops the violence and leads to mechanisms of accountability being adopted. Where such an agreement is not possible, mediation efforts cede to more punitive measures and win-lose outcomes, as in Cote d'Ivoire. One big challenge, as in Syria at the moment, is when agreement is not possible and there is no willingness or capacity for alternatives.

A second challenge is that the conditions that led to success in Kenya are difficult to replicate. However, it provides data to inform where prevention efforts using mediation must be focused:

*One is in building regional capacity and legitimacy for mediation. The AU, for example, was a crucial player in Kenya and provided excellent leadership and a strong set of voices to support its mediators. However, its mediation achievements are uneven; currently, its Conflict Management Division is working hard to upgrade its mediation skills and capacity. AU is notable as well for its new charter that moves from the OAU principle of non-interference to the AU principle of non-indifference.⁴¹ It is a notable demonstration of the evolution of norms at the regional level. A review of

regional capacities and a commitment to upgrading these would make mediation a much more viable option when violence threatens to escalate.

*Another important priority is to support strong civil society organizations that focus on conflict resolution and responsible governance. These will be the voices from within that can provide internal pressure on their government to foster tolerance and political problem-solving rather than violence.

The third challenge is timing. Mediation for R2P prevention purposes is now launched when there is a credible threat that violence within a country will soon escalate to the level of crimes against humanity or worse, to genocide. Prevention is therefore "operational" or "proximate", undertaken to prevent violence that is imminent or already occurring. The reality is that such atrocities are never a result of spontaneous combustion; the ingredients for them are knowable and detectable in advance. Attention must focus much earlier on the systematic dehumanizing of some group as "other" that creates the conditions for mass atrocities to take place. More research into ways to foster such "structural prevention" must take place, to address the political aversion to such early action.⁴²

Notes

¹ UN News Centre, "Secretary-General stresses global responsibility to prevent genocide." 9 December 2010. <http://www.un.org/apps/news/story.asp?NewsID=37001#.UYg_74KAl0w>

² Adapted from Eileen F. Babbitt, "Conflict Resolution and Human Rights: Pushing the Boundaries," in *The Handbook of Conflict Resolution*. ed. I. William Zartman (San Francisco: Sage Publications, 2008), 617

³I. William Zartman and Saadia Touval, "International Mediation." In *Leashing the Dogs of War*. ed. Crocker, Chester A. and Fen Osler Hampson with Pamela Aall. (Washington, DC: United States Institute of Peace, 2007); Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd Edition (San Francisco: Jossey-Bass, 2003); Dean G. Pruitt, "Mediator Behavior and Success in Mediation" in *Studies in International Mediation*. ed. Jacob Bercovitch, (New York: Palgrave MacMillan, (2002) 41-54; Jacob Bercovitch, ed., *Resolving International Conflicts: The Theory and Practice of Mediation*. (Boulder, CO: Lynne Rienner Publishers, 1996).

⁴ I. William Zartman, "The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments, *The Global Review of Ethnopolitics* 1, no. 1 (2001): 8-18; Peter J. Carnevale and Sharon Arad. "Bias and Impartiality in International Mediation," in *Resolving International Conflicts: The Theory and Practice of Mediation*. ed. Jacob Bercovitch. (Boulder, CO: Lynne Rienner Publishers, 1996). 39-53

⁵ Zartman, "The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments"

⁶ Donald B. Strauss, "Kissinger and the Management of Complexity: An Attempt that Failed." In *Dynamics of Third Party Intervention: Kissinger in the Middle East*. ed. Jeffrey Z. Rubin. (New York: Praeger Publishers, 1981). 253-270.

⁷ Richard Holbrooke, *To End a War*. (New York: Random House, 1998)

⁸ Joe Sterling and Salma Abdelaziz. "UN's Syria death toll jumps dramatically to 60,000-plus." *CNN*, 3 January 2013. <http://www.cnn.com/2013/01/02/world/meast/syria-civil-war/index.html>

⁹ The terms "operational" and "structural" prevention were coined by the Carnegie Commission on Preventing Deadly Conflict in their 1998 report, *Preventing Deadly Conflict*. "Operational prevention involves measures applicable in the face of immediate crisis, and structural prevention includes measures to ensure that crises do not arise in the first place or, if they do, that they do not recur." (Executive Summary, xix)

