

POLICY BRIEF

MAY 2021

THE AFRICAN UNION TRANSITIONAL JUSTICE POLICY

EXPANDING THE FRONTIERS
OF TRANSITIONAL JUSTICE

SOLOMON A. DERSSO

*Chairperson
African Commission on Human and Peoples' Rights*



CSV
Centre for the Study of
Violence and Reconciliation

Introduction

In February 2019, the African Union (AU), at the summit it held in Addis Ababa, adopted its transitional justice policy. The AU Transitional Justice Policy (AUTJP) is the culmination of a nearly decade-long legislative process. In the long trajectory of the elaboration of norms by the AU, this is a landmark development, which endows the AU with a full-fledged justice architecture in combination with its human rights architecture and the Malabo Protocol on the criminal jurisdiction of the African Court.

This policy brief provides a summary of the salient elements of the AUTJP and a discussion on the importance of the policy for societies in transition. It outlines what this policy means in terms of the role of the AU and how it can be used by affected groups and advocacy organizations, as well as the prospects and challenges for implementation.

Raison d'Être of the AUTJP

While transitional justice has been initiated and implemented in a number of countries across decades, generating a vast body of knowledge, countries as diverse as Burundi, the Central African Republic, Ethiopia, the Gambia, Libya, Mali, South Sudan, Sudan and Tunisia, among others, continue to confront serious issues and dilemmas as they contemplate, design and implement transitional justice processes.

The dilemmas that African countries face with respect to transitional justice include both substantive and process issues. The major substantive issues involve the tension between peace and justice, questions regarding the form justice should take in transitional settings and the scope of transitional justice, including notably whether and how the underlying conditions and factors that made violations possible can be addressed.

The process issues mainly concern the decision-making process for choosing a transitional justice approach, guarantees for ensuring national ownership, the dominance of external actors in shaping policy making and the political settlement on which transitional justice is premised. An additional issue is the provision of a platform for the active involvement of affected communities, and for taking due account of the roles of

all other sectors of society, including those with responsibility for the conflict and the attendant violations.

Often these dilemmas have led to the adoption of a template approach to transitional justice that is inadequately tailored to each institutional, socio-cultural and political context, or an approach that either does not satisfy the demands of the situation or is poorly designed and/or implemented. Despite the availability of some useful international frameworks, such as the United Nations (UN) approach to transitional justice, the experiences of African states show that major issues remain in respect of which international frameworks offer inadequate or no guidance, or suffer from major flaws.

Apart from such dilemmas at member state level, there have been major lacunae at the continental level with respect to the normative framework of the AU. Despite a plethora of normative instruments relating to peace and security, human and peoples' rights and justice, the AU has had no framework for directing its role with respect to how transitional justice should be addressed in peace processes and political transitions in member states. The AUTJP provides the AU with a framework that enables it to help initiate, support and/or guide transitional justice processes in its member states.

Additionally, the AU has not been in a position systematically to guide societies in transition on both the scope of maneuver they have and the options available to them in terms of initiating, negotiating, planning and implementing transitional justice processes. As the AUTJP puts it, a "stand-alone Framework that articulates the AU's position on transitional justice lends clarity and comprehensiveness to the principles in AU instruments, frameworks, and policies, allowing ease of reference and normatively consistent application" (para. 15).

Normative and Policy Foundations of the AUTJP

The AUTJP is more of a systematic and synthesized presentation of existing norms than an attempt at establishing new ones. As such, the policy represents the synthesize into a coherent statement of the AU's

norms on peace, combating impunity and promoting accountability, reparation, reconciliation, healing and national cohesion/rebuilding (Table 1). As highlighted in the AUTJP, these are to be found in, among others, the Constitutive Act including its Articles 4(o) and 4(h), the Protocol Establishing the Peace and Security Council (PSC Protocol) including its Articles 6 and 14, and the African Charter on Human and Peoples' Rights.

