

NEGOTIATING JUSTICE

Peace Processes as Vehicles for
Transitional Justice



GIJTR

Global Initiative for Justice
Truth & Reconciliation



The International Coalition of Sites of Conscience (ICSC or the Coalition) 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 Coalition now includes more than 300 Sites of Conscience members in 65 countries. The Coalition supports these members through seven regional networks that encourage collaboration and international exchange of knowledge and best practices. The Global Initiative for Justice, Truth and Reconciliation is a flagship program of the Coalition.

Learn more at www.sitesofconscience.org.



The Public International Law & Policy Group is a global pro bono law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution. PILPG was founded in London in 1995, and is currently headquartered in Washington, DC. Since its founding, PILPG has provided legal assistance with over two dozen peace negotiations, and over two dozen post-conflict constitutions, and has assisted every international and hybrid criminal tribunal, as well as helped to create a number of domestic transitional justice mechanisms.



The Centre for the Study of Violence and Reconciliation (CSV R) is an independent, non-governmental, organisation established in South Africa in 1989. We are a multi-disciplinary institute that seeks to understand and prevent violence, heal its effects and build sustainable peace at community, national and regional levels. We do this through collaborating with, and learning from, the lived and diverse experiences of communities affected by violence and conflict. Through our research, intervention and advocacy we seek to enhance state accountability, promote gender equality, and build social cohesion, integration and active citizenship. While primarily based in South Africa, we work across the African continent through collaborations with community, civil society, state and international partners.

ABOUT THIS REPORT

Released in March 2021, this briefing paper *Negotiating Justice: Peace Processes as Vehicles for Transitional Justice* presents lessons and recommendations as to how peace processes can best nurture and promote transitional justice. It is based primarily on the outputs of a remote workshop convened in November 2020 by Consortium partners Public International Law & Policy Group (PILPG), the International Coalition of Sites of Conscience (ICSC) and the Centre for the Study of Violence and Reconciliation (CSV R). Approximately two dozen conflict resolution professionals from six continents gathered for the virtual workshop, including civil society activists, academics, diplomats and leaders of state and multilateral institutions. Also included herein is the Keynote Address to the Workshop presented by Hon. Solomon Ayele Dersso, PhD, Chairperson of the African Commission on Human and Peoples' Rights and Focal Person on Transitional Justice for the Commission. The discussions were framed by case studies from the Balkans, El Salvador, Indonesia, Nepal, Sudan and Uganda. All participants contributed invaluable to this study by offering insights on the relationship between peace processes and transitional justice from their own experiences and observations.

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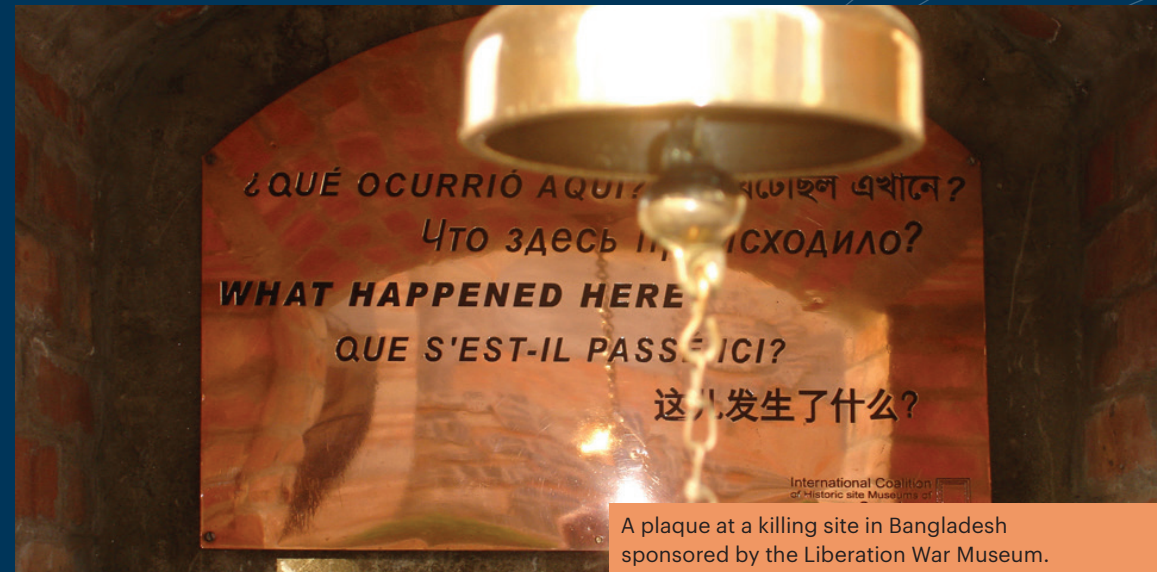
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ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION (GIJTR)

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.



A plaque at a killing site in Bangladesh sponsored by the Liberation War Museum.

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 (CSV), 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 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.



Boys and girls knit in Uganda.

THE ROLE OF PEACE PROCESSES AS SITES FOR ADVANCING TRANSITIONAL JUSTICE*

The latest international level transitional justice instrument is the African Union's Transitional Justice Policy that was adopted in February 2019 by the AU Heads of State and Government.¹ It offers a rich conception of transitional justice.² Accordingly, it defines transitional justice as 'the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.'³

Often transitional justice is viewed as being about confronting the past violations of rights.⁴ This conception of transitional justice is however incomplete. In its comprehensive sense, as richly expounded in the AU Transitional Justice Policy, transitional justice is best captured as a politico-legal process that has the ambition of addressing the wrongs of the past, resolving the insecurities of the present and building a common future in which the interests of all sections of society are duly recognized and protected. As such, apart from the focus on addressing the wrongs of the past, transitional justice demands approaches that create security and peace of today and put in place mechanisms that guarantee

the building of a just, democratic and inclusive political and socio-economic future for all.

