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Uganda's Transitional Justice Policy Development Process and the International Criminal Court

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SAGHAR BIRJANDIAN, APR 21 2020

Critical studies of the International Criminal Court's (ICC) work in African contexts show that some of its personnel and proponents argue or assume that the Eurocentric international criminal justice system administers better justice for atrocity crimes than domestic courts and so-called 'alternative' responses (Nouwen, 2013). The justifications for this superior position often rely on the liberal underpinnings of the Court's mandate and how it does its work (Clark, 2018). African and non-African critics continuously expose and explicitly resist this form of cultural imperialism. However, when discussions about the ICC's work dominate a post-conflict state's public policy landscape or 'policyscape' (Sharp, 2019), it can implicitly undermine domestic processes working to address mass violence in contextually appropriate ways. A case in point is Uganda's National Transitional Justice Policy where the Government of Uganda (GoU) outlined various ongoing and anticipated legal and non-legal responses to address cycles of conflict in the country's turbulent history. The Court's intervention in this context preceded and coincided with the entirety of the transitional justice (TJ) policy development process (2008-2019).

In the broadest terms, TJ comprises 'a set of moral, legal, and political dilemmas involving how best to respond to mass atrocities and other forms of profound injustice in the wake of periods of conflict and repression.' (Sharp, 2018: 1) In the Ugandan context, critical commentators highlighted such dilemmas in relation to the Court's adverse effects on a number of alternatives. However, save for Anna MacDonald's rich empirical analysis, few commentators examine the adverse effects of the ICC's intervention on the state-led TJ policy development process specifically (MacDonald, 2016). As this article argues, the Court's intervention implicitly established the liberal peace as the teleology (i.e. assumed purpose) of Uganda's TJ Policy. The liberal peace framework referred to here assumes that increasing the number of societies that promote human rights, rule of law, democratic governance, and market driven development also increases the likelihood of finding peaceful solutions to domestic and international conflicts (Richmond and Franks, 2009: 3-4). Consequently, these parameters unjustifiably relegated certain conflict-related problems of crucial concern to many Ugandans as beyond the scope of TJ.

Among others, three major factors created the conditions where the ICC could help to produce this effect. First is the Court's symbolic role as a beacon of the so-called 'mainstream' approach to TJ. Second, is the self-ascribed or imposed position of the ICC in the infamous 'peace versus justice debate' where a series of academics and practitioners thoroughly discussed the legal, political, and moral dilemmas of sequencing TJ initiatives in Uganda. Third, these ICC-centred debates raised a number of liberal critiques about how justice ought to be administered for atrocity crimes as the most relevant TJ problems to address. This encouraged a technocratic approach to TJ strategy development, which in turn kept proponents and critics of the Court distracted from the liberal peace parameters limiting the scope of problems that benefited from public debate.

It is important to note here that my analysis is not meant to apportion blame to specific types of actors like 'international experts' or ICC personnel. Phil Clark, Sarah Nouwen and MacDonald provide persuasive evidenced-based accounts of how a range of other actors, particularly the Ugandan government, influenced the Court's intervention to their own ends. Instead, I highlight how ICC-centred debates in general narrowed the scope of conflict-related problems discussed in Uganda's TJ policyscape without this being a purposeful decision by Ugandans writ large. This ultimately undermined the national scope of the Policy and as mentioned limited the utility of public policy

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discussion on TJ. My analysis draws on three years of experience as a practitioner observing the height of Uganda's TJ policy development process and five years of in-depth empirical and secondary research analysing societal problems stemming from mass violence that require TJ response in this context.

The ICC as a Beacon of Mainstream Transitional Justice

In 2003, the Court operationalised itself in a landscape of international intervention promoting the 'rule of law' as a pillar of liberal democracy in conflict and post-conflict African contexts. The world witnessed a shift in international intervention in the nineties as the end of the Cold War encouraged bodies like the United Nations to promote western liberal democracy as the legitimate social order. Throughout this 'decade of international law', international tribunals were used to combat impunity for atrocity crimes across post-conflict contexts. In addition, international peacekeeping operations meant to maintain an absence of armed conflict evolved into a more robust peacebuilding apparatus where peace agreements and post-conflict development strategies commit so-called 'failed states' to liberal reforms (Paris, 2002; Sabaratnam, 2011). Representatives from the UN and the Court have openly expressed the ICC's central role in advancing this agenda in post-conflict settings (UNSC, 2004; UNGA, 2004).

