

## Abstract

*The African Union Transitional Justice Policy (AUTJP) 2019 was designed as a continental guide to member States of the African Union (AU) in the design and implementation of transitional justice. Before its adoption, different member States that have implemented transitional justice programmes supposedly modelled their approach after the international concept of transitional justice. The AUTJP is innovative and groundbreaking, being the first of its kind globally and incorporating principles on African transitional justice mechanisms. Thus, it would seem that the AUTJP provides a template which will assist member states in domesticating and contextualising transition justice against the background of their own experiences and the peculiarities of the African continent. While the Policy incorporates provisions on conventional principles of transitional justice, such as justice and accountability, victim-centred approaches and political and institutional reforms, it differs significantly in its interpretation of some of these principles. Given that over the years, the implementation of transitional justice by African States seems to relatively conceptualise transitional justice and the emphasis on cultural specificity and traditional justice mechanisms by the AUTJP, it is apt to examine the provisions of the AUTJP against the conventional interpretation from the international community. How is the AUTJP likely to shape the experience of African states in conflict situations or emerging from conflict situations like Sudan, Nigeria, Ethiopia or those in dire need of transitional justice? How far will the Policy influence the narratives on transitional justice in Africa? This paper aims to examine the provisions of the AUTJP in light of the conventional conceptualisation of transitional justice. The paper will adopt a doctrinal approach and consult data from primary and secondary sources. The paper argues that while there are manifest divergences from the conventional perspectives on transitional justice, the AUTJP present ample prospects for transforming the transitional justice experience in Africa. However, it will take more than mere adoption of the Policy by member states to translate the ambitious and innovative principles of the Policy into concrete realities for the peace and security structure in Africa and advance the concept of transitional justice within the African continent differently from the experience of the past.*

**Keywords:** Accountability, Peace, Reconciliation, Traditional Justice, Victims

## 1. Introduction

Transitional justice has continuously evolved in perception and scope from the time it gained prominence in the late 1980s and has become an important element in transitioning States and on the global scene<sup>1</sup> From the context of democratization to peacebuilding and development process, transitional justice has become a prescriptive phenomenon deployed in different contexts.<sup>2</sup> Despite the widening context of its application, the main idea behind the concept of transitional justice does not seem to have changed significantly. Whereas the conceptual framework of transitional justice continues to expand with expanding goals and mechanisms, the central/core ideology of transitional justice remains the same. Experiences and practices of different States have continued to define how transitional justice is conceptualised and implemented. Given the different approaches to transitional justice by different African States, the African Union (AU) saw the need to consolidate its position on transitional justice scattered in various legal documents and provide a comprehensive framework for transitional justice on the continent.

The AU adopted the African Union Transitional Justice Policy (AUTJP) in 2019 to establish continental guidelines and common standards for African States in pursuing transitional justice. The AUTJP provides policy parameters, principles and approaches to designing and implementing transitional justice along with benchmarks for each principle and element. The AUTJP is celebratory on many points. First, it is the first continental guide which tries to consolidate a common position on transitional justice globally. Second, it emphasises some of the nuances and specificity of the African context which the conventional narratives may overlook especially. It recognised African traditional justice mechanisms as an accountability measure and a reconciliatory and restorative approach to transitional justice. Third, the Policy attempts to provide an African perspective on the concept of transitional justice. Given the commendatory points of the AUTJP and its role as a continental guide, it is apposite to examine how the Policy conceptualises transitional justice, especially against conventional narratives.

The paper examines the provisions of the AUTJP and how the Policy conceptualises transitional justice. The paper analyses how the Policy is likely to frame the narratives on transitional justice on the continent. The paper is divided into five sections. The first section gives an introductory background to the paper. The second section provides an overview of the broad conception of transitional justice. The third section examines African States' approaches to transitional justice before the adoption of the AUTJP. The fourth section analyses the AUTJP's concept of transitional justice and its prominent features. The

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<sup>1</sup> Pablo de Greiff 'The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice' (2020) 14:2 *International Journal of Transitional Justice* Volume 251. Ruti G. Teitel 'Transitional Justice Genealogy' In Ruth Jamieson (ed.), *The Criminology of War* (2014) 489.

<sup>2</sup> United Nations (UN) 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence - Promotion and protection of human rights: human rights issues, including other means of enhancing the effective enjoyment of human rights and fundamental freedoms' (2021) (A/76/180) available at <<https://documents.un.org/doc/undoc/gen/n21/197/81/pdf/n2119781.pdf>> (Accessed on 19 August 2024). UN 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence - Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.' (2017) (A/HRC/36/50) available at <<https://www.refworld.org/reference/themreport/unhrc/2017/en/118856>> (Accessed on 19 August 2024). Makau Mutua 'What Is the Future of Transitional Justice?' (2015) 9:1 *International Journal of Transitional Justice* 1

section also examines the context of the Nigerian and Ethiopian transitional justice process. The fifth section gives the concluding remarks and recommendations.

