



**TECHNICAL EXPERTS' CONSULTATION TO REVIEW THE AFRICAN TRANSITIONAL
JUSTICE POLICY FRAMEWORK (ATJF)
AGENDA**

Venue: Eka Hotel Nairobi, Kenya

Date: 29th – 31st August 2013

ACRONYMS

ACJ	African Court of Justice
AfCPHR	African Court for Human and People's Rights
APRM	Africa Peer Review Mechanism
ATJF	African Transitional Justice Framework
AU	African Union
AUC	African Union Commission
CAR	Central African Republic
CSVR	Center for the Study of Violence and Reconciliation
DPA	Department of Political Affairs
DRC	Democratic Republic of Congo
EAC	East African Commission
ECOWAS	Economic Commission of West African States
HOS	Heads of States
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
INGO's	International Non-Governmental Organisations
OTP	Office of the Prosecutor
PAP	Pan African Parliament
POW	Panel of the Wise
REC's	Regional Economic Commissions
RTP	Responsibility to Protect
SA	South Africa
SADC	Southern Africa Development Commission
SGBV	Sexual and Gender Based Violence
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UN	United Nations
WG	Working Group

EXECUTIVE SUMMARY

This report is a reflection of a three –day expert consultation to review the African Transitional Justice Policy Framework (ATJF) that was held from 29th - 31st August 2013 in Nairobi, Kenya. The consultation was 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 (CSV). In attendance were representatives from the following African Union organs and institutions: African Commission on Human and People’s Rights, the Pan African Parliament, the African Court on Human and People’s Rights the AU Anti-Corruption Board and the African Union Commission Department of Political Affairs. Also in attendance were members of civil society, academics, partner organizations and human rights experts.

The aim of the consultation was to make final input into the ATJF drafting process. The expert consultation also set out to achieve consensus on a clear road map of activities for the way forward in the two-year process and thereby aimed to contribute to the improvement, review and completion of the proposed transitional justice framework.

In ensuing deliberations, participants agreed on the need 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 consultation further reiterated the notion, as explored in previous consultations on the ATJF, that the current dominant transitional justice discourse has adopted a narrow approach that places emphasis and focus on retributive justice, which inadequately reflects on the contemporary understanding and application of transitional justice on the African continent.

Participants focused on the dilemma of achieving a balance between peace and justice and discussed the critical issue of sequencing. The importance of accountability and responsibility was highlighted as was the significance of international norms and criminal responsibility. The consultation further highlighted the importance of capturing these issues in the framework so as to ensure prioritisation of African values in balance with international norms. Participant’s 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.

Similar to previous consultations on the ATJF, 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 employing transitional justice mechanisms.

Deliberations at the consultation also resulted in further input in key areas of the ATJF, namely; (The role of regional Courts, Hybrid Courts and domestic chambers; TJ mechanisms and Truth Commissions; Gender Justice; Socio-economic rights and economic

crimes; Amnesty and Reparations). The experts further deliberated on the aspect of resourcing of the ATJF. Financial and technical support for TJ processes was seen as very important and it was recommended that African institutions and states be committed to making the first contribution from the region itself. It was recommended that this aspect be highlighted in the framework.

Notably, this was the first time that five AU organs had been involved in the process at the same time. The consultation reiterated the importance of the ATJF within the current African context. It presented valuable ideas on how to frame the debate and made valuable contributions to the development of a clear and concise document. There was consensus that the framework was principally against impunity and the respect for the human rights of victims. It was also recommended that the concept of truth seeking be expanded to include new and emerging tools such as archiving. Coherence between TJ mechanisms was highlighted and the linkage between history and the current realities was found to be critical.

It was further recommended that the framework be linked with other existing documents and instruments. Participants agreed that the framework should be victim-centred and recommended that principles around their substantive and inclusive participation be developed. The role of the RECs and the African civil society in implementing the framework was also discussed. It was further recommended that the role of the AU organs in the implementation of the ATJF be further expounded. It was desired that the common principles as identified in the framework would underpin all efforts on TJ on the continent.

At the close of the consultation, participants agreed that consensus had been reached on the ATJF including underlying principles of the framework and key issues such as the role of regional and national courts, sexual violence and reparations. The experts agreed that the drafters of the framework would incorporate the issues emerging from the consultation into the final ATJF document.

