Irene, Pretoria 12-13 March 2012

Background

The Panel of the Wise commissioned a report on non-impunity entitled ‘Report on Non-Impunity, Truth, Peace, Justice and Reconciliation in Africa: Opportunities and Constraints’) in February 2009. The study was done at the height of the debates on the ICC which had at the time issued the first indictment against a sitting head of state, Sudanese President Omar Al-Bashir. The commissioned researchers sought to interrogate the peace versus justice debate that seemed to be the focus of international justice discourse in Africa at the time.

One of their key findings was that while the AU had in fact on numerous occasions engaged and pronounced on addressing impunity in Africa, there was no coherence and coordination of its efforts and initiatives in that regard. Specifically on the subject of transitional justice, while there were accounts of adhoc country-specific processes, there was not a continental approach or guiding framework on holistic transitional justice measures.

The report further sought to challenge a perception that ‘non-impunity’ is a western, imposed concept. The report highlighted Africa’s leading contribution to the establishment of the ICC as well as the AU’s development of the responsibility to protect (R2P) doctrine. In addition, the report sought to provide a landscape of the national transitional justice initiatives that have been implemented on the continent: from South Africa, to Rwanda, Sierra Leone, Liberia and also the emerging cases of Kenya and Burundi. Included were lesser known cases, where despite justice not being formally pursued, peace had nevertheless prevailed – namely Mozambique and Angola.

The report proposed the development and adoption of an Africa Transitional Justice Policy Framework. To guide its development, the report included as an annexure a draft proposed TJ Policy Framework. While the draft

An expert’s meeting on the Africa Transitional Justice Policy Framework was hosted by the Centre for the Study of Violence and Reconciliation in Irene, Pretoria on 12-13 March 2012. Its objective was:

To review the Africa Transitional Justice Policy Framework and, where appropriate make specific recommendations to improve the structure, scope and content of the framework.

The experts proposed the following structure and content of the Framework:

1 Introduction

The Framework should begin with an introduction section that recognises, acknowledges and traces the history, development and in particular the rationale for developing the TJ Framework in Africa.

The introduction should briefly trace and explore the mandate and role of the AU in transitional justice in Africa.

Key issues for consideration

➢ The spirit of the Transitional Justice Framework recognizes that there have been a number of experiences on TJ in Africa. However, there is a need to codify the lessons derived from these processes.

Key Recommendations/Proposals

➢ The policy document’s point of departure at the introduction should be an outline of the fundamental issues of concern and emerging lessons on transitional justice in Africa.
The policy framework should be broad enough to be amenable to context-specific tailoring to meet member state’s unique needs.

2 Values and Principles

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. It is therefore imperative that the policy framework is premised on the values of peace, justice and reconciliation, which are interrelated, interdependent and mutually reinforcing. Further, peace, justice and reconciliation are African values which are as important to promote as governance, human rights as well as peace and security.

The Framework should also include and promote African shared values relative to: 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.

3 Constitutive Elements of an African TJ policy framework

The experts identified and reiterated the following constitutive elements of an African Transitional Justice Policy Framework as essential in achieving sustainable peace and development on the continent.

3.1 Political transition, mediation and peace processes

Post-conflict transitions (Liberia, Sierra Leone, Sudan to an extent are examples) should be distinguished from post-crisis transitions (Zimbabwe and Kenya are examples). There are similarities in the mediation approaches employed in both settings; but they are also strategic differences. The following are the peace-building features common to both: regional, continental and/or international agencies broker the end to conflict. The general blueprint to end conflict is a power-sharing agreement, which forces the hands of the belligerent parties to agree to end hostilities. Other conditions may call for security sector reform, legal reform, preparing the country for transition to an elected government, and perhaps a transitional justice process. The belligerent parties thus become unlikely – and more often than not grudging – transitional partners, tasked with implementing a transitional justice agenda that is a compromise position. The result tends to be a deadlock and the dilution or neutralization of justice imperatives. There is generally a fixed period assigned to implement the terms of agreement –5 years in the cases of Liberia, Sierra Leone, and DRC.

