

The African Union Transitional Justice Policy Framework
and How it Fits into the African Governance
Architecture (AGA)

*Promise and Prospects for the African Court of Justice
and Human Rights*

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1. INTRODUCTION

The Africa rising narrative has gained traction within and beyond the continent.¹ Endowed with significant human and natural resources, Africa's promise and potential is unparalleled in modern history. The continent's growth and development has undoubtedly transformed over the last decade, buoyed by a youthful demographic. However, Africa's rise is measured in terms of economic growth.² In the midst of the celebrated macro-economic growth lie deep inequality, fragility, unemployment and exacerbating poverty of African peoples.³ Despite marked socio-economic progress in Africa, significant challenges continue to stand in the way of reaping the full potential of the continent's abundance in resources. Democratic governance deficit is identified as one of the structural root causes of Africa's conflicts and under development.⁴ The African Union (AU) acknowledges that 'the scourge of conflicts in Africa is a major impediment to the socio-economic development of the continent'.⁵ To redress conflicts in Africa, the AU commits 'to promote peace and security, human rights and ending impunity'.⁶

In a remarkable departure from its predecessor – the Organization of African Unity – which relied on strict interpretation of the principle of state

¹ The Economist, 'Africa rising: A hopeful continent' (3 March 2013).

² Ibid.

³ African Common Position on the Post 2015 development Agenda, (2015), at ¶ 17.

⁴ Ibid. at ¶ 66.

⁵ AU Constitutive Act, at Preamble.

⁶ Ibid.

sovereignty (non-interference) – the AU’s principle of non-indifference, marked a significant paradigm shift.⁷ In an unprecedented affirmation of the right of the Union to intervene in a Member State where grave crimes have been committed, the AU further condemns and rejects impunity.⁸ Indeed, conscious of the high cost of impunity to Africa’s socio-economic development, the AU’s Peace and Security Council in 2009 – through one of its pillars, the Panel of the Wise – recommended the adoption of an African Transitional Justice Policy Framework.⁹

While sufficient credit goes to the AU Panel of the Wise for the formal recommendation to the AU to consider developing and adopting a Transitional Justice Policy Framework, the original thought and idea about consolidating comparable transitional justice practices in Africa is traceable to the 2009 African Union High Level Panel Report on Darfur (Mbeki Panel Report).¹⁰ The Mbeki Report made an unprecedented attempt to confront the ‘challenge of finding an effective and comprehensive approach to the issues of accountability and impunity on the one hand, and to peace, healing, and reconciliation on the other.’¹¹ The Mbeki Panel Report recommendations were instrumental and likely guided the AU Panel of the Wise on the possible

⁷ Constitutive Act, Art. 4(h) – Principles of the AU provides for the ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

⁸ *Ibid.*, at Art. (o) calls for: respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

⁹ See African Union Panel of the Wise, ‘Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,’ The African Union Series, New York: International Peace Institute, (February 2013), Annex, 72. See also *Protocol Relating to the Establishment of the Peace and Security Council* Articles, 6 and 14 relative to peacemaking and peace building in the restoration of the rule of law and post-conflict reconstruction of societies. At the time of writing this paper (July 2016) the draft framework was being reviewed by a 15 Member States Reference Group constituted by the AU Specialized Technical Committee on Justice and Legal Affairs in November 2015. The draft had been submitted to the STC on Justice and Legal Affairs in November 2016 for consideration and adoption – but was shelved and referred to the 15 Member States Reference Group for further refinement. The Draft is the culmination of efforts by the Department of Political Affairs and the Legal Counsel, African Union Commission with technical support from the Centre for the Study of Violence and Reconciliation, South Africa to consolidate and fine tune the original draft that was annexed to the Report of the Panel of the Wise.

¹⁰ Report of the African Union High-Level Panel on Darfur (AUPD Report), *Peace and Security Council 207th Meeting at the Level of the Heads of State and Government*, 29 October 2009, Abuja, Nigeria, PSC/AHG/2(CC VII).

¹¹ See African Union Panel of the Wise, ‘Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,’ The African Union Series, New York: International Peace Institute, February 2013, at 5.

'contours' of an AU Transitional Justice Policy Framework'.¹² While the Mbeki Report was only focused on the situation in Darfur, its recommendations are applicable to other situations and include: 'the utility of comprehensive national processes and principles for the establishment of hybrid courts in parallel with truth seeking and reconciliation processes'.¹³ This paper examines the draft AU Transitional Justice Policy Framework. The paper is structured into three broad sections. Section 1 begins by tracing the objectives of the AU TJ Policy Framework. Section 2 reviews the Policy Framework's focus and contents. Section 3 is a forecast of the promise and prospects of the Framework in addressing impunity and post conflict reconstruction and development in Africa.

