

**STUDY ON
TRANSITIONAL JUSTICE
AND HUMAN AND
PEOPLES' RIGHTS
IN AFRICA**



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Preface

Africa's engagement with the issues pertaining to transitional justice (TJ) has a long history. TJ as we know it today became a core tenet of processes to deal with the consequences of conflict and authoritarian rule in the 1990s. Since then, scores of African States have made use of or are making use of TJ mechanisms in various forms in order to come to terms with the past and build a shared future of inclusive democratic and developmental systems of governance. Furthermore, given that a number of States are still actively experiencing conflict or acts of repression, the need for processes to achieve sustainable peace remains ever pertinent.

While the African Commission on Human and Peoples' Rights (ACHPR) engaged the issue of TJ in Africa and made some useful pronouncements, there has been a lack of comprehensive guidance on how the African Charter best informs and shapes TJ processes to ensure adherence to the rights guaranteed in the Charter. The Study on Transitional Justice and Human and Peoples' Rights in Africa is the first concrete step taken by the ACHPR to elaborate a Charter-based approach to TJ and elucidate the role of the Commission in TJ processes and mechanisms on the continent. The study draws on TJ literature, the various experiences of TJ as peculiar to the African continent, as well as the unique tools and mechanisms at the disposal of the ACHPR, to develop a comprehensive and coordinated African Charter-based approach for engaging with TJ within its mandate of promoting and protecting human and peoples' rights. I hope that the implementation of the recommendations of the study, including the designation of a special mechanism, will go a long way in enabling the ACHPR to have effective and systematic engagement with TJ processes. I also urge other stakeholders to make use of this study and to cooperate with the ACHPR in its implementation.

The adoption of this study during the 24th Extra-Ordinary Session of the ACHPR in August 2018 was the culmination of many years of hard work and dedication by a large group of people. I would like to commend the Commission for achieving this milestone and to thank my colleagues for their invaluable inputs. In particular, I wish to acknowledge with appreciation the unwavering support of the Centre for the Study of Violence and Reconciliation, which served as the secretariat for this study, for their key role from the inception to the final publication of this study. My appreciation must also go to the members of the Advisory Panel, the legal officers at the ACHPR Secretariat, Abiola Idowu-Ojo and Elsabé Boshoff, everyone who

took part in the regional consultations and experts' reviews, as well as all the other people who contributed to this study in one form or another. We would not have been able to produce a study of this quality and substance without your contributions.

Solomon Ayele Dersso

Commissioner Focal Point for the TJ Study

Executive summary

The African Union (AU) defines transitional justice (TJ) as “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”. TJ is thus directed at ending violence and the attendant injustices in societies emerging from armed conflict or authoritarian repression and establishing an inclusive rule-based political and socioeconomic system that is able and willing to enforce human and peoples’ rights. It does this through a set of judicial and non-judicial measures that have retributive and restorative elements, ensuring that perpetrators are held accountable while providing redress to victims and building social harmony as well as achieving institutional reform and socioeconomic inclusion.

Over the past three decades, TJ has become a common feature of peacebuilding in Africa. Due to a combination of bad governance and external interference since the end of direct colonial rule, a number of countries on the continent have struggled with intra-State conflicts, ranging from electoral violence to civil war. These conflicts are rooted in social inequalities established under colonialism, as well as abusive and extractive practices by dictatorships, military juntas, and the elites of post-independence States. Fierce contestation and the absence of consensus among rival elites in conditions of ethno-culturally charged political polarisation have exacerbated old grievances.

In this context, African States have increasingly looked to TJ to help address historical divisions and prevent the recurrence of conflict. The AU has demonstrated a similar focus on issues of peace, justice and reconciliation. This has included developing the AU Transitional Justice Policy (AUTJP), a continental policy on TJ that aims to guide African member States emerging from conflict or authoritarian rule in their quest to transition to peace and democratic order. The AUTJP has been under consideration for adoption by AU Heads of State and Government at the time of the consideration and adoption, with amendment, of this study.

Having regard to the human and peoples’ rights undercurrents of TJ and the recourse of many member States to some form of TJ process and the rising policy interest in Africa, the African Commission on Human and Peoples’ Rights (ACHPR)

passed a resolution on TJ in Africa. Resolution 235 called for a study on TJ mechanisms on the continent, with the aim of identifying the legislative framework for TJ in Africa, determining the ACHPR's role in implementing the AU's TJ policy and supporting related work, and analysing the possibility of the ACHPR establishing a special continental mechanism on TJ. This report presents the outcomes of the study, undertaken with the support of the Centre for the Study of Violence and Reconciliation assisted by an advisory group. The study outlines the various human and peoples' rights issues that arise in planning and implementing TJ processes and the role of the African human rights system in informing and regulating these processes.

The in-depth review of TJ efforts on the continent demonstrates that measures have been implemented in a rich, diverse, but also uneven manner, depending on the historical and political context of each country. These experiences show the greater effectiveness of a holistic and tailored approach to TJ, which sequences and adapts mechanisms so as to accommodate political dynamics over time and include a broader range of affected actors, particularly victims. The innovations that African countries have developed point to gaps in the mainstream practice of TJ and highlight the importance of: 1) taking local conceptions of justice into account, especially in terms of collective versus individual approaches to justice and reconciliation; 2) going beyond the mainstream focus on civil and political rights violations to address economic, social and cultural rights violations, historical and structural inequalities, and issues of sustainable development; and 3) acknowledging the differential impact of conflict on women and the need for women's participation in the design and implementation of TJ.

In analysing the role of the African human rights system, an overview of the legislative framework of the system for TJ in Africa shows that these instruments support a comprehensive, context-specific and transformative approach to TJ suggested by African experiences to date. The African Charter, for example, institutionalises the indivisibility and interdependence of civil-political and socioeconomic rights. It also recognises the collective rights of peoples in addition to the rights and duties of individuals. The Maputo Protocol recognises women as the most affected members of society in conflict situations and the need for inclusivity and sensitivity to violations against women in designing remedial measures. The AU Constitutive Act and the Protocol Relating to Establishment of the Peace and Security Council of the AU provide for a holistic approach to the potential tension between peacebuilding and justice, and provide for an enhanced role for the ACHPR in TJ efforts.

In terms of the practice of the African human rights system in applying the legislative instruments for informing and guiding TJ in Africa, the ACHPR, as the study demonstrates, has made a contribution in relation to its engagement with TJ on the continent, although its engagement has been episodic and hence weak in comprehensiveness and depth. In response to member States, AU bodies and external actors, depending on the context, the Commission has raised questions and made recommendations on TJ issues through its communications procedure, State-reporting procedures, promotion missions and on-site investigative missions. It has also issued statements and resolutions in response to conflict and systematic violations, particularly in urgent or emergency situations. Finally, the ACHPR has made use of a number of special mechanisms within the Commission, including

special rapporteurs and working groups. With the lessons learned from the ACHPR's previous experiences of using these mechanisms and procedures from the practice of the African human rights system, the study clarifies how TJ can be integrated into all areas of the Commission's work in a strategic manner and identifies the procedural and substantive principles that should guide this process.

While the ACHPR has already adopted the role of promoting African TJ, its efforts have to date been ad hoc and piecemeal. The study envisages that for TJ to comply with the requirements of the African Charter, it needs to involve measures for accountability of perpetrators, to ensure remedy for victims, address the conditions that made the violations possible and guarantee institutional reform. The study therefore recommends that the ACHPR establish a dedicated TJ capacity within the Commission. This could take the form of using the existing focal point, leading ultimately to upgrading it into a special mechanism that systematically guides the engagement of the Commission in addressing the human and peoples' rights issues arising in TJ processes based on the economic, social, cultural and collective rights laid out in the African Charter, and in interfacing with other AU processes and external stakeholders. This dedicated capacity would enable the ACHPR to play a more holistic role in TJ efforts and to shape regional and global TJ discourses. More importantly, it would enable the Commission to empower societies on the continent to implement effective and inclusive TJ processes rooted in African experiences and the rich norms of the African human rights system.

Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AU	African Union
AUTJP	African Union Transitional Justice Policy
CPTA	Committee for the Prevention of Torture in Africa
CSEI	Criminal Investigative and Examination Unit (Cote d'Ivoire)
CSVV	Centre for the Study of Violence and Reconciliation
DRC	Democratic Republic of the Congo
IACmHR	Inter-American Commission on Human Rights
I-AHRS	Inter-American human rights system
ICC	International Criminal Court
IDP	Internally displaced person
IHL	International Humanitarian Law
LRA	Lord's Resistance Army (Uganda)
NGO	Non-Governmental Organisation
NHRI	National human rights institution
OAU	Organisation of African Unity
PCRDR	Post-Conflict Reconstruction and Development
PSC	Peace and Security Council
SCSL	Special Court for Sierra Leone
TJ	Transitional Justice
TJRC	Kenyan Truth Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations
UNHRC	United Nations Human Rights Council

PART I:

Introduction

Background to the Study on Transitional Justice in Africa

1. A properly designed and implemented transitional justice (TJ) process offers the framework that a society coming out of conflict or authoritarian repression requires for implementing appropriate policy measures for resolving the causes and drivers of violence and overcoming the violations and divisions that such conflict sowed over the years. Almost all countries affected by major crisis on the continent have, in one form or another, made recourse to and experimented with TJ processes. As the August 2015 Peace Agreement on the Resolution of the Conflict in the Republic of South Sudan or the 2008 National Accord of Kenya shows, TJ has now become a common feature of peace agreements. There is also increasing policy interest in TJ. As part of its mandate on peace and security, and seeking to make a meaningful contribution to efforts of member States undertaking TJ processes, the African Union (AU) is in the process of finalising a continental policy on TJ.
2. By its very nature, TJ raises important human and peoples' rights issues. Having regard to the human and peoples' rights undercurrents of TJ and the recourse of many member States to some form of TJ process and the rising policy interest in Africa, the African Commission on Human and Peoples' Rights (ACHPR, or the African Commission), acting on its mandate under Article 45 of the African Charter on Human and Peoples' Rights (the African Charter), passed a resolution on Transitional Justice in Africa ACHPR/Res.235 (LIII) 2013 at its 53rd Ordinary Session held in Banjul, The Gambia, in April 2013.¹
3. In adopting ACHPR Resolution 235, the African Commission also drew on various initiatives, including various civil society submissions to the ACHPR.² More broadly, the Resolution also reflected the growing focus within the AU on addressing issues of peace, justice and reconciliation as part of its mandate.