Alongside the advent of the ICC, the TJ industry solidified itself through the establishment of various centres, non-government organisations, research programs, international conferences, and a reputable academic journal. A crucial part of the mainstream marketing scheme in the early 2000s was to disseminate how-to-guides and frameworks to help practitioners develop strategies under the rubric of "transitional justice". Consequently, there is a prevailing approach to defining TJ as the mainstream framework in the practical realm. This dominant framework takes for granted that the purpose of any TJ intervention is to further consolidate a liberal democratic social order. To achieve said ends, it promotes responses to human rights violations in line with certain themes, namely accountability, truth-seeking, reparations, and institutional reform. These 'themes' are often associated with ideal-type 'tools' such as trials, truth commissions, symbolic or material compensation schemes, and liberalising executive, legislative, and judicial branches of government, respectively. Although this menu offers an array of potential responses, the liberal underpinnings of this approach prioritizes 'accountability' as western-style investigations and prosecutions. As such, the ICC functions as a beacon of mainstream TJ in conflict and post-conflict settings, which is demonstrated in the context of the 'peace versus justice debate'.

The Normative Parameters Set by the Peace versus Justice Debate

The current GoU entered a hostile political environment in 1986 when it successfully seized state power using guerrilla tactics to liberate Ugandans from the tyranny of predecessor regime(s). There were many insurgent groups vying for political control at the time that continued to fight the newly installed National Resistance Movement. One of these groups was the Lord's Resistance Army (LRA) that emerged from earlier insurgencies and coexisted with others. In this web of conflict between the state and different groups across the country, the LRA – operating predominately across northern Uganda – received the most international attention because of their extreme forms of violence against civilians.

The GoU referred the situation in northern Uganda to the ICC in 2003 as the atrocities across the north increased dramatically. After its preliminary investigations, the Court only issued five arrest warrants for senior leadership of the LRA even though state-military personnel also perpetrated similar crimes such as murder, rape, and torture. This step launched a global debate about the appropriateness of the ICC's intervention as critical commentators illustrated its adverse effects on establishing peace and administering comprehensive justice in this context. This would come to be known as the 'peace versus justice debate' where the ICC assumed the label of 'justice' and alternative responses were associated with 'peace'. Some commentators reject the peace versus justice dichotomy altogether as it fails to reflect how conflict-affected agents in Uganda interpret their experiences of violence and determine appropriate response (Porter, 2016). However for the discussion here, the binary helps to show where the narrow scope of problems prioritised in Uganda's TJ polycscape came from.

At least three prominent iterations of this debate produced the major liberal critiques that helped to implicitly established the liberal peace as the parameters for a legitimate TJ strategy. The first iteration juxtaposes the ICC as

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'justice' on the one hand and amnesty as 'peace' on the other. The initial *blanket* amnesty program offered any Ugandan citizen that has participated in or waged an armed rebellion since 16 January 1986, the chance to voluntarily turn in their weapons and renounce their participation in such activities. In return, they are freed from the threat of prosecution and given a small resource package to help reintegrate back into the community (Amnesty Act, 2000; Clark, 2018: 193). This helped the GoU to pacify insurgents within and beyond the LRA's ranks. It was understood as a 'blanket' amnesty program as no conditions were placed on amnestied persons to undergo some kind of process where they are held 'accountable' for the harm they caused. For example, by confessing their wrongdoings or sharing information that unravels the truth of what happened. As the GoU considered whether to refer the situation to the Court, there was a growing concern about having a blanket amnesty program coexist with the ICC's arrest warrants for senior LRA commanders.

Proponents of the Court referred to Uganda's constitutional, regional, and international obligations to investigate and prosecute atrocity crimes, meaning that any amnesty program is insufficient (HRW, 2006). Critics raised concern as abolishing amnesty also meant depriving many loved ones that were forcibly recruited into the LRA using various forms of torture, their chance to return home (OHCHR, 2007). Among myriad views, the normative stance adopted by some mainstream proponents was if Uganda is to have any amnesty process, it should be 'conditional' (ASF, 2014). This was one way to ensure that Uganda fulfils its obligations to combat impunity for atrocity crimes as even if amnestied persons do not undergo prosecution, they can be held 'accountable' through participation in a prospective truth commission or so-called 'traditional justice mechanisms' (TJMs).

In the TJ discourse, TJMs often refer to a select few customary dispute resolution mechanisms that are depicted in ways that resemble western-style courtroom justice but with a stronger emphasis on restoring broken relationships between conflict parties. This iteration of the peace versus justice debate portrayed the ICC as a form of 'retributive justice' and 'justice' more broadly as it is associated with punishment. TJMs then assumed the label of 'restorative justice' and 'peace' in general terms. Proponents of TJMs argued that customary processes hold perpetrators accountable through public admissions of guilt, some form of material and/or symbolic compensation, and participation in cultural rituals that cleans residual effects of violence. Among many responses from mainstream proponents, a widely held normative stance in relation to TJMs is that if Uganda is to use these alternatives, then they must adhere to mainstream standards and norms. These standards essentially refer to international 'fair trial' procedures including witness and victim protection and respect for the rights of the accused, among others.

