

**EXPERT’S REVIEW OF AFRICAN TRANSITIONAL JUSTICE FRAMEWORK,
LOME, TOGO 5 AUGUST 2012**

BACKGROUND

An expert’s meeting on the Africa Transitional Justice Policy Framework was hosted by the Department of Political Affairs, African Union in Lome, Togo on 5 August 2012 with an objective to:

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

ATJF REVIEW

INTRODUCTION

- Include a brief paragraph stating the percentage of African states that have implemented TJ processes in the absence of guiding principles for a coordinated approach (what is the implication; why the pressing need for such a framework now?).
- Bring out the link between conflict, insecurity and development stasis more strongly and highlight that this is what TJ attempts to address
- Make the introduction more succinct: 3-4 paragraphs capturing the AU’s TJ mandate;
- An accompanying document containing the contextual overview, history and a more extensive discussion of the rationale can be appended to the ATJF
- The Gender dimension must be articulated briefly – e.g. ‘this policy recognises the differential impact of conflict on men, women, boys and girls’
- State more clearly both the objective of the policy and the core TJ elements that constitute it, i.e right to truth, justice, reparations, principle of non-recurrence
- The structure and sequence of paragraphs should be revised to eliminate repetition and more effectively highlight priorities
- There is a need to spell out the distinguishing features of the ATJF relative to other international frameworks. What is the substantive and value difference or addition (ATJF aims to broaden TJ as currently conceived from its narrow and restricted focus on civil and political rights to incorporate ESCR, collective rights, the right to peace, right to development, human security etc. and to elaborate corresponding state responsibility)

- Replace ‘as Africa exhibits greater capacity in the management of its affairs’ with something to the effect ‘as Africa exercises leadership and assumes ownership of its affairs’

PRINCIPLES AND VALUES

- ATJF should state clearly that where traditional approaches are used, they must be in line with international norms and standards (as per the Charter and the Charter on the rights and welfare of the child)
- Include AU pronouncements, decisions, etc denouncing the most serious crimes
- Para 19: is written from a peacebuilding perspective – it needs to incorporate the right to truth, justice, reparations and non-recurrence to more clearly bring out the TJ dimension
- Para 20: the recognition of criminal justice as a significant but insufficient pillar must be reframed – the language of ‘accountability’ rather than ‘criminal responsibility’ should be used
- ‘Victim’, ‘perpetrator’ dichotomy and the tensions/interplay between these identities needs to be spelled out more clearly
- A substantive and formative scan of the framework should be conducted for gaps to be plugged and language refined in line with AU formulation (draw on AU decisions, resolutions, etc.)

Benchmarks and indicators

- Should be further elaborated and inserted into an accompanying technical document.
- Benchmarks and indicators are currently conflated – they must be distinguished clearly
- Components of peace agreements should be retained (as per original ATJF) and should each reflect TJ goals respectively
- Link between DDR and community safety and security (esp in areas of reintegration)
- DDR should be engendered to address women as ex-combatants, women associated with fighting forces, and women in communities accordingly.

Structure of the section

- Include a chapeau to capture the main elements and to enumerate each element respectively;
- Additional references for women, peace and security – Christine Bell and UNIFEM paper (Nahla to advise)
- Expand on what is meant by ‘national consultation’, ‘participation’ and ‘local ownership’: stipulate that national consultations should precede TJ processes and dedicated multi-sectoral consultations should be convened throughout the TJ process

POLITICAL TRANSITION, MEDIATION AND PEACE PROCESS

The Irene meeting recognised that a significant number of TJ processes have their genesis in peace agreements; hence it is desirable to have guidelines outlining what can legally be incorporated into the agreement and what international law prohibits. One example is which cases can be amnestied and which categories of combatants/perpetrators can be granted amnesty? The Lome reference team agreed to shelve the issue of amnesty and recommended the production of a briefing note on amnesties.

- *Para 30* is vague, it needs to be more specific: outline what should occur in political transitions, mediation and peace processes respectively
- A better balance should be attained between peace and justice (at the moment peace is prioritized - ‘peace shall constitute a first measure of justice in Africa’) noting that considerations of peace may initially necessitate a suspension of justice initiatives, however, this does not preclude the pursuit of accountability once order is restored

JUSTICE AND ACCOUNTABILITY

- Include a chapeau providing ATJF definition/conception of TJ and what it aims to achieve. Set out TJ processes, principles and finally pillars in order to move away from constraining mechanisms-approach (i.e. what can we use to achieve our objective and then apply to each element – what does it look like in political transition, peace process, mediation etc?)
- Centralize victims and their right to justice
- ATJF is not prescriptive about the mechanisms by means of which to attain victim’s justice so complementarity – of different forms at domestic level as well as between domestic, regional and international processes – should be emphasized