## 2. The Concept of Transitional Justice

The concept of transitional justice broadly describes how a society confronts and addresses the violent or repressive legacies of the past.<sup>3</sup> The concept of transitional justice has evolved from the initial narrower conception which contextualises transitional justice in democratic transitions to the wider context of peacebuilding in situations of violent conflicts and even more, development discourse.<sup>4</sup> The conceptualisation of transitional justice has also been constricted by the perspective and context of different authors. Over time, the conceptualization of transitional justice has taken many perspectives on transitional justice. First, there is the human rights approach which seems to focus primarily on addressing the gross human rights violations of the past. Second, there is the political approach which focuses on entrenching democracy and good governance and nation-building after a period of repression. Third, there is the sustainable peace and stability approach which considers transitional justice as a mechanism for attaining sustainable peace within a society. The fourth approach considers transitional justice as a development measure to attain sustainable development within a polity. The concept of transitional justice is multifaceted, as it can be interpreted from various perspectives such as political, legal, social, and developmental. This results in a wide range of descriptions and understandings of transitional justice.<sup>5</sup> Although initially associated with periods of transition, the concept has evolved from earlier notions which strictly confine transitional justice to periods of transition and hinges on the position that there needs to be some sort of transition properly so called.<sup>6</sup> In more recent times, transitional justice has been conceptualised in periods of ongoing conflicts or repression as a means of exploring sustainable peace.<sup>7</sup>

The United Nations (UN) describes transitional justice as ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’<sup>8</sup> The UN’s definition may be described as the international notion of transitional justice. The definition captures the UN’s conception of the goals, elements, actors and mechanisms of transition. The international conception of transitional justice has influenced transitional justice processes within the African continent and continues to influence transitional justice processes. The conventional mechanisms of transitional justice include accountability measures, truth-seeking, reparative initiatives, institutional and legal reforms, etc.<sup>9</sup> The description of transitional justice by the UN shows that transitional justice entails judicial and non-judicial mechanisms or formal or non-formal mechanisms.<sup>10</sup> The goals a State seeks to achieve should determine the mechanisms it chooses to adopt. Each of the mechanisms has its goals which could range from retributive and reparative to restorative or transformative goals. The mechanisms could be channeled towards justice and accountability, truth-seeking, reparation or guarantee of non-recurrence.<sup>11</sup> Initially, the sole responsibility for implementing transitional justice was on the State through its political apparatus within the State, hence, it was not much the business of external actors or institutions. However, the growing obligations of States towards human rights and criminal accountability for egregious crimes and human rights violations under international law birth the international dimensions of transitional justice. Thus, prosecutions by international criminal tribunals were international accountability measures to implement transitional justice at the international level.<sup>12</sup>

The globalisation and institutionalisation of transitional justice processes through the involvement of external and non-state actors such as supranational organisations, Non-governmental Organisations (NGOs), international development partners,

<sup>3</sup> Colleen Murphy *The Conceptual Foundations of Transitional Justice* (2017) 5. Pablo De Greiff *Transitional Justice, Security, and Development* (2011) *World Development Report* 17-18.

<sup>4</sup> Joana Loyo Cabezedo ‘Transitional Justice: Some Reflections Around a Misunderstood Notion’ (2021) 25 *Spanish Yearbook of International Law* 70. Paige Arthur ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 3 *Human Rights Quarterly* 321. Laurel E. Fletcher, Harvey M. Weinstein & Jamie Rowen ‘Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective’ (2009) 31:1 *Human Rights Quarterly* 163. Naomi Roht-Arriaza ‘The New Landscape of Transitional Justice’ In Naomi Roht-Arriaza, Javier Mariezcurrena J (eds.) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006) 1.

<sup>5</sup> Christine Bell ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’ (2009) 3:1 *International Journal of Transitional Justice* 5. Peter Dixon ‘Transitional Justice and Development’ In Cheryl Lawther and Luke Moffett (eds.) *Research Handbook on Transitional Justice* (2023) 359.

<sup>6</sup> Thomas Obel Hansen ‘The Time and Space of Transitional Justice’ In Cheryl Lawther and Luke Moffett (eds.) *Research Handbook on Transitional Justice* (2023) 9.

<sup>7</sup> Hansen op. cit. (n.6) at 12.

<sup>8</sup> UN ‘The UN Secretary-General Guidance Note on Transitional Justice: A Strategic Tool for People, Prevention and Peace’ 2 available at <[https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023\\_07\\_guidance\\_note\\_transitional\\_justice\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023_07_guidance_note_transitional_justice_en.pdf)> (Accessed 14 July 2024).

<sup>9</sup> United Nations. “Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice,” March 2010. Available at <[https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TJ_Guidance_Note_March_2010FINAL.pdf)> (accessed 4 July, 2024).

<sup>10</sup> UN ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies 2004 (S/2004/616) 4 Available at <<https://www.unhcr.org/media/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secretary>> (Accessed 10 May 2024).

<sup>11</sup> UN ‘The UN Secretary-General Guidance Note on Transitional Justice op cit. (n. 8) at 4.

