LOCATING PEACE WITHIN THE JUSTICE AGENDA

The case of the African Union
Transitional Justice Policy
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The International Coalition of Sites of Conscience (ICSC) is a global network of museums, historic sites and grassroots initiatives dedicated to building a more just and peaceful future through engaging communities in remembering struggles for human rights and addressing their modern repercussions. Founded in 1999, the ICSC now includes more than 300 Sites of Conscience members in 65 countries. The ICSC supports these members through grants, networking and training.

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“Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.” 2004 United Nations Secretary-General’s report.
Around the world, there is an increasing call for justice, truth and reconciliation in countries where legacies of grave human rights violations cast a shadow on transitions. To meet this need, the International Coalition of Sites of Conscience (ICSC) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014. The goal of GIJTR is to address new challenges in countries in conflict or transition that are struggling with their legacies of past or ongoing grave human rights violations.

The GIJTR Consortium (“the Consortium”) is comprised of the following nine partner organizations:

- International Coalition of Sites of Conscience, in the United States (lead partner);
• American Bar Association Rule of Law Initiative (ABA ROLI), in the United States;
• Asia Justice and Rights (AJAR), in Indonesia;
• Centre for the Study of Violence and Reconciliation (CSVR), in South Africa;
• Documentation Center of Cambodia (DC-Cam), in Cambodia;
• Due Process of Law Foundation (DPLF), in the United States;
• Forensic Anthropology Foundation of Guatemala (Fundación de Antropología Forense de Guatemala – FAFG), in Guatemala;
• Humanitarian Law Center (HLC), in Serbia; and
• Public International Law & Policy Group (PILPG), in the United States.

In addition to leveraging the different areas of expertise of the Consortium partners, the ICSC draws on the knowledge and longstanding community connections of its 275-plus members in 65 countries in order to strengthen and broaden the Consortium’s work.

The Forensic Anthropology Foundation of Guatemala (FAFG) applies multidisciplinary forensic scientific methodologies to investigations into the circumstances, whereabouts and identity of missing and disappeared persons to provide truth to victims and their families, assist in the search for justice and redress, and strengthen the rule of law. Photo credit: Forensic Anthropology Foundation of Guatemala
The Consortium partners, along with the ICSC’s network members, develop and implement a range of rapid response and high-impact programs, utilizing both restorative and retributive approaches to criminal justice and accountability for grave human rights violations. The Consortium takes an interdisciplinary approach to justice, truth and accountability. On the whole, the Consortium partners possess expertise in the following areas:

- Truth-telling, memorialization and other forms of historical memory and reconciliation;
- Documenting human rights violations for transitional justice purposes;
- Forensic analysis and other efforts related to missing or disappeared persons;
- Advocating for victims, including for their right to access justice, psychosocial support and trauma mitigation activities;
- Providing technical assistance to and building the capacity of civil society activists and organizations to promote and engage with transitional justice processes;
- Reparative justice initiatives; and
- Ensuring and integrating gender justice into these and all other transitional justice processes.

Given the diversity of experiences, knowledge and skills within the Consortium and the ICSC’s network members, the Consortium’s programming offers post-conflict countries and countries emerging from repressive regimes a unique opportunity to address transitional justice needs in a timely manner while simultaneously promoting local participation and building the capacity of community partners.
Participants at a GJTR workshop in Conakry, Guinea learn about self-care while assisting survivors with trauma.
Introduction –

Participants in GIJTR’s African Youth Transitional Justice Academy during a workshop activity in Rwanda in July 2019.

Participants in GIJTR’s African Youth Transitional Justice Academy during a workshop activity in Rwanda in July 2019.
1. INTRODUCTION

“Reconciliation should be accompanied by justice, otherwise it will not last. While we all hope for peace it shouldn’t be peace at any cost but peace based on principle, on justice.” ~ Corazon Aquino

The peace versus justice debate is well-articulated in the transitional justice field. The question of whether peace and justice compete against each other or whether they are complementary and mutually reinforcing in fostering comprehensive and sustainable peace continues to be a subject of keen academic and practice enquiry. On the one hand, proponents for prioritising peace at the expense of justice argue that the pursuit of justice immediately during a post-conflict reconstruction process will only lead to destabilisation and more conflict in an already difficult situation, while, on the other, those in favour of inclusion of justice within the peace agenda maintain that long-lasting peace is elusive and not possible without justice1. Katerina Mansour Riches2 has labelled this “a false dichotomy” of the peace-versus-justice debate. She points out that peace entails more than the cessation of hostilities and justice goes beyond retribution.