2. OBJECTIVES OF THE AU TRANSITIONAL JUSTICE POLICY FRAMEWORK

South Africa's transition from apartheid to a democracy is hailed as nothing short of a miracle.¹⁴ When Nelson Mandela took over from FW de Klerk as President of South Africa in 1994 – after spending 27 years in prison – the world sighed in amazement as once arch-foes formed a government of national unity. De Klerk was appointed as Mandela's deputy until 1996. Inspired and motivated by pragmatism or perhaps a symbolic gesture of reconciliation, it was a game changer in South Africa's pursuit for national unity among diametrically opposed sides. To deal with past injustices of apartheid, South Africa formed a Truth and Reconciliation Commission in 1995 with a mandate to examine human rights violations and atrocities from 1960 to 1994.¹⁵ The mandate was set out in the Promotion of National Unity and Reconciliation Act, South Africa, 19 July 1995. While other African countries¹⁶ had previously attempted reconciliation processes including through truth commissions, South Africa's iconic experiment is heralded as inspiring replication across the

¹² Ibid.

¹³ AU Draft TJ Policy Framework, at 5.

¹⁴ See J. Dugard, 2001. 'Retrospective Justice: International Law and the South African Model' in A James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies*, (University of Notre Dame Press, Notre Dame, 2001); See also 'South Africa: beyond the miracle' accessed at www.sahistory.org.za/collection/27414.

¹⁵ Promotion of National Unity and Reconciliation Act, South Africa, 19 July 1995.

¹⁶ Uganda (1974), Zimbabwe (1985) and Nigeria (1999) See African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity,' *The African Union Series*, New York: International Peace Institute, February 2013, at 21, 27.

continent on dealing with past atrocities.¹⁷ Rwanda, Sierra Leone, Liberia, Kenya, Ivory Coast, Mali, Zimbabwe, and South Sudan are some of the other African countries that have since attempted various transitional justice initiatives.

Although several AU Member States have since attempted different versions of transitional justice, there is lack of a coherent continental approach or guide towards effective and legitimate transitional justice processes and mechanisms. Indeed, the AU Panel of the Wise acknowledges that ‘since the early 1990s, Africa has served as a vast testing ground for new policies to address impunity, seek truth and justice, and enable reconciliation in fractured societies’.¹⁸ The impact of those experiments in meeting the objectives to which they were established is mixed. Several lessons can be teased out from comparable experiences of countries in Africa and beyond that have adopted and undertaken transitional justice. Besides examining effective practices – in light of differences in contextual realities of AU Member States – some of the lessons are on what not to replicate and copy, rather than what to do.

The AU TJ Policy Framework therefore seeks to consolidate lessons, practices and emerging norms on credible and legitimate transitional justice mechanisms and processes in Africa and raises questions about the new locus of justice being fomented through the African Court for Justice and Human Rights. The objectives of the Framework ‘is to assist African Union (AU) Member States emerging from violent conflicts and repression in their pursuit of accountability, sustainable peace, justice and reconciliation. The AUTJF reflects contemporary issues in the area of transitional justice and aims to be a guide that can be adapted by countries in the design and implementation of transitional justice mechanisms.’¹⁹

The Framework makes it clear that it does not seek to create any ‘new obligations for AU Member States’, but rather complements and provides clarity to AU instruments and policies that ‘deepen the links between justice, governance, human rights, peace and security and development’.²⁰ Acknowledging the gap between what transpires in practice and in various AU normative instruments, the Framework seeks to ‘improve the timeliness, effectiveness and coordination of efforts by States emerging from conflict and oppressive rule.’²¹

¹⁷ See Editorial Note, 7 *International Journal of Transitional Justice* (March 2013), at 1, 2.

¹⁸ *Ibid.* at 27.

¹⁹ AU Draft TJ Policy Framework, at 2.