1.0 Introduction

From 29th to 31st August 2013, a three-day expert consultation to review the African Transitional Justice Policy Framework (ATJF) was held in Nairobi, Kenya. The consultation was a collaborative effort between the Centre for the Study of Violence and Reconciliation (CSV) and the Department of Political Affairs of the African Union Commission (AUC).. In attendance were representatives from the following African Union organs and institutions: African Commission on Human and People's Rights, the Pan African Parliament, the African Court on Human and People's Rights the AU Anti-Corruption Board and the African Union Commission Department of Political Affairs. Also in attendance were members of civil society, academics, partner organizations and human rights experts.

The consultation was a continuation of a series of previous consultations on transitional justice which took place on 29th -30th April 2011 in Banjul, the Gambia; a consultation on Transitional Justice in Africa held by the Department of Political Affairs of the African

Union Commission (AUC) in Cape Town, South Africa on 12th –13th September 2011; a reference team meeting to review the draft ATJF held in Lome, Togo, on 5th - 6th August 2012 and the Expert’s Consultation on the Africa Transitional Justice Policy Framework held in Irene, Pretoria on 12th -13th March, 2012.

2.0 Background

As part of its thematic reflections on issues relevant to conflict prevention, and as a contribution to the 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 in 2009 commissioned a report on non-impunity (entitled ‘Report on Non-Impunity, Truth, Peace, Justice and Reconciliation in Africa: Opportunities and Constraints’).

The report recommended 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. This led to the process of the development and adoption of an Africa Transitional Justice Policy Framework.

To this end, 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 in March, 2012. Its objective was to review the draft ATJF and, where appropriate make specific recommendations to improve the structure, scope and content of the framework. A second expert’s meeting was held in Lome, Togo in August, 2012. It further reviewed the draft ATJF and incorporated more detailed provisions. The expert consultation held in Nairobi in August, 2013 was therefore intended to make the final input into the ATJF development process.

Values and Principles of the ATJF
The African transitional justice Framework is a policy to address African concerns through a holistic approach, which takes into account the particular context, cultural nuances and value systems of the continent. It 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 includes and promotes 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.

3.0 Objectives of the Consultation

The key objectives of the consultation were highlighted as follows:

- To revisit the guiding principles of the ATJF
- To make final input into the ATJF drafting process
- To achieve consensus on the way forward

4.0 Overview and Reflection of progress made

Issues for consideration

In revisiting the rationale for a continental transitional justice policy framework and the progress made so far, the consultation discussed the details of the impunity report and the context in which it had been presented. It was noted that the report had recommended that Africa be proactive and prescriptive and as a result the idea of the ATJF was born with the intention of creating a framework that is context specific and reflects the spirit of complementarity. The ATJF was therefore intended to address impunity and enhance accountability within the broader issues of governance, democratic reform and African responsibility.

It was noted that while these principles are embedded in other instruments and frameworks it was envisioned that a stand-alone framework would articulate the principles more clearly and comprehensively. A re-statement/re-iteration of key rights based statements and values of African accountability were required. This was in light of challenges in governance, new and protracted conflicts on the continent. It was highlighted that TJ and HR issues had previously been accorded secondary positions in the peace and security agenda. The ATJF was therefore considered a halfway point in addressing the tension between international and local mechanisms on peace and justice. The experts reviewed the key constitutive elements of an African Transitional Justice Policy Framework as essential in achieving sustainable peace and development on the continent.

Main Recommendations/ Proposals:

In discussing what was uniquely African' about the framework, expert's agreed that the following factors were critical;

- ❖ The introduction chapter of the policy document should be an outline of the fundamental issues of concern and emerging lessons on transitional justice in Africa. This will guarantee the inclusion of African experiences and incorporation of lessons learnt
- ❖ The policy framework should be broad enough to be amenable to context-specific tailoring to meet member state's unique needs.