Timing and sequencing of peace and justice processes to address the consequences of conflict constitutes the middle ground wherein both peace and justice can be pursued, with peace pursued first and the pursuit of justice coming at a later stage3.

From the Lomé Peace Agreement in Sierra Leone in the 1990s to the Agreement on the Resolution of the Conflict in South Sudan in 2015 and its subsequent Revitalised Agreement on the Resolution of the Conflict in South Sudan signed in 2018 and the more recent Sudan Peace Agreement signed in 2020, transitional justice provisions, including justice and accountability processes, are increasingly being incorporated in peace agreements. In recognition of this growing phenomenon on the continent, the African Union Transitional Justice Policy (AUTJP), which was adopted by the African Union Heads of State and Government on 11 February 2019, more clearly outlines the parameters for finding a balance, at least in policy, by locating peace within the justice agenda. The policy also recommends timing and sequencing of transitional justice priorities to address the peace-versus-justice tension.

This paper discusses the AUTJP as a policy case study that locates peace within the justice agenda on the continent, drawing from the rich, three-decade-long practice and experience of transitional justice processes on the continent to guide and inform future transitional justice processes. The parameters set by the policy within which peace and justice processes can co-exist and be pursued in transitional justice through timing and sequencing of the two processes will also be discussed. The paper will also analyse the benchmarks of success for peace processes, making use of African examples, and offering recommendations for future interventions.
2. PEACE AND JUSTICE IN THE AFRICAN CONTEXT

The African continent has been a site of various transitional justice processes and a landscape where justice and accountability have been shunned by political actors in fear of prosecutions and in favour of amnesties and other non-judicial measures of addressing the consequences of conflict, gross human rights abuses and international crimes often attendant to conflict and violence. As Mbeki and Mamdani put it, the belief that “[c]ourts are ill-suited to inaugurating a new political order after civil wars; they can only come into the picture after such a new order is already in place” is quite widespread among political actors and has led to the stalling in signing of peace agreements that incorporate transitional justice processes. In instances where peace agreements are signed, the implementation of the justice and accountability provisions becomes delayed. This has been the case in South Sudan, where the establishment of the Hybrid Court of South Sudan stalled due to a lack of political will to implement it. In the Northern Uganda Juba Peace Agreement(s), which also contained transitional justice processes, the challenge of accountability or prosecution could not be resolved, resulting in the derailment of the negotiations. Some countries opted solely for a peace process devoid of justice and accountability, such as Mozambique, which prioritised amnesty and a negotiated settlement to address the consequences of the 1977 to 1992 RENAMO-FRELIMO civil war.

Solomon Dersso, Chairperson of the African Commission on Human and Peoples’ Rights, notes that African experiences of implementing transitional justice components of peace processes are fraught with challenges of the positions and political interests of key actors responsible for implementation, citing examples of Kenya, Burundi and South Sudan. As Mbeki and Mamdani surmise, in most instances, “no one is wholly innocent and no one wholly guilty” of conflict, thus further compounding the moral standing of the political actors in calling for prosecution of perpetrators. At the same time, the omission of justice in peace processes and peace agreements has not been without serious repercussions, which, in some instances, have led to the reversal of the semblance of peace achieved through cessation of hostilities or near-collapse of such peace deals. In the Mozambican case, the country’s decision to forgo justice in the General Peace Agreement of 1992 saw RENAMO soldiers taking up arms leading to renewed attacks by its armed wing against the FRELIMO-led government between 2013 and 2016, and the subsequent signing of yet another (new) peace agreement in 2019. The 1999 Sierra Leone Lomé peace accord, which provided blanket amnesties for Revolutionary United Front (RUF) and government soldiers, and a negotiated settlement that saw RUF soldiers being awarded political positions in the unity government, resulted in the renewed fighting within two months of the negotiated settlement, as the RUF refused to disarm.
Lessons from the practice of transitional justice in the African context, as highlighted in the examples above, show that there is really no durable peace without justice. As Mansour and Riches note, the goal of transitional justice is pursuit of justice in order to achieve sustainable peace. The AUTJP, based on more than three decades of transitional justice practice and implementation on the continent, incorporates this important lesson and locates peace within the transitional justice agenda. It does so through including peace as one of the elements of transitional justice, and its directive provisions on timing and sequencing of the transitional justice elements, as well as the setting out of the benchmarks of success for peace processes within a transitional justice agenda.

3. PEACE AND JUSTICE IN THE AUTJP

The AUTJP outlines 11 indicative elements of transitional justice, namely: Peace Processes; Transitional Justice Commissions; African Traditional Justice Mechanisms; Reconciliation and Social Cohesion; Reparations; Redistributive (Socio-economic) Justice; Memorialisation; Diversity Management; Justice and Accountability; Political and Institutional Reforms; and Human and Peoples’ Rights. Peace is thus firmly located within the transitional justice agenda.