²⁰ *Ibid.*

²¹ *Ibid.*

3. FOCUS AND CONTENT OF THE AU TJ POLICY FRAMEWORK

The scope and focus of the AU TJ Policy Framework is largely inspired by the AU Shared Values instruments and policies relative to democratic governance, human rights, peace and security and post conflict reconstruction and development.²² The Framework places emphasis on an imperative for synergy, complementarity and coherence between the African Governance Architecture and the African Peace and Security Architecture.²³ Effective implementation of AU Shared Values at national level is critical for addressing impunity and post conflict reconstruction and development. The Framework is conceptualized and designed as an imperative to ‘end violent conflicts and repressive rule, and nurture sustainable development, social justice, human and peoples’ rights, democratic rule, and good governance, consolidate peace, reconciliation and justice in Africa, and prevent impunity’.²⁴

The Framework is structured along four broad areas. It begins by acknowledging the principles and values that underpin the Framework. It then highlights the guiding normative framework which includes the AU Shared Values on democratic governance, human rights, constitutionalism, rule of law, peace and security. While not purporting to be exhaustive, the Framework outlines some of the constitutive elements of transitional justice largely based on comparable lessons and experiences of AU Member States that have undertaken transitional justice in Africa. Finally, the Framework identifies the key actors and governance mechanisms for implementation. The next section examines the four broad areas in turn.

A. Principles and Values

The principles and values that guide the AU TJ Policy Framework emanate from AU Shared Values on ‘peace, justice, accountability and reconciliation, which are interrelated, interdependent and mutually reinforcing’.²⁵ The

²² AU Constitutive Act articles 3 and 4; African Charter on Democracy, Elections and Governance, articles 2, 3, 16, 28 and 39; African Charter on Human and Peoples Rights, articles 1–26; Protocol Relating to the Establishment of the Peace and Security Council articles 6 and 14; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa; The African Charter on the Rights and Welfare of the Child; and AU Policy Framework on Post Conflict Reconstruction and Development, articles 31, 32 and 33.

²³ See *Decision of the AU Assembly on the Declaration of the Assembly of the African Union on the Theme of the January 2011 Summit*:

“Towards Greater Unity and Integration through Shared Values,” (Assembly/AU/Decl.1 (XVI),) 4, 11 (as adopted during the Sixteenth Ordinary Session of the African Union, 30–31 January 2011).

²⁴ *Ibid.*, at 3

²⁵ *Ibid.*, at 7.

Framework is hinged on four main principles: entrenchment of African shared values; promotion of national and local ownership and inclusive participation in transitional justice processes; promotion of reconciliation with accountability and responsibility; and cooperation, coherence and coordination of transitional justice initiatives.²⁶

1. Entrenchment of African Shared Values

The principle of entrenchment of African shared values in the AU TJ Policy Framework broadens the transitional justice discourse and application in Africa beyond conventional understanding thus far. According to the International Centre for Transitional Justice (ICTJ) – globally recognized as one of the pioneer transitional justice institutions – ‘Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms’.²⁷ Emerging largely from the experiences in Nuremberg, Latin America and South Africa, transitional justice until the very late 1990s, was focused on addressing repression in the civil, political rights realm and related human rights atrocities by States.²⁸

While repression and human rights atrocities continue to be the bedrock of pursuit for transitional justice in most African countries, there is emerging consensus that ‘effective realization of socio-economic justice, gender justice, and right to development’ are equally critical if not central to redressing past injustices.²⁹ Entrenchment of AU Shared Values in the Framework reflects and captures Africa’s ‘particular contexts, cultural nuances and priorities’ that place emphasis on African solidarity, socio-economic rights, traditional justice, reconciliation, national cohesion, and transformative development.³⁰

(A) PROMOTION OF NATIONAL AND LOCAL OWNERSHIP AND INCLUSIVE PARTICIPATION IN TRANSITIONAL JUSTICE PROCESSES Transitional Justice thus far has been driven and implemented by States with marginal if any

²⁶ *Ibid.*, at 7, 8.

²⁷ See International Centre for Transitional Justice, ‘What is Transitional Justice?’ www.ictj.org/about/transitional-justice accessed 04 July 2016.

²⁸ See M. C. Okello et al. ed., *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press, 2012); See also Editorial Note, *supra* note 17, at 1–7.

²⁹ AU TJ Policy Framework, at 7. See also Editorial Note, *supra* note 17, at 1–7.

³⁰ *Ibid.*

inclusion and participation of the beneficiaries of those initiatives. However, limited ownership, lack of engagement and participation of beneficiaries of transitional justice entrenches disenfranchisement of victims and survivors of human rights atrocities. The AU TJ Policy Framework in recognition of that trend sought to cure that deficit by underlining the primacy and centrality of victims and citizens in conceptualization, design, implementation, monitoring and evaluation of transitional justice processes in Africa.³¹

The Framework promotes local and national ownership and inclusive participation of beneficiaries in transitional justice processes. While acknowledging that funding and technical support to transitional justice initiatives can be external, it seeks to promote local and national resourcing of transitional justice processes and mechanism to ensure sustainability of initiatives and comprehensively address structural root causes of conflict rather than its symptoms.