<sup>12</sup> The globalization of transitional justice evolved through institutionalized accountability measures such as prosecutions by the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively. Ruti G. Teitel *Globalizing Transitional Justice: Contemporary Essays* (2014) 5.

institutions etc. have raised some criticisms against the concept of transitional justice. It is often the case that there are Western and international interests in transitional justice process in African States hence, the assertion that transitional justice is a neo-colonialist concept.<sup>13</sup> Also, there are arguments that the active involvement of external actors could undermine a truly indigenous and effective transitional justice given the seeming top-down approach owing to the active involvement of external actors.<sup>14</sup> Contrary to such position, this study asserts that transitional justice conceptually captures how a society addresses its repressive past to serve the goals it set out. While the concept was coined and gained traction following the collapse of authoritarian rule and the rise of Western democracy in the late 1980s/early 1990s, the concept encompasses all mechanisms that States employ to address their past to ensure justice, accountability and sustainable peace. Thus, it cannot be described as a neo-colonialist concept.

Considerably, international interest and involvement may be necessary to provide capacity building as such, international stakeholders and actors may be essential for the successful implementation of transitional justice. Non-state actors may be actively or passively involved in transitional justice process by providing technical advice and assistance, capacity building and funding assistance to the State and even implement transitional justice in respect to the State.<sup>15</sup> Each State is sovereign and can define and limit external involvement in its transitional justice process to the necessary extent to guarantee an effective process and in line with its international obligations. Transitional justice is best implemented by the concerned State within its territory. However, international transitional measures such as prosecutions and reparative measures may achieve transitional justice ends in any given context. In any case, international transitional justice measures are designed to be complementary to domestic transitional justice efforts. Hence, States must still maintain the primary responsibility towards transitional justice both in design and implementation. The contention against international involvement in domestic transitional justice process was amplified by the allegations of selectivity and undue focus on African States against the ICC and the threatened mass withdrawal by African States.<sup>16</sup> The validity or otherwise of the allegations do not obviate the need for international transitional justice mechanisms howbeit, in a complementary role.

At the international level, the legal framework for transitional justice is rooted in international legal instruments which protect and promote human rights and provide for criminal accountability.<sup>17</sup> From the Nuremberg trials to the trials by international criminal tribunals like the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda, international conventions and policies have been explored as the legal basis for engaging transitional justice mechanisms such as prosecutions, especially in post-conflict contexts. International conventions proscribing gross human rights violations and egregious crimes such as war crimes, crimes against humanity, genocide, etc. formed the basis for criminal accountability by major perpetrators, in post-conflict situations. With the adoption of the Rome Statute of the International Criminal Court, the International Criminal Court (ICC) became a permanent international accountability mechanism. Regional legal provisions on matters relating to promoting peace and reconciliation, combating impunity and ensuring accountability have been explored as the legal framework for transitional justice at the regional level.<sup>18</sup> The legal framework for transitional justice measures at the domestic level is typically shaped by the specific circumstances and the pre-existing legal framework during the transition period or through the development of new transitional legal framework. Although the human rights commitment of States at the international and regional levels may also determine the legal framework for how transitional justice process is pursued, it is largely dependent on the existing or transitional domestic legal framework. Depending on the local circumstances of the State institutions and the legal landscape, States explore their criminal law provisions alongside other local legislation in line with their constitutional provisions. In extreme cases, transitional government design the legal framework for the transitional justice process.

### **3. African States' Approach to Transitional Justice**

In the last half century, States on the African continent have experienced or are still experiencing one or both of repressive regimes or violent armed conflict. Repressive regimes or violent armed conflicts occasion situations of massive human rights violations leaving a legacy of violence or repression. The repressive legacies of the past often bring about gross human rights violations, illegal killings and massive deaths, sexual and gender-based violence, torture, destruction and devastation of public infrastructure, displacement, etc. Nearly all the African States that have previously experienced some form of conflict or repressive regimes have experimented with transitional justice since the mid late ninety-nineties. While some countries like South Africa, Sierra Leone, Rwanda, Ethiopia modelled theirs after the conventional conception of transitional justice and tagged it as such, some others like Nigeria's were not so labelled. Many of the States themed their efforts at confronting and addressing the ills of the past around seeking a balance between peace and justice on one hand and on the other hand, a balance between justice and reconciliation. Transitional justice attempts by the different States show how different States conceive their

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<sup>13</sup> Stephanie Vieille 'Transitional Justice: A Colonizing Field?' (2012) 4:3 *Amsterdam Law Forum* 58.

<sup>14</sup> Zinaida Miller, 'Effects of Invisibility: In Search of the Economic in Transitional Justice' (2008) 2:3 *International Journal of Transitional Justice* 266.

<sup>15</sup> UN 'Report of the Secretary-General on the Rule of Law op. cit. (n.10) at 9, 11.

<sup>16</sup> Maxine Rubin 'Politicized Justice: Africa and the International Criminal Court' (2020) 14:2 *International Journal of Transitional Justice*, 401

<sup>17</sup> For instance, international human rights conventions such as the UDHR, ICCPR, Torture Convention, Genocide Convention and international policy documents and reports on the rule of law, transitional justice etc.