¹ Available in full in Annex B.

² In relation to civil society contributions, the most relevant is the contribution from the NGO Forum, a biannual event bringing together civil society stakeholders in the margins of the Commission's Sessions. Of particular relevance is the establishment of a special interest group on TJ within the NGO Forum and the adoption of Declaration of the NGO Forum to the African Commission at the 52nd Ordinary Session of the ACHPR relating to TJ. See <http://www.acdhrs.org/2012/10/declaration-of-the-ngo-forum-to-the-african-commission/>.

4. ACHPR Resolution 235 called for a study on TJ in Africa to be undertaken “with the objective of:
 - Identifying the various existing transitional justice mechanisms in Africa;
 - Identifying the transitional justice legislative framework in Africa, in accordance with the African Commission’s mandate to promote and protect human rights in Africa;
 - Determining the Commission’s role in implementing the AU Transitional Justice Policy;³
 - Analysing the opportunities and challenges of the ACHPR in encouraging and supporting transitional justice processes and mechanisms in Africa; and
 - Analysing the possibility for the establishment by the ACHPR of a special mechanism on transitional justice in Africa.”⁴

5. This report presents the outcome of the Study on Transitional Justice and Human and Peoples’ Rights in Africa. The study was undertaken in collaboration with and through the technical support of the Centre for the Study of Violence and Reconciliation (CSV) and the Advisory Panel of the study.⁵

Defining the scope of Resolution 235

6. Questions of TJ are among the major issues that animate the debate on post-conflict or post-authoritarian transitions in Africa and globally. Since its emergence in its current form in the late 1980s and early 1990s, TJ has evolved as a multidisciplinary field of study and a recognised area of expertise and practice. It involves the pursuit of various policy measures aiming at establishing accountability, justice and reconciliation in order to address causes and drivers of violence, the legacies of systematic and widespread abuses and violations and the divisions that violence sowed.

7. TJ is now regarded as an indispensable building block for sound democratic governance, constitutionalism, peacebuilding and national reconciliation in post-conflict societies or societies emerging from violent, authoritarian and divisive periods.⁶ For purposes of the African Charter, the reference point for the existence of TJ is the adoption by a society in transition of some form of legislative, executive/administrative and/or judicial measures seeking not only to end violence and/or authoritarian rule but also to establish accountability and remedy for acts of violations and address the conditions that made systematic or gross human and peoples’ rights violations and atrocities possible. A TJ process is lacking where the society continues to apply the processes used in “normal” times and without the aim of transition to an inclusive peace and/or democratic order. It is the nature (legislative, executive, administrative and/or judicial) and objective of the measures adopted for achieving transition rather than the scope and number of transitional mechanisms that is critical.

³ At the time of finalising this study, the AU Specialized Technical Committee on Justice and Legal Affairs had considered and passed the AU TJ Policy and it was awaiting adoption by the AU Assembly of Heads of State and Government.

⁴ ACHPR/Res.235 (LIII) 2013.

⁵ Commissioner Dersso, who took the responsibility from his predecessor, Commissioner Pacifique Manirakiza, led the conceptualisation of the structure and the drafting of this study through ACHPR/Res.326 (LVII) 2015, adopted at the 57th Ordinary Session of the ACHPR held in Banjul, The Gambia, from 4 to 18 November 2015.

⁶ Tutu, D (1999) *No Future without Forgiveness*, New York: Doubleday.

8. There are at least three considerations on which ACHPR Resolution 235 is premised. First, societies coming out of armed conflict or those transitioning from violent authoritarianism face major human and peoples' rights challenges arising from not only the immediate conflict but also the legacies of the past, including most notably colonial rule. As the experience of many African countries that undertook or attempted to undertake TJ processes shows, these issues are not only confined to violations of civil and political rights. They are also tied to issues of group identity and inequality as well as socioeconomic disparity, cultural dislocation and gendered violence. It is therefore important that the study not only pays particular attention to the characteristic features of the context in which TJ processes are designed and implemented, but that it also properly canvasses all dimensions of the human rights issues and the causes and drivers of violence in that context. This draws on, among others, the diverse human and peoples' rights issues canvassed in the various AU human rights instruments, including the AU Constitutive Act, the African Charter on Human and People's Rights (the African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol), among others.
9. Second, TJ directly concerns the rights and freedoms enunciated in the African Charter, the Maputo Protocol, the African Children's Charter, the African Charter on Democracy, Elections and Governance and the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), among other instruments. This demands that TJ processes be anchored on, and take account of the richness of, the scope of rights and issues of African concern canvassed in these instruments. The African Charter, for instance, emphasises a conception of human and peoples' rights that goes beyond the mainstream liberal human rights standards. It also stresses collective rights of peoples, including the rights to peace and development, and the interdependence between civil and political rights on the one hand and economic, social and cultural rights on the other. Thus, while this study draws on the discourse and practice of TJ in general and African experiences in particular, it also adds to the discourse by informing it with the unique array of materials that the African human rights instruments avail.
10. Third, the ACHPR, as Africa's premier human rights body and on account of its mandate, has both the responsibility and the competence to help member States formulate and implement TJ processes based on and in accordance with the African Charter. As such, this study seeks not only to determine the role that the ACHPR plays with respect to the AU Transitional Justice Policy (AUTJP) but also how it addresses human rights issues in transitional settings in the ordinary course of applying its mandate through its various tools and mechanisms.
11. The ACHPR is established by treaty to "promote human and peoples' rights and ensure their protection in Africa".⁷ In execution of this mandate, the

⁷ Article 30 of the ACHPR.

ACHPR has actively engaged State Parties to the African Charter in addressing threats to the human rights of African peoples. The African Commission's mandate is therefore critically aligned to the scope of TJ. However, as Resolution 235 notes in its preambulatory paragraphs, the ACHPR has possibly not engaged systematically and coherently in relation to TJ. The report therefore provides an overview of TJ experiences on the continent, and describes the African Commission's engagement (or lack thereof) with these contexts, in order to outline its potential role in TJ processes in Africa.

12. The core question guiding the study was: In a transitional setting, how do we best make use of human and peoples' rights in the formulation and implementation of the processes for overcoming the violence of the past, ensuring the security of the present and building the future? This then provides the context for exploring the role for the ACHPR in addressing past violations and supporting the establishment of the political, institutional and security conditions for peace and resolution of the human and peoples' rights issues arising from conflicts and violence.

Methodology

13. The CSVR was requested to act as the Secretariat with responsibilities to coordinate the study, and provide staffing, administrative and technical support for conducting the study. An Advisory Panel of TJ experts from various regions of the continent was convened.⁸ Led by the commissioner responsible for the study, the Advisory Panel provided substantive guidance and oversight to the research, ensuring that the research was contextually grounded and substantively informed by the African Charter. The first meeting of the advisory team was held in October 2013.
14. A team of researchers were appointed to develop country case studies and thematic reports, which were used as the foundation of this consolidated report. The researchers were supported by the regional representatives on the Advisory Panel. The regional experts also reviewed the country case studies to ensure that they captured the key issues. The research was largely undertaken through desktop review, consultative meetings of experts, as well as a number of individual interviews.
15. To ensure that a broad range of perspectives were captured in the research, two regional consultations were held. The consultation for East and Southern Africa took place in March 2015, and the consultation for West and Central Africa in July 2015.⁹
16. In June 2016, the Advisory Panel met in Harare, Zimbabwe, to review the draft TJ study, which resulted in a reformulation of the five chapters of the

⁸ A full list of the members of the Advisory Panel is available in Annex A.

⁹ Representatives from North Africa were not able to participate in the second consultation due to the arrest of the North African Advisory Panel member (Ms Yara Sallam) in June 2014, whose role was to also coordinate and mobilise North African TJ experts for the consultations. Following her arrest, the CSVR lost contact with the North African TJ experts. The consultations were held to identify key substantive and contextual issues and to get feedback on the initial drafts of reports.

study. In October 2017, a side event to popularise the TJ study was hosted on the margins of the 61st Ordinary Session of the ACHPR in Banjul, The Gambia. In April 2018, the final reformulated draft of the study was reviewed and validated by the Advisory Panel during a one-day meeting in Addis Ababa, Ethiopia. The final draft of the study was considered by the ACHPR during its 24th Extraordinary Session in August 2018 and adopted with amendments.