3.1. Peace Processes

In its articulation of peace, the policy provides that the peace process element is "concerned with bringing an end to any ongoing violence and removing the threats of further violence impacting the affected population". The AUTJP adopts the stance that peace is a precursor and a pre-requisite for justice. As Dersso points out, justice, or transitional justice, is a product of peace processes. The examples given in the earlier sections of Uganda, South Sudan and Sudan, amongst others, affirm this view. The AUTJP further outlines mechanisms for pursuing peace as inclusive of peace negotiations and agreements and directs that these should incorporate transitional justice from the very beginning of the negotiation and mediation processes.

The policy buttresses this point by setting out African shared values that should underpin any action aimed at implementing transitional justice processes to ensure that “activities address the root causes of conflict and contribute to the creation of sustainable peace, accountability, social justice and transformative democratic and socio-economic reform”. These values include national and local ownership of the transitional justice process, including the peace process, through establishing partnerships between various actors at a national level, such as beneficiaries and the government, state and non-state actors, and including them in the negotiation and mediation from the design to the implementation of the processes. This value is important for peace processes as it addresses one of the biggest gaps in peace negotiation and mediation processes: the exclusion of various key stakeholders, especially non-state actors, experts and key beneficiaries from design to implementation of the peace process.
The AUTJP further sets out parameters for effective negotiation or mediation processes, providing that they must “identify [transitional justice] goals in peace processes and the measures to end violent conflicts; the establishment of robust guarantees ensuring prevention of new violence against civilians, particularly women and children, ceasefire and cessation of hostilities, and preventing the resumption of hostilities”. The policy directs that serious violations committed during the conflict or authoritarian rule should be investigated and exposed, thus making a case for a justice and accountability process at a later stage. It is important to note that the AUTJP language does not deem a peace process an end in itself but a starting point, a prerequisite and a common ground where warring factions converge to craft the way forward towards achieving peace.

To this end, the policy sets out benchmarks encompassing provisions relating to justice, human rights, reconciliation, accountability, trust building, social cohesion and ending impunity in peace agreements, as well as collecting and preserving evidence for violations already perpetrated, including for sexual and gender-based crimes. The policy also calls for peace agreements that incorporate transitional justice processes to take “full account of the imperative for ensuring accountability for past violations and for reconciliation between sections of society with varying transitional demands”.

3.2. Justice and Accountability

The justice and accountability element of transitional justice in the AUTJP, which aims to provide judicial remedy to victims, thus acknowledging their suffering, draws from and gives effect to the benchmarks for success of peace processes outlined above. The policy, in the same manner, sets out the parameters as well as benchmarks for the success of justice and accountability processes, citing that member states can use plea bargains and pardons to secure cooperation of suspects where necessary as well as other mitigation and alternative punishment measures.

The policy also addresses the contentious issue of the use of amnesties as a compromise and a trade-off for achieving peace, under the justice and accountability process of transitional justice. Given the popularity of amnesties as a transitional justice mechanism in Africa and beyond and their justification by member states as “important tools to secure peace”, a continental position on amnesties through policy imperatives was an urgent one. The need for this African position and pronunciation on amnesties is further necessitated by justifications that widespread prosecutions could put the life of the new democracy at risk and that dwelling on the past and
apportioning blame and pointing fingers through prosecutions is counter-productive to the goal of reconciliation\textsuperscript{16}. While South Africa continues to be a shining example in setting parameters for the use of conditional amnesties for purposes of facilitating victims’ right to truth and reparations, other countries on the continent, such as Mozambique, have applied blanket amnesties that have had the adverse effect of perpetuating a culture of impunity, leading to cycles of conflict and violence.

As Reiter notes, amnesty is dangled as a carrot to entice the surrender of armed actors. Although successful in some cases, such success is usually limited to the demobilisation of individual combatants or the armed wings of the parties\textsuperscript{17}. Sierra Leone and Mozambique cited earlier in this paper attest to the short lifespan of amnesty without justice. Although Sierra Leone, through the Special Court of Sierra Leone, later corrected its initial stance on amnesty by holding perpetrators accountable, Mozambique did not, as evidenced by its 2019 peace deal.