Justice in this context thus goes far beyond judicial forms of accountability and covers a wide range of political, institutional and socio-economic measures required for a transition destined to establish solid foundations for just and inclusive political and socio-economic order.

Although transitional justice covers in its comprehensive sense such a broad conception of justice that goes beyond criminal justice, it is not always the case and it may not indeed be necessary that transitional justice is framed in all cases to reflect all of the elements associated with it. Indeed, the particular form that a transitional justice process takes should be informed by the needs and context of the particular transitional society.

It is worth noting that the resort of a society to transitional justice comes about through various processes. It can be introduced by a victorious force that seized power by defeating an old regime as has been the case in Rwanda and Ethiopia in the 1990s or by a government that replaced an authoritarian regime following elections as in many Latin American countries and in The Gambia in 2017/18.

In many other instances, transitional justice is a product of peace processes. From South Africa's post-apartheid transitional justice that gave worldwide prominence to the use of the truth and reconciliation commission as a framework of transitional justice to the experiences in Liberia, Sierra Leone, and Kenya, more recently in Colombia and the many case studies that are the focus of this conference, the choice of the transitional justice measure that a society in transition adopts constitutes an outcome of a peace process.

Given the focus of this conference on transitional justice in peace processes, my address will accordingly focus on the issues that affect the negotiation of transitional justice in peace processes.



Solomon Ayele Derso, PhD,
Chairperson of the African
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Commission



Internally Displaced Persons (IDPs) ride a bus from an IDP camp in Aramba to their original village in Sehjanna, near Kutum, North Darfur.
Credit: United Nations Photo

JUSTICE AS A SUBJECT OF PEACE MEDIATION

In traditional peace mediation, much of the focus has been on ending the conflict and achieving a negotiated settlement between the conflict parties over the subject of incompatibility. Accordingly, the agenda of peace mediation has been narrowly focused on cessation of hostilities, security arrangements and the accommodation of the warring parties via, among others, some form of power sharing scheme. As a result, transitional justice was not the most common agenda of peace mediation.

It has been in the post-Cold war period that a new model of peace mediation that advocates a comprehensive peace agreement that the issue of justice has emerged as a subject of peace negotiations. Various factors including the rise to prominence of human rights norms in the international system during the 1980 and 1990s (Moyn, 2012; Newman, 2002; Bleeker & Sisson, 2010), the influence of human rights NGOs (Moyn, 2012) and most recently the consolidation of international criminal law with the establishment of the International Criminal Court (ICC) meant that more than ever before the issue of dealing with the past looms very large in almost all peace mediation.

An influential 1996 article observed that a 'major development in the international human rights community in the last decade has been the push to make human rights an integral part of conflict prevention, peacemaking, and peacekeeping' (Anonymous, 1996, 249). Its most immediate impact during



A man prays in Aceh, Indonesia.

that period was the emergence of an approach for limiting the use of blanket amnesty in peace processes. As Hayner observed, '[i]n the negotiated agreements in El Salvador (1992), South Africa (1993), and Guatemala (1996), the parties agreed to compromises that kept blanket amnesty out of the negotiated text' (Hayner, 2018, 11).

Since then, the influence of international norms has expanded. Indeed, international norms are increasingly seen as requiring the inclusion in peace agreements of some measure of accountability. Apart from the work of human rights advocacy groups, a major source of such influence has been international courts. In her landmark work, Hayner (2018) established that 'in most cases investigations or warrants by an international court did affect the course of peacemaking – its pace, content and the exclusion of key participants, or its ultimate success or failure' (Hayner, 2018, 55). The works of Hayner (2018), Newman (2002), Nouwen (2013), Afako (2010) and Gissel (2015) also show how international norms and institutions particularly the ICC have shaped peace processes in northern Uganda, Sierra Leone, Sudan and Colombia.

Over the years, peace processes have come to play a leading role in serving as a site for negotiating and crafting transitional justice. In recent years, it has become very rare to have a peace process that does not include the issue of transitional justice as one of the subjects of negotiations between the parties to the peace process. As rightly pointed out, '[g]one are the days when it was possible to largely avoid addressing the issue of past crimes, as was done in the Good Friday Agreement for Northern Ireland in 1998' (Hayner, 2018, 115).

TRANSITIONAL JUSTICE AS A DIFFICULT AGENDA IN PEACE MEDIATION

Despite the fact that transitional justice has become a common feature of peace mediations, it has proved to be one of the, if not the most, difficult subjects to address in peace processes. Indeed, the emergence of transitional justice as an agenda of peace processes has not made its consideration during the peace mediation any easier.

First, while international norms and recent practice demand the inclusion of transitional justice as an agenda of peace mediation, they tell us very little about how the agenda is to be framed and negotiated, as well as the nature, content and scope of the terms of the transitional justice component of peace agreements.

Second, transitional justice is not readily accepted by the parties to the peace mediation to be one of the agenda items for negotiation. It is not uncommon that its inclusion faces resistance from both parties or at least one of the parties to the peace process.