Report outline

17. This report is structured into five chapters.
18. Chapter 1 provides a review and analysis of the discourse and practice of TJ. It captures the experiences of TJ at national and regional levels, and explores the development of the discourse around TJ and how this influenced the implementation of TJ approaches on the continent. The chapter engages with the mainstream conception of TJ from the perspective of the African human rights system, and lays the foundation for the rest of the report. The chapter is structured into two parts, with the first discussing the experience of the continent with TJ processes and the second focusing on the salient issues and conceptual contours of TJ. The first part succinctly presents the various TJ experiences in Africa and the lessons from those experiences (including a distillation of the diversity of TJ approaches used). The second part focuses on the normative discourse on TJ, identifying the defining conceptual issues shaping mainstream TJ.
19. Chapter 2 outlines the legislative framework of TJ in Africa. This includes analysis of the African Charter, the Maputo Protocol, and the African Children's Charter as well as other relevant AU instruments, including the Constitutive Act of the AU. Through analysis of these instruments, this chapter presents an African human rights system-based approach to TJ that brings out ways in which the range of rights and issues canvassed in these instruments provide a more holistic and transformative conception of TJ, rectifying some of the gaps highlighted in mainstream TJ discourse and practice discussed in Chapter 1.
20. Chapters 3 and 4 provide the framework for a systematic, institutional response to TJ by the ACHPR. Chapter 4 is framed as a draft "Guiding Note" of the ACHPR in relation to TJ, outlining the various principles for a regional approach to TJ, drawing on the rich African experience and the legislative analysis brought forth in Chapter 2. The approach taken is to present principles which are broad enough to allow flexibility in formulating TJ processes tailored to the demands of each specific context.
21. Chapter 5 examines the role that the ACHPR has to play in respect of TJ processes generally, having regard to its mandate. Apart from outlining the guiding principles and how they can be mainstreamed and applied across the existing mechanisms and tools of the African Commission, this chapter also examines the need and possibilities for having a dedicated ACHPR mechanism on TJ.

22. In concluding, the study provides concrete guidance on how to integrate TJ into all the ACHPR's work, particularly with reference to the African Commission's communications procedure, the State periodic report review process, resolutions and statements, promotion and investigative missions, as well as the special mechanism of the Commission. It also crucially formulates both procedural and substantive principles which should guide the development and implementation of TJ processes from an Africa human rights perspective. Its final recommendation is the need for the creation of an institutional mechanism for TJ in the African Commission, either through a focal point or a new special mechanism in order to ensure a streamlined response from the ACHPR in relation to TJ matters on the continent.

PART II:

African Experiences and Perspectives on the Practice of and Discourse on Transitional Justice

Africa's experience with transitional justice processes

23. The quest for just peace and human dignity has been at the core of struggles across the African continent, and underpinned the liberation movements in their fight against colonial rule. The founding Charter of the Organization of African Unity (OAU), predecessor to the AU, notes that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples, [...] and [...] in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained”.¹⁰ Despite the end of direct colonial rule and the ensuing hope for a better post-colonial order, in many places the euphoria of liberation was short-lived. The hope turned into a nightmare as many countries failed to reconfigure the predatory instruments and frameworks of the colonial State and descended into one-party dictatorship, military rule and/or internecine violence, civil wars, military coups and armed insurgencies.

24. The causes of these conflicts could often be traced back to the structural violence of the colonial period and their perpetuation since the end of colonial rule through bad governance and the interference of external powers. These took the form of continued social, political and economic marginalisation and inequalities across different communities and regions, the perpetuation of the abusive and extractive instruments of power by dictatorships, military juntas and elites of the new States and the absence of consensus and fierce contestation among rival elites in conditions of ethno-culturally charged political polarisation. The upsurge in civil wars and other forms of violent intra-State conflicts on the continent, especially in the 1990s, caused major destruction in the lives of people and the society, further weakening States. These wars “unleashed the cycles of violent confrontation and revenge that legitimated armed mobilization as the means to redress grievances”.¹¹ More

¹⁰ OAU Charter, “Preamble”, 25 May 1963, available at http://www.au.int/en/sites/default/files/treaties/7759-sl-oau_charter_1963_0.pdf.

¹¹ African Union Panel of the Wise (2013) “Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity”, p. 8.

than half of the member States of the AU have at some point in the post-independence period experienced conflict or are still actively experiencing conflict or acts of repression.¹²

25. More recently, contestations in times of election have precipitated the descent of some countries into widespread violence by various factions or political parties. This was the case in Kenya after the December 2007 elections, in Zimbabwe in 2008 and in Cote d'Ivoire in 2011. Serious democratic deficits and pervasive socioeconomic deprivations have also resulted in political instability, at times triggering widespread public protests or popular uprisings. A major feature of these conflicts is widespread violations and abuses of human rights and international humanitarian law, with severe effects on the social fabric of societies.
26. Apart from the need to deal with the violations of the past, the conflicts and the attendant violence and violations they inflict on society further give rise to the demand for removing the conditions that made the violations possible and for creating conditions that guarantee the emergence of a just political and socioeconomic order respectful of human and peoples' rights. The major challenges faced by countries transitioning from authoritarian regime to democratisation, such as Tunisia in 2011, Burkina Faso in 2014 and The Gambia in 2017, is how to account for the events of the past, mend the resultant divisions, rebuild national cohesion and achieve inclusive democratic and socioeconomic transformation.
27. In almost all transitional settings, the nature of violence experienced, as well as its effects on the institutions and social relationships of affected societies, are such that the approach to human and peoples' rights used during peacetime situations is inadequate. Transitional settings thus demand institutional and policy innovation in designing processes which would achieve sustainable peace and reconciliation as well as institutional reform built upon principles of equity, justice and human and peoples' rights.
28. While TJ initiatives have been undertaken across all regions of Africa, they were not always conceptualised as such, for example in Nigeria after the end of the Biafran civil war. The experiences of TJ on the continent show the wide range of judicial and non-judicial options available to facilitate the transition from conflict and violence to peace and justice. Many of these approaches were new innovations in policies and practice, which have contributed to shaping the TJ field, and include reconciliation, reintegration of fighting forces, reconstruction programmes, accountability measures and investigation commissions.
29. These processes draw on societal needs for political reconciliation as well as various norms, including those in the ACHPR. Viewed through the prism of the ACHPR, there are three concerns in transitional processes: 1) the cessation

¹² Angola, Burundi, Central African Republic, Chad, Congo-Brazzaville, Cote d'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Guinea-Bissau, Kenya, Liberia, Libya, Madagascar, Mali, Namibia, Niger, Nigeria, Rwanda, Sierra Leone, South Sudan, Sudan, Uganda and Zimbabwe. See also the Armed Conflict Database of the International Institute for Strategic Studies (IISS), available at <https://acd.iiss.org>.

of ongoing violence and violations due to armed conflicts and the provision of remedial measures for victims; 2) the institutionalisation of legislative and institutional measures and reforms best fit to give effect to the rights in the Charter, including those focusing on addressing inequality and socioeconomic deprivations; and 3) the establishment of a rules-based political system able and willing to enforce these legislative and institutional measures.

30. More broadly, the TJ processes which have been undertaken in various African countries have attempted to:
- Establish the truth through commissions of inquiry or investigative truth commissions;
 - Initiate processes for accountability through, among others, prosecutions or other forms of accountability as well as attempts to undertake vetting and lustration;
 - Provide redress for victims through reparations programmes;
 - Make use of and tap into local and community-based processes of justice, more commonly referred to as “traditional justice”;
 - Initiate reconciliation programmes and national dialogue aimed at rebuilding social relationships and national consensus; and
 - Provide for and initiate institutional reforms for the democratic and transformative remaking of the political and socioeconomic systems of governance.
31. It is thus now considered best practice for countries to have a comprehensive approach to TJ which would include judicial and non-judicial processes incorporating restorative approaches to justice which include reparations, participation by all affected persons and institutional reform.¹³

Forms of transitional justice processes in Africa

Accountability through criminal prosecutions

32. We have seen the use of criminal processes in various countries in transition as a means of establishing accountability and rebuilding the rule of law. Criminal trials have accordingly been pursued through national courts, including ordinary courts, special courts/procedures¹⁴ and hybrid courts¹⁵ (in Sierra Leone and currently proposed for Central African Republic and South Sudan). Rwanda made use of the *Gacaca* courts, which used an indigenous community-based jury process for facilitating acknowledgement of the loss and pain of victims and holding the large number of individuals suspected of involvement in the 1994 Rwandan genocide accountable.

¹³ See the AU Transitional Justice Policy and http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_concept_note.pdf.

¹⁴ In the aftermath of the fall of the Dergue regime in 1991, Ethiopia established a special prosecution office for investigating and prosecuting violations perpetrated during the dark years of the Red Terror. In an attempt to respond to the international outcry for justice in Darfur, the Sudan government established a special court for Darfur. Cote d'Ivoire established the special investigative unit for investigating and prosecuting violations perpetrated during the 2010 post-election violence.