In so doing, the AUTJP also advances an approach that recognizes the tensions between the AU's commitments to peace and to justice while articulating a path that ensures their complementary and interdependent implementation. Aiming to achieve a compromise, this approach facilitates the realization of justice and the establishment of peace and an inclusive socio-economic and political system of governance.

TABLE 1: Normative Foundations of the AUTJP

JUSTICE

Articles 4(o) and 4(h) of Constitutive Act and ACHPR

The right to justice, non-impunity, provision of redress for victims of past violations, truth, and securing rule of law and administration of justice, healing and rehabilitation, freedom from discrimination and structural inequality.

PEACE AND AN INCLUSIVE SOCIO-ECONOMIC AND POLITICAL SYSTEM

PSC Protocol and Article 23 of ACHPR

The right to peace and to be protected from violations resulting from violence. Prevention of further victimization and new violations, peacemaking and conflict resolution, peacebuilding, national reconciliation and cohesion, and an inclusive, democratic and just system of political and socio-economic governance.

Expanding the Frontiers of Transitional Justice

While it takes significant inspiration from mainstream transitional justice as embodied in the UN definition, the AUTJP draws on both the rich experiences on the

continent and local expectations and resources to articulate a more nuanced and richer conception of justice. The policy offers a reconstruction of the concept of transitional justice that rectifies the limitations and lacunae in mainstream conceptions.

This reconstruction of the concept is first and foremost captured in how the AUTJP defines transitional justice and the constituent elements of 'justice' and 'transition.' The policy defines transitional justice to cover not only institutional, legal and formal mechanisms but also non-formal and non-judicial approaches. These include cultural practices that a society in transition initiates through inclusive processes and implements "in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation" (para. 19).

Eschewing the excessive focus on legalistic, perpetrator-centric and past-oriented models in mainstream transitional justice, the conception of justice in the policy embraces holistic approaches that focus on redressing the wrongs done to affected groups, healing wounds, restoring broken social relations and institutionalizing values and systems for resolving the root causes of conflict and preventing the emergence of the conditions that precipitate violations.

While the mainstream model prioritizes criminal justice and accountability and their associated four-pillar approach, the AUTJP elaborates a holistic, two-block and multi-dimensional framework of transitional justice (Table 2). It addresses the emotional, psychological and social impacts of violent conflicts and authoritarian rule, which transitional justice theory and practice have largely neglected. The framework in the AUTJP thus recognizes the importance of symbolic and dialogic justice and traditional or religious ritual processes, as well as culturally and socially relevant forms of reparations (in addition to forms of psychosocial and medical support) and acknowledgment of the suffering of victims and expressions of remorse by perpetrators and their collaborators.

The AUTJP also makes a major contribution in its recognition of the uneven impact of violence and violations. It emphasizes the contextual nuances of affected societies and "the gender, generational,

ethno-cultural and socio-economic as well development dimensions of both peace and justice” (para. 19). It underlines the necessity of institutional and procedural innovation over the application of particular models or scripts of criminal justice and peace processes. This entails holistic, victim-centered, multi-disciplinary and integrated strategies of transitional justice that treat accountability, truth, political reconciliation, healing and emotional settlement, as well as social reconciliation involving equitable socio-economic settlement within a framework of sustainable development, as part of the same continuum.

The transitional justice framework in the AUTJP represents a conception of transitional justice that Makau Mutua expounds, which emphasizes what he calls principles that “are guided by their ability to heal; put victims at the centre; seek cooperation with perpetrators; understand abominations as injuries to social relations; de-emphasize the punitive or criminality of offenses and emphasize the causes of the abominations.”

In terms of the process/procedural block, the AUTJP makes an even more profound contribution with regard to national ownership. The policy stipulates that national actors from all sides and sections of

society should assume leadership in the decision-making process for planning, designing and implementing transitional justice processes. This includes the space required for negotiating and achieving political settlement, on which the pursuit of transitional justice processes is based. The policy also emphasizes the “primacy of national resources and capacity whereby the formulation of TJ should appropriately adapt and exhaust all the suitable formal and traditional judicial and non-judicial resources and capacities that the society can mobilize at the national and local levels for justice and reconciliation responses before borrowing from non-national sources and capacities” (para. 32).

