

African Union Commission Consultation with African Union Member States on Transitional Justice



CONSULTATION REPORT

Cape Town, South Africa
12–13 September 2011

AFRICAN UNION COMMISSION CONSULTATION WITH AFRICAN UNION MEMBER STATES ON TRANSITIONAL JUSTICE

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2012: The Year of
Shared Values



CSV²⁰
The Centre for the Study of
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Rwanda Africa, 12th March 2004

Gacaca was the traditional community meeting where problems were solved. It is now being used to enable communities to deal with those involved in the genocide. With overflowing prisons those who confessed have been released and communities have to live with them.

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DISCLAIMER

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ABBREVIATIONS

Art	Article
AMISOM	African Union Mission in Somalia
AU	African Union
AUC	African Union Commission
AUPD	African Union High-Level Panel on Darfur
Consultation	African Union Commission Consultation with African Union Member States' Experts in Transitional Justice, 12–13 September 2011, Cape Town, South Africa
CSO	Civil Society Organisation
CSV	Centre for the Study of Violence and Reconciliation
DDR	Disarmament, Demobilisation and Reintegration
ECOWAS	Economic Community of West African States
HRSA	African Union Human Rights Strategy for Africa
ICC	International Criminal Court
NGO	Non-Governmental Organisation
LRA	Lord's Resistance Army
OAU	Organisation of African Union
OHCHR	Office of the High Commissioner for Human Rights
PCRD	African Union Policy Framework on Post-Conflict Reconstruction and Development
REC	Regional Economic Community
UNAMID	African Union/United Nations Hybrid operation in Darfur
UNDP	United Nations Development Programme
UPDF	Uganda People's Defence Forces

EXECUTIVE SUMMARY

This report is a reflection of a two-day expert consultation on Transitional Justice with African Union Member States organised by the Department of Political Affairs of the African Union Commission (AUC) in collaboration with the Centre for the Study of Violence and Reconciliation (CSVR), which took place from 12–13 September 2011 in Cape Town, South Africa. The consultation comprised representatives of the following: AU Member States – Burundi, Kenya, Uganda, South Africa and South Sudan; the Legal Counsel of the AUC, the Secretariat of the Panel of the Wise; UN Women; independent experts on transitional justice; and representatives from civil society.

The aim of the consultation was to develop a clear and more coherent understanding of contemporary applications of transitional justice in Africa in light of the ongoing processes towards the development of an African policy framework on transitional justice. The Consultation also aimed to contribute to the elaboration, improvement and review of the proposed transitional justice framework which was included in the report adopted by the Panel of the Wise.

In ensuing deliberations it emerged that the current dominant transitional justice discourse has a narrow approach and places much emphasis and focus on retributive justice, which in turn inadequately reflects on the contemporary understanding and application of transitional justice in the African continent. Participants agreed on the necessity to broaden the scope and reach of transitional justice to include the effective and holistic realisation of socio-economic rights, gender justice, and the right to development.

The role of the African Union (AU) in developing a Transitional Justice Policy Framework in Africa was also addressed at the Consultation. Indeed, one of the principle points of consensus emerging from the consultation was that while the term ‘transitional justice’ may not have permeated the AU policy discourse, it is not a new concept and that in fact the issues it aims to address are found in the various mandates of the AU Organs. Various AU instruments contain important norms and standards that are relevant to the application of transitional justice in Africa including the Constitutive Act of the African Union, the African Charter on Human and Peoples’ Rights, and the African Charter on Democracy, Elections and Governance, in addition to other relevant instruments and AU policy pronouncements and recommendations.

The consultation observed that while the attainment of the objectives of transitional justice in Africa – to deal comprehensively with past human rights violations, repression and mass conflicts in order to attain sustainable peace, rule of law and good governance – demands concerted efforts from all stakeholders, the primary responsibility rests with states. Nevertheless, the AU can, and indeed has, contributed to the adoption and implementation of transitional justice processes in various Member States, primarily by providing the normative and institutional framework but also through its good offices for mediation, and technical support. However, it was reiterated that the varied nature and development of transitional justice in Africa should reflect local ownership, context, participation and responsibility.

As part of its thematic reflections on issues relevant to conflict prevention, and as a contribution to the ongoing efforts by the AU to fight impunity and promote a holistic approach that balances the imperatives of peace and justice in post-conflict contexts, the Panel of the Wise adopted a report entitled “Non-Impunity, Truth, Justice and Reconciliation”. The report recommends the development of a Policy Framework on transitional justice to provide the AU with the necessary tool to respond judiciously to the intertwined objectives of securing peace and the longer term importance of establishing the rule of law and preventing future conflicts (POW/PR/COMM(X)).

The consultation noted that there is an emerging consensus that while transitional justice measures and initiatives are anchored principally on the domestic framework, there is an important role that has and can be played by the AU. This necessitates a unified and coordinated approach in developing a policy framework. Accordingly, the AU should employ existing instruments, including the Constitutive Act, to deal with impunity. The existing AU instruments are also located within the broader international legal norms which should not be breached.

It was noted that while international legality provides a broad framework, the national context remains important. The involvement of non-state actors such as the broader civil society and citizens should be harnessed in order to ensure legitimacy and effective implementation of a comprehensive transitional justice policy framework. The AU, Regional Economic Communities (RECs) and other regional initiatives should therefore draw on mutually reinforcing measures when deploying transitional justice mechanisms.

It was recommended that the AU develop long-term initiatives incorporating monitoring and evaluation as opposed to *ad hoc* measures to deal with transitional justice. In addition, the sequencing and spacing of peace and justice focussed initiatives, if necessary, should be informed by the local context. It was argued therefore that an African transitional justice policy framework, if developed, should not be prescriptive, but ought to be a set of guidelines and principles to guide the process and address a range of imperatives and needs such as the achievement of peace, justice and accountability, national unity and cohesion, reconciliation, gender equity, socio-economic rights and development, and victims' right to effective remedies.

Participants highlighted the need to redefine "violations" beyond civil and political rights to include socio-economic rights violations such as targeted underdevelopment, economic crimes, corruption and land grabbing. Furthermore, it was agreed that in order to fully understand the background of the conflicts taking place in the African continent, the relationship between the violations and their underlying root causes must be examined, including causes such as structural inequalities, environmental factors and weak governance systems.

The issue of gender justice was discussed, with particular reference to women's experiences of violence during conflict. It was noted that since war does not end with the mere cessation of hostilities, it is imperative to address the impact of conflict on women, to take into account their need for redress; and to mainstream gender considerations into all components of an effective transitional justice framework. It was further agreed that immediate and durable reparations should be made available to victims of gender violence. In addition, the need to ensure minimum levels of women's representation, as well as the inclusion of women's rights and access to justice in all post-conflict processes was reaffirmed.

The issue of positive complementarity and the inclusion of traditional justice mechanisms within the African Transitional Justice Policy Framework were addressed by participants. While the participants emphasised the importance of including traditional justice mechanisms within the Framework, it was also highlighted that all local reconciliation processes should be underpinned by accountability. The participants further stressed the need to foster positive complementarity between the national and international justice systems, with a view to ultimately strengthen domestic accountability for international crimes and serious violations of human rights. There was also agreement on the need to broaden the scope of accountability to include third party states, transnational corporations and non-state actors.

Regarding the question of amnesties, participants acknowledged that peace-building and reconciliation efforts could consider a limited role of conditional amnesties for low level perpetrators. However, it was emphasised that amnesties at the domestic level must at all times comply with principles of international and national legality. It was further agreed that

despite amnesties being a possible tool for truth-seeking processes to establish comprehensive accounts of the past, they should only be used as a very last resort. The participants rejected the use of blanket amnesty for international crimes.

Participants addressed the links between reparations and development. It was acknowledged that the fulfilment of economic, social and cultural rights through various reparation mechanisms is important for transitional justice in Africa. The participants further agreed on a need for a holistic policy framework, which encompasses judicial, social and economic elements, including reparation for victims of violent crimes to mitigate the effects of their suffering. The importance of centralising reparations as part of effective transitional justice processes was further reaffirmed with participants calling for a pursuit of multiple avenues to obtain reparations for historical injustices.

It was acknowledged by participants that developing an African Transitional Justice Policy Framework offers a possibility to address African concerns in a manner which takes into account the particular context, cultural nuances and value systems of the continent.

Participants further identified the key values and principles to be included in the Framework. These values and principles include the entrenchment and promotion of African shared values; African ownership and leadership; promotion of national and local ownership; inclusiveness and equity; primacy of victim-centred justice; cooperation, coherence and coordination; capacity development; as well as mobilisation, support and solidarity.

Participants emphasised that the primary responsibility for the conceptualisation, implementation and monitoring of transitional justice processes rests with AU's Member States. Therefore, it was agreed that it is crucial for Member States to remain at the forefront of the development of a transitional justice policy framework. However, it was reiterated that it is imperative to guarantee the participation and involvement of all stakeholders including civil society in the development of the transitional justice policy framework

The continuation of deliberations among national and regional actors was recommended, in order to find convergence and commonalities on contemporary conceptions and applications of transitional justice in Africa. Preparation of a transitional justice reference guide was also recommended as well as the implementation of outreach and capacity-enhancing initiatives aimed at a better understanding of the contemporary application, challenges and prospects for transitional justice in Africa. In conclusion, the participants proposed that a series of validation workshops with RECs, independent experts and transitional justice professionals can ensure that the transitional justice policy framework becomes an effective tool.

INTRODUCTION

On 12–13 September 2011, a Consultation on Transitional Justice in Africa was held by the Department of Political Affairs of the African Union Commission (AUC) in Cape Town, South Africa. The consultation comprised representatives of the following: AU Member States – Burundi, Kenya, Uganda, South Africa and South Sudan; the Legal Counsel of the AUC, the Secretariat of the Panel of the Wise, UN Women, independent experts on transitional justice, and representatives from the Centre for the Study of Violence and Reconciliation (CSV), South Africa.

The consultation was a continuation of a previous consultation on transitional justice which took place on 29–30 April 2011 in Banjul, the Gambia. One of the recommendations that emerged from the Banjul consultation was to convene a more in-depth, capacity enhancing consultation on transitional justice with representatives from the (AUC) and AU Member States.

Objectives of the Consultation

The overall objective of the consultation was to develop a clear and more coherent understanding of contemporary applications of transitional justice in Africa, in light of the ongoing processes towards the development of an African policy framework on transitional justice. The Consultation also aimed to contribute to the elaboration, improvement and review of the proposed transitional justice framework which was included in the report adopted by the Panel of the Wise.¹

Another important objective of the Consultation was to find agreement on the role of the African Union (AU) in transitional justice processes in the African continent. Developing consensus on how the AU can complement and enhance the capacity of its Member States to implement transitional justice processes, was a significant question addressed by the consultation.²

Issues addressed by the Consultation

The participants addressed various issues relating to the substance of an African Transitional Justice Policy Framework. Ultimately the participants concurred on a set of key issues, values and principles to be included in the Framework. Amongst the main issues identified for inclusion were social, economic and cultural rights, gender justice, reparations and their link to development, positive complementarity, traditional justice and reconciliation mechanisms and processes, truth telling mechanisms, governance reforms, vetting mechanisms and processes, as well as disarmament, demobilisation and reintegration processes.

1 African Union Communique, 10th Meeting of the Meeting of the Panel of the Wise, Addis Ababa, Ethiopia, 12 May 2011, (POW/PR/COMM(X)), retrieved 21 November 2011 from <http://www.iag-agi.org/spip/IMG/pdf/Panel-of-Wise-May-12-2011.pdf>.

