

## The African Union Transitional Justice Policy: The missing sixth pillar of the African Peace and Security Architecture

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### Introduction

The adoption of the African Union Transitional Justice Policy (AUTJP) in February 2019 was a momentous step on the part of the African Union (AU) in delivering on its mandate to end violent conflicts on the continent and ensure sustainable peace. The policy is a decisive move by the AU to use context-specific transitional justice (TJ) mechanisms to address nation-building and reconciliation in the aftermath of violence and mass atrocities on the continent. However, for the policy to gain an enduring foothold in Africa, it needs to become the guiding normative framework as the sixth legal pillar of the African Peace and Security Architecture (APSA). This TJ pillar will thus work in conjunction with other vital AU organs at all levels. As part of this work, context-specific TJ processes will be disseminated to the various Regional Economic Communities (RECs) and Regional Mechanisms (RMs) which will, in turn, inform and support country-specific proceedings. This encourages a feedback loop into the rest of the APSA pillars, such as knowledge-gathering by the Continental Early Warning System (CEWS), mediation by the Panel of the Wise (PoW), and decision-making by the Peace and Security Council (PSC) in terms of its overall mandate in this regard.

Given the increasing cyclical nature of conflict on the African continent, the AU adopted the

AUTJP.<sup>1</sup> The AUTJP is designed to fill a gap identified by the AU Peace and Security Council's PoW in its 2011 report originally entitled, 'Non-Impunity, Truth, Peace, Justice, and Reconciliation in Africa: Opportunities and Constraints'.<sup>2</sup> The findings of the report highlighted fundamental issues regarding how member states dealt with, and shared experiences of, transitional justice. This laid the foundation for the development of a TJ policy for AU member states, a process largely spearheaded by civil society, notably the South Africa-based Centre for the Study of Violence and Reconciliation (CSVR). This was mostly a collective effort directed towards combating impunity by ensuring that AU peacebuilding efforts addressed matters of justice, reconciliation and healing in the aftermath of violent conflict and systematic and gross human rights abuses.

The role of the AU on the continent cannot be overstated given the predominance of various conflicts across the region. To combat this phenomenon, APSA was assigned the mandate of ensuring the prevention, management and resolution of election-related conflicts and political violence. This organ consists of several pillars that cooperate in addressing issues such as civil unrest, genocide and ethnic cleansing, as well as political violence and related electoral violence.

## The African Peace and Security Architecture

As a first step in ensuring the commitment of the newly founded AU and in delineating its role, the Protocol Relating to the Establishment of the PSC of the AU was adopted in 2002, which outlines the various components and responsibilities of APSA.<sup>3</sup> APSA serves as the organisational structure mandated to 'anticipate and prevent conflicts', and to undertake peacemaking and peacebuilding through diplomatic and coercive means.<sup>4</sup> As one of the chief mechanisms of the AU's institutional structure, APSA was founded on, and informs the basis of, the AU's 2002 commitment to non-indifference, a commitment that makes it responsible for intervening in the internal affairs of member states in situations of impunity and human rights violations, including imminent threats to peace, security and stability on the African continent.

APSA supports the AU's mandate to intervene in conflicts. It provides the AU, the RECs and the RMs with all the support necessary to fulfil the tasks and carry out the mandate as set out in the Constitutive Act of the AU and the founding protocol of the PSC. All the processes of the AU with regard to conflict management are implemented through APSA. The primary responsibility of APSA and its associated pillars has been to resolve conflicts, and most of this

work has been done through mediation. APSA consists of five pillars. These pillars are:

- The PoW, which is tasked with taking on preventive-diplomacy missions by engaging in conflict mediation and brokering peace agreements between warring parties;
- The CEWS, which is responsible for the timely collection of information on evolving conflicts in order to anticipate and prevent conflicts on the continent;
- The AU Peace Fund (AUPF), which is the principal instrument for financing the peace and security endeavours of the AU on the continent;
- The African Standby Force (ASF), which is a multidisciplinary peacekeeping force with military, police and civilian contingents mandated to intervene in a conflict at the request of a member state; and
- The PSC, which is the key pillar of APSA and the apex decision-making organ of the AU for the prevention, management and resolution of conflicts on the continent.

A yawning gap remained in this APSA structure with respect to justice needs and healing components after the resolution of conflicts. However, the AUTJP is aptly configured to fill this gap.