The Framework makes a case for respect for the principle of ‘effective consultation, participation and informed consent in all engagements with affected groups in deciding on priority areas in transitional justice processes’.³² Such consultations and engagements are based on human rights principles of ‘equality, non-discrimination, justice, equity and fairness’ which are the overarching basis for transitional justice in Africa.³³

(B) PROMOTION OF RECONCILIATION WITH ACCOUNTABILITY AND RESPONSIBILITY The AU TJ Policy Framework embraces the AU Panel on Darfur’s triple ‘objectives of peace, reconciliation and justice as interconnected, mutually dependent and equally desirable’³⁴ as underlying pillars of transitional justice in Africa.³⁵ The Framework thus broadens the understanding of justice as going beyond pursuit for retribution. It links ‘reconciliation, accountability and responsibility’ as interrelated imperatives in the pursuit for sustainable peace in Africa.³⁶

To prevent recurrence of conflict which is an overarching goal of credible and legitimate transitional justice, it is important to ensure real ownership of justice models through appropriate consultations and consensus building among all stakeholders including protagonists. The Framework acknowledges and recognizes that victims and perpetrators are part of the same

³¹ Ibid.

³² Ibid.

³³ Ibid., at 8.

³⁴ AUPD Report, at 5.

³⁵ AU TJ Policy Framework, at 8.

³⁶ Ibid.

society and are likely to continue living together post the conflict. The Framework calls for respect and protection of the dignity and rights of victims, witnesses and intermediaries as well as the fair trial rights of alleged perpetrators.³⁷

Women, youth and children bear the brunt of most conflicts. The Framework therefore urges, for their inclusion in the design and implementation of transitional justice initiatives including protection of their vulnerabilities and special needs. In promoting reconciliation with accountability and responsibility, the Framework seeks to promote a comprehensive understanding of justice, which goes beyond criminal trials to one whose overarching goal is to pursue accountability while achieving reconciliation.³⁸

i) Cooperation, Coherence and Coordination of Transitional Justice Initiatives

One of the major gaps in the promotion and consolidation of African shared values is limited cooperation and coordination of AU Organs, Institutions, Regional Economic Communities (RECs) and Member States in their implementation at national level.³⁹ The AU TJ Policy Framework seeks to cure this deficit by urging for clear definition, identification and assignment of roles and responsibilities of all actors and resources at continental and national level.⁴⁰ Actors are not limited to the state and include victims, civil society and international actors.

Early identification and roles assignment ensures coherence, effectiveness, efficiency, timeliness and sustainability of transitional justice initiatives in order to comprehensively address the structural root cause of conflicts. The Framework calls for transparency and exchange of information of local, national and international actors including share of comparable practices and experiences as a means of enhancing trust and learning.⁴¹

(C) **NORMATIVE FRAMEWORK** The AU Transitional Justice Policy Framework revolves around four key normative issues: link between transitional

³⁷ Ibid.

³⁸ See T. Murithi, 'Towards African Models of Transitional Justice' in M. Ch. Okello et al. (eds.), *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press, 2012) at 200.

³⁹ G. M. Wachira, 'Consolidating the African Governance Architecture' in Y. Turianskyi & S. Gruzd (eds.), *African Accountability: What Works and What Doesn't?* (South African Institute for International Affairs, Johannesburg, 2015).

⁴⁰ Ibid., at 9.

⁴¹ Ibid.

justice and accountability; goals of transitional justice; balancing competing transitional justice goals; and sequencing.⁴²

(i) Link Between Transitional Justice and Accountability

International human rights and international criminal law standards that include regional standards provide guidance and normative framework on transitional justice in Africa. Although the Framework does not expressly stipulate which standards apply, most AU Member States are party to several international and regional instruments against impunity and protection of human rights which is indicative of the scope of applicability of these norms in addressing accountability and transitional justice.

i. Goals of Transitional Justice

The overall goal of transitional justice is to address past atrocities and human rights abuses towards sustainable peace, justice and reconciliation. The key elements identified by the Framework as critical for achieving that imperative include: truth seeking; justice; reparations and guarantees of non-recurrence.⁴³ Various international, regional and national norms as well as institutions and tribunals including the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights have addressed some of these elements.⁴⁴ Their interpretations and jurisprudence constitute a body of norms and standards that could guide the implementation of the Framework in Africa.

The Rwanda experiment on the nexus between justice and reconciliation as exemplified by *gacaca*⁴⁵ courts affirms the importance of looking beyond conventional norms on criminal justice to include 'restorative and redistributive justice'.⁴⁶ Symbolic and practical reparations as part of transitional justice are equally highlighted by the Framework as critical and in consonance with international standards and norms.⁴⁷ To ensure non-repetition and

⁴² *Ibid.*, at 9–10

⁴³ *Ibid.*, 10.