2 Her Excellency J.D. Joiner, Commissioner for Political Affairs at the African Union Commission, Statement at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice, Cape Town, 12–13 September 2011, retrieved 21 November 2011 from <http://www.au.int/en/dp/pa/content/statement-her-excellency-mrs-julia-dolly-joiner-commissioner-political-affairs-african-uni-2>.

Additional key values and principles identified for incorporation into the framework, include the entrenchment and promotion of African shared values, African ownership and leadership, promotion of national and local ownership, inclusiveness and equity, the primacy of victim-centred justice, cooperation, coherence and coordination, capacity development as well as mobilisation, support and solidarity.

Methodology for attaining the objectives

In order to attain the objectives identified at the consultation, the participants identified specific roles for the stakeholders and other actors involved in the process. With regards to the AU, the necessity for collaboration and involvement of all AU organs in developing and adopting a transitional justice policy framework was highlighted. However, participants noted the need to remain mindful that the primary responsibility for conceptualising, implementing and monitoring transitional justice processes rests ultimately with AU Member States, hence it is crucial for Member States to be at the forefront of this process.

The participation and involvement of civil society organisations (CSO) was also affirmed. CSOs were encouraged to develop complementary efforts to those of Member States and the AU, and also to develop a database of good practices on transitional justice in Africa. Finally, the participants stressed the need for collaboration between funding agencies, development partners, NGOs and CSOs in Africa in order to ensure local ownership of the Africa Transitional Justice Framework development process.

Structure of the report

This report begins by examining the dominant transitional justice discourse, and the extent to which the dominant discourse reflects the current understanding of transitional justice in the African continent. The first section also discusses the background and context and the different factors motivating for the development of a transitional justice policy framework specifically for Africa.

The second section of the report concentrates on the contribution of the AU to the development of transitional justice thus far. In this section, various AU policy documents are examined and their constitutive transitional justice elements analysed. The necessity to define roles of the AUC and REC in the transitional justice processes in Africa is also discussed.

The third section of the report, discusses the various key issues identified at the consultation including social, economic and cultural rights, gender justice, positive complementarity, the role of traditional justice mechanisms, reparations and development, as well as amnesties. The section explores how these issues have been incorporated into transitional justice processes, as well as the manner in which they could be incorporated into an African Transitional Justice Policy Framework.

The fourth section of the report examines the key values and principles and constitutive elements of the Policy Framework as identified by the participants of the consultation. Special attention is paid to the roles of the different stakeholders and actors in the implementation of the Policy Framework. Finally, recommendations for the way forward are discussed.

BACKGROUND AND CONTEXT

Contemporary understanding and application of transitional justice in Africa

The origin of international transitional justice is traced to the post-Second World War period and especially to the Nuremberg-trials.³ The 'first phase' of the transitional justice discourse was strongly characterised by its retributive nature and has been argued as being reflective of "the triumph of transitional justice within the scheme of international law".⁴ Focus on the punitive disposition remained at the core of the field.

That dominant theory of retributive justice has been further legitimated in the Rome Treaty and by the prosecutions of the International Criminal Court.⁵ As Bosire argues, "by their punitive nature, prosecutions can help to restore the primacy of the rule of law and make clear that its breach carries consequences".⁶ Furthermore, the punishment of those responsible for the gravest human rights violations is one way to provide "effective remedy to the victims".⁷ This limited definition of transitional justice has, however, received a great amount of criticism due to its one-sided view of justice and reconciliation. 2004 marked a seminal moment in the trajectory of transitional justice, when former UN Secretary-General Kofi Annan formalised the UN's normative commitment to transitional justice. Annan's definition of transitional justice spoke to "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation", which include both judicial and non-judicial mechanisms.⁸

Participants of the consultation noted that the dominant transitional justice discourse endorses a narrow, legalistic approach, which stands in contrast to the contemporary understanding of transitional justice in Africa. Participants especially emphasised the necessity to broaden the field and to cultivate a more holistic approach to transitional justice. According to H.E. Ms Julia Dolly Joiner, Commissioner for Political Affairs at the African Union Commission, the transitional justice policy framework should not be narrow in focus, but should be comprehensive, addressing the broader concerns of governance, legal and institutional reforms.⁹ Mr. Abdul Tejan-Cole agreed with this view by arguing that transitional justice is broader than criminal accountability and should be connected to both the economic growth and development of a country emerging from conflict or dealing with mass violations.¹⁰

"the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"

3 R. Teitel "Transitional Justice Genealogy" 16 *Harvard Human Rights Journal* 69 (2003) p. 70.

4 Ibid.

5 C. Villa-Vicencio (January 2009) "Where the old meets the new: Transitional Justice, Peace-building and Traditional Reconciliation Practices in Africa" p. 7, *Uppsala University North Africa Institute*, retrieved 21 November 2011 from http://www.nordicafricainstitute.se/about/partner/claude_ake/camp5.pdf.

6 L.K. Bosire "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa" 5 *SUR International Journal on Human Rights* 71 (2006) p.72.

7 Ibid.

8 Report of the Secretary- General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (3 August 2004).

9 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice" (2011).

10 Ibid.

Ms Nahla Valji emphasised the need for a holistic approach as well as the need to focus on victims' understanding and desire for justice that goes beyond criminal accountability.¹¹ Additionally, Ms Valji argued that the African Transitional Justice Policy Framework should be comprehensive, inclusive, flexible, victim-centered and responsive to specific crimes. It should also accord due consideration to the contextual nature of conflict, transition and the impact of both of these on society, including poverty and under-development.¹² She noted that within Africa there have already been some innovations, such as the Liberia Truth and Reconciliation Commission and the Kenyan Truth, Justice and Reconciliation Commission both of which have investigated economic violations and crimes. Ms Valji further noted that an effective approach to transitional justice is one that is informed by a focus on the values, outcomes and goals of attaining sustainable peace rather than on a short-term check-list of which mechanisms and processes to adopt.¹³

The framing of retributive justice as a normative value of the dominant transitional justice discourse has been criticised by various authors. According to Arbour, the analogy to criminal law is necessary yet "insufficient to deal with the range of grievances and remedial action required in societies emerging from conflict".¹⁴ This view is shared by Borraine who has called for a more holistic interpretation of transitional justice which would offer "a deeper, richer and broader vision of justice, which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation".¹⁵

The 1980s saw an expansion of the transitional justice field, with the emergence of truth commissions in Latin America. Overall, truth commissions "attempt to fulfil the victim's right to truth and give the community as complete a version of history as possible" and also to help to fill the "impunity gap".¹⁶ Truth commissions have since been employed as alternative methods of ensuring accountability in cases where there are vast numbers of perpetrators.

Truth commissions have also been credited with contributing towards the restoration of victims' dignity by helping to identify perpetrators and establishing an accurate account of what was previously concealed or denied.¹⁷ In addition, truth commissions sometimes provide victims with a platform to confront perpetrators, as well as for perpetrators to acknowledge their atrocities and even, in some circumstances, to apologise.¹⁸ Professor Gilbert Khadiagala supported the employment of truth commissions as one of the mechanisms to address impunity.¹⁹ Participants equally stressed the importance of truth telling in transitional justice processes.²⁰ These views are shared by other academics such as Professor Charles Fombad who also argues that truth commissions provide "the most viable, flexible and credible mechanisms" for establishing the foundations of democratic society in Africa and resolving "numerous open

11 Presentation by Ms N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

12 Ibid.

13 Ibid.

14 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

15 A.L. Borraine "Transitional Justice: A Holistic Interpretation" 60 *Journal of International Affairs* 17 (2006) p. 18.

16 L.K. Bosire "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa" 5 *SUR International Journal on Human Rights* 71 (2006) p. 78.

17 Ibid. p.79.

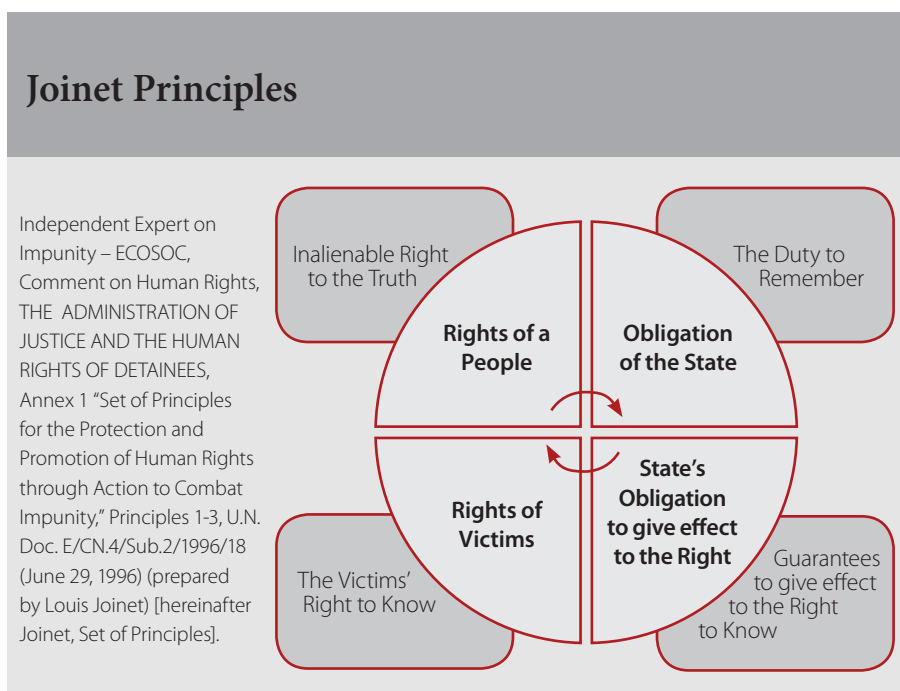
18 Ibid. p.79.

19 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

20 Ibid.

and latent conflicts”.²¹ According to Fombad, truth commissions provide an avenue for “taming, balancing and recasting anger and desire in a positive direction that can provide progress, development, peace and prosperity”.²²

Ms Sooka noted that the right to truth has been accepted by all UN state parties, and is articulated under the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (commonly known as the Joinet Principles).²³ Included within the ambit of this right, is the right of individuals and communities to truth, which imposes upon states an obligation to give effect to this right.



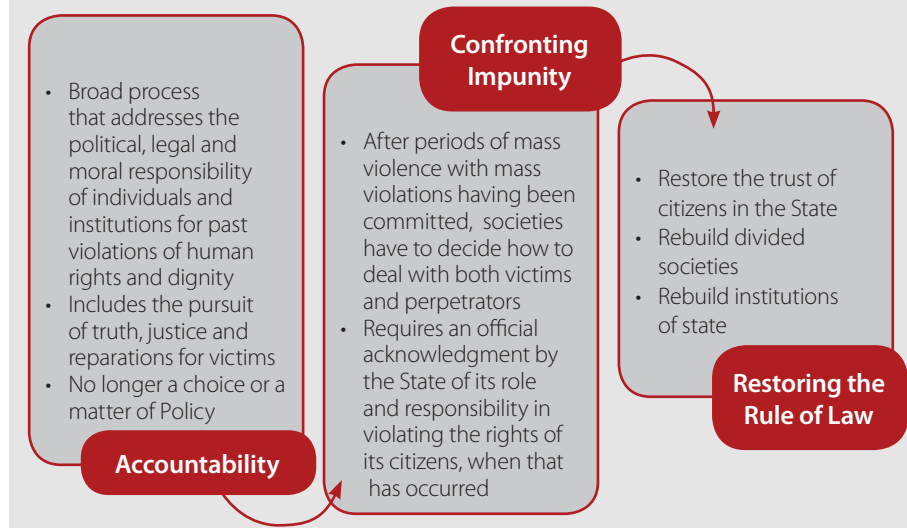
Ms Sooka further noted that the right to truth was important as it articulates accountability, confronting impunity and restoring the rule of law as integrated issues.