These first two iterations of the peace versus justice debate graphed onto the third and most prominent iteration, which pitted a negotiated peace settlement against the ICC, respectively. The peace talks between the GoU and LRA delegates started in 2006 and were held at Juba, southern Sudan. In the backdrop, there was a blanket amnesty process, TJMs increasingly being discussed as viable alternatives for accountability, and the ICC's pending arrest warrants. Critics raised concern that the outstanding warrants decreased conflict parties' trust in the negotiated peace process, particularly LRA delegates. However, proponents and critics seem to agree that *initially*, the warrants encouraged delegates from both sides to begin negotiating in the interest of finding internationally acceptable alternatives to the ICC (Birjandian, 2020). This is the entry point where the liberal critiques in the peace versus justice debate became the most pressing conflict-related problems for Ugandans to address through their TJ policy.

Establishing the Liberal Peace as the Purpose of Uganda's TJ Policy

The ongoing peace versus justice debates put significant pressure on the mediation team facilitating the Juba peace talks to insert an agenda item that specifically deals with 'accountability and reconciliation'. Although another agenda item on 'comprehensive solutions' seemed more important to delegates and many Ugandan observers, the agenda item on accountability received much more negotiation time (Gissel, 2017). The consequent Agreement on Accountability and Reconciliation (AAR) is predominately concerned with getting commitments from delegates – primarily the GoU – to recognize Uganda's obligations under the Constitution, the Rome Statute, and other international and regional agreements to ensure some form of redress for atrocity crimes. The amnesty program is not mentioned at all save for one sentence recognizing the capacity of the Amnesty Commission to implement certain parts of the agreement without reference to specific examples. TJMs are mentioned as one of many alternative

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justice mechanisms; 'alternative' to formal courts established under the Constitution. The major commitments in relation to TJMs is to modify these systems in accordance with the principles of the agreement. The majority of the AAR is dedicated to getting conflict parties to cooperate with 'formal' investigations and to commit the GoU to a series of liberal principles and norms in its approach to administering accountability.

The Annexure where more details about how to operationalise the commitments in the AAR were outlined does much of the same work. It goes further to mention establishing an international crimes division of Uganda's High Court and also commits the GoU to examining how TJMs work to identify their role and to factor in their impact on women and children. Commitments like these then became TJ policy problems primarily because mainstream proponents resourcing the policy development process (e.g. Development Partners Group) and the GoU treated the AAR as the appropriate launching pad for TJ.

For the first five years of the policy development process (2008-2013) government and non-government entities primarily conducted studies about the types of crimes committed during the LRA war and the associated effects on conflict-affected communities across the north. They also garnered citizens' views across the country about how to address the liberal critiques mentioned above. The findings of these studies showed a range of views in conflict-affected communities; some supporting liberal critiques for practical and moral reasons and other challenging them or deeming them irrelevant to their daily lives (Birjandian, 2020). A smaller drafting team within the fifty-member TJ Working Group housed at the Justice Law and Order Sector, drew from these policy studies to develop a working document for public scrutiny. From 2013 to 2015, the third, fourth, and fifth drafts were circulated among a network of TJ civil society organisations primarily based in Kampala and across the north. The fifth draft was the most widely disseminated and representative of the mainstream influence.

The fifth draft of the Policy addresses gross human rights abuses committed from 1986 to date. The first third provides a general background as a series of conflicts pre-and-post independence and outlines relevant domestic, regional, and international legal frameworks. The second third breaks down the problems requiring intervention into thematic areas namely, formal justice, traditional justice, truth telling, reparations, and amnesty. In relation to reparations the policy identifies institutional, legal, and policy gaps that need to be addressed. In relation to formal justice, truth telling, TJMs and amnesty, it mentions similar liberal critiques to those coming out of the peace versus justice debate. For example, it problematizes the lack of gender equity and human rights observance in traditional justice processes. The amnesty law was also problematized because it does not take 'into consideration the nature of crimes committed' (JLOS, 2013: 25). The last third then outlines measures for the GoU and non-government service providers to address the gaps and critiques in the previous section. For example, under formal justice, the government commits to enacting 'legislation on witness protection and victim participation' (JLOS, 2013: 28). Under traditional justice, the government commits to developing guiding principles and checks and balances; increasing the semblance of TJMs to formal courts. Under the amnesty section, the Policy states in bold letters that 'there shall be no blanket amnesty and Government shall encourage those amnestied, to participate in truth telling and traditional justice processes.' (JLOS, 2013: 30)