Third, even after the inclusion of transitional justice as an agenda of peace mediation, negotiation over the form that transitional justice takes is often fraught with tensions and serious difficulties. While the level of difficulty varies from one peace mediation to another, it is not often one of the agenda items of peace mediation that is susceptible to arriving at a quick settlement.

Fourth, even agreement over the form that the transitional justice component

of a peace agreement takes does not guarantee the expected outcome. Experience in the case studies of this conference and others, including those of Burundi, Kenya and currently South Sudan, illustrate that challenges abound in the implementation of the transitional justice component of peace agreements. Often developments that arise subsequent to the peace agreement, particularly in terms of the position and political interests of key actors responsible for implementation, seriously affects whether and how far the transitional justice component is implemented. The case of Aceh is illustrative of this fact.

Peace Versus Justice

There are various factors that account for why the transitional justice agenda of peace mediation is fraught with the foregoing and related challenges. A major factor has to do with the tension that inherently exists between justice and peace. ‘Tension exists’, explains Christian Bell, ‘because international legal requirements of accountability appear to sit uneasily with the need to bring political and military elites to some form of compromise to end fighting.’⁵ How this tension is mediated in peace processes is accordingly a key factor that shapes not only how the transitional justice component of peace agreements is crafted but also the extent to which the parties follow it up with implementation. Hayner maintains that ‘a legal foundation to any peace agreement is essential, but insufficient, and a legal perspective alone misses other interests of victims’. Beyond criminal accountability, other interests of victims and societies in transition in general include ‘developing the structures and institutions needed to implement the rule of law and protection of human rights, establishing an economy...and promoting democratic structures...’ (Villa-Vicencio, 2009, 175) Newman is thus spot on when she observed that ‘transitional societies must balance justice with other values – such as peace, stability and development – which are not co-terminal’ (Newman, 2002, 32).

The question at the core of this tension and the balance that needs to be struck is ‘how to obtain sufficient justice without scuttling the possibility of peace’ (Hayner, 2018, 3). How this issue is addressed at the peace table and the success of a peace negotiation on justice would depend on the formulation of, according to Bleeker & Sisson, ‘pragmatic options that are both respectful of international norms and standards and responsive to the concerns of the relevant stakeholders, including victim communities’ (Sisson & Bleeker, 2010, 71).

INSIGHTS ON THE ROLE OF PEACE PROCESSES AS KEY SITES FOR ADVANCING TRANSITIONAL JUSTICE

It is evident from the foregoing that peace processes have become a major platform for advancing the agenda of transitional justice. However, the degree to which peace processes lead to successful transitional justice processes depends on a wide range of factors. Understanding those factors and forces that affect the role of peace processes in advancing successful transitional justice is accordingly key.

The various case studies that are the subject of this conference and other experiences show that how the issue of transitional justice is included as an agenda of the peace process



Network of Families of the Disappeared Memorial Quilting Project in Nepal

often affects not only how it is negotiated but also the form that it takes in the peace agreement. Whether the issue is broached by the parties to the peace negotiation or mediation⁶, by the mediator,⁷ or by civil society and victim groups⁸ and the degree of support or resistance to the inclusion of transitional justice as an agenda of peace mediation by both or any one of the parties has major bearings on how it is negotiated. A lot of thinking has therefore to go into the question of how the issue of transitional justice is broached as an agenda of a peace mediation.

The possibilities for exploring a range of options at the negotiating table and the level of negotiation among the parties and the involvement of key stakeholders in shaping the negotiation process carry serious implications both in terms of ownership of the transitional justice framework and the degree of its acceptance on the part of various sectors of society. It is therefore critical that the peace process presents adequate space and time for exploring a range of options that allow the parties to reach at a compromise. This entails the use of 'diverse mechanisms to deal with the past, from domestic mechanisms of courts, various types of commissions of inquiry and truth commissions, to international tribunals, and hybrid tribunals that incorporate both international and domestic participation'. Through such exploration of all possible options, a workable compromise can also be realized based on both 'a spectrum of accountability running from investigation through prosecution to punishment' (Bell, 2006, 85) and reduced or alternative punishment, as well as various restorative justice measures including truth and reconciliation processes and reparation programs (Villa-Vicencio, 2009; Hayner, 2018).

Of course, in the current international normative environment, the policy space for exploring the range of options is not absolute. Accordingly, unlike in the past the use of unconditional amnesty as a component of transitional justice is no longer a legitimate and desirable option. As the African Commission on Human and Peoples' Rights pointed out in Communication 431/12 – Thomas Kwoyelo v. Uganda, the most that peace mediation parties may consider is conditional amnesty, which itself is subject to fulfillment of both substantive and procedural requirements.

It is imperative to note that the possibility for such an exploration of a wide range of options that can best work for a particular mediation process

depends on the extent to which it is tailored to the specific conflict situation and the set of factors that shape the mediation process (Afako, 2010; Hayner, 2018). Afako (2010, 22), drawing on the experience from the Juba peace process, offers some useful considerations. First, mediators 'must be prepared to take a firm lead, prioritizing a careful search for a workable settlement.' Second, 'such negotiations need the support of sound and dispassionate legal advice on international, as well as national legal aspects' (Afako, 2010, 23). Third, negotiations in which justice poses a threat to any of the parties require 'consistent efforts invested in explaining the options and processes to the party that stands to lose the most,' and this 'process should not be rushed' (Afako, 2010, 23). Fourth, it should involve 'an inclusive negotiation process in which a range of local, national, regional and international stakeholders participates' (Afako, 2010, 23).