21 C.M. Fombad (May/June 2008) Transitional Justice in Africa: The Experience with Truth Commissions p. 12, *Hauser Global Law School Program*, retrieved 21 November 2011 from http://www.nyulawglobal.org/Globalex/Africa_Truth_Commissions.htm.

22 Ibid.

23 UN Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996).

Why is the Right to the Truth important?



Participants highlighted the importance of incorporating both retributive and restorative justice processes, since peace and justice have the same end goals, and are interdependent and inseparable.

Participants highlighted the importance of incorporating both retributive and restorative justice processes, since peace and justice have the same end goals, and are interdependent and inseparable.²⁴ They argued that there is a need for a thorough understanding of the two streams of transitional justice operating in Africa, and how these could be better integrated rather than being seen as competing. According to Ms Valji, the first, retributive stream relates to prosecutions by the ICC and national/international/hybrid courts and the second, reconciliatory stream, relates to truth finding measures such as Truth and Reconciliation Commissions.²⁵

The development of an African Transitional Justice Framework is required for transitional justice to function effectively in the African context. Ms Yasmin Sooka argued that the development of such a Framework is motivated by various factors which include the desire for sustainable peace in the African continent, eradication of impunity caused by a deficit of democracy and justice, as well as recognition that Africa has played a major role in the development of the international framework on transitional justice.²⁶ Furthermore, the African context requires frameworks which address some of the deeper impacts of social rupture, including the cultural, socio-economic and gender dimensions of conflict. Thus, in order to be most effective, it would be prudent for transitional justice processes to engage with traditional justice approaches.

Participants noted that most of these concerns are not addressed by the current dominant transitional justice discourse, which Ms. Sooka described as having a “narrow focus on solely

24 Consultation Presentation by Ms N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

25 Ibid.

26 Presentation by Ms Y. Sooka at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

civil and political rights”.²⁷ Commissioner Julia Joiner shared this view by stating that transitional justice mechanisms should go beyond addressing civil and political rights violations only.²⁸

Commissioner Joiner further called for the inclusion in the transitional justice discourse of reparations for violations of economic, social and cultural rights, equitable development and the protection of environmental rights.²⁹ Participants identified with this view, adding that an African transitional justice framework should also address the issues of targeted underdevelopment, economic crimes, corruption, land issues and colonial legacies.³⁰

The development of an African Framework for Transitional Justice would ensure that issues pertinent and specific to the African continent would be given appropriate focus. Ms. Sooka argued that “an African Framework offers an opportunity for an African agenda defined by African policy makers and civil society”.³¹ The development of such a Framework would also allow the “construction of an appropriate policy grounded within African instruments and institutions”.³²

Overall, African involvement in the development of transitional justice is of great importance. In ensuing deliberations, participants recalled that Africa has contributed greatly to the “quest for accountability and respect for human rights through supporting the adoption of international norms and standards”.³³

It was further noted that African values, norms and standards support addressing impunity in all of its forms.³⁴ Commissioner Joiner highlighted this point by stating that the AU has remained consistent in its fight against impunity. According to the Commissioner, the collective commitment of African states to fight impunity is demonstrated by the fact that AU member states constitute 30% of the state parties to the ICC.³⁵

Participants acknowledged this point and recognised that Africa has played an important role in relation to international justice, and more specifically with respect to the establishment of the ICC as well as innovative approaches to transitional justice. Ms Sooka briefly noted some of the transitional justice developments to emerge from the continent.

Transitional justice mechanisms should go beyond addressing civil and political rights violations only.

27 Ibid.

28 Commissioner for Political Affairs at the African Union Commission by Her Excellency J. D. Joiner (12–13 September 2011) Statement at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice, *African Union*, retrieved 21 November 2011 from <http://www.au.int/en/dp/pa/content/statement-her-excellency-mrs-julia-dolly-joiner-commissioner-political-affairs-african-uni-2>.

29 Ibid.

30 Presentation by Ms N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

31 Ibid.

32 Ibid.

33 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

34 Ibid.

35 Commissioner for Political Affairs at the African Union Commission by Her Excellency J. D. Joiner (12–13 September 2011) Statement at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice, *African Union*, retrieved 21 November 2011 from <http://www.au.int/en/dp/pa/content/statement-her-excellency-mrs-julia-dolly-joiner-commissioner-political-affairs-african-uni-2>.

Snapshot of TJ experiences in the Region

1990's

- South Africa (Trials, Truth Commission, Amnesties)
- Sierra Leone (Special Court/Truth Commission/Amnesties)
- Ghana (Truth Commission)

Post-1990's

- Liberia (Truth Commission-recommendations on lustration and Trials)
- Uganda (Truth Commission?/Special Chamber/Amnesties/ICC)
- Kenya (Truth Commission/Trials/ICC)
- Nigeria (Truth Commission)
- DRC (Truth Commission/ICC/Military Trials)
- Rwanda (Gacaca/Ad Hoc Tribunals/ICC)
- Togo (Truth Commission)
- Guinea
- Cote d'Ivoire (Truth Commission/ICC)
- Burundi (Truth Commission/Hybrid Tribunal?)

Furthermore, Commissioner Joiner observed that the recent events in the Northern African region have “reaffirmed the collective need to guarantee and respect human and peoples’ rights, the rule of law, good governance, and work towards achieving sustainable peace and development on the continent”.³⁶ Fikre agrees with this view, and argues that North African countries have a unique chance to seize the opportunity of expanding transitional justice into a field which “does not merely rely on retribution, but also restores the socio-economic injustices”³⁷ that the authoritarian regimes had perpetuated.

Finally, there have been increasing calls for greater African leadership in post-conflict management by the African Union and its Member States. According to participants at the consultation the creation of an African Transitional Justice Framework could facilitate deeper African ownership, definition and control of transitional justice issues.³⁸ Furthermore, there is a general consensus on the need to develop and adopt an African Transitional Justice Framework to reflect African shared values and principles, linked to international norms.³⁹ Ultimately, it is the combination of these factors, which has served as an impetus for the development of an African Policy Framework on Transitional Justice.

36 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

37 B. M. Fikre (14 June 2011) Transitional Justice in Africa: Relevance and application for Tunisia, Egypt, Libya and others, *International Law Notepad*, retrieved 21 November 2011 from <http://internationalawnotepad.wordpress.com/2011/06/14/transitional-justice-africa-tunisia-egypt-libya/>.

38 Presentation by Ms. N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

39 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

THE ROLE OF THE AFRICAN UNION IN DEVELOPING AN AFRICAN TRANSITIONAL JUSTICE POLICY FRAMEWORK

The African Union has engaged in the development of transitional justice in Africa. In fact, despite the fact that the African Union has yet to adopt a specific framework on transitional justice, the core values included in the African Union's key documents demonstrate the importance of the issues and are indicative of the form that transitional justice is taking in the continent.

The main document of the African Union, the Constitutive Act contains core values relevant to transitional justice. The Preamble of the Constitutive Act includes acknowledgement of the fact that "the scourge of conflicts in Africa constitute a major impediment to socio-economic development and of the need to promote peace, security and stability as a prerequisite for the implementation of Africa's development and integration agenda." Furthermore, the determination to "promote and protect human and peoples' rights, consolidate democratic institutions and culture and to ensure good governance and rule of law" is also highlighted in the Preamble.

These themes are reaffirmed in Art 3 (f)-(h) of the Constitutive Act. Art 3 (f)-(h) lists promotion of peace, security and stability on the continent, promotion of democratic principles, institutions and good governance, as well as the promotion and protection of human and peoples' rights as the main objectives of the African Union. Art 4, which describes the principles of the AU, echoes the same sentiment including respect for democratic principles, human rights, the rule of law and good governance,⁴⁰ promotion of social justice to ensure balanced economic development,⁴¹ respect for the sanctity of human life, condemnation and rejection of impunity⁴² and the condemnation and rejection of unconstitutional changes of governments⁴³ as some of the key principles of the Union.

One of the fundamental differences between the African Union and its predecessor the Organisation of African Union, is the AU's strong shift away from the principle of non-interference to the principle of non indifference.⁴⁴ Article 4(h) of the Constitutive Act mandates the African Union to intervene in member states in grave circumstances such as war crimes, genocide and crimes against humanity.⁴⁵

40 Art 4(m) of the Constitutive Act of the African Union.

41 Art 4(n) of the Constitutive Act of the African Union.

42 Art 4(o) of the Constitutive Act of the African Union.

43 Art 4(p) of the Constitutive Act of the African Union.

44 K. Govender and Y. Ngandu (2010) Towards Enhancing the Capacity of the African Union in Mediation p. 10, *ACCORD*, retrieved 21 November 2011 from <http://www.accord.org.za/publications/reports/753-towards-enhancing-the-capacity-of-the-african-union-in-mediation>.

45 Art 4(h) of the Constitutive Act of the African Union.

In addition, the establishment of the African Union in 2002 and the successive creation of the Peace and Security Council in 2004 “established concrete institutions dedicated to the promotion of peace, security and stability on the African continent”.⁴⁶

The Protocol Relating to the Establishment of the Peace and Security Council of the African Union has a strong transitional justice nuance to it. According to Art 6 it was created to “promote peace, security and stability in Africa”, in addition to promoting and implementing “peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence”, as stated by Art 3(c). The Preamble of the Protocol highlights the “development of strong democratic institutions and culture, observance of human rights and the rule of law, as well as the implementation of post-conflict recovery programmes and sustainable development policies.” According to the Preamble, this is essential “for the promotion of collective security, durable peace and stability as well as the prevention of conflicts.” The Preamble also demonstrates the determination to ensure the “central role” of the African Union in “bringing about peace, security and stability” on the African Continent.

These themes are reiterated in Art 3,⁴⁷ which describes the objectives of the Peace and Security Council. Furthermore, Art 4 of the Protocol describing the principles of the Council strongly supports transitional justice processes. According to Art 4(c) the Council will be guided by the principles of “respect for the rule of law, fundamental human rights and freedoms, sanctity of human life and international humanitarian law”. Art 4(d), on the other hand, recognises “the interdependence between socio-economic development and security of peoples and States”.

Other relevant norms and standards on transitional justice can be found in the African Charter on Democracy, Elections and Governance. Its Preamble restates the imperatives of the promotion and consolidation of the rule of law, principles of democracy, good governance, human rights and development. The Preamble names unconstitutional changes to government as one of the essential causes of insecurity, instability and violent conflict in Africa, and expresses deep concern over them.

The Charter also focuses on the promotion of gender equality⁴⁸ as well as of sustainable development through social and economic policies.⁴⁹ Art 14 of the Charter also deals with eradication of impunity by noting that State Parties are to ensure “that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law”.

The African Charter on Human and People’s Rights is an equally pivotal instrument relative to an African Transitional Justice Framework. The Charter provides the foundation for the protection and promotion of rights and is progressive in its inclusion, in addition to civil and political rights, of economic, social and cultural rights, which affirm the broad based approach to transitional justice that is needed in the African context. The Charter provides for the right to development (Art 22), the right to peace and security (Art 23), as well as rights to an environment favourable to peoples’ development (Art 24). The Charter also imposes upon States an obligation ‘to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies’ (Art 21(5)). Women and children’s rights are also strongly entrenched in the Charter, which provides under Article 18(3) that States must ‘ensure the elimination of every

46 K. Govender and Y. Ngandu (2010) Towards Enhancing the Capacity of the African Union in Mediation p. 11, *ACCORD*, retrieved 21 November 2011 from <http://www.accord.org.za/publications/reports/753-towards-enhancing-the-capacity-of-the-african-union-in-mediation>.