Issues for consideration

- There is a need for consultation between mediators and TJ experts: for the latter to appreciate the complexity of mediation, and for the former to appreciate how to maximise the positive potentials of a peace agreement for the subsequent TJ process.
- It is advisable for a continental or regional body to oversee implementation of a TJ process, so that there is oversight (monitoring and periodic review) and accountability (reporting).

Key Recommendations/Proposals

- TJ policy should articulate key minimum TJ standards for mediators
- Must highlight inclusiveness and consultation: involvement of CSO, women’s groups, youth, traditional leaders, religious leaders, refugee groups, diaspora community, etc.
- Must propose M&E as a feature of all TJ processes

3.2 Truth, reconciliation and national cohesion processes

There is an increasing trend for transitional justice goals to be outlined in the mediation process. There is also an increasing tendency to devolve all justice imperatives on truth commissions so that they become overburdened and invariably doomed to have very limited impact.
Issues for consideration

- The AU has and should continue to act as a guarantor of peace processes, even at national level, as in Liberia and Kenya.
- Guidelines should be required to regulate the workings of multiple institutions with justice mandates (e.g. Sierra Leone Special Court and Truth Commission – where the former refused to cooperate with the latter owing to confusion over the respective roles and mandates and the interrelationship between the institutions).
- Women’s inclusion in truth commission should be encouraged: not only in a passive role (as mothers, wives or sisters who suffer secondary trauma to the primary trauma of men) but actively and beyond the narrow formulation of harms considered.
- Distinction between public and private/in-camera hearings.
- Motivation for a witness protection programme, particularly for vulnerable groups, including women and children.
- Motivation for special hearings for gender-based violence.
- Implementation of reparations regime.
- Conflict of interest: people implicated in crimes under consideration should not be considered as commissioners otherwise the integrity of the Commission becomes compromised.
- Representation: selection criteria should be determined and the selection process conducted through broad and representative participation.
- The commission should strive to be as demographically representative (in terms of ethnicity/locale/gender/class/political spectrum, etc.) as possible.

Key Recommendations/Proposals

- The right to truth and the international law basis of truth commissions should be spelled out clearly.
- The definition of a truth commission should be provided as well as the justification/rationale (noting that a truth commission is not a prerequisite of a transitional justice process neither is it necessarily appropriate for all contexts);
- Distinguish truth commission from similar bodies (e.g. commission of inquiry).
- Clearly articulate the pitfalls of pardons for truth commissions (particularly those reliant on conditional amnesties – the case of South Africa is illustrative in this regard).
- Motivate for a follow up body to the truth commission and spell out its role, namely to monitor implementation of truth commission recommendations and review progress – general M&E).

3.3 Acknowledgement, apology and memory

Acknowledgement, apology and memory have the potential to contribute to peacebuilding, to counter obfuscation and secrecy, and to challenge a culture of state oppression/repression.

Acknowledgment and apology have not been used much in Africa; Canada and Australia have issued public acknowledgements and apologies to their respective indigenous communities. There is some contestation over whether acknowledgement and apology amount to state responsibility.

Memory is a double-edged sword: while the desire to preserve the memory of the conflict as part of establishing a new historical narrative can be strong, it does have the potential to be misused for political ends. This is why inclusive memory is critical, as are the many types of memorial initiatives available: examples include the re-naming of public spaces, changing of educational curricula especially historical texts, art and culture. There are also many forms that memorials can take – the TJ policy framework should motivate for memorials which contribute towards community development and/or community reparations, such as for example, a clinic which can function as a site of memory.
where people are free to talk about the past, at the same time as they can seek treatment or psycho-social support.

Archiving and documentation: do we give sufficient consideration to where information accumulated through various TJ processes is stored? For example, what happens to TRC documents? Who has access to these? How accessible are they? It is assumed that the history from TJ processes becomes a national asset – but is this necessarily what individuals who have shared their stories want? They may regard their story as something to which they are physically entitled, in order to make sense of the past and what happened to them.