¹⁵ It was in Sierra Leone that a hybrid court was used in Africa for the first time for addressing past violations. Most recently, Central African Republic initiated the establishment of a hybrid court in 2016 and such a court is proposed as part of the TJ component of the 2015 South Sudan peace agreement.

33. A growing practice is also the use of military tribunals to hold soldiers to account for violations committed. The Democratic Republic of Congo (DRC), South Sudan and Tunisia have made use of military tribunals, although not necessarily as part of a broader TJ process. There are also countries, such as Uganda, which have established or are in the process of creating divisions within their judiciary that will enforce international criminal law. Others, such as Sierra Leone and Chad, have gone a step further to establish criminal courts with jurisdiction over international crimes. The use of criminal prosecution has also been pursued through international courts. While Ethiopia's effort to prosecute the crimes of Fascist Italy committed in Ethiopia and the call for prosecuting the crimes of apartheid in South Africa did not succeed, Rwanda and Sierra Leone used international tribunals for prosecuting the crimes committed during the conflicts in both countries. Various cases have also been pursued within the framework of the International Criminal Court (ICC), albeit with limited success.
34. Criminal prosecutions, however, present contextual complexities in post-conflict settings. Both the *Gacaca* courts in Rwanda and the Red Terror trials in Ethiopia, for example, have been criticised for their "failure" to comply with the international standards of fair trial rights. As in many countries recovering from conflict, local court systems are not well equipped to handle the size and complexity of prosecutions for mass crimes in accordance with the standards that are applied in ordinary circumstances.
35. In the case of Rwanda, the combination of the sheer scale of suspects (reported to reach as high as one million people) and the lack of national judicial capacity (due in part to the killing of the members of the judiciary during the genocide) necessitated the resort to the *Gacaca* court system, which is locally administered by elected members of the community with active participation of victims and community members. It aimed at not only holding perpetrators accountable and fighting impunity, but also facilitating restoration through truth-seeking and community-level recognition of wrongs done and suffered. Among others, the *Gacaca* courts have been charged for providing inadequate guarantees of impartiality, defence and equality before the law. However, various institutional, legal and contextual challenges meant that trade-offs between holding perpetrators of human rights violations accountable and upholding international standards of fair trial, which are applicable in normal circumstances, could not be avoided. Given that the use of such mechanisms creates the opportunity for local ownership, participation and societal recognition of the suffering of victims, the trade-off on its own is not a problem. What is important is to ensure that such trade-offs are legitimate in that they serve public interest and are necessary and proportional.
36. The even-handed application of criminal processes in investigating and trying all parties to the conflict is another major issue from the perspective of the African Charter. This has been an issue in Rwanda and Ethiopia, where criminal processes were limited to members of previous regimes. In 2011, Cote d'Ivoire established the Special Investigative Unit, which later became the Criminal Investigative and Examination Unit, or CSEI, with the mandate to investigate and prosecute crimes committed during the post-election violence. As in Ethiopia and Rwanda, the CSEI has also been accused of

failing to take action against forces affiliated with the incumbent government. In the context of the conflict involving the Ugandan armed rebel group the Lord's Resistance Army (LRA), which was referred to the ICC, the Chief Prosecutor of the Court opted for not opening investigations into the role of the Ugandan forces. With respect to Kenya, while the cases against both Uhuru Kenyatta and William Ruto were eventually withdrawn, the criminal prosecution in this case had the consequence of disincentivising all sides from pursuing other measures of TJ.

37. Another option that has been used for dealing with the inadequacies of national processes is the hybrid-court model. In Africa, one such example is the Special Court for Sierra Leone (SCSL). Although the SCSL registered major improvements over the Rwandan and Ethiopian trials, to the extent that it sought to uphold international standards in its processes, it was not itself without major limitations.¹⁶ The fact that its jurisdiction was confined to those bearing the greatest responsibility meant that it created a huge accountability gap. Unlike in Rwanda, a large number of perpetrators of human rights violations did not get to account for the wrongs in which they had a part, leaving victims disenchanted. The hybrid court was also accused of applying selective justice as it failed to prosecute all those considered to have borne the greatest responsibility. Many also found the issuing of only 13 indictments by a court that operated for 13 years unsatisfactory, given the amount of resources used and the limited contribution it made to the national judicial process.¹⁷ The failure of the court to prosecute business actors like De Beers, which supported and substantially benefited from the conflict, has also been criticised.¹⁸
38. These various experiences involving the use of criminal trials as part of a transitional process on the continent have revealed that the use of criminal prosecution in transitional situations is not the same as its use for vindicating the rights of victims of violations under ordinary circumstances. Although there is a lot of value in applying all the standards that ordinarily apply in criminal processes, in reality this may not always be possible in all transitional situations. While this does not dispense with the need for holding perpetrators accountable, from the perspective of the African Charter, a major issue it gives rise to is determining the scope of latitude that societies in transition can afford when deciding the reach and form of criminal prosecution to be applied for holding perpetrators of human rights violations accountable.
39. It is worth noting that criminal trials are not universally used in all transitional situations on the continent. The determination of the use of criminal prosecutions and their forms depends on a set of contextual factors. Given pressing human and peoples' rights needs, of victims in particular and the broader society in general, there are times when criminal processes are used only as subsidiary or complementary rather than primary measures of TJ. Clearly, in transitional societies characterised by precarious political stability

¹⁶ See Jalloh, CC (2011) "Special Court for Sierra Leone: Achieving Justice?" *32 Mich. J. Int'l L.* 395.

¹⁷ Special Court for Sierra Leone and No Peace Without Justice, "Impact and Legacy Survey for the Special Court for Sierra Leone", August 2012, p. 40; Open Society Foundations, "Legacy: Completing the Work of the Special Court for Sierra Leone", pp. 15-16, available at <https://www.opensocietyfoundations.org/sites/default/files/legacy-scsl-20111101.pdf>.

¹⁸ Jalloh, *supra* n 16 at 424.

and weak institutional capacity, it is not always the case that the competing objectives of prosecuting perpetrators of violence and achieving political settlement and reconciliation for ending violence may always be resolved in favour of the former.

40. In South Africa, criminal prosecution was not the main mechanism of TJ. It was envisaged only as a conditional measure to be used for those who did not apply to receive amnesty or to whom the Truth and Reconciliation Commission (TRC) refused to grant amnesty. As the then Chief Justice of the Constitutional Court of South Africa put it, South Africa opted for such an approach on account of “a difficult, sensitive, perhaps even agonizing, balancing act between the need for justice to victims and the need for reconciliation and rapid transition to a new future”.¹⁹ Similarly, in Mozambique, the parties to the conflict recognised that the expectations for addressing the divisions and violence of the civil war could not meaningfully and realistically be met through retributive justice, but required transformation of the various groups, including *Resistência Nacional Moçambicana* (Mozambican National Resistance) rebels, and a focus on building the political parties and institutions for a unified Mozambique. The subsequent relative stability of the State, as demonstrated by a series of free and fair elections accompanied by macro-economic growth, is often held up as a TJ success story. While human rights advocates are often predisposed to reject the use of amnesties in TJ, it is clear that in at least some cases amnesty, particularly qualified or conditional amnesty, may be necessary in pursuing TJ objectives.
41. It emerges from the foregoing that while there is room for societies in transition to make choices on how to pursue accountability, the space for such policy choice is not absolute. Instead, the choice of designing a TJ mechanism/process needs to conform to certain human rights requirements which are themselves subjected to the tests of justifiable limitations as the prevailing peace and security conditions require, a test that applies not only in transitional settings but also in normal situations.

Truth, reconciliation and social healing processes

42. Even when circumstances allow for the pursuit of criminal prosecution, by its very nature criminal prosecution has major limitations for addressing the human and peoples’ rights concerns arising from large-scale violations. As Justice Albie Sachs of the South African Constitutional Court explains, “[c]ourts are concerned with accountability in a narrow individualised sense [...] [and they leave] [t]he social processes and cultural and institutional systems responsible for the violations uninvestigated”.²⁰ One mechanism that has become instrumental for offering victims the platform for recognition of their suffering and perpetrators the opportunity for acknowledging and repenting their wrongs and seeking forgiveness is what are called truth (and

¹⁹ *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).

²⁰ Sachs, A (2011) *The Strange Alchemy of Life and Law*, Oxford: Oxford University Press, p. 84.

reconciliation) processes.²¹ These are legally established non-judicial national investigative bodies comprised of reputable independent personalities who are tasked to probe and report on the nature and patterns of human rights violations over a certain period of time or in relation to a particular conflict.