<sup>18</sup> For instance, Article 4 (o) and (h) of the AU Constitutive Act are provisions which empower the AU to intervene in situations of massive violations of human rights in member states. Also, Articles 40 - 42 of the AU Policy on Post-Conflict Reconstruction and Development (PCRD) 2006 makes provisions for the protection of human rights and the empowers the AU to develop mechanisms for addressing past and ongoing violations. Article 3 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) vests the court with jurisdiction to try gross human rights violations.

unique needs in addressing the past, how they conceptualise the 'kind' of justice their context requires and the components of justice during transition to attain the variously defined goals. This shows the varied conception of the 'type' of justice, transitional justice entails and the relativity of the modalities of transitional justice in different contexts.<sup>19</sup>

In the past, transitional justice attempts by the States could take the form of political actions through executive, administrative or judicial measures to establish accountability and remedy the violent actions of the past. These measures took the form of criminal prosecutions, truth-seeking through truth commissions, provisions for general amnesty and pardon to some perpetrators, actions aimed at addressing the conditions that made the gross violations of human rights possible and in some cases, constitutionalism. Thus, domestic transitional justice processes before the AUTJP 2019 included mainstream mechanisms such as justice and accountability measures (criminal prosecution), truth-seeking, attempted reparations, reconciliation and rehabilitation programmes, institutional reforms, vetting and lustrations. Some States explored traditional justice mechanisms but the focus was largely on the conventional mechanisms.<sup>20</sup> The approaches by different States were determined by the type of transition and the underlying circumstances of the transition.<sup>21</sup> Thus, the conventional conception of transitional justice has largely influenced how African States have perceived and attempted transitional justice. However, such perception may not have translated to how effectively transitional justice was implemented or the States' attitude towards its potential.

The notion of transitional justice from the experiences in different States seemed to suggest that States see transitional justice as optional and not a necessity during or after transition. States focus on looking forward and consider addressing the repressive past as an obstacle to progress, development and sustainable peace. This stance by States is often to the detriment of the victims of the repressive past. Where States have attempted transitional justice programmes, some States design transitional justice initiatives as a means to validate or bolster public support for the new regime or in other cases, transitional justice only appears to have succeeded halfway or on a short term.<sup>22</sup> Reconciliation is one theme that runs across all transitional justice efforts and mechanisms in the past. However, it is difficult to capture a clearly defined conception of reconciliation from the different approaches by States, given the different components States attribute to reconciliation.<sup>23</sup> Often, it would seem that States compromise on strict criminal accountability in pursuance of reconciliation-themed transitional justice.

The practice of granting blanket amnesty to perpetrators, which is often criticised, is also a common feature of the transitional justice process in many States and it is usually premised on the theme of forgiveness and reconciliation. Experiences across various African States show that the strict adoption of formal transitional justice mechanisms does not address the past adequately.<sup>24</sup> On the other hand, States cannot dispense with the formal mechanisms as they are important features of transitional justice initiatives to ensure accountability and prevent impunity. In all cases, both direct and indirect victims of the repressive past are usually at the receiving end of the State's approach, negatively. The experiences and approaches taken by different States also reveal that the focus is usually on the violations of civil and political rights violations. States often shy away from addressing economic, social and cultural rights violations. In accounting for the past, States pay little attention to historical and structural inequalities, the differentials in the impact of the past on the vulnerable group within the demography and the gendered dimensions of violence or repression.

Drawing from the experiences of various States and the need to define a continental-based transitional justice template that captures the unique challenges of African States, the AU set out to design a continental policy on transitional justice. Informed by the recommendation of the AU High-Level Panel on Darfur (AUPD) in 2008 and subsequent report by the AU Peace and Security Council in 2011, the AUTJP harmonises the AU's legal positions on the different elements of transitional justice in a single policy document.<sup>25</sup>

#### **4. The African Union Transitional Justice Policy 2019**

The African Union defines transitional justice as the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socioeconomic transformation.<sup>26</sup> The AUTJP definition make a broad description of transitional justice that evinces how the AU conceptualises, the nature, scope and the goals of transitional justice. The definition shares similar components with that of the UN. Both definitions acknowledge that

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<sup>19</sup> Joana Loyo Cabezudo op. cit. (n. 4) at 77.

<sup>20</sup> Some prominent examples of traditional justice mechanisms that have been explored in transitional justice context include the Gacaca Courts in Rwanda, the Mato Oput in Uganda, Bashingantahe (Counsel of Wise Men) in Burundi, Magamba spirit mediums in Mozambique and Fambul Tok or 'family talk' in Sierra Leone.

<sup>21</sup> It would seem that transitions negotiated based on compromises and concessions by parties were themed more around reconciliation. Transitions borne on the wings of 'conquest' tethered towards accountability and criminal justice more against the 'vanquished'.

<sup>22</sup> In post-repressive regimes in Nigeria and Ethiopia in 1999 and 1995 respectively, transitional justice attempts by the countries made little impacts with short-lived successes of truth-telling (Nigeria) and selective prosecutions (Ethiopia).

<sup>23</sup> For instance, in the South African example, it would seem that a minimalist interpretation Kai Ambos 'The Legal Framework for Transitional Justice: A Systematic Study with a Specific Focus on the Role of the ICC' In Kai Ambos, Judith Large and Marieke Wierda (eds) *Building a Future on Peace and Justice Studies on Transitional Justice Peace and Development: The Nuremberg Declaration on Peace and Justice* (2009) 24, 25.