The AUTJP, therefore, acknowledges that, as Mallinder\textsuperscript{18} also observed, amnesties are on the increase, and are necessary in some instances, therefore necessitating a balance between providing amnesty to some perpetrators and efforts to end impunity for international crimes. To foster this balance, the AUTJP directs that provision of amnesty should serve the “purpose of preventing further violence and the facilitation of accountability and reconciliation, including the rights of victims to truth and reparations”\textsuperscript{19}. As such, it must “create institutional, political and security conditions to ensure observance of the rule of law and human rights and humanitarian law”. The policy also provides that amnesties, when used in transitional justice processes, must include victims and affected communities, whose participation and consent should determine the extent and conditions of such amnesty.

The policy is clear in its position that transitional justice processes should not allow “blanket” or unconditional amnesties, a position that the African Commission on Human and People’s Rights affirmed in its obiter dictum to the Thomas Kwoyelo case\textsuperscript{20}. The Commission went further to define conditional amnesties as “those that usually offer relief from criminal conviction or criminal prosecution altogether for defined category of actors and on meeting certain preconditions including full disclosure of what they know about the conducts covered by the amnesty and acknowledgment of responsibility”\textsuperscript{21}. In its rejection of blanket amnesty, the AUTJP further directs that amnesties be implemented in a manner that is impartial and transparent, based on clear criteria, wherein information about the amnesty is publicised.
4 BALANCING PEACE AND JUSTICE INTERESTS THROUGH TIMING AND SEQUENCING

The tensions between peace and justice make it clear that the two processes are often competing in priority and implementation in societies emerging from a violent past. As Sriram notes, in most transitioning societies, “the choice is seldom simply ‘justice’ or ‘peace’ but rather a complex mixture of both”. There is, therefore, a need for various processes and objectives aimed at achieving peace, justice and reconciliation to co-exist and be implemented. The mutuality of peace and justice as well as the need to sequence these processes towards achieving long-lasting peace has been well articulated in the 2004 United Nations Secretary-General’s report through the following statement:

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.

Sequencing thus allows amnesties to be granted to facilitate peace agreements or democratic transitions without abandoning the idea of justice. Rather, sequencing allows justice and even truth to be postponed until it is less likely to have a destabilising effect on the post-transitional state. In many ways, sequencing provides a means of temporarily accommodating the dichotomies of old while allowing their limitations to be mitigated.

In tandem with the UN report, the AUTJP also addresses the tensions between the peace and justice processes through its principle of synergising, sequencing and balancing of these transitional justice elements. The policy outlines these two transitional justice processes not as competing ideas and outcomes by directing that “a balance and compromise must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other”. To this
Gugulethu Street art (Cape Town, South Africa) – an expression of what is all too often a pervasive issue within our communities.
end, the policy provides that “[t]he choice of the combination of TJ measures should endeavour to mutually reinforce, and ensure the complementarity of, the objectives of peace and reconciliation on the one hand and justice and accountability, as well as inclusive development, on the other.”

The policy goes on to describe sequencing as referring to the need for various TJ measures to be “comprehensively planned and complementarily organized in their formulation and programmatically ordered and timed in their implementation”24. Balancing, in turn, is described as finding the middle ground whereby a compromise is achieved between the demand for justice in its retributive or prosecutorial form and the need for society and communities to achieve reconciliation and peace25.

5. CONCLUSION

In its comprehensive transitional justice policy that seeks to guide African member states on implementing transitional justice processes to address a myriad of challenges resulting from conflict, violence and other occurrences that lead to political instability and gross human rights violations, the AU addressed the peace versus justice tension by locating peace within the justice agenda. Drawing from the Corazon Aquino, the 11th President of the Philippines statement, that “Reconciliation should be accompanied by justice, otherwise it will not last. While we all hope for peace it shouldn't be peace at any cost but peace based on principle, on justice”, sums up the place of peace within the justice agenda.

The AUTJP has firmly located peace within the justice agenda in its articulation of peace processes as one of its core elements of transitional justice and by addressing the contentious issue of amnesty within a justice agenda. The policy’s provisions on balancing demands for peace by member states and warring factions and justice by victims and affected communities through timing and sequencing further highlight that the two processes can co-exist and be implemented in a complementary and mutually reinforcing manner to achieve sustainable peace. On the continent, at least, experience has shown that pursuit of peace alone, in the absence of justice, guarantees the return of conflict in the future.
REFERENCES


5. Thabo Mbeki and Mahmood Mamdani in fn 3 above


7. Katerina Mansour & Laura Riches in fn 2 above

8. Ibid


10. Ibid, para 43

11. Fn 4 above


13. AUTJP, para 49


16. AZAPO v President of the Republic of South Africa 1996 (8) BCLR 1015 (CC)

17. Ibid


19. AUTJP, para 89


21. Ibid, para 288


23. AUTJP, para 38

24. Ibid

25. Ibid