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- ¹⁰ Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance." Volume 20, No. 1 (A), March 2008. 2
- ¹¹ Thomas G. Weiss. "Halting Atrocities in Kenya." *Great Decisions*. Foreign Policy Association. 2010
- ¹² Human Rights Watch. "Ballots to Bullets." 4
- ¹³ The data for this case study are taken primarily from Elisabeth Lindenmayer and Josie Lianna Kaye, "A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya." (New York: International Peace Institute, August 2009). When other sources are used, they are footnoted.
- ¹⁴ Lindenmayer and Kaye (2009), 3-4
- ¹⁵ The Constitutive Act of the African Union, entered into force in 2001, establishes a role for the AU in conflicts within states, quite different from the more hands-off approach of the Organization of African Unity that preceded it. Article 4(h) of the Constitutive Act provides for "... the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." See "The Constitutive Act of the African Union" accessed at <http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm>
- ¹⁶ George Wachira, with Thomas Arendshorst and Simon M. Charles. "Citizens in Action: Making Peace in the Post-Election Crisis in Kenya -- 2008." (Nairobi: NPI-Africa, January 2010)
- ¹⁷ Lindenmayer and Kaye, 22
- ¹⁸ J. R. P. French and B.. "The bases of social power," In *Group dynamics*. D. Cartwright and A. Zander. (New York: Harper & Row, 1959)
- ¹⁹ Lindenmayer and Kaye, 9
- ²⁰ Ibid, 11
- ²¹ Ibid, 17
- ²² Wachira (2010), 38-41
- ²³ John Githonga, "Fear and Loathing in Nairobi: The Challenge of Reconciliation in Kenya." *Foreign Affairs* (New York: Council on Foreign Relations, May/June 2010).
<http://www.foreignaffairs.com/print/66448>
- ²⁴ Weiss, "Halting Atrocities in Kenya."
- ²⁵ These laws were passed in the wake of a 1999 coup, and required that both parents be native Ivorian in order to be a citizen. Ouattara's mother was from Burkina Faso, and therefore he was disqualified from running in the 2000 presidential elections. See *GlobalSecurity.org* at <<http://www.globalsecurity.org/military/world/war/ivory-coast.htm>>
- ²⁶ IRIN, "Cote D'Ivoire: Crisis bodes ill for country, region." In *Depth: Cote d'Ivoire Crisis* (UN Office for the Coordination of Humanitarian Affairs, 2002) at <<http://www.irinnews.org/In-depth/70881/38/Cote-d-Ivoire-crisis-2002>>
- ²⁷ UN Security Council, S/RES/1528, 27 February 2004. At <<http://www.undemocracy.com/S-RES-1528%282004%29.pdf>>
- ²⁸ International Crisis Group, "Cote d'Ivoire: Can the Ouagadougou Agreement Bring Peace?" Africa Report No. 127, 27 June 2007. At <<http://www.crisisgroup.org/en/regions/africa/west-africa/cote-divoire/127-cote-divoire-can-the-ouagadougou-agreement-bring-peace.aspx>>
- ²⁹ International Crisis Group, "Cote d'Ivoire: Is War the Only Option?" Africa Report No. 171, 3 March 2011. 1
- ³⁰ ECOWAS, "Extraordinary Session of the Authority of Heads of State on Cote d'Ivoire." Press Release No. 192, 24 December 2010.
- ³¹ United Nations, "Press Conference by Secretary-General's Special Advisors on Responsibility to Protect: Genocide in Connection with Situation in Cote d'Ivoire." New York: Department of Public Information, 19 January 2011.
- ³² African Union, "Communique of the 259th Meeting of the Peace and Security Council." Addis Ababa, 28 January 2011.
- ³³ Ibid.
- ³⁴ Voice of America, "Ivory Coast's Gbagbo Rejects AU Mediation Proposal." 9 March 2011. At <<http://www.voanews.com/content/gbagbo-team-rejects-au-mediation-on-ivory-coast-117732034/136286.html>>

³⁵ International Coalition on the Responsibility to Protect, "The Crisis in Cote d'Ivoire: The African Regional and Sub-Regional Response." at <http://responsibilitytoprotect.org/index.php/crises/crisis-in-ivory-coast>

³⁶ David Zounmenou and Dimpho Motsamau, "AU Resolution on Cote d'Ivoire Confirms Ouattara's Victory." *ISS News*, Institute for Security Studies, 11 March 2011.

³⁷ United Nations, UN Security Council Resolution 1951, 24 November 2010; UNSC Resolution 1962, 20 December 2010; UNSC Resolution 1967, 19 January 2011; UNSC Resolution 1968, 16 February 2011; UNSC Resolution 1975, 30 March 2011.

³⁸ African Union, "Communique of the 265th Meeting of the Peace and Security Council." Addis Ababa, 10 March 2011.

³⁹ International Coalition on the Responsibility to Protect, "The Crisis in Cote d'Ivoire."

⁴⁰ International Crisis Group, "Cote d'Ivoire: Diffusing Tensions." Africa Report No. 193, 26 November 2012. <http://www.crisisgroup.org/en/regions/africa/west-africa/cote-divoire/193-cote-divoire-defusing-tensions.aspx>

⁴¹ BBC News, "Profile: African Union." 1 February 2012.

http://news.bbc.co.uk/2/hi/country_profiles/3870303.stm

⁴² The latest discussion of a much earlier approach to prevention is presented in David A. Hamburg and Eric Hamburg. *Give Peace a Chance*. (Boulder, CO: Paradigm Publishers, 2013)