43. From the perspective of the African Charter, different mechanisms can be used for addressing human rights violations, provided that they guarantee redress and a measure of accountability. Thus, what is important is that the mechanism that is chosen meets expectations relating to addressing human rights violations, while ensuring peaceful settlements. One such legal expectation is the need for investigating and establishing the facts about the violations, including the determination of the form and nature of the violations, the circumstances that made the violations possible and the actors involved in the perpetration of the violations. From the perspective of vindicating the rights of victims, there is also the expectation of availing them with options for redress, for having their voice about their experience heard and the violations which they suffered duly acknowledged. From the perspective of establishing accountability and a culture of human rights, another expectation is the provision of an avenue for perpetrators to give an account of what happened, acknowledge the wrongs they committed and contribute to redress. Ultimately, there is also the broader interest of the African Charter within the framework of Articles 1 and 25 for the establishment of the political, sociocultural and institutional conditions for the promotion, enjoyment and protection of human and peoples' rights.
44. Given the fluid sociopolitical and weak institutional conditions of transitional settings, these expectations can also be satisfied outside of judicial processes. TRCs are one such non-judicial mechanism commonly used in the aftermath of major crises. While their structure and the scope of their mandate have varied from country to country, such commissions have been established in more than 16 African countries thus far.²²
45. Seen through the prism of the legal expectations under the African Charter, several issues of concern have been identified from the various experiences on the continent with TRCs. One such issue is the process of establishing such commissions. It is a requirement of the standards of the African Charter rights that the investigation of violations has to be independent and credible. The existence of a transparent and participatory process in the establishment of such commissions is key. For example, the appointment of the first set of commissioners for the Liberia TRC by the then president met with strong objections over concerns about the legitimacy and credibility of the process, as well as the independence of the appointed members. Similarly, the suitability of the chairperson of the Kenyan Truth, Justice and Reconciliation Commission (TJRC), Bethuel Kiplagat, who was elected by the then Kenyan president, was challenged by various stakeholders, including TJRC commissioners and civil society organisations which called for his resignation.

21 For a comprehensive account of truth commissions, see Hayner, P (2011) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd edition, New York: Routledge.

22 Central African Republic, Chad, Cote d'Ivoire, DRC, Ghana, Kenya, Liberia, Mali, Mauritius, Morocco, Nigeria, South Africa, Sierra Leone, Togo, Tunisia, Uganda and Zimbabwe.

46. TRCs also have the challenging role of probing the acts of all those involved in human rights violations. The South African TRC was charged for failing to issue subpoenas or search orders against the South African Defence Force and the African National Congress. Similarly, despite making former president Jerry Rawlings appear before the Commission under subpoena, Ghana's National Reconciliation Commission was criticised for failing to ask him probing questions. Although the Kenyan TJRC identified former president Daniel arap Moi as a person of interest who should have been specifically questioned regarding a number of violations during his presidency, this was not done.
47. The issue of procedural fairness has also been raised in a few countries.²³ For example, the Liberian TRC was criticised for naming individuals for violations without clearly establishing that the legally required standard of proof had been met.²⁴ It named over 150 individuals to be prosecuted, and another 49 to be barred from public office for three years, among whom were several prominent public figures including former president Ellen Johnson Sirleaf. In 2010, some politicians named in the report filed a class action lawsuit against the Liberian TRC, alleging that the report violates their due process rights.²⁵ The South African TRC also faced similar court actions, both during its processes and upon release of its reports. Among the many court cases filed against the TRC was one which sought to force the Commission to notify in advance those to be named for violations in public hearings. The Constitutional Court held that the TRC must provide reasonable notice to those expected to be named. Similarly, in Kenya, Senator Beth Mugo, a member of the wider Kenyatta family, successfully obtained a court judgment that expunged from the TJRC report findings in which she was adversely mentioned.²⁶
48. In light of the legal expectations highlighted above, another issue of particular significance with respect to the use of TRCs is the appropriateness of the mandate of such commissions. Although there is no single model to be adopted in determining the mandate of a commission, the minimum expectation is that the law establishing such a commission should grant it a mandate (including the accompanying resources) that is strong enough to enable it to achieve the objectives of establishing the truth, acknowledging and redressing victims, and determining accountability for violations. Concerns regarding the mandate of such commissions relate not only to the possession of the requisite investigative and fact-finding authority, as well as its independence, but also the scope of the mandate including the types of violations to be investigated and the temporal and geographical scope of the mandate.
49. While the focus is often on violations of civil and political rights, from the perspective of the African Charter, violations of socioeconomic rights and peoples' rights are of significant interest in establishing a full account of the violations and the corrective measures to be adopted. Indeed, apart from violations to the rights to life, bodily integrity and personal liberty, most

23 For example, Chad, Liberia and South Africa.

24 AU Panel of the Wise, *supra* n 11.

25 James-Allen, P *et al.* (2010) "Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia", International Center for Transitional Justice, p. 17.

26 See *Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo* [2016] eKLR.

countries have had to grapple with the issues of destruction of sources of livelihood and socioeconomic infrastructure; exclusion and marginalisation of groups; uneven distribution of resources; ethnic and regional disparities; and systemic corruption. In 2005, Liberia was the first country to highlight within the mandate of its TRC the importance of focusing on economic crimes. Similarly, truth commissions in Kenya and Tunisia also sought to address corruption and socioeconomic marginalisation as major issues of concern for the socioeconomic well-being of society.

50. A separate key challenge has been the public release of the reports of such bodies. In countries such as Nigeria²⁷ and Zimbabwe,²⁸ the reports of such investigation commissions have not been made public. The publication of reports is important for victims and for establishing shared national accounts of violations, while also enabling a broader commitment to transparency and accountability. Without the public release of the reports of such commissions, which enables members of the public to engage the issues identified in the reports and the implementation of attendant recommendations, many of the objectives of such commissions as vehicles of TJ, and hence mechanisms for redress, cannot be met.
51. A further challenge is the conclusion of TJ processes without the adoption of clearly outlined implementation mechanisms or roadmaps for the future. Even where such implementation plans are adopted, lack of political will may also result in the failure to set up, sufficiently resource or maintain and see through to its conclusion the programmes of such implementation mechanisms.

Reparation and redistributive measures

52. Reparation is a form of restorative justice, which means that its focus is on the needs of victims and the restoration of social equilibrium. It is thus a critical mechanism for repairing relations between society and victims, as well as potentially between victims and perpetrators. The latter is particularly present when perpetrators are held directly responsible for the reparative measures.
53. Reparation is premised on the recognition that providing redress when violations occur is an essential mechanism for giving meaningful effect to rights. The right to redress thus accompanies all other rights. As the ACHPR noted in its General Comment No. 4, the right to redress encompasses “the right to an effective remedy and to adequate, effective and comprehensive reparation”.²⁹
54. The right to reparation is well established in international law. Found in several multilateral treaties, it is now accepted as part of customary international law. In the works of the United Nations (UN), the components of reparation include: restitution (returning the victim to his or her state before the crime was committed); compensation; rehabilitation; satisfaction (a broad group of measures that includes access to justice and truth-seeking); and guarantees

²⁷ Osun Truth and Reconciliation Commission 2011; Rivers State Commission of Inquiry 2015.

²⁸ Zimbabwe National Peace and Reconciliation Commission 2013.

²⁹ ACHPR, “General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)” (2017).

of non-repetition. From the perspective of the African Charter, notably its recognition of the African value of social cohesion, reparation additionally entails the establishment of conditions for healing wounds, mending broken societal relationships and restoring the social equilibrium.

55. At least 14 countries in Africa have prescribed reparation initiatives.³⁰ While this indicates acceptance of the imperative of reparation, the design and implementation of reparation regimes is often fraught with challenges. First, there is the challenge of determining the criteria for identifying the category of people entitled to reparation. Equally important is the determination of the nature and scope of reparation as well as the process and the necessary considerations for making such a determination.
56. Another challenge observed from various experiences on the continent is in ensuring that reparative measures are actually implemented. While peace agreements or truth commissions often provide for reparations for victims, in some cases the State refuses the responsibility for the provision of reparation, while in others it simply is not seen to be important. Although South Africa was compelled to provide reparations after sustained civil society pressure, threat of court action and court orders for individual once-off payments to persons registered as victims with the TRC, the battle to receive a broader scope of reparation continues unabated.³¹ One of the most successful experiences of reparation awards was in Ghana, where reparation awards were made soon after the submission of the TRC report.
57. By their nature, reparative processes are concerned with previous violations. As such, their focus is principally on the past and narrowly on the individual harm suffered. They tend not to address the damage caused to the physical and social infrastructure.³² Given the impact of violations on the socioeconomic and peoples' rights of affected members of society, this gap constitutes a major omission. Most importantly, reparative processes are ill-suited to dealing with the conditions of socioeconomic marginalisation and inequality that facilitated and exacerbated the violations. In addition to reparation, there is thus a need for adopting and implementing redistributive measures that include socioeconomic and fiscal policy measures that address structural socioeconomic marginalisation and exclusion for redressing past inequities and achieving social (prospective) justice. Despite various limitations, including in implementation, useful experiences in this respect include the proposal in the AU High Level Panel Report on Darfur for special development measures for Darfur and affirmative action policies for historically marginalised groups and regions in South Africa and Ethiopia, respectively.

30 Algeria, Uganda, Sudan, South Africa, Rwanda, Nigeria, Liberia, Kenya, Ghana, Ethiopia, DRC, Chad, Tunisia, Morocco and Sierra Leone.

31 Khulumani Support Group, available at <https://www.khulumani.net/khulumani/statements/item/1282-khulumani-demands-the-protection-of-the-victims-reparation-fund-from-disbursement-by-government-as-its-financial-year-closed-and-unrepaired-victims-of-apartheid-crimes-face-even-greater-economic-hardship-as-a-result-of-today-s-cabinet-shuffle.html>.