Issues for consideration

- Memory and history: what is the regional dimension – can this be incorporated into the process? How do we construct this history in a way that is not merely nationalistic? South Africa is illustrative of the regional dimension: how can a TJ process capture and acknowledge the contribution of neighbouring states, and the interlinkages in their respective histories.
- With the regional dimension of memorialization, it is important to consider both perspectives: the national to the regional and the regional to the national: i.e. what do citizens of the region remember and what was the implication of harbouring South Africans?
- What precautions should be taken with respect to a victim-perpetrator dialogue? How can this be facilitated to strengthen community dialogue?
- The utility of memory is significant: preservation of memory and commemoration despite state failure to recognise and compensate for loss of life, injury and loss of property, is one way in which preservation of memory can be linked to reparations.

Key Recommendations/Proposals

- Herstory – women must be brought into the national narrative.
- Archiving should be a separate section which addresses not only truth commissions but also the archives generated by the military, secret police, prosecutions, etc.
- The significance of archiving should be highlighted and questions of preservation brought to the fore in addition to organization and access.
- The link between memorialization and reparations must be clearly spelled out.

3.4 Economic, Cultural and Social Rights

Should economic, social and cultural rights (ESCR) be treated as a separate issue to reparations and development? Should it be linked with social justice, human security, poverty, land right/access/return, or multinational liability/involvement in conflict? One way to resolve this is to think of ESCR and all of these other issues as lying at different points on a continuum: reparations are time-bound whereas ESCR are generally long-term and not pursued until well into or after the transitional phase (as a remedy addressing the root causes of economic deprivation and/or systematic marginalization).

Accountability for exploitation of natural resources and extractive industries needs to be included so that it doesn’t fall off the transitional agenda: the peace-building phase needs to ensure that such actions do not persist. Zimbabwe’s Kimberly process, for example, was one initiative to ensure that livelihoods were not compromised by exploitation during political instability.

The link between TJ and development must be emphasized so that at the phase of nation building and reconciliation, reparations programmes – both individual and collective – are acknowledged as key national priorities, adequately budgeted for and political will mobilized for their implementation. Unless this link is made, states are condemned to continue cycles of deprivation which create fertile conditions for further cycles of violence. State failure to protect should not be conflated with state failure to provide development for citizens (i.e. a development project, which serves as a collective
The reparations programme is distinct from a development project wholesale – the latter should not be used as justification to escape responsibility for the former).

**Issues for consideration**

- Specific ESCR issues that would need to be addressed in the TJ policy include accountability for large scale ESCR rights violations; affirmative action policies as remedies to counteract discrimination; systematic deprivation or denial of development on the basis of regional/ethnic/indigenous origin; land dispossession, etc.
- N Uganda and Darfur are cases that can be cited as case studies of development policies aimed at alleviating conditions/legacies of historical marginalization.
- Post-conflict reconstruction should be closely monitored by regional and continental bodies to ensure that it contributes to long lasting social change and is not diverted to political elites.
- In light of the politicization of the Kimberly Process in Zimbabwe, the role of civics in monitoring resource exploitation should be outlined.
- The policy framework should highlight that reparations are a state responsibility first and foremost: the involvement of other actors should be contemplated as a supplement (the state should not pass the buck to those most responsible as an excuse to escape responsibility)
- Often different actors are tasked with different reparations programmes: the coordination of these processes should be contemplated – particularly with respect to ministerial/institutional lines of responsibility
- The issue of reparations tends to be avoided because of the significant resources required. However, the N. Uganda case presents an interesting angle: donors fund the scheme, which government frames as an attempt to address the grievances of the affected community – does this constitute reparation or development?
- The numbers of those directly affected has significant financial implications for any reparations programme: it is implausible to compensate individually in cases such as N. Uganda and Darfur. Therefore, the most affected (killed, tortured, disappeared) should have individual reparations; those who suffer such things as loss of property, etc. can receive collective reparations. Both of these are state responsibilities. Stabilization, reconstruction, redevelopment aimed at rehabilitation can be supported by donor partners
- It is the discourse rather than actions which lead to confusion: the government of Uganda asserting that it acknowledges the historical marginalization of N. Uganda and on that basis implementing development programmes as redress, sounds like reparations. The symbolic and discourse related elements of reparations – reiteration of dignity, assertion of rights, acknowledgement of harms is the most important element of repair NOT the restoration to former position. Reparation process should be a dialogue between the state and victims enabling the latter to reclaim their power.
- There should be reference to other AU documents to reinforce the notion of state responsibility in this regard: Constitutive Act, etc.