- ❖ The issue of local ownership and a clear definition of local participation including the importance of the local context should be highlighted
- ❖ The framework should adopt a victim centred approach rather than focusing on perpetrators
- ❖ An acknowledgement that African systems prioritise reconciliation over punishment and have over the years developed creative ways that reflect this approach.
- ❖ The need to capture the values that are central to different African cultures on key issues such as reparations for victims.
- ❖ The need to reflect further on important aspects of the African value system

The experts further agreed that a set of common concepts and principles around TJ can form the basis from which to balance the imperatives of peace and justice in conflict. It was noted that for legitimacy, the desire to deal with impunity and enhance reconciliation in the ATJF had to remain consistent with international standards/norms. This was to be achieved while taking into account the historical and situational aspects that the framework sought to deal with such as the '*Peace .vs. justice*' dilemma. It was further reiterated that there was need to codify lessons learnt from various TJ experiences in Africa. With the general starting point that peace must come first, the challenge remained how to institute a new TJ institutional framework that took into account the pillars of truth, justice, reparations and non-recurrence.

4.1 International Prosecution of Crimes

The main legal issues discussed at the expert's consultation with respect to the International prosecution of crimes centred on the following issues;

- ❖ Complementarity
- ❖ Universal Jurisdiction
- ❖ State immunity
- ❖ Exclusion from trials
- ❖ Locus of trials
- ❖ Deferral
- ❖ Domestic prosecution of international crimes
- ❖ Amnesties (despite the prohibition of amnesties by the UN there are more de facto amnesties since then) they are seen as pre requisites for reconciliation.
- ❖ The effectiveness of Truth Commissions including mandates and the effective implementation of their recommendations.
- ❖ The prosecution of economic crimes as crimes against humanity.
- ❖ Reparations for victims including issues of funding, building a link between development & reparations (particularly in economically weak states), moral and collective reparations.
- ❖ Integration of local culture and traditions as well as existing community processes
- ❖ How to adopt a victim centred approach
- ❖ How to deal with the fallout after legal justice?
- ❖ Peace vs. Justice

- ❖ Will the policy framework deal with the root causes rather than focusing on non-repetition?

4.2: The International Criminal Court (ICC) & Africa

Issues for consideration

In debating this issue, it was agreed that an African understanding of justice that is broader than legal justice and includes socio economic issues and root causes was required. The role of the ICC within such a framework was explored. The emergence of a new role for regional courts in the prosecution of international crimes through the draft protocol to empower the African Court on Human and People's Rights (AfCHPR) with criminal jurisdiction was a key development in TJ.¹ Questions were raised as to how these courts would deal with issues of corruption, economic crimes and witness protection.

A panel of experts provided key updates on recent ICC cases/judgements. It was acknowledged that the role of the ICC in norm changing needed to be captured in the ATJF. However, since 2009 (*Al Bashir* case) there had been a marked stalemate between the AU and the ICC. It was considered important to take this into consideration in the development of the ATJF. A key challenge noted was the fact that in practice, parties and non parties to the Rome statute debated or coalesced around the AU and UNSC on matters before the Court.

A case in point was the *Kenya Case* in which the AU had taken a hard stance including contemplating a mass withdrawal by African States from the Rome Statute which had resulted in a vote (53-1) for exit from the court. The stalemate continued including on the selection, investigation, timing and venue of the court's cases. Here it was noted that the AU had petitioned the ICJ to rule on the contentious issue of the immunity of heads of state and senior officials. The debate as to whether the court was subject to the international system and politics continued to take centre stage. The consultation debated the contemporary issues that the ICC debate presented in Africa including country specific scenarios.

Key emerging issues in this debate included the politics of international justice, questions on the immunity of Heads of State and Senior officials, the principle of Complementarity, extended/ new crimes, the sequencing of peace and justice, strategies for ensuring co-operation and enforcement of the ATJF as well as the role of civil society in the framework.

Main Recommendations/Proposals

- ❖ The expert consultation explored the role of civil society in the ICC processes and it was agreed that specific efforts be formulated to engage, involve and include African civil society, including non-governmental organizations, professional and trade

¹ There is a proposal that The AU and its Member States negotiate and adopt a lean legal instrument, by way of a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which will grant a new international criminal jurisdiction to the envisaged African Court of Justice and Human Rights

associations to understand, engage and therefore support and improve the emerging governance, human rights, peace and security architecture of the AU and the RECs in Africa, including the specific place of international courts therein.