There is no one size fits all approach. As such, it matters a great deal in terms of a more successful outcome whether the transitional justice approach negotiated and crafted in the peace agreement is tailored to the needs and realities of the specific context. As Daly points out '[e]ach country's transitional path consists of a unique constellation of social, historical, political, economic, ethnic, racial, religious, military, and other factors; these factors distinguish each transition from the others; and it is these differences in transitions that compel different institutional responses to past wrongs' (Daly, 2002, 77). That is why the African Union Transitional Justice Policy stipulates that the 'choice of TJ should be context-specific, drawing on society's conceptions and needs of justice and reconciliation, having regard to: The nature of the conflict and the violations it occasioned, including



A group of Afghan women, former refugees newly returned from Iran
Credit: United Nations Photo

the situation of women and children, as well as other groups in vulnerable conditions; The conditions and nature of the country's legal system, traditions and institutions as well as its laws.⁹

In exploring the range of available options for negotiating and crafting the transitional justice approach in a particular peace process, attention should also be paid to a range of factors that influence the peace process and its outcome. One such factor is the political context. Of particular significance in this respect is 'the balance of power that produces the agreement and continues to influence its implementation' (Bell, 2006, 75). Beyond this, the

role of members of the public particularly victim groups, civil society actors and the level of mobilization and engagement of various sectors of society also form part of the political context.

The other contextual factor that shapes the choice and nature of the justice mechanisms negotiated during peace mediation is the institutional context. As Duthie explained, the institutional context 'includes national and formal institutions, such as justice systems and constitutions, and more local institutions, such as community-based justice and reconciliation practices' (Duthie, 2017, 11). The institutional context also affects the choice of whether various transitional justice mechanisms would rely on national capacity or draw on international expertise for their design and composition or use the existing national framework or a new one. In the Colombia peace agreement, various issues affecting the Colombian criminal justice system including corruption, lack of impartiality and weakness meant that 'a new tribunal and an independent prosecutor would be required' (Hayner, 2018, 205). The peace agreement accordingly proposed 'Special Jurisdiction for Peace, a multi-layered special tribunal operating independent of the normal criminal justice system and having its own special prosecutor's office, pre-trial chambers to receive confessions and consider amnesties, and several chambers for prosecuting cases (Hayner, 2018, 208-209). The Juba Peace Agreement on Northern Uganda also proposed the establishment of a new national criminal infrastructure (Nouwen, 2013; Afako, 2010).

On how the nature of the conflict affects the choice and/or design of transitional justice mechanism/s, Duthie states the nature of conflict and political violence 'raises questions about the human rights violations to be addressed, the types of trust or reconciliation that need to be fostered, and the appropriate measures to do so' (Duthie, 2017, 16). Thus, whether the conflict is 'intra-state wars, inter-state wars, non-state armed conflicts, military coups, elections-related political violence, or one-sided violence' would be among the considerations in the type, nature and design of the transitional justice approach that the parties could negotiate and agree to (Duthie, 2017, 17).



Internally displaced persons from Protection of Civilians (POC) sites run by the UN Mission for South Sudan.
Credit: United Nations Photo

CONCLUSIONS

Peace processes are important platforms for negotiating and crafting the transitional justice mechanisms for addressing issues of accountability and reconciliation that a transitional society faces. Various factors shape the extent to which peace mediation facilitates the crafting of a successful transitional justice approach and the extent to which such a transitional approach succeeds in meeting the accountability and reconciliation objectives is meant to realize.

It is however clear from the various case studies and experiences that for a peace process to advance the cause of transitional justice, it is of paramount importance that it addresses both the substantive and process issues that directly affect prospects of success. As noted above, the major substantive issues involve the dilemma involving the tension between peace and justice, the question on the form that justice takes in a particular transitional setting and the scope of focus of transitional justice, including notably whether and how the underlying conditions and the factors that made violations possible can be addressed as part of transitional justice.

The process issues mainly concern the decision-making process and the policy space for choosing the transitional justice approaches (which, although not absolute (as highlighted above), gives parties to the peace mediation enough space for arriving at and choosing a negotiated outcome), the guarantees for ensuring national ownership, the degree of influence of external actors in shaping policy making, the political settlement on which transitional justice is premised and the provision of the platform for active involvement of affected communities and for taking due account of the role of all other sectors of society including those with responsibility for the conflict and the attendant violations.

REFERENCES FOR KEYNOTE ADDRESS

* Keynote address for presentation at the “*Negotiating Truth and Justice: Peace Processes as Vehicles of Transitional Justice*” workshop held on 9-12 November, 2020 by Solomon Ayele Dersso, PhD, Chairperson of the African Commission on Human and Peoples’ Rights and Focal Person on Transitional Justice for the Commission

¹ African Union (2019), African Union Transitional Justice Policy, (Addis Ababa: AU).

² See Solomon A. Dersso (2020), AU pushes new frontiers of transitional justice, Mail and Guardian (20 Jan 2020), available on <https://mg.co.za/article/2020-01-20-au-pushes-the-frontiers-of-transitional-justice/>.

³ African Union Transitional Justice Policy, p.4.

⁴ As one recent account noted, transitional justice is a process whose ‘most direct objective’ is ‘the protection and vindication of victims’ rights.’ Duthie, R. (2017) Introduction. In: Duthie, R. and Seils, P. (eds.) *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies*. New York: International Centre for Transitional Justice, pp.8-39, 10.

⁵ Christian Bell (2006). *Negotiating Justice? Human Rights and Peace Agreements*. (Switzerland: International Council on Human Rights Policy) 75.