**Key Recommendations/Proposals**

- Policy should distinguish between accountability for large scale violation of socio-economic rights and protection of natural resources, averting plunder/corruption
- Symbolic nature of reparations (reiteration of dignity, assertion of rights, acknowledgement of harms ) must be emphasized
- ‘Reparations will, where possible, restore to former position’
- Urgent/interim reparations need to be incorporated and distinguished from reparations which may have significant lag before implementation

### 3.5 Gender Justice

The TJ policy framework, as is currently formulated, does not have a dedicated gender section. This is positive in a sense, because gender should be assumed to apply to the whole document. Gender justice
ought to be a concern for states at all times; it should be part of broader social justice rather than simply narrow criminal accountability.

However, if we assume that conflict provides positive and negative potentials, then we are able to capitalize on the former and minimize the latter. The position of women is often improved during conflict: they are able to assume decision making roles, become breadwinners, etc., therefore, we need to be mindful of using language such as ‘restoring to former position’, which can be problematic where women’s position prior to conflict was worse off than it is subsequently. Acknowledgement of the improved gender status and gender equality should be motivated for and attempts made to maintain an enabling environment.

Reference to traditional African values may also be problematic insofar as such traditions are patriarchal. A review should be conducted of African traditional practices relating to peace, justice and reconciliation to ensure that they do not offend gender justice concerns. There also needs to be recognition that both men and women are victims of patriarchy: so a process to remedy this should not be superficial. Boys and girls and their particular needs should also be identified: and the challenges of transitioning from adolescence to adulthood during times of conflict should be articulated.

There is an implicit assumption in policies that gender will be taken care of: however, the shopping list of resolutions calling for increased participation of women in African/indigenous reconciliation systems should not prevent us from conducting a substantive review of the indigenous systems in question. Discriminatory processes, such as for example the payment of a cow for defilement, or the forced marriage of young Muslim women to their rapists, should be abolished.

‘Ritual’ is discouraged in the policy (see p57); however rituals can potentially be useful, the policy simply needs to distinguish between what is harmful and what is useful (rituals can be used to re-introduce a perpetrator or victim back into their community).

Youth are significant catalysts in and of conflict: how can the policy assert the agency of youth in post-conflict settings, and not depict them merely as a constituency that needs to be saved? International instruments speak of men and women needing to be in the negotiating room; what of youth?

The requirement of integrity for participation in TJ processes should be interrogated: women are sometimes complicit in upholding patriarchy so the TJ policy should be more explicit than simply calling for female representation.

The policy makes reference to sexual offences: there needs to be mention of gender indignities not classified as rape. The definitions need to be reviewed; in this regard the South African case is instructive: as recently as 2009, the Sexual Offences Act redefined rape to include penetration by means of an instrument. Previously only physiognomic violations amounted to rape, with the result that there was an impunity gap.

Engendering reparations is critical. However, class should also be factored in: what rural woman need, in terms of repair or reconciliation is very different from their urban counterparts. Marginalized and vulnerable groups also need to be brought to the fore.

The impact of the global on the local needs to be acknowledged: if the transitional moment is not seized, and support provided to implement gender reforms, then gender inequalities will persist.

**Issues for consideration**
Immunity of agency staff for sexual offences committed during transitional period, e.g. sex for food; DRC UN peace-keepers, needs to be reviewed and the position clearly spelled out in the policy.

Key Recommendations/Proposals

- Include a section on gender under each theme as opposed to a dedicated section on gender (so that it is not implicit but quite explicit that gender considerations should be factored into all components of the policy framework. This will also make clear that it is not a separate “women’s” add-on to the rest of the policy
- The disproportionate impact of violent conflict on (young) men should be highlighted in policy
- The rationale, values and principles should expressly acknowledge the gender priority
- Traditional justice: rituals and practices inconsistent with gender rights should be highlighted
- Reparations: consistency of language – collective, socio-cultural dimension, gender specific priorities and implications for process should be noted

3.6 Legal and Institutional Reform; Security Sector Reform; DDR; Vetting & Lustration

Institutional and legal reforms are very important in conflict and post-conflict settings – particularly where states or regimes carried out repressive policies.