Even though each theme was significantly 'contextualised' by non-mainstream drafters of the policy, the themes themselves, the problems listed under them, and the responses in the last section reinforce that the implicit purpose of Uganda's TJ intervention is to further consolidate a liberal democracy. More overtly, the overall goal in the fifth draft is 'to enhance legal and political accountability, for gross human rights abuses and violations to promote reconciliation, foster social reintegration and contribute to peace and security.' (JLOS, 2013: 26) Central concepts in this goal like 'peace' and 'security' and the goal itself were not adequately debated in the TJ polycscape. Instead, their meanings were assumed or at best deduced from various policy studies and debates centred around the ICC and the technical issues of accountability. The irony of the Policy's limited purpose is that core conflict-related problems that move beyond liberal critiques were raised throughout the policy development process, but they were largely treated as the beyond the scope of TJ.

Missed Opportunities in Uganda's TJ Policy Development Process

A crucial missed opportunity is in relation to the discussions on 'comprehensive solutions' during the peace talks.

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The resultant Agreement on Comprehensive Solutions (ACS) identifies the lack of inclusiveness in government and regional disparities as core issues the GoU needs to address. These challenges have been identified by many Ugandans as causes and effects of atrocity violence since the colonial period. In a context where there is no regime change and the GoU is culpable for diverse forms of violence against its own population, government delegates taking responsibility for these wrongdoings is an underappreciated accomplishment of the Juba talks. In addition, lack of inclusive government could be interpreted as a violation of civil and political rights for certain portions of the population, which is a concern for mainstream TJ. However, because of ICC-centred debates, the societal problems discussed under 'comprehensive solutions' were treated as something separate from the technical issues of 'accountability'. Further evidence that the issues in the ACS are relevant is their inclusion in Uganda's National Policy on Peacebuilding and Conflict Prevention, which was in part developed as a response to the perceived regional scope of the TJ policy. For example, it problematises the ethnicisation of politics, which is a fundamental cause and effect of violence during the colonial era and post-independence. But yet again, the issues in the Peace Policy were treated as beyond the scope of TJ without sufficient public deliberation. This leads us to the most crucial unaddressed tension in the TJ Policy: is the scope regional or truly national as the drafters intended?

The policy problems were primarily derived in relation to the LRA war and the liberal critiques in the peace versus justice debates. Consequently, the liberal peace implicitly defined the purpose of the Policy making the regional/national question unimportant as regardless of the scope, the mainstream's teleology remains the same. This unresolved tension makes it difficult to convince Ugandans writ large that the Policy is relevant to their diverse experiences of violence. Key figures in the drafting process such as Lyandro Komakech stated in retrospect, that a national conference after the Juba talks ended would have been a more appropriate departure point for the policy development process (Birjandian, 2020). In addition, civil society organisations produced materials and facilitated events that could have been used to give the policy the national framing many Ugandans desire. For example, Refugee Law Project's Compendium of Conflicts or African Youth Initiative Network's National War Victims Conference could have been effective launching pads for TJ problem-mapping. However, these materials and platforms only enriched the Policy's pre-existing framework as an outcome of the AAR.

The mainstream influence died down significantly in 2016 as the election cycle drew service providers' attention toward contemporary human rights issues. In addition, by this time, the LRA commander Dominic Ongwen's trial at the Hague showed Ugandans how limited the Court actually is in practical terms. By 2017, public engagement on TJ significantly subsided and drafts of the Policy circulated among parliamentarians and other decision-makers. The Ministry of Internal Affairs then helped to revise the draft before its anti-climactic adoption by Cabinet in June, 2019. Some notable changes that reinforce the limited scope of the fifth draft include the insertion of a foreword and a distinct problem statement explaining the Policy's national scope; deletion of any timeframe limiting the choice of relevant conflicts; and a change in the oversight mechanism from a prospective TJ Commission to the extant Amnesty Commission.

As the ICC is a beacon of the mainstream approach to TJ, it would be beneficial for commentators to substantively define the meaning of 'transition' in post-conflict contexts where the Court is active and a TJ strategy is being developed. However, to be effective, commentators should ideally generate a grounded definition of 'transition' in each case that reflects the social change conflict-affected agents associate with responding to societal problems stemming from mass violence. This can help to prevent inadvertently generating parameters that limit the scope of problems deemed relevant for TJ response. It can also help to prevent an implicit mission creep of the liberal peace without deliberate commitment from those who would ultimately sustain it: conflict-affected agents.

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