⁶ In Aceh, the role of the Free Aceh Movement (GAM) – the armed opposition group party to the peace talks – or in Guatemala that of the Guatemalan National Revolutionary Unity (URNG) was central for broaching the issue of justice at the peace table.

⁷ In Burundi the lead role for the inclusion of justice in the Arusha Peace Accord was played by mediator.

⁸ As in Sierra Leone (O’Flaherty, 2004) or Colombia (Diaz, 2018) these groups force the issue of justice to the peace table by virtue of being represented in or invited to the peace process.

⁹ AUTJP, para. 36.

BEST PRACTICES AND LESSONS LEARNED IN NEGOTIATING JUSTICE

States emerging from armed conflict or authoritarian rule face a critical challenge in reckoning with their complicated pasts. While the seeds of this restorative process may be sown even before the end of conflict, peace negotiations offer key opportunities for the achievement of transitional justice objectives. A peace agreement that sets forth a comprehensive framework and that conscientiously responds to victims' needs can lay the groundwork for national reconciliation and renewal. Conversely, one that deals casually or carelessly with transitional justice imperatives can cause grievances to fester and entrench a culture of impunity.

This briefing paper presents lessons and recommendations as to how peace processes can best nurture and promote transitional justice. It discusses strategies that stakeholders might adopt in order to motivate genuine discussion of transitional justice and break deadlocks, design robust and responsive programs, and boost compliance. It also provides specific guidance on the five core elements of transitional justice: accountability, truth-telling, reparations, institutional reform, and memorialization.



Government and opposition parties seated at the negotiating table in Juba during the Sudanese peace talks in 2020.
Credit: PILPG

NEGOTIATION DYNAMICS

It is not unusual for negotiating parties to be reluctant or unwilling to fully engage in conversations surrounding transitional justice. Often this intransigence stems from a perceived tension between peace and justice. Conflict resolution and healing, it is argued, require that past wrongs be forgiven or forgotten; retrospection will only serve to prolong conflict and preserve enmity. To the extent that parties are open to considering transitional justice, they may have a very narrow and self-serving range of remedies in mind.

If unable to overcome obstructionist negotiating tactics, a peace process risks being unable to deliver a meaningful form of transitional justice. It may institutionalize a form of victors' justice, propagating the dominant narrative and silencing dissenting voices. In many cases, transitional justice processes born of flawed peace processes have granted privileged status to combatants, in areas such as reparations, amnesty, and public employment. A stilted peace process may also produce imbalanced transitional justice mechanisms, overemphasizing certain types of justice while devoting insufficient attention to others.

To avoid these outcomes, negotiators may adopt a number of strategies to ensure that transitional justice is given its due. First, they can mitigate the apparent tradeoffs between peace and justice by suggesting that the two be viewed instead as mutually reinforcing. According to the "peace with justice" conceptual framework, peace and justice are inextricably linked and may be productively pursued in parallel. Advocates might illustrate the need for justice in order to secure a sustainable peace and present restorative, rather than retributive, models. This expanded notion of justice is supported by the different modes of transitional justice and the different harms it is intended to redress, which may include cultural, democratic, dignitary, distributive, and moral harms.



Woman in Nepal holds up her identification card.
Credit: United Nations Photo

Initial resistance to transitional justice may also be softened through strategic approaches to sequencing. In some cases, initiating transitional justice processes early on can push the parties to the negotiating table, or can keep spoilers away. Forms of transitional justice that are more feasible under prevailing circumstances can also be prioritized for immediate action, with other components reserved for a time when conditions allow. In the meantime, transitional justice may be promoted indirectly by gathering together the necessary ingredients. In Bosnia, for example, the return of refugees led to narrative competition that made truth-telling possible.

International actors may have a role in breaking the impasse on transitional justice negotiations. Outsiders can serve as mediators facilitating dialogue between the parties, though they must be careful to preserve the impression of neutrality and not to impose solutions externally. They can also incentivize the parties to seriously engage by offering dividends such as funding or international legitimization.

Delegations favoring transitional justice serve themselves by arriving at the forum well-prepared. Planning and forethought enable them to proactively seize the initiative in setting the agenda and putting forward fully-developed proposals. It also demonstrates to the opposing party the import of transitional justice to the negotiations and forces it to issue responses to concrete policy options.

DESIGNING EFFECTIVE INSTITUTIONS

In developing transitional justice programs, there are a number of global considerations that peace negotiators should have in mind. These include taking a holistic approach, adapting programs to the local context, strategically evaluating the merits of specificity in language, involving civil society and victims, and the usefulness of international participation.

HOLISTIC APPROACH

A holistic and integrated approach to transitional justice is vital owing to the collective comprehensiveness and interdependence of its constitutive components. A process skewed too far toward accountability, for instance, will not satisfy victims' needs for truth, redress, and structural reforms.

A comprehensive program also has the advantages of creating multiple



Community Members meet at The Eye that Cries, a large-scale memorial in a public park in Lima, Peru, which was designed to honor victims of violence perpetrated by the state and radical opposition groups between 1980 and 2000.

points of access and bolstering impact through overlapping interventions. This holds true within each component, too. Reparations, for instance, may take several different forms. Furthermore, the outputs of one component may impact the workings of another. For example, prosecutions and truth-

telling cannot proceed without procedural and personnel reforms that build trust in state institutions. Drafters should therefore strive for a balanced view of transitional justice and should establish coordination mechanisms linking different components.