Law reform requires a 3-fold approach:

i. Institutions and laws fully respectful of the rule of law (RoL)
ii. Institutions and laws that can promote accountability and prevent recurrence
iii. Institutions and laws to restore/rebuild citizen’s trust in public institutions and regional organizations.

One problematic with this concept stems from the terminology used: at times, there remains nothing to be reformed – institutions and laws may need to be created from scratch.

The AU Constitutive Act states that the AU rejects impunity and that it confers upon itself the right to intervene in member states where extraordinary crimes have been committed. This can inform AU TJ policy intervention.

The notion of an African Criminal Court is sound as there is a legal basis for it: the AU has the right to intervene in cases of international crimes or crimes against humanity. Such a court would, therefore, supplement other African TJ interventions.

In the TJ policy, the section on investigations and prosecutions, which recommends hybrid courts, is problematic because the result is multiplicity and selectivity: too many hybrid courts would need to be convened in member states, and they may well be selective in terms of the perpetrators they pursue. A single mechanism at continental level would address this impunity gap. The structure of the mechanism – for example appointing ad hoc judges – may alleviate some concerns and also ensure representation.

At the AUC/DPA level, the establishment of a dedicated TJ unit to assist member states implementing TJ processes would be valuable. There is also a need to involve existing human rights mechanisms in TJ: ACHPR, AfCHPR (although, the latter may be more challenging as it is a judicial body whose jurisdiction might conflict with that of an African Criminal Court).

Art 58 deals with massive and systematic violations of human rights: the African court could use this article to address TJ policy.
Lessons should be drawn from The International Conference on the Great Lakes, which has a TJ protocol that prohibits the commission of international crimes and proposes the establishment of a mechanism to address such crimes (this document is a draft; nevertheless, it is still useful).

In terms of institutional reform at the national level, the military and police services in particular need to be transformed into civilian and human rights centred institutions.

**DDR programmes:** demobilization should be conducted in a manner that is fair and guided by a human rights framework. This can act as a deterrent against demobilized persons reverting to unlawful conduct. In Burundi, the limited funding offered as a demobilization incentive made reintegration into civilian life virtually impossible.

In the same vein, objective criteria should be identified for demobilizing combatants. The case of Burundi is instructive once more: foot soldiers who had no connection to those most responsible were not permitted to pursue military service, which left them with few career options.

**Judicial reform:** the judiciary is a key element of the state. The policy should identify as a need the capacity strengthening of African judges on issues of TJ. The document should also stress the need for the judiciary to be representative of all sectors of society – selection should consider ethnic/political/ideological/gender sexual orientation among other things. This should not, however, be at the expense of judicial competence.

In terms of access to the criminal justice system: steps should be taken to ensure that marginalized communities – those located in outlying areas – have access to justice. The remote courts used in DRC is one innovation to draw on. Legal aid and capacity strengthening of public defenders is equally important. A strengthened witness protection programme is another critical consideration, especially as criminal justice systems on the continent rely heavily on witnesses.

There is a need to valorize traditional and community-based mechanisms: if we refer to p57, we should not limit the focus solely to traditional justice. There are some community-based mechanisms, such as mediation, which are popular and effective.

The formulation relying on the nature or gravity of crimes is problematic: the focus should be on the status of the perpetrator within the organizational hierarchy in line with the norms of international law.

One additional recommendation: even if traditional mechanisms are advocated for, they should not necessarily be reformed in order to compete with formal courts. Gacaca was problematic insofar as judges who were not trained in law were expected to classify perpetrators and international criminal law acts according to categories defined in complex legal instruments. Traditional justice should not be taken out of, or superimposed onto an inappropriate, context.