- Para r, p 14 is confusing: political bodies take decisions, quasi-judicial/ judicial bodies implement - this distinction needs to be clearly elaborated
- Para r – ‘strengthen capacity’: do we mean that of the affected state to combat impunity at the domestic level? If so, this must be made explicit
- Spell out that one goal of justice is to end impunity
- Para s, p 14 calling for respect of the ICC may be hostile to the AU..? This could be reframed to highlight complementarity considerations such as the strengthening of local courts and domestic justice systems for ICC to genuinely become court of last resort
- Para c, p 15 on the ICC as above – retain as is or rephrase?
- Cooperation of concerned states should be elaborated (extradition, universal jurisdiction)

TRUTH-SEEKING AND INDEPENDENT COMMISSIONS

- The principle of truth requires far more than just a truth commission: If we have an encapsulating principle on the “right to truth” then a range of truth-seeking mechanisms can be enumerated
- The framework should make it clear that truth commission are not valuable in and of themselves: the framework should clearly stipulate guidelines for truth commissions e.g. transparency, independence, vetting and screening of candidates, capacity building, privacy of victims, archiving and documentation, etc.
- The gender dimension needs to be reflected - gender/sex disaggregated data, mapping of gendered effects (also draw on recommendations from the Engendering TJ meeting)
- Follow up/implementation strategies and mechanisms should be outlined – role of NHRIs and RECs
- The politics of truth commission should be discussed – i.e. the use of truth commissions to conceal rather than reveal truth; to denounce/compromise political opponents;
- Financing truth-seeking mechanisms: discuss potential strategies such as an independent financial mechanism or trust to fund truth commissions and reparations

ARCHIVING

- Important considerations: what security and preservation measures should be put in place; how should ownership and access be regulated (and which categories of persons should qualify) and balanced against victim's right to privacy (Yasmin to forward guidelines)

ACKNOWLEDGEMENT, APOLOGY AND MEMORY

- Emphasize the formulation process (as opposed to the content) of an acknowledgement or apology statement/ceremony as a way to further reconciliation;
- Particularities of access in Africa call for thinking outside the box when it comes to memory e.g. mobile museums
- Note and advance best practice to avoid the use of memory to further division and victimise "the vanquished"
- Link history with truth commission reports - historical clarification to be used in the educational programmes
- Outline inter-generational narratives and how these are utilised;

Fact finding and documentation

- Note that these processes can be undertaken jointly or separately;
- Fact-finding and documentation missions can be linked to truth commissions
- Outline guidelines for the use, storage and protection of information gathered through these processes
- Note the gender dimension (sex disaggregated data collection)
- Note the role of civil society in truth seeking and documentation – what support and protection measures should be put in place?

REPARATIONS

- UN documentation may not be the best reference documents on this issue – draw heavily on African instruments
- Provide specific recommendations on reparation approaches: the different admin forms, mapping of reparation components, etc.
- Discuss how states can balance reparations and development imperatives so that they become complementarity rather than competing demands
- Reflect guidelines for good reparations programmes

- Draw on the Irene report to articulate the different forms of reparations, outline budgetary implications, government coordination (line ministries) and cite examples of creative approaches used in the Inter- American system
- Outline the role of third parties and who should (i) be held liable (ii) contribute (perpetrators, multinationals, donors)
- Briefly discuss the politics of TJ and reparations funding and make recommendations on how to avoid the pitfalls
- Engender reparations (refer to Engendering TJ minutes and report)
- ESCR violations – this needs to be strengthened by further research
- Land dispossession: highlight the linkages between restitution, displacement and return (and the gender dimension) and the complex legal frameworks required for respective reparations
- Spell out the role donor partners can play in supporting states to fulfil their responsibilities and obligations
- Highlight the right to reparation and set out gender principles (Nairobi Declaration, recognised by the ACHPR)
- Enumerate monitoring guidelines for state implementation of reparations programmes
- Recommend the establishment of reparation funds at the commencement of TJ processes so that they are not an after-thought but are given the same priority as other TJ mechanisms
- Assert that efforts should be made to ensure that reparations are administered “promptly” (what this implies and entails should be spelled out clearly) so that citizens are equipped to realise the dividends of peace
- Provision must be made for interim reparations to address the urgent needs of victims/survivors, e.g. medical, psychosocial, legal, etc.
- DDR and reparations need to be linked e.g. pensions
- Consider reference to the Rome Statute on reparations and the Victim fund in draft Protocol
- Judicial proceedings should consider Protocol on victim’s reparations