CONTEXTUAL ADAPTATION

Transitional justice programs must be tailored to their local contexts across a number of different dimensions. First, different types of conflict create different transitional justice needs and opportunities. Some conflicts involve armed struggle while others are characterized primarily by political oppression; some conflicts end in regime change while others end in regime persistence or transformation. The nature and outcome of the conflict will affect the demands of the population, the opportunity horizons, and the responsiveness of the government.

Second, transitional justice needs may vary within a state depending on how different regions experienced the conflict. In Sudan, regions that saw years of warfare prioritized accountability and security sector reform, whereas regions that had primarily been affected through marginalization and maltreatment focused on economic development and political, social, and cultural inclusivity. Regional variation underscores the need for tiered transitional justice initiatives taking effect at both the community, regional, and national levels.

Third, transitional justice must account for and ideally incorporate cultural norms and practices. There are a number of different ways of doing this, including by supporting and acknowledging traditional justice processes, providing traditional forms of reparation, and cooperating with religious and community leaders. At the least, cultural sensitivity should be ingrained into transitional justice institutions.

SPECIFICITY OF LANGUAGE

Drafters face a strategic choice as to the level of specificity with which to inscribe their transitional justice plans. Peace agreements that precisely articulate the obligations they require, the time and place of implementation,

and the penalties for noncompliance are usually thought to be stronger commitment devices. However, it is still possible that the parties will sign on to exhaustive pacts but demonstrate lack of political will to ensure their effective implementation, as in South Sudan. Moreover, reaching agreement often becomes increasingly difficult as the text becomes more granular. Despite the wishes of the parties, the specificity of the agreement may therefore be determined by political practicalities.

Depending on the context, there may be merit to preserving an element of constructive ambiguity in the agreement anyways. In Colombia, the parties left some uncertainties in the text so that they might reach consensus, trusting that the specifics would be broached at a later date. Compromise may in fact grow more likely over time, as parties that are antagonistically disposed at the outset become more cooperative as they build a track record of shared success. A degree of ambiguity also allows for flexibility and evolution as circumstances change. However, vagueness makes it harder to hold signatories to their commitments and easier for them to claim compliance without taking consequential steps.

Along with the substance of the agreement, debate remains as to the value of a detailed timetable. On the positive side, setting a schedule provides clear benchmarks by which to monitor compliance and conveys to the public measurable signs of progress as each step is completed. However, a rigid implementation timetable may be viewed as impractical. This can be especially dangerous because flouted deadlines may cast doubt on the continued legitimacy of the entire agreement.

Understanding that some level of ambiguity is inevitable, negotiating parties might consider including any of several mechanisms designed to preserve options for the future while maintaining momentum. First, in order to remove any doubt, an agreement could include a clause specifying that ambiguities are to be interpreted in a manner consistent with the parties' intentions and objectives or with international law, as they typically are anyways. Second, the agreement can lend the parties additional flexibility and agency by outlining an amendment procedure. An inability to adapt to changes on the ground may impair the legitimacy of the agreement if it leads the parties to forsake their commitments. Finally, agreements that are limited in scope may either require that the parties reconvene within a specified time frame for further talks or that they enter into collateral or follow-on agreements.

CIVIL SOCIETY AND VICTIM INVOLVEMENT

Because transitional justice is intended to benefit the public at large, and especially victims of abuses, it makes sense to include their representatives at various stages of the process. During negotiations, civil society and victims' groups may be consulted as to their views on the shape and priorities of transitional justice. Peace agreements also broaden their appeal by providing for the participation of civil society in transitional justice institutions. This might include reserving positions on commissions for civil society leaders, accepting civil society-produced documentation as a source of evidence, or providing funding for memorialization or other projects led by civil society organizations and victims' groups. Lastly, peace agreements can instill public confidence and accountability by involving civil society actors in the oversight of transitional justice. In addition to any roles formally assigned to it by the peace agreement, civil society may of course also support transitional justice through advocacy, outreach, and education.



Community members paint a mural in Colombia.
Credit: United Nations Photo

INTERNATIONAL PARTICIPATION

International actors may participate in transitional justice institutions in various ways. International experts sitting on committees or judicial mechanisms as members or observers may provide technical guidance and oversight. Internationalized mechanisms, such as tribunals or truth commissions, may be perceived as more impartial, capable, and legitimate. On the other hand, the involvement of external parties may undermine the sense of transitional justice as a national initiative. Parties to the conflict may also resist foreign meddling in internal affairs. Lastly, international entities may suffer from deficits in local knowledge and geographic distance from their intended beneficiaries.

ELEMENTS OF TRANSITIONAL JUSTICE

In essence, transitional justice consists of five different components: accountability, truth-telling and reconciliation, reparations, institutional reform, and memorialization. This section puts forward best practices for incorporating each into peace agreements.

ACCOUNTABILITY

Well-crafted peace agreements erect an accountability framework that clearly defines the relationships between its constitutive elements. One of these may be the establishment of new judicial mechanisms, such as specialized chambers or hybrid courts. This may be accomplished in several different ways. Some peace deals comprehensively set forth the structure, mandate, and composition of these tribunals, including provisions related to jurisdiction, sources of law, location, funding, and victim representation and compensation. Others provide only a general outline intended to be later supplemented by legislation and regulation. Finally, sometimes the conflict actors call on other third parties to establish judicial mechanisms on their behalf.