**Issues for consideration**

- The language used in the formulation of provisions on traditional justice and practices should be nuanced and precaution should be taken to ensure that the merits are not lost due to tensions caused by the framing of the issues.
- There is a draft protocol on a proposed African Criminal Court; validation workshops for this protocol have already been held. The document is virtually a fait accompli. What is the implication of the operationalization of this court for the TJ policy framework?
- Institutional reform tends to focus exclusively on the police, military and judiciary. This focus need to be broadened to include ministries such as housing (which deals with the resettlement of IDPs) and Land Affairs (which is tasked with reforming the land register, and ensuring access to land, the reform of land tenure rights – a very topical and relevant issue for Southern
Africa. The institutional capacity and increased budget of such ministries needs to be borne in mind otherwise reform cannot happen.

- Sometimes the reform or transformation needed is not of institutions but of public opinion. This is demonstrated by the constitutional debates in South Africa, where populism is sometimes put forward as justification for not respecting the rule of law (RoL).
- Should vetting and lustration be dealt with separately or form a component of reform? Vetting is a process whereby staff members of a public institution are subjected to scrutiny – not necessarily by a formally constituted board, it may be an informal review process – to determine if they are suitable to support a state reform agenda. Lustration is the process whereby said personnel are purged and barred from holding public office for a stipulated period on account of being implicated in international crimes. Both processes require public engagement, liaison with affected persons (victims and perpetrators and complicit institutions – media, CSOs).

Key Recommendations/Proposals

- The rationale for reform needs to be clearly stipulated.
- The nature of the reform sought should be spelled out (RoL, human rights, protection, promotion of accountability, restoring citizen’s confidence and trust in state legitimacy?)
- Distinction between ‘reform’ and ‘(re)construction’ critical for financial and structural implications
- Alternative and community justice process should be incorporated alongside traditional approaches.
- In terms of positive complementarity, the spheres of operation should be clearly spelled out: what crimes can be addressed at community level versus crimes that should be left to the national or international sphere?

3.7 Accountability (international, regional, national and traditional)

The policy as currently formulated gives primacy to prosecutorial accountability measures. There is a proposal to restructure the sequence of accountability measures so that they start from the national level and graduate outwards to international measures.

However, it is true that states emerging from conflict often do not have the capacity to deal with accountability at the domestic level. This is why complementarity should be advanced: national legal systems should be strengthened so that they are the court of first instance failing which there is recourse to continental bodies and only as a last resort would cases be taken before the ICC.

Key Recommendations/Proposals

- The sequence of accountability measures should be restructured in the policy so that it is bottom up (national, regional, continental, international) rather than top-down.

3.8 Amnesties

This section, as it currently appears in the policy framework, needs to be expanded. It can start by outlining the least controversial cases that can lawfully be amnestied (see Art 65, Res_?), for example where citizens take up arms against a government. On the opposite end of the spectrum one finds blanket amnesties, which the law prohibits. Unlawful amnesties are not binding on international courts or third party legal procedures. Examples of such crimes include ICC crimes (crimes against humanity, genocide, war crimes and the crime of aggression) as well as torture. Grave breaches of the Geneva Convention can also not be amnestied. Sometimes consideration of other rights – e.g. a victim’s right to truth – has been used to restrict the application of amnesty.

No major deviation from the current treatment of conditional amnesties in the policy framework is required.
Lack of amnesty should not be understood to mean the same as responsibility to prosecute – there is a great deal of scope for prosecutorial discretion in the selection and prioritization of cases, based on the evidence, etc.

**Pardons** should be distinguished from amnesties: whereas amnesty is granted before any prosecutorial process is followed, the opposite is true of pardons – these are conferred after a prosecutorial process has been followed to its conclusion. Pardons, therefore, serve to restrain the imposition of a sentence handed down in the judgement. Pardons, like amnesties, should not necessarily be viewed in a negative light as they present opportunities – particularly in respect of the right to truth.

**Plea bargain**: this is almost akin to conditional amnesty, in that the perpetrator motivates for a reduction of sentence on the basis of cooperation with the state. A critical consideration here is proportionality: the sentence should not be reduced to such an extent that it fails to provide a sense of justice in light of the crime committed.