⁴⁴ See Generally various decisions of the African Commission on Human and Peoples Rights, Heyns and Killander (ed). 2013. *Compendium of Key Human Rights Documents of the African Union*, Pretoria University Press, 222–356. Provide further references of Case Law emerging from the ACtHPR.

⁴⁵ See, Hollie et al., 'Genocide, Justice and Rwanda's Gacaca Courts', 30 *Journal of Contemporary Criminal Justice*, at 333–52.

⁴⁶ AU TJ Policy Framework, at 10.

⁴⁷ *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations General Assembly resolution 60/147, 16 December 2005; *Ibid.*, at 10

recurrence, the Framework identifies implementing structural reforms on democratic governance and accountability that include legal and institutional reforms, vetting and lustration and security sector reforms in order to restore trust by citizens to the broken institutions of state.⁴⁸

ii. Balancing Competing Transitional Justice Goals

The Framework is clear that there is no one size fits all formula of what transitional justice policies and mechanism a country should adopt.⁴⁹ In fact in a continent as diverse as her people, countries have the discretion to undertake transitional justice processes that respond and are in alignment with the peoples' needs towards finding lasting peace. What is critically important is ensuring that the models adopted consider the triple objectives of peace, reconciliation and justice without compromising either.

Certainly not an easy task, the Framework recognizes that transitional justice is not a perfect alternative to justice during peace times and is therefore an outcome of negotiations and compromises. As such it may yield to some imperfect solutions. The norms that should guide such an undertaking should therefore be defined by broad citizen consultations and participation to ensure ownership by citizens and compliance with regional and international norms and standards.

iii. Sequencing

One of the unique but controversial propositions of the AU TJ Policy Framework is the imperative – if need be – of sequencing various transitional justice initiatives. Based on pragmatism and a desire to ensure that adopted transitional justice initiatives are not compromised by political considerations, the Framework acknowledges the need to sequence certain transitional justice initiatives.⁵⁰ The Framework emphasizes that the question is not a choice of whether to pursue justice or peace but rather of when to pursue either.⁵¹ Peace and justice are therefore not necessarily conflictual but in fact if 'properly pursued, they promote and sustain one another'.⁵²

B. Constitutive Elements

Traditionally, transitional justice identified five core elements: criminal prosecutions; reparations; legal and institutional reforms; truth commissions and

⁴⁸ AU TJ Policy Framework, at 10.

⁴⁹ Ibid.

⁵⁰ Ibid., at 10

⁵¹ Ibid.

⁵² Ibid.

memorialization.⁵³ Besides the five core elements, the AU TJ Policy Framework included three more elements: peacemaking processes; traditional justice; and gender and children justice.⁵⁴ The additional elements reflect the particular realities and context within which comprehensive transitional justice is understood in Africa.

C. Peacemaking Process

Most transitional justice initiatives in Africa have emerged because of compromise, negotiation, mediation and peace agreements. Peacemaking processes in Africa thus constitute the point of departure for negotiating inclusion of transitional justice processes and initiatives in peace agreements. The legal basis for the AU's engagement in peacemaking processes in Member States is the Constitutive Act⁵⁵ and the Protocol to the Peace and Security Council.⁵⁶

The AU and its building blocks – the RECs – are therefore actively engaged in facilitating and at times act as guarantors of peace processes as was exemplified in Kenya, Zimbabwe, Ivory Coast, Mali, South Sudan, Burundi, Lesotho and Central Africa Republic. Some of these peacemaking processes have resulted in transitional justice initiatives notably in Kenya, South Sudan, Ivory Coast, Central Africa Republic and Mali.

The Framework provides guidance to Member States on the importance of ensuring that peace agreements take into account the following core issues among others:

- a) The interconnectedness and interdependence of the imperatives of peace, justice, and reconciliation.
- b) Political, economic, and social drivers of conflicts.
- c) The regional and external dimensions of these conflicts.
- d) Inclusion and participation of all stakeholders including women, youth, civil society and victims.
- e) Conformity to international legal obligations.
- f) Implementation and monitoring mechanisms.⁵⁷

In order to give peace a chance, the Framework calls on Member States to ensure that parties 'enter into negotiations for a permanent cease fire,

⁵³ International Centre for Transitional Justice, 'The Elements of a Comprehensive Transitional Justice Policy' sourced at www.ictj.org/about/transitional-justice.