- ❖ It was agreed that while the expansion of the jurisdiction and mandate of regional courts was welcome, it was key that the issue of complementarity be considered. Here, it was important to adopt strategies that moved from legal complementarity to complementarity of actions and modalities.
- ❖ How do we ensure that the ATJF has the level of force as a serious framework? It was agreed that a consultative process would enhance the legitimacy of the ATJF and ensure that it constituted a significant contribution to the global justice system.
- ❖ It was noted that while African HR system prioritized restoration/reconciliation over prosecution there was need to ensure that the norms and standards of International law were not diluted.
- ❖ The ATJF provides a platform to address the impunity gap that was usually left by the few high profile prosecutions normally carried out under the international law framework.
- ❖ There exists a need to guide states on development of implementation mechanisms – only 4 countries have explicit African Court implementation mechanisms. In this way, regional legal systems could be useful to strengthen national systems including a mechanism that allows civil society to file cases directly under article 34 (6) of the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights (Protocol on the African Court). National Human Rights Institutions should be enabled to file cases before the African Court.

5.0 Building consensus on the thematic areas

5.1 Regional courts, hybrid courts and domestic chambers

Issues for consideration

In discussing the role of Regional courts, hybrid courts and domestic chambers it was noted there is potentially a role to play in TJ for the RECs. Regional courts include the ECOWAS Court of Justice, the SADC Tribunal and the East African Court. Hybrid courts such as that of Sierra Leone were discussed as well as new/recent judicial mechanisms including that of the case of Hissène Habré². Key new developments in the arena of prosecution had also included the introduction of new chambers in Uganda³ and Kenya⁴ that were equipped to

² The African Union and Senegal reached agreement on the court plan in the Hissène Habré case marking a turning point for justice in Africa. The Chambers’ statute provides the framework for a trial that could indeed be a transformative moment for African justice. It will be the first time that the courts of one African country try the leader of another country for alleged human rights crimes. The African Union, which played a key role in pressing for the trial, will appoint the presidents of the trial and appeals courts from other African countries. Even more important, Habré’s victims will participate in the case as civil parties, presenting witnesses and evidence, with the right to seek compensation.

³ The International Crimes Division is a special Division of High Court of Uganda was established in July 2008.

⁴ Kenya recently launched the International Crimes Division (ICD) of the High Court of Kenya in Nairobi. This is in line with the enactment of the International Crimes Act for Kenya, Act No. 16 of 2008. Kenya’s High Court under Section 8 of the International Crimes Act has the

try crimes against humanity. Of particular interest to the experts was the emerging role of regional courts in prosecuting war crimes and crimes against humanity. Developments within the Constitutional Court in South Africa as regards the SADC tribunal were also noted as advances in prosecution of crimes on the continent.

It was noted that the normative framework for these courts existed under the African Charter on Human and People's Rights (ACPHR). The challenge remained how to exercise complementarity between regional courts and the ACPHR especially with regards to the court's capacity to deal with individual criminal responsibility as well as balancing political interests.

Main Recommendations/ proposals

- ❖ The proposed expansion of the jurisdiction of the (envisaged) African Court to include serious crimes of international concern, including genocide, crimes against humanity, war crimes, unconstitutional changes of government and possibly other crimes was seen as a welcome development. It however required political will for effective enforcement.
- ❖ The African system must correspond to the international system and take note of the minimum international standards and norms.
- ❖ Complementarity - how can national, regional and international courts work together to ensure they achieve TJ objectives. There is need for investment in ensuring these entities are synergized.
- ❖ Development of a structure that outlines the hierarchy of courts on the continent clearly. RECs Courts should be the Court of first instance and then referrals or requests made to higher courts; complaints are sent to the regional courts after having exhausted local remedies.
- ❖ The establishment of a proposed African legal fund to provide legal aid/support
- ❖ A focus on restorative justice vs. criminal justice that speaks to the core understanding of justice in Africa and explores whether in Africa reparations and development programs can be part of the solution.
- ❖ Does complementarity mean wholesale adoption? There must be room to consider elements from the African system that can be added to the jurisprudence as of the Rome Statute.