47 Especially Art 3(a)-(c) and Art 3(f).

48 Art 3(6) of the African Charter on Democracy, Elections and Governance.

49 Art 9 of the African Charter on Democracy, Elections and Governance.

discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The AU's engagement with transitional justice processes in Africa was also highlighted in the 2009 Recommendations of the African Union High-Level Panel on Darfur (AUPD). In its report, the AUPD observed that the "objectives of peace, justice and reconciliation in Darfur are interconnected".⁵⁰ According to the Panel's recommendations, in order to deliver justice, promote reconciliation and encourage healing there is a need for "a comprehensive, integrated, systematic and innovative approach" which would be anchored in the national legal system.

The Panel also recommended the creation of a hybrid court in order to "strengthen the existing (legal) system".⁵¹ The Panel's other recommendations included the establishment of reconciliation and truth mechanisms, compensation programmes, as well as "other measures for strengthening the justice sector in Darfur to deal with post-conflict violations",⁵² including traditional justice mechanisms "to deal with those perpetrators who appear to bear responsibility for crimes other than the most serious violations".⁵³

The Panel took a holistic approach to the question of reparations, stating that reparations should not be limited only to the injustices suffered by Darfurians during the conflict, but should also include the damage caused by "historical injustices".⁵⁴ In its recommendations, the Panel envisioned a central role to the African Union in the transitional justice process of Darfur, stating that "it should be the responsibility of the AU to initiate and establish a system for constituting the mixed judicial panels and nominating legal officers for the hybrid court".⁵⁵

The approach taken by the AUPD in its recommendations demonstrates the new, broader and holistic view of transitional justice, which is starting to gain traction in debates about the future of transitional justice in Africa and the AU's role in these processes.

Such a broad and holistic view of transitional justice was also shared by the "Report on Non-impunity, Truth, Peace, Justice and Reconciliation in Africa – Opportunities and Constraints", adopted by the Panel of the Wise. The Panel firstly observes in the Report that the ending of impunity and promotion of justice and reconciliation are "indistinguishable from the core objectives that underpin the formation of the AU".⁵⁶ In relation to the promotion of transitional justice in general, and the reinforcement of common values and rules enshrining rule of law and respect of human rights, the Report named the Panel of the Wise to the task due to it being a "major institution in Africa's leadership structure".⁵⁷

The Report recommends that the African Union "revisit its core guiding principles and underscore its commitments to those principles by urging member states to ratify and implement instruments such as the African Charter on Human and Peoples' Rights, the Protocol on the Rights of Women in Africa and the new African Court of Human and Peoples' Rights".⁵⁸

The AU's engagement with transitional justice processes in Africa was also highlighted in the 2009 Recommendations of the African Union High-Level Panel on Darfur (AUPD).

50 Report of the African Union high-Level Panel on Darfur (2009), p. 79.

51 Ibid. p. 83.

52 Ibid. p. 85.

53 Ibid. p. 89.

54 Ibid. p. 90.

55 Ibid. p. 109.

56 Panel of the Wise "Report on Non-impunity, Truth, Peace, Justice and Reconciliation in Africa – Opportunities and Constraints" (2011) p. 2.

57 Ibid. p. 4.

58 Ibid. p. 4.

The African Union's engagement with the furthering of transitional justice in Africa has not, however, been solely a theoretical one. As Mukundi Wachira observes, by obtaining the authority through its Constitutive Act, the African Union has become "actively engaged in negotiations for peace, conflict resolution and political settlement in a number of member states".⁵⁹ Practical examples of the AU's engagement with transitional justice processes includes the political pressure exerted by the Assembly of the Heads of State and Government of the AU in 2006, when it mandated Senegal to prosecute the former president of Chad, Hissène Habré, for his involvement in crimes against humanity.⁶⁰ In its decision the Assembly referred to the Articles 3 (h), 4 (h) and 4 (o) of its Constitutive Act to validate its competence on the matter. While the trial is yet to see the light of day, it is instructive that efforts are underway by the AU to deal with the Hissene Habre case.

The Assembly was also heavily involved in the mediation of the post-election crisis in Kenya in 2008. The AU has also imposed various economic and political sanctions against its Member States, that failed to conform with its constitutional principles. In 2005 the AU's Peace and Security Council backed the sanctions imposed on Togo by ECOWAS and urged its Member States to impose an arms embargo and travel ban on Togo. In February 2009 the AU imposed sanctions, including a travel ban and a check on bank accounts on Mauritania, after General Mohamed Ould Abdelaziz seized power undemocratically in 2008. In October 2009, the AU imposed sanctions on the junta in power in Guinea-Bissau, and in March 2010 the AU called for the diplomatic isolation of Madagascar until its government agreed on internationally mediated power-sharing talks. The AU has even gone as far as sanctioning the use of force in 2007 against the rebel group which had undemocratically seized power in the Anjouan island in the Comoros.

In addition to the political and economic sanctions, the AU has also established various peacekeeping missions, including AMIS in Sudan from 2005 to 2007 when it was replaced by the AU/UN hybrid operation (UNAMID), and AMISOM in Somalia, which was established by the Peace and Security Council in 2007.⁶¹

Despite these positive developments, the AU's involvement with the transitional justice processes in Africa so far can only be described as ad hoc, partly due to "inadequate human capacity, financial resources and frameworks/mechanisms".⁶² As observed by Govender and Ngandu "in the interest of peace and security, it is critical to ensure that the AU possesses the capacity to fulfil its mediation mandate. In comparison to the human and economic costs associated with violent conflicts and the consequent financial costs of peacekeeping operations, developing the AU's mediation capacity and expertise would be an inexpensive venture".⁶³ And, since agreements framed out of mediation are more and more beginning to incorporate transitional justice priorities, increasing the AU's mediation capacity would also enhance more effective and appropriate transitional justice approaches.

As a considerable number of African countries are currently going through transition from conflict to democracy, the definition of the AUC's and REC's role in the transitional justice processes in Africa is timely.⁶⁴ As Commissioner Joiner observed, these transitions "will lay the

59 G. Mukundi Wachira "Advocating for the Adoption of a Holistic Transitional Justice Policy at the African Union" (August 2010) p. 3.

60 Assembly/AU/Dec.127 (VII).

61 PSC/PR/2(LXIX).

62 K. Govender and Y. Ngandu (2010) Towards Enhancing the Capacity of the African Union in Mediation p. 11, *ACCORD*, retrieved 21 November 2011 from <http://www.accord.org.za/publications/reports/753-towards-enhancing-the-capacity-of-the-african-union-in-mediation>.

63 Ibid.

64 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

Despite these positive developments, the AU's involvement with the transitional justice processes in Africa so far can only be described as ad hoc.

foundation for critical reflection and discussion on the role of AUC and the RECs in transitional justice in Africa”.⁶⁵

Finally, however, as Commissioner Joiner pointed out, “the central mandate of the AU relative to transitional justice is to support its Member States’ efforts, initiatives and processes”.⁶⁶ The primary responsibility for conceptualisation, implementation and monitoring of the transitional justice processes rests with AU’s Member States, and therefore, it is crucial that the Member States are at the forefront of these processes.⁶⁷

These transitions “will lay the foundation for critical reflection and discussion on the role of AUC and the RECs in transitional justice in Africa”.

65 Commissioner for Political Affairs at the African Union Commission by Her Excellency J.D. Joiner (12–13 September 2011) Statement at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice, African Union, retrieved 21 November 2011 from <http://www.au.int/en/dp/pa/content/statement-her-excellency-mrs-julia-dolly-joiner-commissioner-political-affairs-african-uni-2>.

66 Ibid.

67 Ibid.

KEY ISSUES FOR CONSIDERATION IN DEVELOPING AN AFRICAN TRANSITIONAL JUSTICE POLICY FRAMEWORK

In recent years, the African Union and its Member States have increasingly called for greater African leadership in post-conflict management in Africa. As Commissioner Joiner stated in the consultation, establishing an African Policy Framework on Transitional Justice “provides the best hope for coherence and African ownership in all areas of transitional justice aimed at achieving the ultimate goal of building sustainable peace in Africa”.⁶⁸

The current AU-led process of consensus building “to reflect African experiences on transitional justice and to establish frameworks and parameters for support”⁶⁹ began in April 2011 with the Consultation with AU Organs, Regional Economic Communities and Stakeholders on Transitional Justice in Banjul, Gambia.

During the Banjul consultation, it was acknowledged that issues embodied in the transitional justice discourse are already reflected in various African Union instruments and in the mandates of the African Union organs.⁷⁰ These instruments include the AU Constitutive Act, African Charter on Human and Peoples’ Rights, the Protocol to the African Charter on the Rights of Women in Africa, the African Charter on Democracy, Elections and Good Governance, the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Recommendations of the African Union High Level Panel on Darfur as well as the Panel of the Wise’s “Report on Non-Impunity, Truth, Peace, Justice and Reconciliation in Africa: Opportunities and Challenges”.

The importance of cross-referencing these legal and policy documents as well as the African Union Policy Framework on Post-Conflict Reconstruction and Development (PCRD) and the African Union Human Rights Strategy for Africa (HRSA) within the African Transitional Justice Framework was further stressed by the participants of the Cape Town Consultation.

Indeed, the PCRD and the HRSA are important documents with transitional justice undercurrents, which have to be embraced in the development of an African Transitional Justice Framework. The PCRD, which was adopted in July 2006 in Banjul, Gambia, was one of the first documents dealing directly with post-conflict situations. It was created as a guide “for the development of comprehensive policies and strategies that elaborate measures that seek to consolidate peace, promote sustainable development and pave the way for the growth and regeneration in countries and regions emerging from conflicts”.⁷¹ One of the indicative elements included in the PCRD is ‘Human Rights, Justice and Reconciliation’.

68 Ibid.

69 Ibid.

70 Ibid.

71 Executive Council (Ninth Ordinary Session, 25-29 June 2006) Report on the Elaboration of Framework Document on Post Conflict Reconstruction and Development (PCRD) EX.CL/274 (IX), *African Union*, retrieved 21 November 2011 from [http://www.africa-union.org/root/JA/Conferences/2007/mars/PSC/12%20mars/EX.CL.274%20\(IX\)%20-%20Report%20on%20Post%20Conflict%20Reconstruction.doc](http://www.africa-union.org/root/JA/Conferences/2007/mars/PSC/12%20mars/EX.CL.274%20(IX)%20-%20Report%20on%20Post%20Conflict%20Reconstruction.doc).

One of the indicative
elements included in the
PCRD is ‘Human Rights,
Justice and Reconciliation’.

The PCRDR was designed to go “beyond limited interventions, noting that post-conflict reconstruction and development-activities do not stop with stabilisation but seek to achieve long-term sustainable development as underpinned by the African vision of regeneration and growth”.⁷² This approach is very similar to the one envisioned for the African Transitional Justice Policy Framework.

The PCRDR also highlights the need for countries and societies emerging from conflict to make critical decisions regarding the use of restorative and/or retributive justice. With regards to human and people’s rights, Art 41(a) the PCRDR highlights the need to guarantee and protect socio-economic rights as well as the rights of women.

In addition, Art 41(b) calls for the promotion of institution building of national structures promoting and protecting human rights as well as for the creation of legal provisions for justice for victims of human rights. In relation to reconciliation, Art 41(c) calls for the total rejection of impunity and obliges countries emerging from conflict to encourage and facilitate peace building and reconciliation activities, to guarantee opportunities for the use of traditional mechanisms of reconciliation and/or justice as well as to promote institute building. The same article highlights the need for policy development in relation to developing mechanisms for dealing with past and ongoing grievances, providing remedies and reparations for the victims of conflict and promotion of a culture of peace. The African Transitional Justice Framework would therefore complement the PCRDR by further elaborating on norms, principles, values and approaches for addressing human rights, justice and reconciliation in post-conflict countries.