⁵⁴ AU TJ Policy Framework, at 11.

⁵⁵ Constitutive Act of the AU, Art. 3 (f), 4(e).

⁵⁶ Protocol to the Peace and Security Council, Art. 6, 13 and 14.

⁵⁷ AU TJ Policy Framework, at pg. 11.

including comprehensive security arrangements'.⁵⁸ Such arrangements should include disarmament, demobilization and reintegration of former combatants as well as repatriation, resettlement, reintegration and rehabilitation of refugees, internally displaced people and in particular women and children.⁵⁹

D. *Traditional Justice and Reconciliation Mechanisms*

African traditional justice systems embrace accountability mechanisms that go beyond retribution.⁶⁰ The AU TJ Policy Framework adopts that approach in recognition that traditional justice in Africa has duo objectives of justice and reconciliation. The Framework calls on AU Member States 'to broaden their understanding of justice beyond retributive justice to encompass restorative, redistributive and transformative measures found in traditional African systems'.⁶¹ However, it cautions that traditional justice should not be employed to trample upon fundamental human and peoples' rights as codified in regional human rights instruments.⁶²

The Framework promotes 'support and respect for communal based accountability mechanisms that seek to foster integration and reconciliation'.⁶³ In acknowledgement of the role transitional justice plays towards reconciliation, the Framework seeks integration of 'generic African practices into international norms and standards that would enhance international commitment to end impunity and promote peace, justice and reconciliation'.

1. Truth Commissions and Archives

Truth Commissions have become synonymous with transitional justice. They are often the transitional justice processes of choice or default after periods of conflict to investigate past human rights atrocities. The Framework identifies truth commissions as pivotal for transitional justice in Africa and elaborates their scope, mandates and factors which impact upon successful truth commissions.

The Framework provides guidance on possible mandates of truth commissions depending on their contexts and circumstances that prompted their

⁵⁸ *Ibid.*, at 13

⁵⁹ *Ibid.*

⁶⁰ See Murithi, *supra* note 38, at 200–17.

⁶¹ AU TJ Policy Framework, at 14.

⁶² *Ibid.*

⁶³ *Ibid.*

establishment. These range from fact finding, investigations, public consultations, hearings and recommending for accountability, legal and institutional reforms, lustration and reparations. One of the important contributions of truth commission is to establish the truth and provide an account of what happened which is useful for documentation and immortalizing history through archives and records.

The Framework provides indicators for successful truth commissions that include: independence of commissioners; sufficient but realistic mandate; publication and dissemination of reports; implementation of recommendations; and dealing with denial and acknowledgement.⁶⁴

(A) JUSTICE AND ACCOUNTABILITY Besides national and international criminal prosecutions, the AU TJ Policy Framework acknowledges the purpose served by informal and indigenous justice systems – accountability and reconciliation. It notes that national and international prosecutions are an important component of addressing impunity. The Framework reaffirms that the purpose for justice in the African context has five principal objectives: accountability, deterrence, retribution, rehabilitation and reconciliation.⁶⁵

The Framework underscores the importance of the complementarity principle in prosecuting international crimes. Victims' rights, protection of witnesses and fair trial rights are equally emphasized as is the importance of exploring regional criminal accountability mechanisms once they become operational.⁶⁶

The AU TJ Policy Framework recognizes the role that amnesties can play to bring combatants and opposing camps to the negotiating table. However, it reaffirms that amnesties are not permissible if they:

1. Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights;
2. Interfere with victims' right to an effective remedy; or
3. Restrict victims' or societies' right to know the truth about violations of human rights and humanitarian law.⁶⁷

⁶⁴ *Ibid.*, at 18

⁶⁵ *Ibid.*, at 18.

⁶⁶ *Ibid.*, at 18–25; See also the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014.

⁶⁷ *Ibid.*, at 21.

(B) REPARATION AND MEMORIALIZATION The AU TJ Policy Framework endorses international norms and standards on reparations as the point of reference on reparations in transitional justice processes in Africa.⁶⁸ The guidelines reassert the 'state to individual responsibility for reparations.'⁶⁹ According to the UN Guidelines, reparations include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁰

The Framework reaffirms the principle that 'reparations are both individual and collective, and are a public acknowledgement by a new or reconstructed society of the harms suffered; and provide recognition for a victim as well as redress'.⁷¹ For reparations to be meaningful they must be accompanied by a public acknowledgement and must be 'adequate, effective and prompt'.⁷² While reparations can be individual they can also be collective and could also include symbolic gestures such as memorialization.⁷³ The Framework outlines benchmarks and indicators for successful reparation programmes. Such indicators include: transparency; effective participation of victims; fair and just processes; gender sensitive; prompt and adequate and linked to development agenda for sustainability.⁷⁴