**Mitigation of punishment**: international law does allow for consideration of the degree of responsibility so that those lower down the ranks do not incur responsibility on behalf of those higher up in the command chain. Those who issue command orders or are involved in the design and financing of international crimes do not escape prosecutorial process. This is particularly useful where perpetrators are also victims (Northern Ugandan is an example of where people were abducted and forcibly coerced into committing crimes).

**Timing** is a crucial element when seeking accountability: it is easier to prosecute three months after the crime than it is thirty years after the fact, given evidentiary integrity – justice can be denied purely on the basis of a lack of witnesses or sufficient evidence to pursue prosecutions many years after a crime is committed. This notwithstanding, the Pinochet case demonstrates that even when there is an assumption that justice cannot prevail, it may simply be a matter of waiting until such time as legal reforms create an enabling environment in which to pursue accountability.

Command responsibility and international law emphasis on this category is a challenge: “those most responsible” in law may not necessarily be perceived as such by victims. In Latin America, equal emphasis is placed on those responsible for the commission of the most abhorrent crimes in addition to those who organize and fund these crimes – under the Rome Statute it is only the latter who fall into this category. The TJ policy framework definition of ‘most responsible’ should focus on hierarchical structure as well as the substantive nature of crimes. However, it is not realistic to require prosecution of all people implicated in the commission of international crimes. There should be a set of criteria: top tier can be dealt with by courts mandated to try international crimes, and foot soldiers can be put through alternative processes (where they are both punished, acknowledge the wrongfulness of their actions and then re-integrated into society). The multiple aims are the reason traditional/community-based processes are so appealing because they attempt to achieve all of these). Those at mid-level and at the top can be formally prosecuted.

Codification of traditional and community-level processes is not desirable because the form these approaches take defies legal logic – for example the acceptance of a spiritual dimension and of rituals that are anathema to courts. However, there have been some attempts which have yielded positive results: a community in Namibia was assigned responsibility for codifying its customs. The process of doing this encouraged them to confront some of the restrictions and less desirable elements of the customs, such as discrimination against women. Imposition from the government is unlikely to be met with enthusiasm, nor is it likely to yield similar results. Any traditional or community mechanism should have the following elements: punishment, restitution, reparation.

The question of prosecution should not be left to the discretion of the state: victims generally know who their aggressors are and attacks are documented, albeit informally: every injury and loss noted, in preparation for the time when justice can be pursued. However, there is an expectation that
government will act to facilitate this justice. In Sierra Leone, the situation was complex because of the involvement of minors: victims wanted to see perpetrators brought to account irrespective of their age. In such a case, one approach to take to satisfy both parties is to allow for consideration of mitigating factors to motivate for a reduction of sentences.

Victim-centred justice: there is a great deal of value in ownership and closure – the opposite of which fuels and sustains conflict. Because of membership within a community, great care should be taken when deciding the category into which a perpetrator should be assigned.

Because TJ is so institutionalized, we struggle to accept that traditional and community-level processes occur organically within communities and contribute significantly toward accountability and reconciliation. Continental and regional bodies should be mindful of community initiatives and take caution not to deny the agency of communities to develop processes which contribute to sustainable peace.

Issues for consideration

Key Recommendations/Proposals

- Spell out and distinguish clearly between crimes which can and cannot be amnestied
- Discuss the crimes which fall between those which can and cannot be amnestied and propose possible ways in which they can be respectively addressed – conditional amnesty, plea bargaining, pardon, sentence mitigation, etc.
- In terms of traditional or community processes, spell out the underlying principles, avoid being prescriptive about the form and articulate the three criteria which must be met by any process of this nature, i.e. acknowledgement, accountability/penalty, reparation

4 Implementation, resource mobilisation, monitoring and evaluation

A section on the role of the different actors- AU, states, civil society and other stakeholders in the implementation, resource mobilisation, monitoring and evaluation should be included in the framework and clearly outlined. In addition:

- The TJ policy framework should be made actionable for greater mobilization by all stakeholders
- The policy framework must be simplified and synthesized, to make it is easy to read, understand and popularize
- CSO TJ interventions should be coordinated to avoid duplication: an audit should be conducted into who is doing what to recommend how efforts can be harnessed.
- Thought must be given to the most effective way to generate buy-in and support for the TJ policy framework within the AU