Finally, in Art 44, the PCRDR recognises the disproportionate impact that conflict has on women, by stating that special attention should focus on the situation of women. The Policy Framework acknowledges that most reconstruction interventions have tended to ignore or marginalise women’s issues and addresses this gap by mainstreaming the issues of women and gender through all of its indicative elements as well as as a stand-alone element.

The Human Rights Strategy for Africa (HRSA), formulated under the auspices of the Department of Political Affairs of the AUC, also includes themes which are central to the Transitional Justice Framework. Principles on which the HRSA is based, have strong elements of transitional justice, such as respect for human rights and democratic principles, respect for the rule of law, interdependence between socio-economic development and human security as well as gender equality.

The HRSA was created to be a guiding framework for collective action by the AU, RECs and Member States, and is aimed at strengthening the African human rights system. Thus, as acknowledged in the “Context” of HRSA, it was created as a response to the need to enhance the capacities of the AU organs and institutions and of the AU member states to respond better to instances of serious or massive violations of human rights in Africa.⁷³ The Strategy also aspires to address the challenges of the African human rights system to ensure effective and co-ordinated promotion and protection of human rights in the African continent.⁷⁴

Despite the various past efforts of the AU and the RECs, a lot remains to be done in order to achieve an effective and holistic implementation of transitional justice in Africa. This was also noted in the Report on the Elaboration of Framework Document on Post Conflict Reconstruction

72 Ibid.

73 “Context” of the Human Rights Strategy for Africa, Department of Political Affairs, African Union Commission.

74 Human Rights Strategy for Africa, Department of Political Affairs, African Union Commission.

Criminal accountability measures, social-economic measures, gender justice, reparations and its links to development are important for achieving lasting peace and reconciliation.

and Development, which acknowledged that “responses to post-conflict situations have, in the past, remained fragmented and largely ineffectual”.⁷⁵

The Framework also needs to address the wide plethora of challenges faced by states emerging from conflict in Africa, in order to aid in achieving a successful transition from conflict to peace. Furthermore, in order to create an effective and holistic framework, suitable approaches to transitional justice have to be found. The transitional justice policy will have to address the issues and concerns specific to the African continent, or as the Panel of the Wise report stated, find a manner which will “respond judiciously and expeditiously to the difficult dilemma of balancing the immediate need to secure peace with the longer term importance of establishing the rule of law and preventing future conflicts”.⁷⁶

The calls for an expanded and holistic understanding of justice by the Panel of the Wise and the AUPD have also been supported by numerous authors. For example, Zalaquett has defined the objectives of transitional justice as being the prevention of re-occurrence of abuses and the reparation of the damages the abuses have caused.⁷⁷ Participants at the Cape Town Consultation also noted that depolarisation of the divided society, institution building, economic stability, civic trust and the rule of law are principle aims of a transitional justice process.⁷⁸ In addition, transitional justice includes efforts aimed at achieving accountability of perpetrators, truth recovery, reconciliation, institutional reform and reparations.

The overarching view expressed at the consultation, as well as the emerging consensus among academics⁷⁹, is that in order to achieve true reconciliation, the transitional justice process has to be a holistic and long-term one, which reaches beyond retributive justice. In addition to criminal accountability measures, social-economic measures, gender justice, reparations and its links to development are important for achieving lasting peace and reconciliation, especially in the African context.

Social, economic and cultural rights

The Consultation highlighted the need for the African transitional justice policy framework to redefine violations beyond civil and political rights. Participants agreed that ‘violations’ should also include socio-economic rights violations such as targeted underdevelopment, economic crimes, corruption, land grabs and the colonial legacy. In addition, in order to fully understand

75 Executive Council (Ninth Ordinary Session, 25-29 June 2006) Report on the Elaboration of Framework Document on Post Conflict Reconstruction and Development (PCRD) EX.CL/274 (IX), *African Union*, retrieved 21 November 2011 from [http://www.africa-union.org/root/UA/Conferences/2007/mars/PSC/12%20mars/EX.CL.274%20\(IX\)%20-%20Report%20on%20Post%20Conflict%20Reconstruction.doc](http://www.africa-union.org/root/UA/Conferences/2007/mars/PSC/12%20mars/EX.CL.274%20(IX)%20-%20Report%20on%20Post%20Conflict%20Reconstruction.doc).

76 Panel of the Wise “Report on Non-impunity, Truth, Peace, Justice and Reconciliation in Africa – Opportunities and Constrains” (2011) p. 4.

77 J. Zalaquett “Balancing ethical imperatives and Political constrains: The Dilemma of New Democracies Confronting Past Human Rights Abuses” 43 *Hastings Law Journal* 1425 (1991-1992).

78 Y. Sooka “Holding peace and justice in tandem” Article presented at a Centre for Conflict Resolution Conference: Peace versus Justice? Truth and Reconciliation Commissions and war Crimes Tribunals in Africa, Cape Town, 17-18 May 2007.

79 For example, Y. Sooka in “Holding peace and justice in tandem” Article presented at a Centre for Conflict Resolution Conference: Peace versus Justice? Truth and Reconciliation Commissions and war Crimes Tribunals in Africa, Cape Town, 17-18 May 2007, J. Zalaquett in “Balancing ethical imperatives and Political constrains: The Dilemma of New Democracies Confronting Past Human Rights Abuses” 43 *Hastings Law Journal* 1425 (1991-1992).

the background of the conflicts taking place in the African continent, the relationship between the violations and their underlying root causes must be emphasised, including causes such as structural inequalities, environmental factors and weak governance systems.

The view expressed at the Consultation resonate with those by various experts and academics, such as Louise Arbour, who observes that transitional justice must aid in the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.⁸⁰ According to Arbour transitional justice must “reach to and beyond the crimes and abuses committed during the conflict, which led to transition, into the human rights violations that pre-existed the conflict and caused or contributed to it”.⁸¹ As Arbour notes, while examining these human rights violations “it is likely that one would expose a great number of economic, social and cultural rights violations”.⁸²

However, due to the fact that transitional justice is so heavily inspired by the mainstream, criminal law focused justice, in the majority of the transitional justice processes inadequate attention is paid to economic, social and cultural rights.⁸³ As Laplante further notes, the current, dominant view of justice “has related exclusively to accountability and redress for violations of civil and political rights” while at the same time neglecting the social economic rights.⁸⁴ Yet, the violations of the civil and political rights are “intrinsically linked to violations of economic, social and cultural rights, whether they are causes or consequences of the latter.”⁸⁵ Furthermore, “if economic and social inequalities go unaddressed and the grievances of the poor and the marginalised go unheard” there are only “uncertain guarantees of non-repetition” of the conflict.⁸⁶ This has been demonstrated in the cases of Northern Ireland and South Africa, where “systematic discriminations and inequalities in access to health care, work or housing have led to, or exacerbated social tension, which leads to conflict”.⁸⁷

The need to address the underlying socio-economic questions was stressed at the consultation with the imperative to “incorporate a development agenda that will take account of the socio-economic dimensions of conflicts” highlighted.⁸⁸

80 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

81 Ibid.

82 Ibid.

83 Ibid. p. 3.

84 L.J. Laplante “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through Human Rights Framework” *International Journal of Transitional Justice*, Vol 2, 331-355 (2008) p. 332.

85 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

86 L.J. Laplante “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through Human Rights Framework” *International Journal of Transitional Justice*, Vol 2, 331-355 (2008) p. 332.

87 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

88 Presentation by Ms Y. Sooka at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

Gender Justice

One of the issues highlighted at the consultation, was the need to focus on gender-based crimes and the gendered impact of conflict. The need for a holistic gender approach in the African Transitional Justice Policy Framework was emphasised by participants throughout the consultation. With regards to the violence experienced by women during conflicts, participants noted that war does not end for women with the cessation of hostilities and agreed that immediate reparation should be made available for the victims of violence.⁸⁹

Informal discussions were suggested as a way of helping the victims to come to terms with the violence they had suffered. Participants further agreed that the Framework should include specifically dedicated sections on gender, on the impact of conflict on women and their needs for redress, as well as mainstreaming gender considerations into all sections of the framework.⁹⁰

Moreover, participants agreed that the Transitional Justice Framework should ensure minimum levels of women's representation as well as the inclusion of women's rights and access to justice in all post-conflict processes. Ms Valji noted that since 2000, fewer than 10% of peace negotiators globally have been women, fewer than 2% signatories have been women. It was also proposed during the consultation, that all transitional justice mechanisms should be assessed for their gendered impact and ensure that transitional justice measures address the relationship between women's security, development and justice.

Various authors share the view adopted by the participants about the importance of including gender justice in the transitional justice discourse.⁹¹ Valji argues that women's experiences of the conflict and violence differ from those of men due to pre-existing and inherent gendered power relations in the states emerging from conflict.⁹² This argument is supported by Para 131 of the UN Beijing Platform For Action, which states that "women and girls suffer predominantly or exclusively from specific types of harm during armed conflict both because they are female and while entire communities suffer the consequences of armed conflict, women and girls are particularly affected because of their status in society as well as their sex".⁹³ Arbour concurs with this stance by stating that the sexual violence experienced by women during the conflicts "stems from long-standing prejudices, lack of equality and discrimination that had condoned such violence all along".⁹⁴

89 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

90 Report on the African Union Commission Consultation with African Union Member States on Transitional Justice in Africa, 12–13 September 2011, Cape Town, South Africa.

91 Such as L. Arbour in (2007) Impunity for war crimes against women, *Office of the High Commissioner for Human Rights*, retrieved 21 November from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7487&LangID=E>, M. Melandri in "Gender and Reconciliation in Post-Conflict Societies: The Dilemmas of Responding to Large-scale Sexual Violence" *International Public Policy Review*, Vol 5(1), October 2009, and N. Valji in (2007) Gender Justice and Reconciliation, *Friedrich-Ebert-Stiftung*, retrieved 21 November 2011 from <http://library.fes.de/pdf-files/iez/05000.pdf>.

92 N. Valji (2007) Gender Justice and Reconciliation p. 4, *Friedrich-Ebert-Stiftung*, retrieved 21 November 2011 from <http://library.fes.de/pdf-files/iez/05000.pdf>.

93 UN Beijing Platform For Action, para 131 in C. Levine "Gender and Transitional Justice – a case study of East Timor" September 2004, Canadian Consortium on Human Security.

94 L. Arbour (2007) Impunity for war crimes against women, *Office of the High Commissioner for Human Rights*, retrieved 21 November from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7487&LangID=E>.

Despite their gravity, however, women's experiences of inequality and violations are often largely ignored in the post-conflict period.⁹⁵ It is due to this historical exclusion of gender (and especially women's experiences) in the transitional justice field, that the involvement of women in mediation processes, constitution-making and legislative reforms is important, as participants reiterated during the consultation.⁹⁶ Furthermore, the lack of attention to gender questions has led to the impunity of the perpetrators. This emboldens them to strike again, "perpetuating and encouraging vicious cycles of attack and reprisal, even when a country emerges from conflict".⁹⁷

An opportunity for transforming the unequal gender power relations is presented in post-conflict situations.⁹⁸ Nonetheless, this moment for transformation is fleeting, therefore adding to the importance of focusing on and furthering gender justice through transitional justice mechanisms.⁹⁹ Consequently the process of developing an African Transitional Justice Framework should be used as an opportunity to ensure gender justice.¹⁰⁰

There has been substantial progress within the field of international law towards acknowledging and addressing women's experiences of sexual violence during conflict.¹⁰¹ This progress is demonstrated by the prosecutions by the ICTY and ICTR in which rape was confirmed as a crime against humanity and as an act of genocide, the inclusion of sexual crimes and prosecution on the basis of gender in the Rome Statute, adoption of the Resolution 1325 by the Security Council which focuses on violence against women during conflict, and by the 2004 Report of the Secretary General on "The rule of law and transitional justice in conflict and post-conflict societies", which acknowledges the need for women to be included in all mechanisms seeking to rectify past violations.¹⁰²

Participants at the consultation, however, argued that there is a danger that the developments in the realm of international law "reduce women's experiences of conflict to only that of sexual crimes".¹⁰³ Focus on the sexual crimes alone "will not address the system of unequal power relations and the use of violence against women as a means to enforce the unequal relations".¹⁰⁴ Consequently, in order to ensure the effective realisation of gender justice as well as progress towards sustainable peace and transformative justice, "the whole field of transitional justice has to be gendered"¹⁰⁵ and the transitional justice mechanisms seeking to address the needs of the victims have to be expanded beyond the current privileging of a patriarchal notion" of what those needs are.¹⁰⁶

An opportunity for transforming the unequal gender power relations is presented in post-conflict situations.