<sup>24</sup> Egeria Nalin 'Transitional Justice in Africa: Between the Fight against Impunity and Peace Maintenance' In Giovanni Cellamare and Ivan Ingravallo (eds.) *Peace Maintenance in Africa: Open Legal Issues* (2018) 135.

<sup>25</sup> Paras 14-15 of the AUTJP.

<sup>26</sup> Para 19 of the AUTJP.

transitional justice entails judicial and non-judicial mechanisms or formal or non-formal mechanisms. However, the AUTIP ascribes a wide range of goals to transitional justice beyond addressing the past and ensuring accountability. The definition provided by the Policy considers transitional justice not only as an approach to addressing the past but also as an approach to attaining development, socio-economic justice and transformation.<sup>27</sup> Thus, while transitional justice looks backward to account for the past, it also looks forward to attain holistic transformation. The AUTJP emphasises the themes of retribution, reconciliation, restoration and restitution and attempts to incorporate a victim-oriented approach to transitional justice. The tone of the entire Policy projects reconciliation as the most prominent ideology behind transitional justice. The Policy failed to provide a harmonised position on the concept and nature of reconciliation in transitional justice contexts. Rather, the emphasis on reconciliation echoes a more liberal approach to transitional justice that must be effectively balanced in an integrated and holistic manner

The Policy emphasises the role of consultative process which is broad-based and inclusive in designing transitional justice. This provision addressed the exclusive approach of many States in the design of transitional justice. It emphasizes the role of multiple actors not just in the implementation of transitional justice process but in the process of formulating and designing transitional justice programme. Broad consultations, where effectively conducted, provide a premise for public approval and acceptance of the transitional justice process. Subsequently, it will reinforce the process of designing and implementing transitional justice programme that is strategic and integrated and more likely to capture the needs of the people, address structural issues and provide legitimisation for the transitional justice process.

In addition to addressing the repressive past within a State, the Policy conceives transitional justice as a means of implementing social and transformative justice to address divisions and structural inequalities.<sup>28</sup> This perhaps aligns with the view that transitional justice must have socio-economic impacts and achieve social justice. This perception goes beyond the conservative perception of transitional justice. While there are authors who hold the view that transitional justice should have socio-economic aims, the controversies which trail the practical application of the view deny it overwhelming support.<sup>29</sup> Given the struggles some African countries have had with transitional justice processes in the past, it would seem overambitious to stretch the concept of transitional justice to accommodate socio-economic issues. While it is ideal that transitional justice processes address divisions and inequalities related to the repressive/violent past, extending the elements of transitional justice process to redistributive justice in all contexts may be ideating. The experiences of States show that such a goal is usually unattainable in the first instance. Nonetheless, there are possibilities that well-designed and implemented transitional justice programmes may achieve a measure of social and transformative justice.

The Policy aligns with the notion that transitional justice need not be associated with periods of transitions properly so called.<sup>30</sup> Transitional justice is not time-bound to defined transition periods, however, even in the context of ongoing conflicts or repression, States' attempt to address the violent or repressive legacies may be deemed as transitional justice. Hence, transitional justice should be considered in contexts where conflicts or repression exist or are ongoing or in situations where large-scale abuses have ended, but there is no clearly defined political transition.<sup>31</sup> Recognising peace processes as an element of transitional justice further reinforces the position that transitional justice is not time bound to periods after violence or repression but may be a precursor of a proper transition from violent conflict or repression

The AUTJP provides States with a continental guide and template for designing and implementing transitional justice. It stipulates common standards and guidelines and provides benchmarks for different transitional justice mechanisms. The Policy identifies nine principles and eleven elements of transitional justice. The elements are not mechanisms of transitional justice in the conventional sense. Rather, the Policy elicits them as important features of transitional justice, which a State must consider in designing its transitional justice programme. The elements incorporate components of conventional transitional justice mechanisms such as truth commissions, reparations, and accountability measures. Additionally, the Policy recognises peace processes as an element of transitional justice. This presents a radical perspective on the core mechanisms of transitional justice. While peace processes such as peace mediation or peace negotiation are precursors of transition especially in the context of armed conflicts, they are often regarded as elements of peace-building rather than transitional justice, in itself.

The Policy acknowledges the differential impact of conflicts or repressive regimes on different vulnerable groups and their need for participation in the design and implementation of TJ. It emphasises the gendered nature of the impacts of violent or repressive legacies and identifies vulnerable victim groups including women and girls, children and youth, persons living with disabilities, internally displaced persons, refugees and stateless persons. These people groups are often paid less attention or even marginalised in the transitional justice process. Addressing the gendered impacts of past repression or violence is a main

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<sup>27</sup> Paras. 23, 67-70

<sup>28</sup> Paragraph 19.

<sup>29</sup> Juan Carlos Ochoa-Sánchez 'Economic and Social Rights and Transitional Justice: A Framework of Analysis' (2019) 18:5 *Journal of Human Rights* 522. Katie Boyle 'Reconceptualising Socio-Economic Rights in the Transitional Justice Discipline' (2017) 20b *The Journal of Law, Social Justice and Global Development*. Evelyne Schmid and Nolan Aoife 'Do no harm'? Exploring the scope of economic and social rights in transitional justice' (2014) 8:3 *International Journal of Transitional Justice* 362.