5.2 Transitional Justice Mechanisms and Truth Commissions

Issues for consideration

In examining the role of Truth Commissions (TCs) in Africa, participants agreed that TCs are necessary. However, they require clear mandates, sufficient resourcing and political will to be effective. It was noted that the TC processes should be inclusive and also have a focus on marginalized communities. The issue of how the report/findings are handled and linked to other issues such as prosecution was discussed extensively. It was noted that there had been instances on the continent where TC reports had been deliberately delayed, names expunged and good recommendations had gone unimplemented.

The possibility of complementing TCs with other mechanisms such as larger community dialogues to ask citizens what they consider as the appropriate forum/method was deliberated. Experts agreed that indeed truth-seeking can be achieved through other methods as long as these reflected national ownership and solutions. Making the links between TCs and executive, parliamentary and judiciary systems remained a challenge in most situations.

Main Recommendations/Proposals

- ❖ Truth Commissions should be linked to past national enquiries and other legal systems such as courts.
- ❖ There should be a clear plan for the implementation of TCs reports.
- ❖ Disclosure is important and the TC reports should be made public
- ❖ Protection of victims should be prioritized.
- ❖ Issues of powers of TCs, mandate, timing and access to the commission should be considered carefully.
- ❖ The possibility of responses such as reparations and follow up of the recommendations of the reports/ findings by civil society or the African commission should be explored.
- ❖ The ATJF can suggest that recommendations of TC recommendations are actionable in courts of law.

5.3 Gender Justice

Issues for Consideration

This session sought to explore how TJ processes in Africa had incorporated gender as well as how the gains with regards to gender justice made in other processes could be incorporated into the ATJF process to enhance gender justice on the continent. Discussion centered on the issue of mainstreaming gender in the framework versus addressing the issue through a separate clause.

The discussion however noted that reference to traditional African values may also be problematic in so far as such traditions are patriarchal. Here, it was agreed that TJ cannot be treated in a gender neutral manner and if gender was not highlighted the inherent bias in how women are treated in these processes would continue. It was agreed that while engendering reparations was critical, issues of class needed to be factored in such as the fact that 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 also needs to be acknowledged: if the transitional moment is not seized, and support provided to implement gender reforms, then gender inequalities will persist.⁵

Main Recommendations / Proposals

- ❖ Gender issues mainstreamed throughout the ATJF
- ❖ A paragraph on gender justice in the introduction of the framework to be maintained
- ❖ A specific focus on SGBV to be maintained in recognition that sexual violence produces key challenges – e.g. investigation, court processes, women friendly processes, enabling legislation, etc.
- ❖ The issue of gender justice needs to be followed up through further and more detailed guidelines after the passage of the ATJF
- ❖ The underlying factors that affect the effective participation of women in TJ – including roles, power relations etc. to be considered by the ATJF
- ❖ Sexual violence against men and boys to be recognized in the ATJF

5.4 Socio-Economic Rights and Economic Crimes

Issues for consideration

The meeting explored the current definition of socio-economic rights and economic crimes as well as how they are handled on the continent. Of concern was the issue of prioritizing prosecution to the detriment of reparations. Here the issue of whether reparations should be individual or collective was discussed.

Participant's also debated whether it was possible to continue to separate reparations from mainstream development and how to address lost opportunities occasioned by conflict/crisis. It was reiterated that the link between TJ and development must be emphasized so that at the phase of nation building and reconciliation, reparations programs – both individual and collective – are acknowledged as key national priorities,

⁵ A separate report on gender justice had been commissioned and its recommendations would be incorporated into the ATJF.

adequately budgeted for and political will mobilized for their implementation. 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.

Main Recommendations/Proposals:

- ❖ Economic, social and cultural rights (ESCR) be treated as a separate issue to reparations and development in the ATJF
- ❖ The need to make mention of different forms of violations and legacies: Slavery; Colonialism; Land tenure systems since colonialism.
- ❖ Benefit sharing - the lack of it for communities
- ❖ While colonialism and slavery cannot become a scapegoat for the failings of current leadership on the continent, it is important to appreciate the continued impact of these legacies on current country situations. (Note emerging jurisprudence on colonial responsibility e.g. the *Mau Mau* case that has resulted in compensation of freedom fighters by the British Government).
- ❖ Economic, social and cultural rights should be anchored in existing legal frameworks but extend their boundaries to include for example, the concept of human security and be reflected in the African Charter on Democracy, Elections and Governance (ACDEG) and the African Public Service Charter.
- ❖ The ATJF should take into consideration the systematic under-development of specific regions by States and propose recommendations to States on how to resolve this as well as avert further violation of rights
- ❖ It is important to make States accountable for their agreements relating to natural resources
- ❖ Where remedies have been prescribed there is a need to see whether they have reached their ultimate/desired result e.g. Zimbabwe land program;
- ❖ There is need for more detailed and factual information on the impact and full spectrum of economic crimes;
- ❖ There is a need to address contemporary issues relating to trade and debt such as illicit capital flows.
- ❖ In tackling issues related to corruption consideration should be given to those that give and those that receive or solicit bribes, in other words investors should be seen as potential facilitators or active participants in corruption. Some potential remedial actions could include blacklisting errant investors or organizations.
- ❖ Legitimate ownership as opposed to legal ownership to address historical injustices
- ❖ Asset recovery; including African artifacts in European museums

- ❖ Need for continental responses to international issues e.g. jurisprudence on violations by multinationals e.g. in the area of the environment
- ❖ Addressing the right to employment, the possibility of preferential arrangements that ensures a reciprocal benefit to the State.
- ❖ Addressing the question of the diaspora and the Socio-economic aspects of citizenship and migration
- ❖ Contemplating cultural rights and practices when undertaking some TJ related activities e.g. exhumations
- ❖ Ensuring sufficient recognition of cultures within the national identity e.g. Northern Nigeria, South Sudan, and Mali
- ❖ Addressing the economic and cultural destruction occasioned by conflict when considering redress options e.g. life of those who grew up in IDP camps in Northern Uganda, cut off from their culture for about 20 years, not even knowing the value of land. Factoring in the process of readjustment and fitting back into the society.
- ❖ Are socio-economic justice issues sufficiently catered for during integration considerations?
- ❖ Do we want a continental narrative? A continental identity? Perhaps declassifying records from former colonial states- perhaps at the AU level?

5.6 Amnesty

Issues for consideration

On this critical issue it was noted that amnesty was often considered to be in conflict with other TJ processes and as such was often a contentious area of debate. There was general disapproval of blanket amnesty, especially for crimes that are considered to be international crimes. The AU position was that peace should come before justice. Participants discussed whether amnesty can lead or contribute to justice?

The ATJF was in keeping with the definition of amnesty as not premised on impunity but rather an acknowledgement of its potential contribution to reconciliation (Geneva Convention). It was therefore considered progressive jurisprudence to offer conditional amnesty as it was clear that the practice showed that amnesty is indeed important as a pre-requisite for justice and in some instances the handing over of power. It was however noted that the lack of a clear legal definition of amnesty had resulted in different applications and approaches with regards to aspects such as forgiveness, pardons, plea bargaining, etc.

Main Recommendations/Proposals

- ❖ No major deviation from the current treatment of conditional amnesties in the policy framework is required.
- ❖ De jure and de facto amnesty – just because an amnesty is granted does not mean there is no room to prosecute further down the line
- ❖ Need to distinguish between those who bear ‘the greatest responsibility’ and those that are low rank and file
- ❖ Need to strengthen the link between amnesty, truth-telling and other forms of accountability
- ❖ 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.
- ❖ Who do you give amnesty? The issue of the immunity of Heads of State and senior officials? What of heads of rebel groups and other non-state actors?
- ❖ Need to distinguish amnesties from pardon, and plea bargaining (as had been clearly outlined in the deliberations of previous consultations on the ATJF).
- ❖ Recognition of amnesty on an individual basis and in context of mass violation – and there are differences, so there is either a de facto or legal amnesty

5.7 Reparations

Issues for consideration

In discussing reparations it was noted that there was a need for clarity in the definition of actors or those responsible for remitting reparations for example were they individuals, other countries, institutions or corporate entities. This would expand the discussion to include actors other than the state. The issue of personal responsibility was discussed including whether an individual who had been granted amnesty could give reparations. It was reiterated that these programs should be linked with development and be designed in a way that ensures that they do not create more inequalities for people who were already victimized.