The AUTJP’s rich articulation of national ownership is intended to address two major flaws in the mainstream transitional justice model. The first flaw is its tendency to limit the opportunity for national actors, including victims, to discuss and debate through inclusive and open consultative processes how they should craft a transitional justice process tailored to their context and needs. As Wendy Lambourne, for example, points out, “the UN’s emphasis on four predefined key pillars undermines the potential for considering local perspectives on transitional justice priorities.” She goes on to state that “local affected communities and national governments are not offered the opportunity

TABLE 2: AUTJP Model of Transitional Justice

CONTENT/SUBSTANTIVE BLOCK	PROCESS/PROCEDURAL BLOCK
<ul style="list-style-type: none"> • Peace process – negotiation of peace and ending continuation of violations and prevention of new violations • Accountability and non-impunity • Restorative justice including memorialization • Reparative justice • Socio-economic/redistributive justice • Ethno-cultural justice • Political and institutional justice • Gender justice 	<ul style="list-style-type: none"> • National ownership – a) national policy space including primacy of national process leadership and decision-making in planning and choosing the form transitional justice takes and the mechanisms for its implementation, and b) primacy of national legal and institutional as well as cultural resources and human resources capacity • Consultative and inclusive process that guarantees participation of national stakeholders from all sides and sections of society with particular attention to the voice of victims and freedom of expression • Mechanism for national democratic endorsement as necessary

to develop alternative mechanisms tailored to meet their particular goals and priorities.”¹

The second flaw in the mainstream model is the preference it accords to certain forms of transitional justice, which tends to limit the scope of options the affected population can explore. In this regard, Lambourne observes that “whilst local traditional or informal approaches are being promoted by transitional justice scholars and some practitioners, the UN appears not to take such alternatives seriously. The ‘justice cascade’ prevails, with a sometimes grudging nod towards the truth commission alternative, with little recognition that other more creative options might prove to be more appropriate in different cultural and conflict contexts.”²

As pointed out elsewhere, “in the African context, the conditions and historical context of violations demand a comprehensive and more substantive conception of transitional justice that goes beyond juridical and legal forms of justice.”³ This necessitates the availability of space for and the possibility of exploring a range of avenues for designing arrangements that have the prospect of meeting expectations of transitional justice. Such an approach affirms the legitimacy of and allows narrative justice, symbolic justice and traditional or religious ritual processes as well as culturally and socially relevant forms of reparation. The AUTJP acknowledges the importance of such traditional and local justice mechanisms.

The theme of national ownership is buttressed by the space given in the AUTJP to context. The 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 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” (para. 36).

Finally, from a substantive perspective, the AUTJP provides the parameters for designing specific mechanisms of transitional justice. These are presented in the form of benchmarks that offer detailed guidance, drawing on both relevant norms and experiences in African countries. What is notable is not only the distilling of good practice from various experiences into benchmarks, but also the room for maneuver embedded therein, which allows a tailor-made application or formulation of specific mechanisms.⁴ To put it differently, the policy sets out clearly the purpose and functions of each mechanism, as well as the objectives and benchmarks for measuring the quality of its design and success of its implementation. Yet, at the same time, it succeeds in not being too prescriptive, leaving as much as possible a margin of appreciation for the specific circumstances in individual states to determine the best processes for that context.

The Role of the AU, Member States and Non-State Actors in the AUTJP

For the AU

Beyond and above the substantive components, the AUTJP clarifies the roles of various actors. For the AU, the policy endows it with a framework that is sure to fill a strategic gap in its normative and policy arsenal. The AUTJP becomes the foundation for the AU justice architecture. It is possible to identify at least four ways in which it shapes the role of the AU.