## The African Union Transitional Justice Policy

According to the AUTJP, transitional justice:

*refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.*<sup>5</sup>

The rationale underlying the AUTJP is to outline a TJ process that will allow governments, faith leaders, community leaders, and society at large to come together as a transitional force before, during and after conflicts in order to ensure justice, equality and dignity for a country and its people in the future.

Human rights and transitional justice are significant areas of concern in all post-conflict societies. Human rights are an essential consideration in enforcing peace agreements, protecting refugees and internally displaced persons, ensuring capacity-building in respect of civil society so that that leaders may be held accountable, and in the establishment and functioning of truth and reconciliation commissions (TRCs). The primary goal is to transform patterns of destructive relationships into constructive and healthier patterns of interaction, cooperation and coexistence. Since the 1990s, various forms of TJ processes have been implemented in different African states, including Angola, Algeria, Burundi, Chad, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Ethiopia, Ghana, Kenya, Liberia,

Mozambique, Nigeria, Namibia, Rwanda, Sierra Leone, South Africa, Sudan and Uganda. The TJ processes employed in an attempt to heal and move these post-conflict nations forward include criminal justice trials, TRCs, and bargaining for amnesty between victims and perpetrators.<sup>6</sup>

Transitional justice is crucial in order to address the legacies of past injustices and human rights violations as a conduit for building sustainable peace. 'Transitional justice embodies an attempt to create ... sustainable peace after conflict, mass violence or systemic human rights abuse.'<sup>7</sup> The field encompasses not only state-building or stabilisation activities, but also activities that aim to strengthen the social fabric of society, rebuild trust

and bring about cohesion. The adoption of the AUTJP allows the continent to address the various implementation gaps that have occurred with regard to how individual, post-conflict states put into effect TJ processes. This is evident in cases such as that of Uganda where political elites under President Museveni, in order to garner international donor funds and validation, agreed to implement substantive TJ mechanisms with no intention of moving forward in respect of their obligations.<sup>8</sup> One minister even went so far as to state that 'it is important to dress these justice things up for international credibility'<sup>9</sup>. Actions such as this have led to the slow enactment of TJ laws, to the extent that such laws are seldomly implemented, or, when they are, being poorly executed.

## Recommendations

1. The AUTJP should be adopted as a treaty of the AU and, in essence, become the sixth legal instrument of APSA. It will then constitute the cornerstone of the AU's emerging African Justice Architecture.<sup>10</sup> This would place responsibility on the AU to intervene and implement the organisation's protocols on transitional justice rather than merely make recommendations that are left to member states to adopt or reject. It would also result in the AUTJP becoming a binding AU protocol on all TJ processes. For sustainability and consistency in applying transitional justice, the AU has to take the lead. Although a context-based approach will inform every TJ process of a member state, there needs to be continuity and consistency in how the process is rolled out. This can only be achieved if transitional justice is a core function of APSA, that is, if, as stated in the AUTJP, there are 'strategic proposals for the design, implementation, monitoring and evaluation of African TJ processes'<sup>11</sup>. The key emphasis, here, is that the document is a proposal and that its impact will not be complete until it becomes the guiding principle of the AU's Protocol on Transitional Justice across the continent.
2. The mandate in terms of the AUTJP should be delegated via the RECs, which can then act as conduits through which the continental protocol on transitional justice is communicated, and by means of which it is aligned to regional and country contexts. The proximity of the RECs to member states increases the possibility of uptake of the AUTJP principles and makes it more likely that compliance will be directed and monitored.
3. Key to the elevation of the AUTJP is the PoW. An advocacy role for the PoW is essential in order to effectively promote and reinforce guiding principles on the rule of law and transitional justice across the continent. In the last decade, for instance, the PoW has contributed to resolving several conflict situations in the region. Entities similar to the PoW exist at the REC level, which makes for a continuous chain of fact-gathering. As an organ tasked with preventive diplomacy and mediation, and given its role of diplomacy and experience in interlocution, the PoW should act as the 'champion' and key change-maker with regard to transitional justice on the African continent. Championing transitional justice would align with African values and would be based on the African tradition of mediation that is entrusted to elders. Through the intelligence gathered by way of the CEWS and the Early Warning Systems (EWSs) of the various RECs on country-specific conflict triggers and affected parties, information can be collected timeously with the aid of the PoW and be fed into the AU TJ database.
4. A knowledge-based strategic communication and advocacy network or community of practice in pursuit of transitional justice wherever it is needed is imperative for

compliance with the normative guidance provided in the policy. A sprawling network of information-gathering, including indigenous-based conflict-resolution mechanisms across the spectrum, is a must for the successful implementation of TJ policy. Information and communications technology (ICT) platforms will be essential for the quick dissemination and sharing of intelligence and relevant information across the CEWS, the EWSs and the RECs.