32 An example that serves as the exception is Kenya, where the TJRC provided for collective reparation programmes entailing reparative measures meant to address socioeconomic violations. Kenya's TJRC report had a reparations framework that contained collective reparations, including: formal recognition and registration of specific areas as "community land" as defined under Article 63 of the Constitution (2010) as part of addressing historical injustices; socioeconomic measures where communities or groups of victims have access to a process to collectively decide on the use of reparations funds for the community; and government policy measures as a means of correcting the historic marginalisation of communities.

Institutional and political reform

58. Institutional reform refers to a broad range of initiatives aiming at reforming or creating the political and institutional arrangements necessary for democratic and socioeconomic renewal and transformation. At the macro level, such reform entails revising existing or developing new constitutions that reconstitute the social contract between citizens and the State, the fundamental rules on the organisation and exercise of government power as well as the accompanying legislative reforms. Constitution-making has been a core element of the transition in various countries such as South Africa (1993–1996) and Kenya (2008–2010). In addition to disarmament, demobilisation, reintegration and security sector reform as undertaken in, among others, Ethiopia, Liberia and Sierra Leone, such reform also entails the judicial reforms and administration of criminal justice reforms, which are a key part of re-establishing the rule of law and functioning State bureaucracy in post-conflict countries.
59. Other common reforms include non-criminal forms of accountability (vetting and lustration programmes). Vetting and lustration programmes are a way to purge public officials responsible for human rights abuses and ensure that they will no longer serve in a public capacity. Within the continent, vetting and/or lustration processes were used as early as 1969 in Ghana and as recently as 2013 in Tunisia. Other countries which have instituted such processes include Algeria, Nigeria, Liberia, Ethiopia and, most recently, Burkina Faso. Kenya undertook judicial and police vetting processes, with mixed success.³³ As with other processes, issues of due process and fairness have been raised with respect to vetting and/or lustration processes.
60. Constitutional and other institutional reforms alone have proved to be inadequate, as experiences in various countries, including Ethiopia and Kenya, attest. Equally important is also achieving change in the behaviour of political actors and in the way politics is conducted and power exercised. It requires not only the cleansing of public institutions through vetting/lustration but also the transformation of institutional attitudes, mindsets and practices. Central to this is the active and sustained promotion and enforcement of principles of accountability, legality, transparency, responsiveness and respect for human rights, including non-discrimination and equality in government decision-making and in the conduct of the affairs of the State as well as civilian control of security institutions.

Local and indigenous justice mechanisms

61. Given the limits of retributive justice in transitional settings discussed above, post-conflict societies on the continent started looking into more local justice and indigenous practices of dispute settlement and reconciliation.³⁴ One of the main aims of these indigenous processes is to allow a more holistic approach

³³ Kenya's judicial vetting process yielded the following outcomes: In vetting the Court of Appeal, four of its nine judges, or 44% of the bench, were deemed unsuitable, mostly on grounds of being partial in the furtherance of government repression. In the High Court, seven of its 44 judges, or 15.9%, were deemed unsuitable. However, three judges successfully argued their review applications and were retained. At the magistrates level, only 14 of its 298 members, or 4.7%, were deemed unsuitable, but this was due to practical difficulties associated with vetting magistrates rather than it being a reflection of their suitability.

³⁴ Huyse, L & Salter, M (eds.) (2008) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African experiences*, Sweden: International IDEA.

where local cultural values and belief systems are incorporated into the mechanisms aimed at addressing injustices. These processes have been referred to as local or indigenous justice, although they are also at times referred to as “traditional”, a Eurocentric term that portrays all approaches to justice outside the mainstream European legal thought as primitive and lacking in human rights legitimacy. While they have their own flaws, like any system of justice, they serve as the basis for administering justice and dispute settlement for a significant portion of society across many parts of the continent.

62. The African Charter, in affirming the African values of social cohesion and providing for a “rights culture”, establishes a firm legal basis for relying on and making use of local or indigenous mechanisms as a vehicle for TJ. Apart from Article 17(2), which provides for the right of individuals to take part in cultural life, the right to culture is further recognised under Article 22 as a collective right of peoples to their cultural development. Under Article 29(7), the Charter provides for the preservation and strengthening of positive African cultural values, of which the local or indigenous dispute settlement mechanisms form a part.
63. The *Mato Oput* in Uganda, and *Gacaca* in Rwanda, *Magamba* spirit mediums in Mozambique, *Fambul Tok* or “family talk” in Sierra Leone and *Bashingantahe* (Counsel of Wise Men) in Burundi, among others, are examples of innovative local TJ processes on the continent. Many indigenous approaches share broad principles and practices, incorporating elements of restoration, truth-seeking, acknowledgement, apology and reparation in the form of compensation and/or service. These measures are restorative and often aim at reparation to the wronged party, rehabilitation of the perpetrators, bringing back harmony and re-establishing relationships.
64. The adequacy of local forms of justice for dealing with mass atrocities on their own and without major modifications is raised as one area of concern. While the use of local dispute settlement or justice processes for large-scale violence is not historically totally alien to African societies, as the *Gacaca* courts in Rwanda attest, questions remain as to whether and how they effectively deal with gender-based violence perpetrated during conflicts. Similarly, although they enjoy community and cultural legitimacy and are accessible, as noted above in relation to the *Gacaca* courts, there are concerns that they may legitimise oppressive and discriminatory structures or otherwise be manipulated, adapted or implemented without proper safeguards.³⁵ Other areas that require attention include most notably the inclusion of women and youth in those processes.

³⁵ Illif, A (2012) “Root and Branch: Discourses of ‘Tradition’ in Grassroots Transitional Justice”. *International Journal of Transitional Justice*, 6(2): 253–273.

Current issues in and perspectives on the mainstream discourse and practice of transitional justice

65. Apart from the issues specific to each of the TJ mechanisms of which African States have experience, some more general issues have also been identified, including how gender features and is (or is not) addressed in TJ processes, as well as the debate around peace versus justice. This debate raises questions around the timing and sequencing of TJ measures and balancing the tension between various TJ objectives, including adjustments in the application of criminal processes and the conditions for the use of amnesty and clemency.

Gender and transitional justice

66. Major progress has been registered in recognising the differences in the experiences of women and men, both during war and in the post-conflict period. This is now generally accepted, with continental and global norms being developed within the last 20 years.³⁶ These have related particularly to the area of sexual and gender-based violence. The International Criminal Tribunal of Rwanda was, in 1998, the first international tribunal to define rape in international criminal law and to recognise rape as a means of perpetrating genocide.³⁷ The SCSL, in February 2009, was the first court to make convictions on the charge of “forced marriage”. The conviction and sentencing to life in prison, on 3 May 2016, of Hissène Habré, the former president of Chad, for war crimes and crimes against humanity, including rape and sexual slavery of women during his time in power from 1982 to 1990, is a milestone for women’s rights in Africa.³⁸
67. The successful prosecution of gender crimes in these processes can largely be attributed to innovative measures designed for the specific contexts. These included women-only hearings, friendlier court processes as well as legal teams (prosecutors and judges) taking a progressive approach with a firm understanding of the local context. The latest development in this sphere addresses gender-based violations irrespective of whether they target women or men.³⁹
68. The inclusion of gender experts in TJ processes has also been found to be valuable. The AU Commission of Inquiry into the violence in South Sudan was innovative in the involvement of a range of expertise: a commissioner (who was also the Special Envoy to the AU Chairperson on Women, Peace and Security) had the responsibility to look at the overall mandate and ascertain the extent to which gender considerations had been incorporated; at the secretariat level, it incorporated the AU Women, Gender and Development Directorate; and also employed gender specialists for

³⁶ Sexual and gender-based violence has been addressed by the Security Council in UN Resolutions 1820, 1888 and 1889; Rehn, E & Sirleaf, EJ (2002) *Women, War, Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-Building*, New York: United Nations Development Fund for Women. Alam, M (2014) *Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes*, New York: Palgrave Macmillan, explores how TJ institutions provide due diligence to the lived experiences of women during war and violent political upheaval and how these can also help transform unequal gender relations.

³⁷ “The ICTR in Brief”, available at <http://unictr.unmict.org/en/tribunal>; *The Prosecutor v Jean-Paul Akayesu* (ICTR-96-4).

³⁸ Taking place in Senegal in 2015, this was also the first universal jurisdiction case to proceed to trial.

³⁹ See the 2014 International Criminal Court’s Policy Paper on Sexual and Gender-Based Crimes.

investigative expertise. The Maputo Protocol in Article 20 provides for the right to peace, and provides women with the right to participate in the promotion and maintenance of peace.