Main recommendations/Proposals

- ❖ Need for prioritization of reparations (urgent, mid- term, long term).
- ❖ Reparation programs should prioritize the recognition of the social/cultural harm done to communities and consultations with victims are key.
- ❖ The ATJF can explore the possibility of expanding ‘reparations’ to encompass acknowledgement, apologies, memorialization, retrieval of reputation, restoration of dignity, etc. Thereby maintaining the moral/symbolic element.

- ❖ An expanded approach to apologies to ensure that there is a connection with other sectors e.g. corporates and that the apologies are linked with the ATJF principles.
- ❖ Need for proper assessment of the needs of victims to ensure the suitability of reparations.
- ❖ State should primarily fund reparations.
- ❖ The link between reparations and development should be clear
- ❖ There is need for concrete wording on reparations in the ATJF
- ❖ Unidentified aspects of the transition period should be covered by reparation programs – e.g. trauma.
- ❖ State should address the vulnerabilities that allow for that violence to happen (with special reference to SGBV).
- ❖ Reparations programs should not have a time limit.
- ❖ Collective forms of reparations and links with other programs that government has.

6.0: Funding TJ processes

Issues for Consideration

Expert's at the meeting agreed that access to resources is a key determining factor of the success of TJ programs at all levels - national, regional, continental. The high cost of the processes was noted with example of the estimated costs of the ICC (\$177 million) the ICTY (\$1 billion) and the cost of truth commissions (from \$450,000 to \$15 million).

With specific regard to the ATJF, the prospect of securing funding for the framework was discussed. It was noted that it had been the practice that international processes attracted more funds as compared to reparations programs.

It was noted that the AU Peace Building Fund was mainly externally funded yet there was need for African states to support the ATJF as a show of solidarity, self-reliance and ownership. In this regard, the AU has the collective capacity and should utilize its rights - where there is a gap external actors can assist. UN Charter Chapter 8 Article 52 provides that the UN Security Council should assist and encourage regional organizations to achieve these aims.

Main Recommendations/Proposals

- ❖ ATJF should be incorporated into national budgeting processes
- ❖ There should be a minimum amount of money that states should contribute to the framework
- ❖ Private financing and consolidated funding should be explored

- ❖ Reparations related to land/ natural resources can be linked to capital intensive and high profit yield activities such as mining, etc.
- ❖ AU should consider fundraising for the ATJF the way that they do for humanitarian crises
- ❖ Use of levies/ taxes
- ❖ A consolidated budget that combines TJ and Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) processes can be developed
- ❖ Voluntary funds for African citizens can be solicited
- ❖ A 'Marshall plan' (proposed large-scale rescue program) similar to that of the US in the 1940's can be developed to fund the ATJF
- ❖ A TJ continental Trust fund can be put in place and can benefit from asset recovery from economic crimes and reversal of illicit financial flows
- ❖ Political commitment and sense of responsibility will result in sustainable funding.
- ❖ After passing the Framework, it should have a funding plan that is forward looking and itemized. This should be the result of a separate exercise to determine budget lines and costing.
- ❖ The ATJF should contain a clause about a commitment from the AU and member states to the process. As a principle – preamble says that this is an Africa owned framework.
- ❖ A committee on the issue of funding the ATJF is established.

7.0 WAY FORWARD

Experts agreed that consensus had been reached on the underlying principles of the framework and key issues of the policy document. It was desired that the common principles as identified in the framework would underpin all efforts on TJ on the continent.

The AU and CSVR reiterated their commitment to promoting transitional justice on the continent including through the ATJF. The process was seen as timely and had received a lot of support and interest from member states and relevant stakeholders. The level of coordination was commendable and the consultation had resulted in fruitful deliberations and final input into the framework.

The expert's consultation agreed that the drafters of the framework would incorporate the final recommendations and proposals from the consultation as captured in the deliberations and this report. The next step was to fine tune the framework and complete the process by 2014 after which a roadmap for implementation would be developed.

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Technical Experts' Consultation to
Review the African Transitional Justice
Policy Framework (ATJF) Agenda
Venue: Eka Hotel Nairobi, Kenya
Date: 29th – 31st August 2013

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