95 N. Valji (2007) Gender Justice and Reconciliation p. 5, *Friedrich-Ebert-Stiftung*, retrieved 21 November 2011 from <http://library.fes.de/pdf-files/iez/05000.pdf>.

96 Presentation by Ms. N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa Consultation.

97 L. Arbour (2007) Impunity for war crimes against women, *Office of the High Commissioner for Human Rights*, retrieved 21 November from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7487&LangID=E>.

98 N. Valji (2007) Gender Justice and Reconciliation p. 8, *Friedrich-Ebert-Stiftung*, retrieved 21 November 2011 from <http://library.fes.de/pdf-files/iez/05000.pdf>.

99 Ibid.

100 Presentation by Ms. N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa Consultation.

101 N. Valji (2007) Gender Justice and Reconciliation p. 8, *Friedrich-Ebert-Stiftung*, retrieved 21 November 2011 from <http://library.fes.de/pdf-files/iez/05000.pdf>.

102 Ibid.

103 Ibid. p. 11.

104 Ibid. p. 11.

105 Ibid. p. 8.

106 Ibid.

Participants emphasised the need to explore the linkages between reparations and DDR processes.

That position is also supported by Melandri, who argues that a broader approach to transitional justice is required in order to encompass women's experiences of conflict.¹⁰⁷ Melandri states that in order to truly reflect women's experiences there is a need to broaden the scope and meaning of justice itself as well as to re-interpret and expand the concept and process of reconciliation to meet women's needs accurately.¹⁰⁸ Melandri also agrees with the invisibility of women's experiences in current transitional justice processes, despite the significant steps taken towards the inclusion of these experiences on the international level, and calls for the encompassing of gender justice to the transitional justice discourse.¹⁰⁹

In addition to the issue of sexual violence experienced by women, participants also noted the adverse effects of the land tenure systems on women in Africa. The necessity for women to be able to inherit properties was also stressed in the discussions.¹¹⁰ An example was given of the Sierra Leone Truth and Reconciliation Commission which made key recommendations on addressing the legal status of women in order to address inequality, as a way to reduce women's vulnerability to violence.

Reparations and development

Another key issue, which emerged during the Consultation, was the significance of reparations in post-conflict situations and their connection to development assistance. The participants agreed on a need for a holistic policy framework, which encompasses judicial, social and economic elements, including reparation for victims of violent crimes to mitigate the effects of their suffering.¹¹¹ The participants further reiterated the importance of centralising reparations as part of effective transitional justice processes and motivated for the pursuit of multiple avenues to obtain reparations for historical injustices, including through accountability processes in national and foreign fora.

During the discussions, participants highlighted the importance of timing with regards to reparations and the financing of disarmament, demobilisation and reintegration (DDR) processes. Participants emphasised the need to explore the linkages between reparations and DDR processes, in order to avoid the perpetuation of new injustices or the creation of the perception that perpetrators benefit while victims' rights remain unfulfilled¹¹². Mr Abdul Tejan-Cole cautioned against development programs that do not impact directly upon the victims affected by the conflict. Mr Tejan-Cole cited the Sierra Leonean case as an example, where the victims were denied reparations, while the former militias and soldiers gained various benefits through the DDR-process.¹¹³

107 M. Melandri "Gender and Reconciliation in Post-Conflict Societies: The Dilemmas of Responding to Large-scale Sexual Violence" *International Public Policy Review*, vol 5(1), October 2009, p. 5.

108 *Ibid.* p. 6.

109 M. Melandri "Gender and Reconciliation in Post-Conflict Societies: The Dilemmas of Responding to Large-scale Sexual Violence" *International Public Policy Review*, vol 5(1), October 2009, p. 5.

110 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

111 *Ibid.*

112 Presentation by Ms N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

113 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

The fulfilment of the economic, social and cultural rights through various reparation mechanisms is important for the transitional justice process in Africa. This was highlighted by Ms. Ntsiki Sisulu-Singapi (CSVR Board member), who emphasised the importance of addressing the root causes of conflicts in Africa including economic and social injustices.¹¹⁴ Professor Khadiagala in support of that view argued that reparations should be comprehensive and have a broader context with the inclusion of rehabilitation mechanisms.¹¹⁵ Khadiagala further stated that issues relating to cultural, social and economic rights should be at the ‘front burner’.¹¹⁶

These sentiments are echoed by the Office of the High Commissioner for Human Rights, which “accords reparations a special place among transitional justice measures”.¹¹⁷ Overall, victims’ right to reparations is well documented in international law, as illustrated in the OHCHR “Rule of Law Tools for Post-Conflict States”.¹¹⁸ In 2005 United Nations General Assembly identified the five mechanisms of reparation in Resolution 60/174¹¹⁹, which included restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

In addition to the legal aspects, reparations have a strong reconciliatory element to them. This was emphasised by participants who advocated for the shifting of priorities to include reparations for victims in order to ensure that the Transitional Justice Policy Framework has a transformative and sustainable impact.¹²⁰ Participants called for the need to focus on victims’ understanding of justice, which includes reparations and goes beyond criminal accountability.¹²¹

This view is supported by Eijkman who argues that the general objective of post-conflict reparations is to remedy the past harms, but even more specifically to “recognise the suffering of the victim, accountability of the state or other groups and to express social solidarity”.¹²²

In reality, however, the type of post-conflict reparations and their implementation “relies heavily on the local context and available resources”.¹²³ Political considerations also often have a strong part to play. Conversely, once the reparations are implemented their impact has been reported to be very positive. For example, the war victims in Bosnia-Herzegovina acknowledged the restoration of their property rights as “both a material and moral recognition of their suffering.”¹²⁴

114 Ibid.

115 Ibid.

116 Ibid.

117 Panel of the Wise “Report on Non-impunity, Truth, Peace, Justice and Reconciliation in Africa – Opportunities and Constrains” (2011) p. 16.

118 OHCHR (2008) Rule of Law Tools for Post-Conflict States Reparations Programs p. 5-6, *Office of the High Commissioner for Human Rights*, retrieved 21 November 2011 from www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

119 General Assembly (16 December 2005) Resolution 60/147, Office of the High Commissioner for Human Rights, retrieved 21 November 2011 from <http://www2.ohchr.org/english/law/remedy.htm>.

120 Presentation by Ms. N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

121 Ibid.

122 Q. Eijkman “Recognising the Local Perspective: Transitional Justice and Post-Conflict Reparations” 10(3) *Global Jurist*, Issue 3, Article 6, p. 4.

123 Ibid. p. 7.

124 Ibid. p. 8.

Reparation programmes,
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Similarly, according to a study by UNDP in Kosovo in 2007, the vast majority of respondents “supported material compensation”.¹²⁵ Comparable results of the public’s wide support for material compensation for victims of conflict has been reported in Afghanistan, Iraq, Colombia and Northern Uganda.¹²⁶

Based on these results Eijkman concludes that “post-conflict reparations are a form of transitional justice that could contribute to justice, reconciliation, social reconstruction or lasting peace.”¹²⁷ This approach is also supported by Bosire who argues that “in countries emerging from conflict, reparations can serve to fill the justice gap created from the non-prosecutions of perpetrators.”¹²⁸

It is, however, important to acknowledge that “reparations can never restore victims fully to the *status quo*” and therefore can only be “a part of a package of transitional justice measures”.¹²⁹ As Bosire argues, without the involvement of institutional reforms, prosecutions and truth-seeking, “reparations are likely to be seen as an attempt to buy acquiescence or as inadequate gestures of little long-term consequence.”¹³⁰ In addition, if the compensation is paid out very late and if they are of negligible amounts, the compensation can become “disempowering to the victims” as happened in the case of South Africa’s reparations programme.

With regards to the development aspect of reparations, Duthie argues that “transitional justice measures should be designed and implemented in ways that are ‘development sensitive’”.¹³¹ Yet, at present reparations policies tend to concentrate on the consequences and symptoms of violent conflicts and dictatorship rather than at the root causes of the conflicts, as Buckley-Zistel observes.¹³²

Reparation programmes, however, have the potential to become more development sensitive through the realisation of the economic and social rights of communities, which have been victims of human rights abuses. Examples of such reparations include the housing and restitution programs in South Africa, Guatemala and Bosnia Herzegovina. Additionally the Guatemalan and Peruvian truth commissions also recommended improvements of the educational system in order to respect the indigenous culture.¹³³

The most pioneering development-sensitive reparations program so far was recommended by the Moroccan Equity and Reconciliation Commission, which recommended the establishment of various social-economic and cultural development programs, which aim to benefit various

125 UNDP (2007) Public Perceptions on Transitional Justice – Report on Transitional Justice Opinion Polling Survey in April-May 2007 in Kosovo, *UNDP Kosovo*, retrieved 21 November 2011 from www.kosovo.undp.org/repository/docs/transitional_justice_eng.pdf.

126 Q. Eijkman “Recognising the Local Perspective: Transitional Justice and Post-Conflict Reparations” 10(3) *Global Jurist*, Issue 3, Article 6, p. 8.

127 Ibid.

128 L.K. Bosire “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa” 5 *SUR International Journal on Human Rights* 71 (2006) p. 81.

129 Ibid.

130 Ibid.

131 R. Duthie “Toward a Development-sensitive Approach to Transitional Justice” *International Journal of Transitional Justice*, Vol 2, 292-309 (2008) p. 292.

132 S. Buckley-Zistel (2 December 2009) Connecting Transitional Justice and Development, International Conference on The Contribution of Civil Society and Victim Participation in Transitional Justice Processes, retrieved 21 November 2011 from www.victim-participation.org/files/Buckley-Zistel.pdf.

133 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

regions and groups of victims.¹³⁴ The Commission further stressed its wish to treat the “issue of reparations in a symbolic and material form, involving individuals, communities and regions”.¹³⁵ Through its recommendations, the Moroccan Equity and Reconciliation Commission acknowledged the fact that “an approach which solely focused on the individual victims of human rights crimes would offer inadequate support for many other people who had been differently affected by the conflict”.¹³⁶

Arbour highlights the significance of these development-sensitive, collective reparations by arguing that “reparations to individual victims will never substitute for more broad based and longer-term socio-economic policies that aim to redress and prevent widespread inequalities”.¹³⁷ However, as Duthie observes, it is important to keep reparations and development projects conceptually distinct and that “reparations are by no means a substitute for broad-based development or distributive justice policies”.¹³⁸ Participants, however, called for the examination of the relationship between development assistance, the right to development, and reparations as well as the need to provide urgent interim reparations, as these are intrinsically linked in post-conflict situations in Africa.