69. Despite these developments, various concerns remain. One such area relates to the gap between the ambitions of the legal norms and the practice attributable to poor implementation⁴⁰ as well as stubbornness of social attitudes. Another is around issues of procedural fairness, especially when women come before such processes as accused persons.⁴¹ Similarly, there are continuing issues in terms of the establishment of policy measures, the provision of the required space and social conditions for ensuring the participation and representation of women in peace processes, including in the formulation and running of TJ processes. Furthermore, there are remaining challenges in relation to women's participation in the transitional processes and sufficient representation of women, which essentially correspond under international law to important elements of UN Security Council Resolution 1325.⁴²
70. Certain TRC processes made considerable efforts to guarantee that women's voices and stories were not ignored. In the final reports of the Sierra Leone, Liberia and South Africa TRCs, chapters were included which were dedicated to the violence perpetrated against women as well as proposals for reparation and reform which included references to women's situation. The Sierra Leone and Liberia reports further incorporated changes in law as a form of reparation to address the marginalisation of women. Sierra Leone, learning from the silence on the issue in South Africa, gave a clear mandate to its TRC to provide "an opportunity for victims to give an account [...] and for perpetrators to relate their experiences, [...] giving special attention to the subject of sexual abuses and to the experiences of children within the armed conflict".⁴³ Morocco has also been described as "ground-breaking" in its gender-sensitive work around reparation, despite the fact that only one of the 17 commissioners was a woman. The gender-sensitive reparation included payments for victims' wives and daughters equal to those of victims' male relatives. This measure challenged the existing Moroccan inheritance law. In calculating the reparation, the Commission took into account the additional harm that women suffered because of their status in a patriarchal society. Both measures served to advance women's positions under Moroccan law.⁴⁴
71. It is worth noting that one of the biggest critiques against the South African TRC is that while it brought about political transformation, it left behind the (equally important) notion of social transformation, thus leaving the "new" South Africa with the same structural inequalities which characterised the

40 Sigsworth, R & Kumalo, L (2016) "Women, Peace and Security: Implementing the Maputo Protocol in Africa". *Institute for Security Studies Papers*, 295.

41 See <http://unscr.com/en/resolutions/doc/1325>.

42 The UN Security Council adopted a resolution (S/RES/1325) on women and peace and security on 31 October 2000. The resolution reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peacebuilding, peacekeeping, humanitarian response and in post-conflict reconstruction, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security. Resolution 1325 urges all actors to increase the participation of women and incorporate gender perspectives in all UN peace and security efforts. See <http://www.un.org/womenwatch/osagi/wps/> for more information.

43 Truth and Reconciliation Commission Act, 2000, Section 6(2).

44 AU Panel of the Wise, *supra* n 11 at 40.

apartheid regime.⁴⁵ Adding a gendered analysis highlights the possibility of providing interventions that extend justice from the legal environment into the realm of development, where access to education, healthcare and equal employment opportunities is integral to the sustainability of reconstruction efforts⁴⁶ and for addressing the structural conditions that make women particularly vulnerable to violence during conflicts.

Timing and sequencing

72. In many of the experiences across the continent, various TJ objectives (of ending ongoing violence, ensuring justice and reconciliation and building a democratic system of governance) present societies in transition with major policy dilemmas and implementation challenges. In the fragile transitional context, these challenges at times necessitate a sequenced approach.⁴⁷ At the early stages of transition, more focus is thus put on consolidating security, peace and stability while only such measures for establishing accountability as the security, institutional and political conditions of the country permit (such as investigations, collection of evidence and protection of witnesses) are initiated, with full measures of justice processes temporarily suspended or programmatically planned to allow consolidation of stability and the strengthening of the national voices for accountability. Such sequencing should, however, be programmed as part of a comprehensive plan with necessary guarantees of implementation to forestall failure of implementation of criminal justice measures duly agreed to as part of the transitional process.
73. Some countries have carried out some of the processes concurrently. Such was the case in Sierra Leone with a special (hybrid) court and the truth commission operating in parallel. This approach threw up some major challenges, especially since there were no clear parameters for how the two institutions could cooperate, creating some confusion. It has been argued that “[b]oth should have played a complementary role, with the Court trying (and convicting) only the masterminds of the conflict and the TRC-SL [Truth and Reconciliation Commission of Sierra Leone] providing a more complete record of the conflict”.⁴⁸ Yet, there were major concerns about whether confessions by perpetrators at the TRC could be used during trials at the court. There were also disputes between the two over access to detainees. Other countries have opted to sequence processes, beginning with truth-seeking processes and followed by other accountability mechanisms, although the implementation of the accountability mechanisms stalled in many of these situations, including Liberia, Burundi and Sudan.
74. The temporal scope of TJ processes may result in the exclusion of some victims from participation in these processes. The South African TRC only saw 22,000 victims qualify for reparation when the TRC process concluded in 1998, and to date an unofficial list of victims indicates more than 100,000

45 Stanley, E (2001) “Evaluating the Truth and Reconciliation Commission” 39 *Journal of Modern African Studies* 526–527.

46 The World Bank (2006) “Gender, Justice and Truth Commissions”, p. 12.

47 See the AU Panel of the Wise (2013) *Non-Impunity, Truth, Peace, Justice and Reconciliation in Africa: Opportunities and Challenges* [AQ: is this meant to be the ref in fn 11? If so, change to AU Panel of the Wise, supra n 11; “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General”, UN Doc. S/2004/616 (23 August 2004).

48 Ibid.

others who did not participate in the TRC and thus were excluded from accessing the reparation programme. Another contemporary example is the Kenya ICC cases, where the ICC's distinction of case and situation victims was deemed to have marginalised victims who were not allowed to participate in the cases and occasioned tensions among victims.

Balancing of competing transitional justice objectives

75. The tension that arises in particular transitional settings between the various objectives of TJ may not be amenable to being resolved through timing and sequencing. At times, the resolution of such tension may necessitate balancing the contending objectives. Usually, this entails reaching a compromise between the demands for criminal justice and the need for bringing a country ravaged by violence together and moving it rapidly towards building a shared democratic future, albeit without forgetting or denying the past. This finds support in various African traditions and thoughts that underscore the interdependence of reparations to victims and reforming society and balancing individual and societal duties and claims. The essence of these thoughts is encapsulated in the enunciation of all three generations of human and peoples' rights and duties in the African Charter.
76. In transitional settings, these may necessitate institutional and procedural innovation/compromise whereby accountability measures are designed and implemented in a way that avoids holding the society in the past and facilitates the building of a shared future in which those who suffered violence play an active and central role. Such measures of compromise include using prosecutorial strategies that facilitate the cooperation of suspects, such as plea bargains and the use of conditional amnesty and pardon as part of truth and reconciliation processes. Sentencing formulas involving mitigation and/or alternative forms of punishment also constitute examples of procedural compromise. While such institutional and procedural changes may put limitations on the right of the victim to effective remedy,⁴⁹ they constitute justifiable limitations within the framework of Article 27 of the African Charter to the extent that they are proportional and serve the legitimate public interests at stake.
77. The use of traditional justice and reconciliation principles emphasising conciliation, community participation and reparation can also be used as a vehicle for achieving such compromise, as has been effectively used in, among others, Rwanda. Africa's experience with respect to such institutional and procedural compromise and innovation is highlighted in the sections below dealing with clemency and amnesty and traditional justice.

Clemency and amnesty

78. Eighteen African countries have instituted amnesty agreements, laws or programmes.⁵⁰ Some of these have had more than one amnesty process (e.g. Algeria, Zimbabwe and Burundi). While rules of international law

⁴⁹ Communication 245/02 - *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para. 215.

⁵⁰ Algeria, Burundi, Central African Republic, DRC, Nigeria, South Africa, Zimbabwe, Uganda, Mozambique, Angola, Rwanda, Djibouti, Libya, Tunisia, Senegal, Sierra Leone, Guinea-Bissau and Cote d'Ivoire.

barring the use of amnesties have emerged, the human rights imperatives of ending the continuation of violence and getting perpetrators to disclose the full accounts of wrongs done may necessitate the use of qualified amnesties as an unavoidable compromise. The growth in legal practice and jurisprudence has begun to define some of the procedural aspects to be considered before such an amnesty can be regarded as legally justifiable. It is thus now legally established that there cannot be a blanket amnesty; that amnesty should not be for only one party to the conflict (i.e. there should be equal application); and that the processes for granting amnesty must be transparent.

79. In the aftermath of the so-called period of national tragedy (1990–2000), Algeria adopted, through a referendum, the Charter for Peace and National Reconciliation (the Charter) in 2005. As the government put it in the Algerian Periodic Report submitted to the ACHPR in 2015, the Charter constituted a sovereign choice by the people of Algeria on the strategy to resolve the crisis “based on the strengthening of national cohesion and the promotion of national peace and reconciliation in order to put behind them, once and for all, the serious crisis that occurred in Algeria”. Although the Charter envisages the payment of compensation for victims, it granted rebels amnesty and exonerated State security forces from responsibility. In addition, Decree No. 06-01 of 27 February 2006 adopted in pursuit of the 2005 Charter precluded courts from assuming jurisdiction over complaints relating to violations that took place during the national tragedy. While it provides for the reintegration of former combatants into society, arguably this kind of blanket amnesty for grave violations is not in line with the approach to TJ consistent with the African Charter as it does not provide for any measure of accountability.
80. Some amnesty processes have been limited to only include certain crimes, and have sought to exclude more senior perpetrators (as was the case with the Ugandan amnesty for the LRA), or have excluded sexual violations (as in South Africa). More serious violations have also been excluded by particular amnesties (e.g. involvement in massacres or bombings through the Algerian Civil Concorde Law of 1999). In many countries there have been de facto amnesties for footsoldiers due to prosecutions only targeting the more high-level perpetrators (e.g. Ethiopian Red Terror trials and the ongoing national court prosecutions in the DRC).
81. In addition to amnesty, Algeria and South Africa have also instituted forms of clemency for those who were serving sentences. In Algeria, this resulted in the release of the second-in-command of the Islamic Salvation Front, as well as several hundred other rebel group members shortly after the adoption of Decree No. 06-01. While in the case of South Africa “[i]t was [initially] agreed that the South African Constitution, the Prisons Act and the 1990 Indemnity Act would be used and that ‘a group of wise men’ would be appointed to deal with releases and the granting of indemnity”, in the end it was agreed that “all prisoners whose imprisonment is related to political conflict of the past and whose release could make a contribution to reconciliation should be released” and, as a result, 149 prisoners were released with immediate effect and

without any formal process at all.⁵¹ Following this initial process, further releases were only made on successful applications for amnesty.