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- The language in this section is too academic – needs to be reviewed, restructured and revised by legal practitioner to more clearly spell out the ESCR issues
- Draw more heavily on the provisions of the African Charter on Human and People’s Rights
- Locate ESCR within the different levels and mechanisms of TJ processes
- Gendered perspective: effects of ESCT violations on women; displacement; impact on dependants, etc.
- Set out guidelines to address economic violations (Gisse report – Special Rapporteur’s discussion on debt, corruption and Structural Adjustment Programmes)
- In introduction, reflect why ESCR are important for TJ in Africa
- Also incorporate ESCR into mandate and reparations sections;
- Spell out the relationship of civil-political rights to ESCR violations (ESCR as root or underlying cause of conflict, which is characterized by CPR violations so causal cycle)
- Capture gendered dimension
- Enumerate the forms of violations that result in economic inequalities;
- Mainstream ESCR and address in a stand-alone section;

GENDER JUSTICE

- Change title of section: perhaps ‘strengthening women’s access to justice’
- There needs to be a statement on the plurality, diversity and inclusiveness of gender
- Include marginalised and vulnerable groups (e.g. widows, rural women, orphans, etc.)
- Include crucial sections on witness protection, investigations, and reparations (further research and a briefing note is recommended)
- Drafters to refer to minutes and report of Engendering TJ meeting

AMNESTY

- Define amnesty such that it is not premised on impunity but rather acknowledges the potential contribution to reconciliation (Geneva Convention)
- Spell out clearly which cases can be amnestied and which cannot

- Distinguish amnesties from other accountability measures (spelling out those preferred before and after judicial process) e.g. pardons, plea bargains, etc.
- Legal experts to review language closely and revise where necessary;
- Discuss link between amnesty, truth-telling and other forms of accountability
- De jure and de facto amnesty – legality of amnesty key: insertion of unlawful amnesty in peace agreement does not prevent prosecution
- While international norms prioritize the accountability of those higher in command responsibility hierarchy, foot soldiers should not be granted impunity – this is where amnesties present opportunities
- In light of the capacity challenges state’s face in conducting the trials of huge numbers of people, steps should be taken to build the capacity of domestic criminal justice systems, recourse should be made to prosecutorial discretion in jurisdictions where available, and other justice mechanisms such as community forums, traditional courts, etc. should be utilized.
- Prioritizing cases for prosecutions and monitoring: which institutions should be mandated?
- Complementarity: ‘willing and able’ - what is the threshold for this?

VETTING & LUSTRATION

- Clear definition
- Spell out the goals of vetting and lustration processes and provide (positive and negative) case studies – e.g Liberia, Kenya, Sierra Leone
- Highlight importance of local level involvement and participation;
- Independence and transparency in selection process and rigorous interrogation of aspirant members of public institutions.

CONSTITUTIONAL, LEGAL AND INSTITUTIONAL REFORM

- Spell out the link between constitutional, legal and institutional reform; and the relationship between citizens and the state (by instilling/increasing/restoring faith in government and state institutions, facilitating active citizenship, deepening democratic values, etc.)
- What do we mean by constitutional reform; discuss the goals of institutional reform and what we mean by this – put in place recommendations

- Inclusion of wealth/power sharing for the benefit of citizens
- Opportunity for the constitution to bring in broader societal redress – critical entry point for securing broader structural reforms.
- Cultivating respect for the rule of law

Resource mobilisation

- Ensure resources are available for TJ initiatives;
- Identify alternative resource avenues
- Ensure that consideration is given to human resource needs and the funding of mechanisms
- Propose the establishment of an AU general fund that can be used as a used as a flexibility mechanisms to assist members states with seed funding for TJ processes..?

Actors, governance mechanisms and process

- May want to address actors, governance mechanisms and process separately
- Prioritize national actors over internationals but spell out the complementary role of actors at each level (state, national institutions, CSOs, etc.)
- Peace and Security Protocol, ECOSOC, Article 20 of the Charter, PCRCD- all should guide in articulating the role of civil society.
- Multinational corporations, multilateral institutions, mercenaries: what are their roles – should also be included in the section on accountability
- Replace ‘international actors could’ with ‘international actors should’
- Include the media and its role – communication, information/awareness raising, sensitization, validation

Additional comments:

- Accountability- the mechanisms are scattered. Structure needs to be more coherent
- Review the language used in the section on women’s access to justice and right protection.

MOVING FORWARD: THE ROLES OF DIFFERENT ACTORS

- AU Organs and RECs to review ATJF at meeting on margins of Summit in Abidjan (CSO consultation could be held thereafter)
- As a matter of priority for the DPA and in line with the recommendation from the Cape Town meeting, a broad consultation must be convened – preferably before the end of 2012 – drawing together CSOs, think-tanks, academics and media

representatives from across the continent for inputs on the draft ATJF (consensus needs to be reached on whether this happens before or after recommendations of the Lome meetings are incorporated into the policy framework)

- Legal consultants should be hired to assist Prof Khadiagala with the final ATJF revisions in line with recommendations from reference team/expert's meetings
- Validation meetings to be convened thereafter (early 2013) by DPA and Legal Council for AU policy organs and member state representatives
- Development partners should be included, but informally
- Political lobbying can then commence at a political level within member states
- Steps should be taken to ensure PSC buy-in