Positive complementarity, accountability and the inclusion of traditional justice mechanisms in the African Transitional Justice Policy Framework

During the consultation, participants discussed the key issue of including local reconciliation processes within the African Transitional Justice Policy Framework. While emphasising the importance of the inclusion of traditional justice mechanisms, participants highlighted the need to ensure that accountability underpins all local reconciliation processes.

Participants also stressed the need to foster positive complementarity between the national and international justice system. According to participants this will strengthen domestic accountability for international crimes and serious violations of human rights.¹³⁹ The participants emphasised especially the need for complementarity between the international tribunals, hybrid courts and domestic legal systems with regards to prosecutions and investigations. States should provide effective accountability mechanisms to prosecute crimes against humanity and war crimes.¹⁴⁰ It was noted that at this particular point, Africa and the AU, could define what

134 The Moroccan Equity and Reconciliation Commission (December 2005) Rapport Final – La réparation, *Moroccan Equity and Reconciliation Commission*, retrieved on 21 November 2011 from http://www.ier.ma/article.php?id_article=1432.

135 Ibid.

136 Ibid.

137 L. Arbour (25 October 2006) Economic and Social Justice for Societies in Transition p. 11, *New York University School of Law Center for Human Rights and Global Justice*, retrieved 21 November 2011 from www.chrgj.org/docs/Arbour_25_October_2006.pdf.

138 R. Duthie “Toward a Development-sensitive Approach to Transitional Justice” *International Journal of Transitional Justice*, Vol 2, 292-309 (2008) p. 299.

139 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

140 Ibid.

The participants emphasised especially the need for complementarity between the international tribunals, hybrid courts and domestic legal systems with regards to prosecutions and investigations.

positive complementarity involves, especially given the role of South Africa as one of the key focal points on the issue of complementarity in relation to the ICC.

The participants were also unanimous about the need to broaden the scope of accountability from focusing exclusively on the individual to include third party states, transnational corporations as well as non-state actors.

Furthermore, as Sooka argues, the danger of an impunity-gap exists in cases, where the focus is solely on individual criminal responsibility in conflicts involving mass violence.¹⁴¹ In these cases, two groups remain largely untouched: in the first instance, members of communities who benefitted directly or indirectly from the conflict and in the second instance, bystanders who benefitted from the violence and did not intervene to stop it.¹⁴²

Addressing criminal accountability in the African context, however, faces various challenges, with one of the main problems being the lack of institutional capacity. In the discussions, the problem of institutional weakness was emphasised by Commissioner Joiner and Professor Khadiagala, who both called for institutional reforms.¹⁴³ Bosire notes that “frequently, the poor legal capacity can be a major impediment to domestic prosecutions in Africa”. According to Bosire, this is demonstrated in the lack of independence, integrity and infrastructure of the legal domestic judicial systems.¹⁴⁴

Consequently, in order to avoid impunity, great consideration and care has to be exercised in terms of how criminal prosecutions are realised. As Kamali notes “hasty prosecutions of human rights violators by a legal system that is incapable of handling numerous cases or that has not yet gained legitimacy in the eyes of the public would have the opposite effect of its intended pursuit of justice”.¹⁴⁵

An example of a successful utilisation of a local reconciliation mechanism is the Rwandan case, where the sheer number of perpetrators (over 125,000) made prosecutions in the formal courts impossible. The traditional Gacaca-courts, the hearings of which involved whole communities, were set up to hear cases involving various categories of perpetrators and to pass a judgment. The Gacaca-process has received varied assessments for its ability to ensure the delivery of justice and reconciliation. Despite some concerns over fair trial rights by some critics, the process has been commended for its “cultural authenticity and reconciliatory character.”¹⁴⁶ A study conducted in 2002 found that the public’s perception of the Gacaca-system was overall positive, with 82% of the interviewees stating that they “had confidence in the process”.¹⁴⁷

141 Presentation by Ms Y. Sooka at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

142 Ibid.

143 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

144 L.K. Bosire “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa” 5 *SUR International Journal on Human Rights* 71 (2006) p.77.

145 M. Kamali “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa” 40 *Columbia Journal of Transnational Law* 89 (2001-2002) p. 93.

146 B. Oomen (2007) *Justice Mechanisms and the Question of Legitimacy – The Question of Rwanda’s Multi-layered Justice Mechanisms* p. 17, *FRIENT*, retrieved on 21 November 2011 from <http://www.frient.de/publikationen-service/dokumente/library/justice-mechanisms-and-the-question-of-legitimacy.html>.

147 Ibid. p. 18.

In Uganda, the Acholi leaders have expressed their preference for traditional measures over international ones, to achieve reconciliation in Northern Uganda, which has been ravaged by a civil war.¹⁴⁸ During the consultation, the representative of the Republic of Uganda, Ms Juliet Mugerwa Namiro stated that the Ugandan government has indeed applied the traditional *Mato Oput* reconciliation process in addition to amnesty and military strategies to end the violence between the Uganda Peoples Defence Forces (UPDF) and the Lord's Resistance Army (LRA).¹⁴⁹ According to Ms Namiro, the combination of these processes has contributed to the cessation of hostilities in Northern Uganda.¹⁵⁰

Concern has been voiced, however, about the traditional processes failing to meet the basic standards of international criminal justice such as those of fair trial.¹⁵¹ Consequently, the system has been considered to be "flawed and ill-equipped to address international crimes"¹⁵² such as genocide. It has been suggested that despite the traditional community-based mechanisms, such as the Gacaca-courts, not being able to replace a more formal judicial process of prosecuting the worst perpetrators of human rights violations, they could be used as one measure at a local level to "help ease some of the pressures" present in a country emerging from large-scale conflict.¹⁵³

The possibility of using traditional justice systems in the African context was raised as important by participants who felt that "drawing from traditional knowledge systems should be considered and explored", and incorporated into the development of the the African transitional justice framework.¹⁵⁴

However, despite the benefits of the traditional or community-based mechanisms and truth-seeking mechanisms, such as lower costs and capability to handle large numbers of perpetrators, collective accountability "has to be complemented by individual accountability if a society is to successfully put its authoritarian past behind it".¹⁵⁵

The lack of institutional capacity, however, is not the only challenge in relation to criminal prosecutions in Africa. As noted by the Panel of Wise Report, further obstacles confronting international criminal law in Africa include the perception of the principles as a threat to sovereignty, the perceived threat of international legality as intrusive on weak states, and the fear of selective application and implementation of international criminal law.¹⁵⁶

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148 L.K. Bosire "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa" 5 *SUR International Journal on Human Rights* 71 (2006) p.78.

149 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

150 Ibid.

151 Amnesty International (2002) Gacaca: A question of Justice, *Amnesty International*, retrieved 21 November 2011 from <http://www.amnesty.org/en/library/info/AFR47/007/2002>.

152 M. Kamali "Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa" 40 *Columbia Journal of Transnational Law* 89 (2001-2002) p. 77.

153 J. Sarkin "Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past" 2 *International Law Forum du Droit International* (2000) p. 118.

154 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

155 B. M. Fikre (14 June 2011) Transitional Justice in Africa: Relevance and application for Tunisia, Egypt, Libya and others, *International Law Notepad*, retrieved 21 November 2011 from <http://internationallawnotepad.wordpress.com/2011/06/14/transitional-justice-africa-tunisia-egypt-libya/>.

156 Panel of the Wise "Report on Non-impunity, Truth, Peace, Justice and Reconciliation in Africa – Opportunities and Constrains" (2011) p. 1.

Greater attention needs to focus on how hybrid courts would complement and be integrated into the building of national institutions.

In addition, the lack of available resources is one of the major impediments to the realisation of retributive justice in Africa. However, despite these obstacles, there is a need for the “newly democratic states to pursue both justice and truth, no matter how imperfect, in order to sustain their democratic order and to achieve reconciliation among different segments of the society”.¹⁵⁷

Consequently, international alternatives, such as the trials by the International Criminal Court in the gravest cases of human rights violations have to be considered as a possible solution, especially in the cases where the state itself is unable or unwilling to prosecute the perpetrators. Mr Tejan-Cole highlighted this by arguing that it is due to impunity and lack of effective judicial systems to prosecute criminals within national jurisdictions that the ICC is involved in investigating and prosecuting international crimes in Africa.¹⁵⁸

Various factors, such as the limited capacity of the ICC itself, as well as the unwillingness of states to co-operate with the prosecutions can, however, hinder the process significantly. As Okechukwu Oko notes, the success of international criminal prosecution “ultimately depends on the support and acceptance by the public whose conduct it seeks to influence.”¹⁵⁹ Yet, according to Oko, the prosecutions of the ICC are treated with suspicion and skepticism by vast majority of Africans, partly due to them being viewed as a “symptom of the deep-seated paternalism that pervades much of the West’s dealings with Africa” and partly due to the international model of justice being “inconsistent with the traditional notions of justice”.¹⁶⁰ In general, the international criminal prosecutions are viewed as “judicial colonialism and imperial condescension.”¹⁶¹

During the discussions, participants noted that the involvement of the ICC in Africa is being adversely perceived, due largely to the inability of government officials to understand and appreciate the complementarity principle of the Rome Statute, which places the primacy of investigation and prosecution of international crimes on the states in which the international crimes are committed.¹⁶²

Establishment of hybrid courts would be another alternative in situations where the state lacks the resources and the domestic judiciary of the state is too weak to cope with the prosecutions. Hybrid courts would enable the international community to provide funds and technical assistance without overtaking the process and so threatening the state’s sovereignty. For example, the establishment of the Special Court for Sierra Leone was done “partly as a response to the disintegration of the domestic judicial system”.¹⁶³ The utilisation of hybrid courts was supported by participants indicating that Africa needs to adopt the notion of hybrid courts in national judicial systems.¹⁶⁴ It was argued that the AU Commission should have a role in building capacity of hybrid courts.¹⁶⁵ Overall, the results achieved by hybrid courts have been “promising” and according to the former ICTY judge, Patricia M. Wald, hybrid

157 M. Kamali “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa” 40 *Columbia Journal of Transnational Law* 89 (2001-2002) p. 77.

158 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

159 O. Oko “The Challenges of International Criminal Prosecutions in Africa” 31 *Fordham International Law Journal* (2007-2008) p. 365.

160 *Ibid.*

161 *Ibid.* p. 366.

162 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

163 L.K. Bosire “Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa” 5 *SUR International Journal on Human Rights* 71 (2006) p.77.

164 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

165 *Ibid.*

courts are the “likely wave of the future”.¹⁶⁶ Mr Tejan-Cole cautioned however, that greater attention needs to focus on how hybrid courts would complement and be integrated into the building of national institutions.¹⁶⁷

Amnesties

The role of amnesty in transitional justice processes in Africa was also discussed in-depth. Participants agreed that transitional justice processes should include mechanisms to bring combatants and offenders in need of reintegration into broader peace-building or reconciliation programmes.

Participants acknowledged that peace-building/reconciliation programmes could take the form of conditional amnesties for low level perpetrators. Nevertheless, the participants noted that international law forbids amnesties for perpetrators of international crimes such as crimes against humanity. Accordingly, it was agreed by the participants, that amnesties at the domestic level must comply with a minimal rule of law taking into account the principles of international and national legality.

Undeniably, amnesties are an essential tool for truth-seeking and DDR processes. According to participants however, amnesties should be discussed as a last resort only.¹⁶⁸ The need to utilise amnesties requires a solid justification.¹⁶⁹ Various authors agree with this standpoint, stating that amnesties can be very dangerous if used injudiciously.¹⁷⁰ As Fombad states, greatest care has to be exercised not to cheapen the amnesties, for example, “by it being granted upon request with no conditions”.¹⁷¹

Fombad further argues, that especially in the case of granting conditional amnesties some form of compensation should be given to the victims.¹⁷² Overall, however, if amnesty is selective or is combined with the threat to prosecute, it is “capable of significantly aiding the reconciliation process especially where it leads perpetrators to acknowledge their past wrongs publically”.¹⁷³ When used in this manner, amnesties can have a forward-looking and constructive role”.¹⁷⁴ It was noted though, that greater attention is needed to articulate more clearly the place of amnesties within the broad range of transitional justice processes.