<sup>30</sup> Para 20.

<sup>31</sup> The position aligns with earlier notions advanced by the UN in its 2004 Secretary-General report on the Rule of Law and Transitional Justice op. cit. (n.10) at 8 and in subsequent reports on transition justice

concern of transitional justice narratives.<sup>32</sup> Beyond the focus on the gendered impacts of the repressive past, the Policy extends the spectrum to other vulnerable groups which are often subsumed in the larger victim demographic in transitional justice discourse. While it may be more demanding to design and implement a transitional justice programme that effectively captures all victim groups, its far-reaching potential to address inequalities and divisions is more valuable.

The Policy amplifies the position that transitional justice process involves multiple actors and the responsibility for transitional justice does not lie solely with the State. It recognised the State as just one of the main actors in transitional justice process. Other non-state actors such as civil society, NGOs, regional economic groups (RECs), and international organisations, are important stakeholders in transitional justice process with shared responsibilities and roles. Although they may not share the main responsibility for transitional justice within a polity, they play vital roles in the successful design and implementation of transitional justice. Thus, it is impractical to exclude external actors from transitional justice process. However, while the Policy recognises the role of external actors and even recommends it, there is no clear definition of the scope of the involvement of external/international TJ mechanisms especially, international accountability mechanisms such as prosecutions by the ICC or the African Court of Human Rights and Criminal Justice. It does not particularly define the modalities of the relationship between domestic and international transitional justice processes. While external transitional justice mechanisms are designed to be complementary to the domestic transitional justice process and the legal framework for the mechanisms often makes provisions for trigger mechanisms, it is difficult to ignore the rift in the relationship between transitional justice at both levels in the same context. The Policy may have overlooked the need to expressly address a point of conflict between African States and international accountability mechanisms in transitional justice context. Although the criminal jurisdiction of the African Court of Human Rights and Criminal Justice is yet to be operational, it remains to be seen how the regional mechanism for criminal accountability will play out. The slow ratification of the Malabo Protocol foreshadows the hesitation towards external accountability measures for transitional justice. Some States have shown the tendency to ignore their obligations under the law to exclude or restrict external influence.<sup>33</sup>

The Policy identifies nine principles of transitional justice. The principles are different from the elements of transitional justice. The principles are parameters that guide and underlie transitional justice process from the point of design to implementation. The principles emphasise core values which have previously impacted transitional justice within the African context. The principles of African leadership,<sup>34</sup> national and local ownership<sup>35</sup> and African shared values<sup>36</sup> establish the need for States to actively take the primary responsibility and integrate inclusive public participation in transitional justice process. This will obviate undue external interventions or influence in transitional justice process. The principles of inclusiveness, equity and non-discrimination<sup>37</sup> gender and generational dimensions of violations and transitional justice process<sup>38</sup> address the gender deficits and the challenges of exclusion and marginalisation of vulnerable groups often associated with transitional justice process. The principles of context specificity,<sup>39</sup> synergising sequencing and balancing transitional justice elements<sup>40</sup> and cooperation and coherence<sup>41</sup> emphasise the flexibility and adaptability of the concept of transitional justice. It reinforces the view that the differences in transitional justice approaches do not necessarily create ambiguity around the concept of transitional justice or the 'kind' of justice it entails.<sup>42</sup> Conversely the relativity of the modalities of transitional justice approaches underscores the multiplicity of the goals of transitional justice. The goals can be timed and organised through the choice of mechanisms and the modalities of implementation with the view of attaining the overall aim of transitional justice within each context. Overall, the principles consolidate the substantive and procedural objectives of transitional justice, gleaned from international practice on transitional justice. The AUTJP attempts to comprehensively capture the specific challenges of transitional justice in Africa through the enunciated principles. Where the principles are strategically incorporated in transitional justice process within a State, it will significantly guarantee the effectiveness and wider impact of transitional justice programmes.

The Policy articulates eleven elements of transitional justice which incorporate and expand the conventional mechanisms of transitional justice. It proposes a wider range of approaches to the elements and includes radically different components of each element. While the Policy recognises core transitional justice mechanisms such as justice and accountability measures,<sup>43</sup> truth commissions and reparations, the components are more expansive and stretch the conventional limit. The Policy uniquely emphasises traditional justice mechanisms as one of the elements of transitional justice. However, it is not clear whether the reference to their complementary role delimits their application in different contexts. The provisions on applicable benchmarks

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<sup>32</sup> Catherine O'Rourke 'Transitional Justice and Gender' In Cheryl Lawther and Luke Moffett (eds.) *Research Handbook on Transitional Justice* (2023) 76. Holly Dunn, 'The Transitional Justice Gap: Exploring 'Everyday'gendered Harms and Customary Justice in South Kivu, DR Congo (2017) 25:1 *Feminist Legal Studies* 71.

<sup>33</sup> The responses of Kenya and Sudan to the ICC arrest warrant issued against serving presidents and the disposition of other African States to effecting the arrest warrant are prominent examples of resistance to external transitional justice interventions. Obiora Chinedu Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections' (2015) 9:1 *International Journal of Transitional Justice* 9:1: 90.

<sup>34</sup> Paras 24-27.