Memorialization is identified as an important component of reparations and transitional justice given its symbolism as a tool for reconciliation, healing, justice and conflict prevention.⁷⁵ The AU's unprecedented establishment of a continental human rights memorial is commended and highlighted as an important contribution to ongoing peace and reconciliation efforts among Member States.⁷⁶ The Framework identifies benchmarks and indicators for successful memorialization programmes. These could include:

⁶⁸ *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147, 16 December 2005; See also the Hague Convention on the Laws and Customs of International Humanitarian Law IHL and Customs of Land Warfare of 1907; International Covenant on Civil and Political Rights; African Charter on Human and Peoples Rights articles ; *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, The African Commission on Human and Peoples' Rights (the African Commission or ACHPR), meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, 15–28 November 2007; *Ibid.*, at 26.

⁶⁹ AU TJ Policy Framework, at 26.

⁷⁰ *Ibid.*, at 26.

⁷¹ *Ibid.*

⁷² *Ibid.*, at 27.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at 28.

⁷⁵ *Ibid.*, at 30.

⁷⁶ *Ibid.*, at 30.

Effective participation and consultation of all stakeholders to ensure ownership; complementarity with other transitional justice processes; gender sensitive; incorporates official acknowledgement of atrocities and responsibility; comprehensive and respectful of diversity of victims.⁷⁷

2. Institutional and Legal Reforms

To guarantee non-recurrence, societal transformation and legal and institutional reforms are necessary especially if the institutions and laws failed to prevent atrocities. One of the sustainable and transformative transitional justice guarantees for non-repetition is an overhaul and reforms of laws and institutions that failed to prevent human rights atrocities. The Framework identifies legal and institutional reforms as the bedrock of guaranteeing non-recurrence.⁷⁸ Strengthening democratic governance, protection and respect for human rights, constitutionalism and rule of law is regarded as crucial components of comprehensive transitional justice.

Accompanying legal reforms is the need for removal and lustration of public officials who may have been complicit, implicit and perpetrated human rights violations and atrocities. That entails vetting of public officials and if need be their removal from public office. Such a process should be undertaken in compliance with fair due processes and international human rights standards.

E. Gender and Children

Women and children often bear the brunt of conflict as victims and survivors. The Framework in recognition of the effect and impact of conflict on women and children provides guidance on the imperative to adopt and take special measures to address their vulnerability, needs and concerns in transitional justice processes. The Frameworks calls for ‘inclusion of child specific or child friendly mechanisms to address the experiences of children in conflict’.⁷⁹ Such measures could include prioritizing anonymity, best interests of the child, and psychosocial support.⁸⁰ International and regional human rights standards on children should always apply especially relative to international and local criminal prosecutions of child soldiers.⁸¹

⁷⁷ Ibid.

⁷⁸ Ibid., at 31.

⁷⁹ Ibid., at 32.

⁸⁰ Ibid., at 33.

⁸¹ Ibid.

Protecting the rights of women in Africa have gained significant momentum since the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁸² However, challenges remain in implementation of AU standards and norms on the rights of women especially during conflict. The Framework 'cognizant of the disproportionate effect of conflict on women and girls, requires that transitional justice measures should transform the lives of women and girls particularly those vulnerable to conflict-related human rights abuses, including systematic sexual violence that often continues unabated even after conflict ends'.⁸³

The Framework calls for prosecution of sexual and gender-based violence and inclusion and participation of women in peacemaking and transitional justice processes. It also includes factoring gender considerations towards effective realization of socio-economic rights and full and equal participation in state rebuilding especially political leadership.⁸⁴

F. *Actors and Governance Mechanisms*

Implementation of the AU TJ Policy Framework is hinged on effective coordination and identification of actors, resources and mechanisms to bring its propositions to action. State and non-state actors including partners are identified as crucial for implementation of not only the Framework but national transitional justice processes. The Framework calls on state actors to develop legal and institutional frameworks, strategies and appoint focal persons for coordinating implementation.⁸⁵

The AU and RECs' role include guiding implementation, facilitating harmonization of policy instruments, providing technical support and monitoring implementation in Member States.⁸⁶ The AU's judicial and quasi-judicial organs are envisaged to provide investigative, prosecutorial and protection of human rights violations as well as monitoring compliance of AU human rights shared values. Given the importance attached to peacemaking processes by the Framework, the AU's Panel of the Wise is identified as an important actor for mediation and facilitating political negotiations.⁸⁷

⁸² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

⁸³ AU TJ Policy Framework, at 34.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, at 38.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at 39.