Many peace agreements recognize traditional justice mechanisms (TJMs) and integrate them into national accountability frameworks. If negotiators choose to do so, they may need to take steps to align traditional practices with human rights principles, especially as it pertains to the rights of women and of the accused. Within both TJMs and other accountability mechanisms, the issues of child perpetrators and gender-based violence should be handled with

special care. It is also common for peace agreements to express general commitments to amnesty, though details concerning eligibility and conditionality are more often found in subsequent legislation. Amnesties that are too broad in scope may be deemed incompatible with international law or domestic law.

Timing can impact accountability in several different ways. Indictments that precede a peace agreement, for example, may have either beneficial or detrimental effects. On one hand, a criminal indictment may sideline spoilers from the negotiations and may signal the importance of holding perpetrators to account, leading to a more serious treatment of justice issues. On the other hand, the risk of prosecution may lead negotiating parties to send delegates who are not qualified to make decisions or may lead them to dig in their heels. Even if prosecutions are not possible or prudent before peace talks, advocates can begin developing proposals for future institutions, prosecution strategies, or amnesty plans ahead of time. During the negotiations, it can be strategic to postpone discussions on accountability for later in the game. This allows time for the parties to build confidence by first reaching agreement on issues with less sensitivity and may force compromise by leveraging the pressure of an approaching deadline.

Accountability should also be designed in a way that maximizes institutional linkages. Domestic and international accountability mechanisms can cooperate in capacity-building, information-sharing, and case transfers. At the domestic level, for accountability to be credible it likely must be preceded by institutional reforms that may include vetting and legal reform. Judicial processes may also be tied to other transitional justice components, such as by receiving case referrals from truth commissions or issuing reparations orders.



Built in 1913, the Peace Palace in The Hague, the Netherlands is the seat of the International Court of Justice.
Credit: United Nations Photo

TRUTH-TELLING AND RECONCILIATION

Truth-telling serves a critical function as a component of transitional justice that reinforces all other efforts through the promotion of individual and collective healing. Truth-telling may help to establish the identities of perpetrators, the root causes of human rights violations, types of violations, circumstances and facts surrounding violations and appropriate remedies. Peace agreements may reference different types of truth-telling processes, including investigatory commissions and “mappings” of patterns in the violations. Nevertheless, the truth commission is the most prevalent mechanism for truth-telling that appears in peace agreements. The language included in these agreements usually details the mechanism’s jurisdiction, the period covered, the types of violations that may be reviewed, the activities and operations of the truth-telling body and the composition of the commissioners which may include political stakeholders or a cross-section of society.

Negotiations surrounding truth-telling and reconciliation can be contentious for a number of reasons. Parties may be unwilling to admit wrongdoing, or may insist that responsibility should be shared equally, even if the facts indicate otherwise. Some also sense a contradiction between truth-telling and reconciliation, preferring to absolve the sins of the past and direct the focus towards the future. This attitude has prevailed in several post-conflict states, with victims treated as stubborn for insisting on revisiting harms or

finding forgiveness problematic. In part due to the difficulty of related negotiations, truth commissions established by peace agreements often require implementing legislation, which may result in additional delays or impasse.

Perhaps the most critical aspect of a truth commission is



Women convene in the Gambia.

the selection of competent and independent commissioners. This may be complicated by the demands of the negotiating parties, each of which may lobby for representation. A peace agreement must therefore set out objective qualifications and a transparent selection process. In addition, drafters should not overlook logistical concerns, such as resources, security, and timelines, which may significantly affect the efficacy of truth commissions.

Truth commissions can only be successful with broad public participation. To achieve this, peace agreements can offer minimal inducements, such as compensation for time taken off from work. They can enhance accessibility by operating in multiple languages, establishing regional offices, and publicly broadcasting their most important proceedings. And they can accommodate variation in experience by empowering regional divisions to concentrate on local conditions. Parties should also clearly communicate the purposes of truth-telling and reconciliation mechanisms and devote the necessary time and effort into reconciliation as a significant aspect of the process.

REPARATIONS

There are several different types of reparations: compensation, rehabilitation, restitution, satisfaction, and guarantees of non-recurrence. Decisions as to which are most appropriate will be highly contextual, but some combination is likely warranted in order to respond to different needs. States able to afford monetary compensation should manage expectations as to the type of awards available in their public messaging and weigh the costs and benefits of immediate relief, such as balloon cash payments, against long-term support, such as pension plans. While many victims view the former as more attractive, the latter option has a lower upfront price tag, encourages sustainable financial planning, and sustains the process of rectification over a longer time period.

Peace agreements have historically struggled to adequately define the class of victims eligible for monetary reparations, erring both towards over- and under-inclusivity. Due to its unique sensitivity, compensation to victims of sexual assault may prove especially controversial. Drafters should install culturally appropriate procedures to protect survivors and should consider gender-sensitive forms of proof. Excluding injuries that do not necessarily leave a physical imprint, such as psychological, economic, and social harms, wrongly denies reparation to deserving victims. However, it can be difficult to define

these harms in an administrable fashion. When whole communities are affected by these sorts of harms, reparation may best be provided collectively in the form of development, social services, or humanitarian assistance.

In practice, men, former combatants, and members of the ethnic or religious majority have an easier time receiving reparations. To correct for societal inequalities and encourage transformative processes, peace agreements can include language prohibiting discrimination in the distribution of reparations, planning for affirmative outreach efforts in vulnerable communities, and providing assistance to marginalized victims in navigating the application process.