<sup>35</sup> Paras 28- 32.

<sup>36</sup> Para 34.

<sup>37</sup> Para 33.

<sup>38</sup> Para 39.

<sup>39</sup> Paras 35-37.

<sup>40</sup> Para 38.

<sup>41</sup> Para 40.

<sup>42</sup> Joana Loya Cabezudo op. cit. (n.4) at 78.

<sup>43</sup> Paras 77-82.

and standards do not explicitly highlight relevant criteria for exploring traditional justice mechanisms in each context. The provisions appear broad and generalised without necessarily eliciting normative standards for engaging the mechanisms.

The Policy includes redistributive justice as an element of transitional justice. It may appear rather overambitious to stretch the concept of transitional justice to redistributive justice. The experiences of African States in their attempt at transitional justice reveal the struggle many States have with the socio-economic dimensions of transitional justice process. Arguably, it may be described as one of the weakest points of transitional justice process in Africa. While admitting that addressing government deficits and development challenges through transitional justice programmes is important, it should not be the goal in the first instance. It is probable that transitional justice programmes may eventually address socio-economic inequalities in the long run when properly implemented. It may be quite ambitious for a society especially societies emerging from systemic and violent conflict situations to pursue redistributive justice goals. One of the challenges of transitioning societies is limited resources and financial capacity. Thus, a socio-economic component of transitional justice may only be realisable from a long-term approach. Also, an intentional incorporation of the redistributive justice element will demand a strict application of the principle of synergising, sequencing and balance. While the element of redistributive justice appears idealational, this study does not imply that it should be abandoned or excluded in transitional justice process.

The Policy attempts to make a comprehensive provision for transitional justice within the continent, hence, it provisions on plea bargains, pardons, mitigation of punishment/alternative punishments and amnesties.<sup>44</sup> These are concepts that have been fundamentally abused within the African context, hence, their 'use' in transitional justice process has often been controversial and criticised. The elements are drivers of the victors' justice narrative and have tendencies to be politically exploited to legitimise autocratic actions. While these concepts are controversial elements of transitional justice approach owing to their propensity to abuse, the benchmark provisions seem to capture the main points of controversies. The benchmarks on the elements of amnesty, plea bargain and mitigation of sentence or alternative punishment make broad reference to States' deference to international obligations such as the anti-corruption commitment, zero impunity for serious crimes, etc. in their utilisation. This is one of the high points of the Policy which may make a difference in the transitional justice approach in the African context.

The AUTJP provides an ideal transitional justice template which is largely comprehensive and strategic. However, it is difficult to overlook the compromisingly normative nature of the Policy as another idealistic document that may only be good on paper and of little effectiveness in practice. Worse still, is the recommendatory nature of the provisions, hence, its impact lies largely with States and their disposition to the Policy. States have no binding obligation to adopt the Policy while addressing their context. In half a decade since its adoption, a few States that have reportedly referred to the provisions of the AUTJP may not have had a significantly different experience from their past attempts at transitional justice. For instance, Nigeria and Ethiopia are undergoing transitional justice processes following the model by the AUTJP.<sup>45</sup> In reality, however, it is difficult to connect the claim with the reality in these countries. While it may pre-emptive to predict the transitional justice process in Ethiopia as it is just kicking off, that of Nigeria mocks the reference to the Policy as its guide. The two countries share similarities as they are just emerging from conflict situations and have not been fully transitioned from conflict situations, yet.

In Nigeria, the purported transitional justice process has not brokered peace in conflict-ridden zones neither does it seem that the requirement of broad consultations has been explored in designing the transitional justice programme.<sup>46</sup> The situation in Ethiopia is similar, as it is still grappling with conflicts in other regions of the country even after the Tigray conflict has ended and despite the ongoing transitional justice process.<sup>47</sup> In Ethiopia, although there were consultations, there are questions around the coverage of the consultations and the inclusion of relevant stakeholders.<sup>48</sup> These questions raise foundational issues to the transitional justice process in Ethiopia and the extent of its validation by the public. In both cases, there is no report on the States leveraging on the Policy's provisions on capacity building or the AU or RECs providing support to build the capacities in the States.

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<sup>44</sup> Paras 83-92.

<sup>45</sup> African Union (AU) Roadmap to the Implementation of the African Union Transitional Justice Policy in Response to the Assembly Decision/AU/Decl.5 (XXXII) on the Adoption of the Policy 5 available at <[https://au.int/sites/default/files/documents/41242-doc-Roadmap\\_for\\_the\\_Implementation\\_of\\_AU\\_ENGLISH\\_Sep\\_091.pdf](https://au.int/sites/default/files/documents/41242-doc-Roadmap_for_the_Implementation_of_AU_ENGLISH_Sep_091.pdf)> (Accessed 19 June 2024).

<sup>46</sup> Transitional justice programmes in the north-eastern region of Nigeria were designed without broad consultations with the communities directly affected by the conflict. Hence, the public rejection of programmes like the OSC designed to reform and re-integrate repentant Boko Haram militants. There are reports of public outcry against the reintegration of the 'repentant' militants into the community by locals. Femi Owolabi 'Take them to govt house or Aso rock'- Borno residents reject 'reformed' boko haram fighters' The Cable (Abuja, 24 July 2020) available at <<https://www.thecable.ng/take-them-to-govt-house-or-aso-rock-borno-residents-reject-reintegration-of-ex-boko-haram-fighters>> (accessed 9 December 2023).