First, the AUTJP shapes the norm implementation role of the AU. While the AU has engaged in responding to the challenges of transitions in its member states by relying on existing norms and tools, for a long time it

1 Wendy Lambourne, “What Are the Pillars of Transitional Justice? The United Nations, Civil Society and the Justice Cascade in Burundi,” *Macquarie Law Journal* 13 (2014): 43–44.

2 *Ibid.*, 44.

3 See Solomon A. Dersso, “Transitional Justice in Africa: Between Wide Application and Deep Contestation,” 2017, <https://www.csvr.org.za/publications/2814-lecture-the-state-of-transitional-justice-in-africa-between-wide-application>.

4 See Roger Duthie and Paul Seils, eds., *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (New York: International Centre for Transitional Justice, 2017).

did so without a coherent frame of reference. Its engagement has been characterized by what one may call ad hoc-ism. For the AU's role to be predictable and normatively coherent, as well as helpful in meeting the needs of societies in transition, including the difficulties facing specific sections of society such as women victims, it is imperative that the AU operates with adequate clarity and not in a policy vacuum on the fundamentals of transitional justice processes.

As the policy acknowledges, it brings into a coherent framework the AU's various normative commitments relating to peace, combating impunity, promoting accountability, reparation and reconciliation, and enabling social healing, which are scattered in various instruments and decisions. Accordingly, the policy "lends clarity and comprehensiveness to the principles in AU instruments, frameworks and policies, allowing ease of reference and normatively consistent application" (para. 15).

Second, the AUTJP helps the AU in informing its various initiatives related to peace and security (preventive diplomacy, peacemaking, conflict resolution) and democratic and constitutional governance and human and peoples' rights. Accordingly, it offers AU policy makers and mediators a critical guide on the various considerations they need to take into account in planning and implementing conflict resolution and post-conflict peacebuilding interventions.

Third, the AUTJP will now serve as a reference that helps the AU in the provision of guidance and support to member states, particularly in terms of the design and implementation of transitional justice processes in line with or within the framework of established normative and policy commitments. Rather than using its own disparate experiences and expertise, the AU will now be able to deploy transitional justice experts who will operate within the same parameters by reference to the AUTJP.

Finally, in the light of the innovative and distinct approach to the conception and formulation of transitional justice it advances, the AUTJP helps the AU in informing its international relations with respect to the engagement of international actors on transitional justice issues on the continent.

For State Actors

Perhaps the most important audience of the AUTJP is member states of the AU. After all, it is at this level that transitional justice processes are principally designed and implemented. Despite the fact that there are rich materials to draw from, including the experiences of various African countries and internationally established approaches as expounded by the UN, African societies in transition did not have a stand-alone common reference framework. The most important contribution of the AUTJP for member states is therefore in providing them with an authoritative source of reference in the initiation, planning, designing and implementing of transitional justice processes.

Understandably, the AUTJP does not establish new obligations on member states of the AU. But it has an important interpretative value. Accordingly, the AUTJP clarifies the scope of their obligations and the modalities for pursuing transitional justice within the framework of and in compliance with their obligations under various AU instruments relating to peace and security, democracy and rule of law and human and peoples' rights.

The AUTJP also offers member states an instrument that has a pedagogic/persuasive role. In other words, the policy becomes an important basis by reference to which member states can explain to their various constituencies the need for and their approach to transitional justice.

Similarly, when transitional justice is demanded and proposed as part of a transitional process, the AUTJP offers AU member states the basis and parameters for negotiating with various stakeholders in the design and implementation of transitional justice mechanisms.

The AUTJP offers useful materials that help AU member states assert national ownership and use transitional justice processes as an avenue for the reconstitution of state-society ties and the provision of locally driven and contextually tailored access to justice.

For Non-State Actors

The AUTJP does not target the AU and AU member states only. It envisages non-state actors as an

additional target audience. As such, it addresses victims and other affected sections of society, civil society organizations and conflict parties, among others.