INSTITUTIONAL REFORM

Institutional reform, especially vetting, should be sequentially prioritized due to its instrumental value. Specifically, a purging of compromised individuals from the public sector is necessary in order to enable other transitional justice processes to attain legitimacy. However, lustration can also go too far, as exemplified by Iraq's de-Ba'athification. In general, only individuals personally implicated in abuses need to be removed. Moreover, vetting does not need to be strictly exclusionary. Some states have instead barred public employees from further promotions or have offered incentives for them to leave their posts.

Beyond expelling bad actors, institutional reform should create pathways for underrepresented groups to enter public service. One way to do so is by setting quotas within various state institutions for different demographic or political groups. Another is to adopt some form of affirmative action or positive discrimination in government hiring practices. These programs enhance the legitimacy of institutions by giving marginalized people a voice in their operations.

The positive impacts of vetting are not likely to endure unless accompanied by institutional reforms designed to ensure their longevity. Peace agreements should therefore introduce anti-corruption guidelines or committees to guarantee long-term public sector accountability. Vetting and legal and administrative reform should also be overseen by an independent watchdog that can comment on their validity and efficacy. To guard against future abuses, peace agreements may also establish a human rights commission or an ombudsman to monitor governmental policies.

MEMORIALIZATION

Peace agreements often neglect or undervalue memorialization. When they do mention it, it is typically only in very general terms. While it may be unreasonable for agreements to enter into great detail on memorialization initiatives, they can nonetheless go a long way towards setting the stage. For example, negotiators can designate funding and staffing to state-led memorialization projects and can promise support and training for community-led initiatives. To avoid the exclusion of minority groups from memorialization efforts, it should be specified that this support will be allocated in a non-discriminatory fashion and across different regions.



Peace agreements may further contribute to memorialization by guaranteeing the protection and preservation of memorial sites and of the historical record. The negotiating parties will likely have in their possession documents and artifacts with tremendous memorial value. In some contexts, the retention of military control over historical sites has led to narrative exclusion or the justification of human rights abuses as military necessities. Agreeing to shared or neutral-party stewardship of these sites can prevent these distortions.

Finally, peace negotiations can advance memorialization projects by referring to some of the media through which they are to be transmitted. Importantly, they can call for the production of educational curricula aimed at preserving historical memory. They can also stipulate that certain memorialization initiatives should be broadcast on national television or radio.

IMPLEMENTATION

A number of obstacles may impede the implementation of transitional justice processes after the signing of a peace agreement. A commonly recurring pitfall is a simple lack of political will among the signatories to abide by their commitments. To preempt this, peace agreements can attach incentives to specific phases of implementation. This is especially common in amnesty provisions, wherein eligible applicants must first participate in a truth-telling or traditional justice process. Other benefits, such as community development funds, land redistribution, or representation in government, can also be tied to the completion of antecedent milestones. To ensure long-term compliance, perks can be unlocked in stages coinciding with prominent markers along the implementation timeline.

Active monitoring and oversight can also play a role in holding the parties to their obligations. While the signatories may insist on representation within monitoring mechanisms, their credibility can be augmented by also installing members of civil society or the international community. Assigning leadership roles to these neutral actors sends a strong signal about the entity's independence. In establishing monitors, peace agreements should delineate their functions and authorities, reporting requirements, and rights of access.

As noted earlier, preliminary reforms may be required in order for other state institutions to effectively implement transitional initiatives. In addition, institutions cannot act productively without adequate resources. Rather than imposing unfunded mandates, peace agreements should therefore take care to allocate sufficient budget lines to each plank of the transitional justice platform.

The implementation of transitional justice programs is not only dependent upon state action, but upon the participation of the populace. At times, popular

participation in truth-telling or reparations has been hindered by barriers to access. Peace agreements can remove some of these barriers by, *inter alia*, creating multiple points of access, accounting for linguistic diversity, and disseminating educational materials to help the public better understand bureaucratic procedures. They can also earn public support by aspiring to deliver real indicators of progress in the near term, while also recognizing that sustainable and significant results take time. Realizing measurable impacts early in the process can keep the public engaged and stave off frustration with lengthy processes.

CONCLUSIONS

Peace processes represent pivotal moments for post-conflict societies during which transitional justice institutions may take shape. Committed negotiators can help their cause by tactful framing of the issues, judicious sequencing, and ample preparation. In designing the mechanisms to be included in a peace agreement, they should take a holistic approach that provides for accountability, truth-telling and reconciliation, reparations, institutional reform, and memorialization. They should look for openings to involve civil society and victims' groups, adapt their prescriptions to local context, and weigh the respective merits of constructive ambiguity in the text and international participation in transitional justice institutions. Lastly, peace agreements can bind the parties more firmly to their transitional commitments through phased implementation, continued monitoring and oversight, funding allocations, and measures to induce popular support and participation.

REFERENCES

- ¹ In various contexts, many scholars and practitioners have detected a recurring conflict between the ideals of peace and justice. Some favor a "peace-first" approach that prioritizes conflict resolution above all else, including often-contentious forms of transitional justice. Others are more insistent on the immediate achievement of justice, even if it means prolonging conflict in the short-term, because a durable peace is impossible without it.
- ² For example, Islam recognizes financial compensation (*diyya*) to victims or their next of kin in cases of killing, physical injury, or property damage.
- ³ After the fall of Saddam Hussein in 2003, public sector employees affiliated with his Ba'ath Party were removed from their positions and barred from future public employment. While this policy effectively cleansed the Iraqi state of the former regime, it also bred widespread instability and discontent among a large, newly jobless class.



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