<sup>47</sup> United Nations Office for the Coordination Humanitarian Affairs (UN OCHA) 'Ethiopia Situation Report.' 10 June 2024 available at <<https://reports.unocha.org/en/country/ethiopia/>> (15 July, 2024). Julia Crawford 'Flawed transitional justice in Ethiopia.' 19 October 2023, available at <<https://www.justiceinfo.net/en/123440-flawed-transitional-justice-ethiopia.html>> (accessed 18 December 2023).

<sup>48</sup> Although the Transitional Justice Working Group of Experts (TJWGE) established by the Ethiopian government conducted road consultations across the country, it had no regional representation from Tigray which was a serious oversight by the government. It would appear that the government undermined the role of experts from the region directly affected by the conflict in the Working Group

In Sudan, the AU and other external actors are employing peace mediations and negotiations to broker peace in the ongoing conflict in the State.<sup>49</sup> However, there has not been much success with the external intervention largely due to the multiplicity of interests of different external actors, largely differing goals and lack of effective coordination of external interventions. The situation in Sudan amplifies the concerns about external intervention in transitional justice process and questions who should be the relevant actors in peace processes and how the interventions by external actors and actions should be coordinated in transitional justice process. If the case studies in these countries are anything to go by, they portend low prospects for the AUTJP's transformative objective.

The AU may have missed the chance to address the existential gap between the normative narrative on transitional justice in the conventional sense and the actual reality with practice in the African context. It would seem that the Policy attempted to comprehensively capture all the possible narratives on transitional justice while seeking to contextualise the concept within the African context. However, it seems the Policy does this at such a great compromise that may have ignored or undermined the African realities. The role of the rule of law and transitional justice is another prominent challenge with transitional justice processes. While the Policy acknowledged that circumstances that demand transitional justice are usually characterized by the breakdown of the rule of law, it does not offer any provisions on how States may explore the adherence to and the promotion of the rule of law in transitional justice contexts. This has been a recurring challenge with the transitional justice process in many African States especially, those emerging from repressive regimes. The rule of law and its role would have been included as one of the principles enunciated by the Policy. A broad provision on the rule of law with accompanying benchmarks may potentially rule out the problem of selectivity and victor's justice often raised against transitional justice programmes.

The Policy may have lightly expressed the preventive potentials of transitional justice. Sustainable peace and development require that States address the gross human rights violations of the past by ensuring accountability, and preventing impunity while also fostering reconciliation and healing. This study argues that recurrent failure to address the legacies of the past has led many African States to the cyclic structure of violence, bad governance and instability. Where transitional justice is effectively implemented to address the repressive or violent legacies of the past, it could address structural issues and entrench intergenerational justice which forestalls future conflict or reduces the probability of recurrence of repression.

## **5. Conclusion and Recommendations**

The AUTJP provides a normative approach to and relatively conceptualises transitional justice. It attempts to provide a broad-based comprehensive approach to transitional justice that incorporates all the perspectives of transitional justice narratives from human rights to development discourse. The Policy attempted to depart from the strictly legalistic approach to transitional justice by integrating the peculiarities of the African contexts. It uniquely recognises African traditional justice mechanisms, stretches transitional justice discourse to socio-economic aims and incorporates redistributive justice elements. This echoes some of the rhetoric of the mainstream discourse on transitional justice. Rather than establishing redistributive justice as an element of transitional justice from a normative perspective, the Policy could have simply recognised the possibility of attaining redistributive justice through well-executed transitional justice measures. The Policy emphasizes the need for each State to address the repressive legacies of the past and to implement tailored transitional justice mechanisms that are appropriate for their unique situations. And engage appropriate transitional justice mechanisms that fit their peculiar circumstances. Transitional justice does not offer a one-size-fits-all approach to addressing the past. Thus, while States may model their transitional justice attempt after another, the Policy establishes substantive and procedural benchmarks that States may adapt to their context. The normative standards established by the Policy may transform the approach to transitional justice in Africa if States genuinely adopt the provisions of the Policy and respect their obligations and commitments to protect and promote human rights and end impunity. In incorporating elements such as plea bargains, amnesties and related concepts, States must especially, move from autocratic legalism, and selective justice to promoting the rule of law and transformative constitutionalism. The AU must make extensive use of the provision on capacity building at the regional and continental levels and actively provide support for member States in their transitional justice process. Ultimately, the impact of transitional justice process is determined by many factors ranging from the design of the programmes to the implementation and how effectively, a State engages the mechanisms to achieve the goals of transitional justice. The AUTJP provides a normative and strategic approach to transitional justice which may significantly change the narrative of transitional justice in Africa in design, implementation and accomplishments.

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<sup>49</sup> Amani Africa 'Insights on the Peace and Security Council (PSC) - Briefing on the Situation in Sudan' 18 August 2024 available at <<https://amaniafrica-et.org/briefing-on-the-situation-in-sudan-august-19-2024/>> (Accessed 21 August 2024)