Greater attention is needed to articulate more clearly the place of amnesties within the broad range of transitional justice processes.

166 University of Virginia School of Law News Release (15 April 2005) Wald Sees International Tribunals Evolving Toward “Hybrid” Courts, *University of Virginia School of Law*, retrieved 21 November 2011 from http://www.law.virginia.edu/html/news/2005_spr/wald.htm.

167 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

168 “Report of the African Union Commission Consultation with African Union Member States on Transitional Justice”.

169 Ibid.

170 M. Kamali “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa” 40 *Columbia Journal of Transnational Law* 89 (2001-2002) p. 102.

171 C.M. Fombad (May/June 2008) Transitional Justice in Africa: The Experience with Truth Commissions p. 12, *Hauser Global Law School Program*, retrieved 21 November 2011 from http://www.nyulawglobal.org/Globalex/Africa_Truth_Commissions.htm.

172 Ibid.

173 M. Kamali “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa” 40 *Columbia Journal of Transnational Law* 89 (2001-2002) p. 102.

174 Ibid.

KEY PRINCIPLES AND ELEMENTS OF AN EFFECTIVE AFRICAN TRANSITIONAL JUSTICE POLICY FRAMEWORK

Key values and principles

The importance of an African transitional justice policy framework reflecting African values, principles and standards was stressed by the participants during the consultation. The African Transitional Justice Framework has the potential to address African concerns through a holistic policy, which takes into account the particular context, cultural nuances and value systems of the continent.¹⁷⁵

In order to develop such a Framework, the participants identified the key values and principles of an African Transitional Justice Policy Framework. These values and principles include:

- The entrenchment and promotion of African shared values,
- African ownership and leadership,
- Promotion of national and local ownership, inclusiveness and equity,
- Primacy of victim centred justice,
- Cooperation, coherence and coordination,
- Capacity development, and
- Mobilisation, support and solidarity.

Participants argued that the inclusion of these key values and principles to the African transitional justice policy framework constitutes a shift from a mechanism based definition of transitional justice to a more value and outcome based definition.¹⁷⁶

175 Presentation by Ms Y. Sooka at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

176 Presentation by Ms N. Valji at the Consultation with Experts from AU Member States Emerging from Conflict/Post-conflict on Transitional Justice on 12–13 September 2011 in Cape Town, South Africa.

Constitutive Elements

During the Consultation, the participants also identified various Constitutive Elements of an African Transitional Justice Policy Framework. The inclusion of these elements to the transitional justice process in Africa is essential in achieving sustainable peace and development.

Security Sector Reform

One of the key elements identified by the participants was security sector reforms (SSR). According to Davis, “reforming the system to ensure security agents become protectors of the population and the rule of law is of the utmost urgency” in a post-conflict situation.¹⁷⁷ Davis further notes the strong links that SSR has with transitional justice, with SSR “contributing to state-building, democratisation and peacebuilding in countries with a legacy of massive human rights abuse”.¹⁷⁸

The necessity of the inclusion of SSR is also demonstrated by the fact that in 2009, there were 27 active armed conflicts in the African continent.¹⁷⁹ According to Hendrickson and Karkoszka, the conflicts in Africa are “driven by a complex interplay of internal, regional and global factors” and affect a large number of the African population.¹⁸⁰ Furthermore, this has also resulted in “the rapid militarisation of the continent”.¹⁸¹ Incorporating processes which seek to transform these institutions, in terms of personnel and culture, are therefore important for long-term peace.

Vetting and Lustration

In addition to SSR, the participants named vetting and lustration as one of the key components to be included in an African transitional justice policy framework. The “practice of vetting – scrutinising the individual role played by various state personnel in order to determine whether they should be removed from public service – or that of lustration – a wholesale purge of the civil service of the old regime – are options that have been employed by transitioning states in the past. Vetting which employs individualised scrutiny and due process may further the aims of institutional reform in some situations. Lustration or purging, however, without due process threatens to build reform on the foundations of injustice”.¹⁸²

177 L. Davis (June 2009) “Transitional Justice and Security Sector Reform” p.7, *Initiative for Peacebuilding*, retrieved 21 November 2011 from www.initiativeforpeacebuilding.eu.

178 Ibid.

179 Uppsala Conflict Data Program (2010), *Uppsala Conflict Data Program*, retrieved 21 Nov 2011 from http://www.pcr.uu.se/digitalAssets/18/18752_conflict_region_2009a.jpg.

180 D. Hendrickson and A. Karkoszka (2002) “The challenges of security sector reform” p. 188, *Stockholm International Peace Research Institute*, retrieved 21 November 2011 from www.sipri.org/yearbook/2002/04.

181 Ibid.

182 N. Valji and B. Harris, (2007), *Institutional Transformation Overview Pamphlet*, Justice In Perspective: Truth, Justice And Reconciliation In Transition: A CSVr Educational/Training Package, available on request from CSVr.

De Grieff has described the vetting process as “an expression of the desire for a new beginning, or at least a renewal” which aims to address the “impunity gap faced by societies emerging from conflict”.¹⁸³ According to de Grieff, vetting has various dimensions and its use is not limited to the most obvious punitive dimension.¹⁸⁴

Concerning the punitive function of vetting, de Grieff argues that “vetting subjects people to loss of jobs and income” in post-conflict circumstances “in which economies are in crisis and job creation is stagnant if not receding.”¹⁸⁵ Vetting, however, also “subjects people to shaming”, and as de Grieff further argues “the more public the exclusion, the greater the potential for becoming the recipient of the public’s opprobrium”.¹⁸⁶ Vetting further has a preventive function, which does not only work on the individual, but also on a more structural level.¹⁸⁷

With regards to the other dimensions of vetting, vetting can also be seen as a “trust-inducing measure” as well as an “enabling condition of other transitional justice measures”.¹⁸⁸ Finally, vetting can also “facilitate the broader sorts of institutional reform measures that are often called for in the aftermath of conflict and in transitions to democracy”.¹⁸⁹

Mediation

Participants also named mediation as one of the key elements to be included in the African Transitional Justice Policy Framework. Mediation can be an important transitional justice mechanism, and as Kirschhoff argues “different mediation models can deal with the specific challenges within the field of transitional justice to widely varying degrees.”¹⁹⁰ At its best, mediation “encourages and supports the process of acknowledgment and healing”.¹⁹¹ It can also enable dialogue between polarised factions, in order to broker a mutually agreeable, preferably non-violent solution or end to hostilities. According to Kirschhoff, in the context of transitional justice, an interest-oriented approach is “particularly suited to realise the full potential of mediation.”¹⁹² Participants noted therefore the need to integrate or link the developments around mediation within the AU, within the Transitional Justice Policy Framework.

Other key elements identified by the participants for inclusion into the Transitional Justice Policy Framework were reconciliation mechanisms and national cohesion, in particular processes which address the divisions in society.

183 P. de Grieff (2007) Vetting and Transitional Justice p. 524, Heinrich Böll Stiftung, retrieved on 21 November 2011 from old.boell-tr.org/images/cust_files/080409160802.pdf.

184 Ibid.

185 Ibid. p. 525

186 Ibid.

187 Ibid.

188 Ibid.

189 Ibid.

190 L. Kirschhoff (25–27 June 2007) Linking Mediation and Transitional Justice p. 9, *International Conference on Building a Future on Peace and Justice*, retrieved 21 November from www.peace-justice-conference.info.

191 Ibid.

192 Ibid.

Roles of the different stakeholders and actors

Participants also agreed that it would be imperative for the Transitional Justice Policy framework to include and define the roles and responsibilities of the various actors including civil society, the private sector, donors, and development partners in the implementation of the framework. Definition of the roles would facilitate the harmonisation of the implementation process and prevent potential duplication and inconsistency of the activities taken.

Participants noted that one of the primary issues is to ensure the collaboration and involvement of all AU organs, including the RECs, in developing and adopting a Transitional Justice Policy Framework on the continent. Strong involvement of the AU organs would guarantee that the framework is African owned, and that the AU inter-organ meetings and activities can be used as a platform for inputs from all stakeholders and to monitor the status and implementation of an African transitional justice policy framework.¹⁹³

Participants further agreed on the AUC's role in ensuring that the policy development process is open and transparent and aims to promote and protect the rights of African peoples. It was also concluded that the AUC's role should include informing states of matters relating to the framework and transitional justice, as well as monitoring the framework's implementation. The monitoring would take place by developing oversight mechanisms to ensure full compliance of the transitional justice policy framework by member states when adopted.¹⁹⁴

Adoption of an "African Day of Transitional Justice", was also suggested by the participants. Such a Day would aid in highlighting the unique experiences of Member States, including those in conflict, emerging from conflict, in transition or consolidating democracy.¹⁹⁵

With regards to civil society organisations (CSOs), the participants agreed on CSO assistance in the compilation and production of comparable lessons, and best practices for implementing transitional justice. Furthermore, the participants emphasised the role that CSOs have to play in engaging in discussions with additional actors, such as the ICC, on the role of the African Court of Human and Peoples Rights and the Assembly of State Parties to the Rome Statute in enhancing positive complementarity and ensuring that states are capable of investigating and prosecuting those who commit crimes under the jurisdiction of the ICC.¹⁹⁶

The CSOs were also encouraged to develop a road map and way forward that will complement the efforts of the AU and to develop a database of best practices and information on transitional justice in Africa.¹⁹⁷

With regards to activities by funding agencies and development partners, the participants concurred on the priority of establishing funding programs related to transitional justice in Africa. The participants also considered the mainstreaming of transitional justice into the existing projects very important.¹⁹⁸ Finally, the participants stressed the need for collaboration

Participants noted that one of the primary issues is to ensure the collaboration and involvement of all AU organs, including the RECs, in developing and adopting a Transitional Justice Policy Framework.

193 "Report of the African Union Commission Consultation with African Union Member States on Transitional Justice".

194 Ibid.

195 Ibid.

196 Ibid.

197 Ibid. A database of organisations and literature is available at website of the African Transitional Justice Research Network (www.transitionaljustice.org); where individuals can also subscribe to an international listserv.

198 Ibid.

Participants agreed on CSO assistance in the compilation and production of comparable lessons, and best practices for implementing transitional justice.

between funding agencies, development partners, NGOs and CSOs in Africa to ensure local ownership of the Framework development process.

At the consultation, the participants also concurred that the framework should include a specific section on resource mobilisation, ensuring that it reflects the broadest range of resources available, including Africa-based resources. Such a section is needed to guarantee that the development of the framework is African owned rather than dependent on external resources only.

Recommendations

The participants made various policy recommendations on the way forward in the development, adoption and implementation of an African Transitional Justice Policy Framework. It was agreed by participants that further discussions and consultations on transitional justice should be held under the framework of the African Governance Architecture and African Peace and Security Architecture, including the ongoing discussions about implementation of the African Shared Values and Human Rights Strategy for Africa.

Furthermore, the participants recommended the continuation of deliberations among national and regional actors, in order to find convergence and commonalities on contemporary understandings and applications of transitional justice in Africa. A further recommendation was to develop a transitional justice reference guide and tool kit.

The participants recommended further outreach and capacity-enhancing initiatives aimed at a better understanding of the contemporary application, challenges and prospects of transitional justice in Africa. Also, validation workshops with RECs, independent experts and transitional justice professionals were proposed by the participants.

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