International actors and partners are acknowledged as crucial in providing comparable lessons as well as technical and additional financial resources.

4. PROMISE AND PROSPECTS

The development of an AU TJ Policy Framework marks a turning point for the AU in the fight against impunity. Beyond reaffirming its condemnation and rejection of impunity in its founding instrument – the Constitutive Act⁸⁸ – the AU through the Framework elaborates specific measures and practical steps to enhance accountability and realize human and peoples' rights in Africa. The Framework's significant promise is its offer to Member States crucial guidance on dealing with past atrocities. The Framework reasserts the idea that 'peace, justice, accountability and reconciliation, are interrelated, interdependent and mutually reinforcing'.⁸⁹

Although it acknowledges that it might be necessary to sequence these processes based on appropriate timing and seizing the right moment, the Framework notes that the none of the four imperatives of peace, justice, accountability and reconciliation can be sacrificed for the other.

The Framework elaborates the mandates, provisions and relevant principles of AU Shared Values instruments in addressing impunity whose implementation would guarantee non-recurrence. One of the Framework's value propositions beyond affirming that its legal basis is the AU Shared Values instruments is the identification of comparable lessons and practices in Member States on dealing with impunity and addressing historical injustices. The Framework reasserts the fact that AU Shared Values are not in contradiction with international human rights and humanitarian standards.

Unlike any other transitional justice instruments globally, the AU TJ Policy Framework's point of departure is the imperative of peacemaking processes in shaping and informing transitional justice. Political negotiations and mediation in Africa offer perhaps the best platform for inclusion of transitional justice processes. The role of the AU Panel of the Wise and Regional Economic Communities as well as the African Governance Architecture and Peace and Security Architecture in undertaking, coordinating and guaranteeing peacemaking processes has significant potential and promise to yield sustainable peace in Africa.

⁸⁸ Constitutive Act, Art. (o) calls for: respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

⁸⁹ *Ibid.*, at 7.

The Framework places emphasis on examining structural root causes of conflict in the design and conceptualization of transitional justice processes and mechanism among countries emerging from conflict, rather than only looking at the symptoms of conflict. Democratic governance, deficit, and in particular human rights violations and lack of respect for the rule of law and constitutionalism are identified as critical drivers and triggers of conflict. The Framework suggests not only reforming laws and institutions but also building state capacity to promote and uphold principles of democratic governance as essential in facilitating reconciliation and ensuring socio-economic and political justice.

The Framework's potential in changing the paradigm of state-society relations is marked by its according primacy to citizens and beneficiaries of transitional justice processes. Responding to heightened demands by citizens that 'nothing about us, without us' which has reverberated across the continent, the Framework calls on Member States to ensure that ownership of transitional justice processes resides with its beneficiaries. Through appropriate and genuine participation and consultations with citizens, victims and civil society the Framework goes beyond rhetoric to insist on inclusion of all actors from design, implementation and evaluation of transitional justice initiatives.

One of the unique contributions of the Framework in post conflict reconstruction and development in Africa is its broadening of the notion of justice beyond retributive justice to encompass restorative, redistributive and transformative justice. The Framework embraces traditional and alternative justice systems whose twin objectives of ensuring accountability and reconciliation is the hallmark of African understanding of justice.

The importance of socio-economic justice in transitional justice in Africa finds adequate emphasis in the Framework. Through promotion of effective reparations programmes that are designed to ensure that victims' losses are acknowledged publicly, symbolically through memorialization and where need be materially, the Framework finds significant resonance in Africa.

Another unique and important contribution of the AU TJ Policy Framework is its acknowledgement of the gender dimensions of transitional justice. Besides appropriately calling on Member States to address the special needs and vulnerabilities of women victims in conflict, it identifies women as peace makers, mediators and actors who have great promise and capacity to ensure transitional justice processes are effective, legitimate and credible. The Framework equally addresses the special vulnerabilities of children in conflict as victims and also as perpetrators – child soldiers – and how to deal with such children based on the overriding principle of the best interest of the child.

Conscious of the imperative for synergy, harmony, coherence and importantly the fact that its promise and potential hinges on the extent to which it is implemented at national level, the Framework identifies critical actors and mechanisms for that purpose. The AU, RECs, Member States, and non-state actors including civil society and development partners are crucial for the effective implementation of the AU TJ Policy Framework. As efforts continue to ensure that the Framework is adopted by the AU, one can only wait with bated breath for what promises to be a game changer in Africa's fight against impunity and the push for accountability and post conflict reconstruction and development.