5. A study on the gendered nature of truth and peacebuilding found that the involvement of women in civil society groups and peace negotiations makes the resulting peace agreements 64% less likely to fail.<sup>12</sup> Centralising the AU's transitional justice in the form of a sixth pillar to APSA would ensure that all TJ processes delegated to the various RECs and member states would stay true to the need for including women in framing context-specific TJ processes. This would determine, and standardise, the terms of reference relating to what constitutes a human rights crime (e.g. what constitutes sexual violence), as well as ensure that women have

meaningful roles in peace negotiations, in peace agreements, and in determining what a peaceful future for a state would embody. Women, children and other vulnerable groups are also the worst affected by any conflict. Sudan's conflict in Darfur, for instance, reveals how women are systematically raped, killed and displaced – and it is these women who are also tasked with the heavy burden of 'picking up the pieces' once the conflict has subsided, of rearing children, and of sustaining livelihoods under dire circumstances. Regardless of this, women are still largely absent from peace processes. For example, Sudanese women played a pivotal role in the pro-democracy protests that forced former President Omar al-Bashir to step down in April 2019. Now, these women find themselves sidelined and almost entirely excluded from peace and transition negotiations in Sudan. A gender-sensitive AU TJ process fills the gap, marked by the many missed opportunities, for fragile countries to achieve lasting peace, as it addresses the perspectives, needs and concerns of women and other vulnerable groups.

## Conclusion

The AUTJP is indeed a game-changer, as it has the potential to move Africa in the direction of sustainable peace and development. However, in its current form, it does not make it mandatory for member states to implement TJ processes according to its principles and propositions. For member states to comply with it, the AUTJP should not be a mere policy but ought to be converted into the guiding framework for the establishment of the sixth legal instrument of APSA and become the central organ informing the AU's emerging justice architecture. This sixth pillar will be the central organ of the AU dealing with transitional justice, will be mandated to ensure the resolution of past violent conflicts on

the continent, and will be binding on all member states. This organ will work in tandem with all other pillars of APSA – particularly the PoW, the EWSs and the CEWS, the RMs, and the RECs – in order to achieve the resolution of conflict, mass human rights violations and state repression. Making transitional justice central to the peace and security mandate of the AU will ensure the consistent and unbiased implementation of TJ processes by member states. In this way, the AU will strengthen its position with regard to guaranteeing peace, justice and reconciliation on the African continent.

## Endnotes

- 1 The African Union Transitional Justice Policy (AUTJP) was adopted on 12 February 2019 at the 32nd Ordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia.
- 2 Now entitled 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity'.
- 3 African Union (AU), Peace and Security Report, 2012:1.
- 4 Cited in the Protocol Relating to the Establishment of the Peace and Security Council (PSC) of the AU, Articles 2, 3(b) and 6.
- 5 AUTJP, 2019:4.
- 6 Commissioner SA Dersso (African Commission on Human and Peoples' Rights), 'The State of Transitional Justice in Africa – between Wide Application and Deep Contestation'; lecture delivered at the State of Transitional Justice in Africa Continental Forum, 19–21 October 2017, Johannesburg, South Africa:2.
- 7 P van Zyl, 2005, 'Promoting Transitional Justice in Post-Conflict Societies', in A Bryden & H Hanggi (Eds), Security Governance in Post-Conflict Peacebuilding, Geneva Centre for the Democratic Control of Armed Forces: 205.
- 8 A Macdonald, 2019, 'Somehow This Whole Process Became So Artificial!': Exploring the Transitional Justice Implementation Gap in Uganda, International Journal of Transitional Justice 13:225–248.
- 9 Ibid.
- 10 'The State of Transitional Justice in Africa' (note 6 above):3.
- 11 AUTJP, 2019:2.
- 12 Council on Foreign Relations, 2019, 'Women's Participation in Peace Processes'; available at: <https://www.cfr.org/interactive/womens-participation-in-peace-processes>.

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