The AUTJP avails these various non-state actors with the bases and parameters for negotiating with various stakeholders in the design and implementation of transitional justice processes.

For affected groups, including victims and survivors, the AUTJP serves as an important tool for articulating their interests and having a meaningful say in transitional justice processes.

For civil society organizations, the AUTJP not only serves as an advocacy tool but also has educational value. It helps in informing their advocacy for transitional justice and their programs for supporting the planning and implementation of transitional justice processes.

Conclusion

The AUTJP has been a long time coming. The process of the making of the policy turned out to be a huge advantage for articulating a uniquely African conception of transitional justice. While informed by existing discourse and practice of transitional justice, the AUTJP expounds a comprehensive framework that draws on the experiences of countries across the continent and the specificity of the historical, political and socio-economic as well as institutional challenges of transitions in Africa.

Rather than treating transitional justice as a purely normative and technical exercise, the policy not only affirms its political nature but also historicizes it, with its emphasis on national ownership, inclusive consultations and transformation of institutional arrangements and power relations. As such, instead of approaching transitional justice as a stand-alone process, the policy rightly frames it as part of and one of the avenues for the overall political, institutional, socio-economic transformative transition that a society coming out of violent conflict or authoritarianism embarks on.

As a result, the policy advances a two-block framework for transitional justice. The first building

block is the content/substantive component of transitional justice, which is composed of eight elements (Table 2). It is unique in its consideration of the role of local/indigenous (traditional) approaches, reparative justice, socio-economic justice and gender justice as critical elements of transitional justice. The second block is the process/procedural component. This is made up of three elements that underscore the primacy and imperative of national ownership involving both process leadership and use of national resources as a basis for designing transitional justice and the necessity of consultations and inclusive processes.

In providing for such rich and transformative instruments, as AU Commission Chairperson Moussa Faki notes in the preface to the policy, the AUTJP “will be of great assistance to countries in addressing the challenges of reconciliation, social cohesion and nation-building more effectively, all of which are central to peacebuilding and sustainable human development.”

These dimensions of the AUTJP, along with its normatively coherent and historically grounded approach to the thorny issues of peace versus justice, make it valuable not only for Africa but also for the global discourse on and practice of transitional justice. One thus agrees with the hope Chairperson Faki expresses in the preface that this articulation of transitional justice is sure to make “a significant contribution to the global discourse and practice on transitional justice” and help steer the debate on peace and justice “towards a more balanced and, ultimately, more effective approach.”

How the AUTJP will inform and shape the discourse on and practice of transitional justice on the continent and beyond depends on how various actors, including the AU, state actors and non-state actors, make use of the rich resources it provides. Accordingly, it is crucial that the policy is made known by the AU and its institutions, AU member states and their agencies, and non-state actors, including civil society organizations, victim groups and academic and research institutions, through public forums, media engagements and the production of targeted advocacy and research materials.

ABOUT THE CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION

The Centre for the Study of Violence and Reconciliation (CSVr) is a non-governmental organisation which envisions societies that are peaceful, equal and free from violence. CSVr aims to understand and prevent violence, heal its effects and build sustainable peace at the community, national and regional levels. We do this through collaboration with and learning from the lived and diverse experiences of communities affected by violence and conflict to inform innovative interventions, generate knowledge, shape public discourse, influence policy, hold states accountable and promote gender equality, social cohesion and active citizenship.

CONTACT US

33 Hoofd Street
Braampark Forum 5
3rd Floor
Johannesburg, 2001
South Africa

Tel: +27 (11) 403 5650
Fax: +27 (11) 339 6785
Email: info@csvr.org.za

501 Premier Centre
451 Main Road
Observatory
Cape Town, 7925
South Africa

Tel: +27 (21) 447 2470
Email: ctadmin@csvr.org.za

www.csvr.org.za

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Designed and typeset by COMPRESS.dsl | 800409G | www.compressdsl.com



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