The limits in the mainstream discourse and practice of transitional justice

82. In approaching the issue of TJ and human and peoples' rights, one should bear in mind the nature of the prevailing context being dealt with. The term "transitional" in "transitional justice" is meant to capture this context, one characterised by a lack of political, legal and socioeconomic normality and stability. While much attention in the discourse on TJ puts a premium on the "justice" ambit, it is clear that the "transitional" ambit is not merely a prefix to and a non-substantive adjective for the term "justice". It should be seen as having a substantive aspect to it. Against this background, Professor Makau Mutua identified two critical notions that the normative concept of TJ captures. First, "it acknowledges the temporary measures that must be taken to build confidence in the construction of the post-despotic or conflict society".⁵² Second, instead of a winner-takes-all approach as a beachhead to the future, "transitional justice calls for deep concessions on either side of the divide".⁵³
83. As to the dimension of "justice" in the normative concept of TJ, the basic questions of particular import are what "justice" in the particular context of transition applies and the objectives of such justice. Often it is said that the attention of TJ is about confronting the past violations of human and peoples' rights inflicted on members of society. This conception of TJ is necessary but incomplete. In its comprehensive sense, apart from the focus on addressing the wrongs of the past, TJ demands approaches that create security and peace today by securing the cessation of hostilities and a peace agreement, and putting in place mechanisms that guarantee the building of a just, democratic and inclusive political future for all.
84. Understandably, much of the discourse on and practice of TJ, including the experience in Africa, is shaped by and tends to have a legalistic bias. An often-quoted description of TJ is from the UN Secretary-General's report of 2004, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies". The legalistic bias is also reflected in the preference that is often expressed towards the use of retributive justice taking the form of prosecutions and criminal accountability. A traditional (albeit incorrect) perception is that criminal justice mechanisms are the most crucial aspects of TJ.⁵⁴ Probably based on the assumption that the essence of TJ is only to tackle impunity, prosecution before a national or international court was considered to be the ultimate goal of TJ, effectively excluding wider issues of justice. Any meaningful effort towards realising "freedom, equality, justice and dignity as essential objectives for the achievement of the legitimate

51 Truth and Reconciliation Commission Final Report - Volume 1, p. 51.

52 Mutua, M (2011) "A Critique of Rights in Transitional Justice: The African Experience", in Gaby Oré Aguilar & Felipe Gómez Isa (eds.) *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, Cambridge: Intersentia, p. 31.

53 Ibid.

54 This is evident even in the advocacy of several NGOs that focus almost exclusively on tackling impunity. See generally Mobeck, E, "Transitional Justice in Post-Conflict Societies: Approaches to Justice", available at http://www.bundesheer.at/pdf_pool/publikationen/10_wg12_psm_100.pdf.

aspirations of the African peoples” has thus to go beyond a singular and narrow focus on retribution.

85. It is now accepted that “a comprehensive approach to transitional justice also includes non-judicial but restorative approaches to justice involving mechanisms that offer reparation and the promise of institutional reforms”.⁵⁵ This was clear even when TJ achieved prominence as a vehicle for coming to terms with past violations, particularly under violent authoritarian regimes. Already in the early 1990s, when Latin American transitions were unfolding, with a range of attempts to grapple with the past and build a peaceful future, the “Chilean human rights lawyer José Zalaquett [argued] that policies to address past human rights violations should achieve one or more of the following:
- A measure of national unity and reconciliation, particularly when the human rights violations of the past took place in a context of (if not directly caused by) extreme political polarization and civil strife, including forms of armed struggle;
 - Build or reconstruct institutions that are conducive to a stable and fair political system;
 - Procure the economic resources needed to achieve those ends, particularly when the transition periods are marked by fragility and when a measure of economic success is instrumental for political stability.”⁵⁶
86. Such a rich and comprehensive conception of TJ debunks a one-size-fits-all approach. It lends itself to a contextual determination of both the balance between various dimensions of TJ and the particular aspect which a transitional society may choose to emphasise.
87. Another characteristic of mainstream discourse and practice of TJ is that it is largely confined to violations of civil and political rights. It has for the most part sought to address violations of the right to life, freedom from torture and inhumane treatment and personal liberty. While the focus on these rights is fundamental, it limits the reach of TJ to physical violence of individuals. Political freedoms are important, but as the case of South Africa has demonstrated, they can be of limited utility in addressing the indignation and injustice that result from socioeconomic deprivations. As a renowned African TJ scholar put it, “[i]t is an illusion to think of powerlessness and human indignity in the African context in purely political terms, as the human rights movement does, and to prescribe political democracy and the human rights doctrine as a panacea”. He also argues that “[r]eal human powerlessness and indignity in Africa – the very causes of the illegitimacy of the African State – arise from social and economic conditions”.⁵⁷ In this context, our conception of violations that take place in conditions of violence or violent authoritarianism, and that should be addressed in transition, cannot thus be limited to violations of civil and political rights only. It should also cover the various socioeconomic deprivations and inequalities affecting various sections of society.

⁵⁵ See http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_concept_note.pdf.

⁵⁶ Zalaquett, J (1995) “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints”, in Neil J. Kritz (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume One*, Washington, D.C., United States Institute for Peace, p. 6., quoted in AU Panel of the Wise, supra n 11.

⁵⁷ Ibid., 37

88. Equally important is thus the consideration of acts such as embezzlement of public funds, corruption, nepotism in the provision of services and in recruitment to public services, the unfair concentration of economic opportunities and benefits in the hands of certain elites and their constituencies as forms of violations. These acts should also be characterised as violations requiring accountability and socioeconomic justice. Indeed, going beyond the national political level, a comprehensive human rights approach should also encourage and articulate socioeconomic policies able to address the debilitating consequences of the dominant frameworks of the international economic order on the most vulnerable sections of society, including most notably the role and responsibilities of multinational companies.
89. Another aspect of the mainstream discourse is the general preference for modern legal approaches and processes. This generally limits the scope of participation of people with limited access to or tradition of using these processes, and who rely on indigenous approaches to justice and conflict resolution. The space in the African Charter and the richness of the provisions of the Charter provide the widest possible framework for making use of and adapting indigenous processes in pursuing TJ.
90. Most transitions in Africa are from conflicts to peace. In almost all conflict situations on the continent, violence resulted in not only the violation of civil and political rights but also all other categories of rights, including socioeconomic rights. Accordingly, any meaningful attempt at redressing past violations, ending ongoing insecurities and addressing future uncertainties should resort to a TJ conception that embraces civil, political and socioeconomic rights.
91. An individualist bias is one of the features of the mainstream discourse and practice of TJ. This bias is particularly problematic in Africa where group and community rights are deeply embedded, both in the cultures of the people and in the multinational nature of the African State.⁵⁸ Given that experiences in South Sudan and Kenya show that conflicts or violent instability take ethno-cultural divisions, an approach with a focus on individualism will prove utterly inadequate. We thus need to have a conception of human rights that gives due account to the group and collective dimension of the interests of members of society.
92. This tendency of focusing on individualism is at times seen in the emphasis that is put on individual criminal responsibility as well. There is certainly a role for individual criminal responsibility. Yet, an approach that puts primacy on individual criminal responsibility suffers from the flaw of reducing systematic and widespread violations to individual criminality. An approach that is limited to individual criminal responsibility will fail to properly probe and rectify the systematic and structural conditions and the political mobilisation of members of society that make the conflicts and the attendant violations possible.

⁵⁸ Ibid., 36.

93. One also finds in much of the discourse on and practice of TJ that there is too much focus on the wrongs of the past. Although they have an interest in seeing that perpetrators of those wrongs are held accountable, those affected by violence have an even greater interest in having their present needs met and the emergence of a more just system. The focus on the past has thus to be balanced with a focus on both the needs of the present and building an inclusive, just and democratic future. A TJ process with such a balanced focus not only enables a more nuanced approach to the wrongs of the past but also allows members of society to overcome the divisions and antagonisms of the past, and work towards a common future to achieve transformation.

Conclusion

84. This chapter offered an overview of some of the notable experiences in Africa, focusing on highlighting the critical human and peoples' rights issues or challenges which have arisen in the conceptualisation, designing and implementation of TJ processes on the continent.
95. The review establishes that there is rich experience in using various TJ processes across many countries in Africa. Importantly, it has established that there is not only diverse but also uneven experience in the use of TJ approaches on the continent. These experiences show that while TJ approaches need to be tailored to the needs and demands of the specific situations of the society concerned, what is lacking is the parameters or basic standards that the design and implementation of these TJ measures should comply with. In this respect, the questions highlighted in the analysis include the scope of the margin of appreciation relating to the institution of criminal prosecution to hold perpetrators of violations accountable; the nature and scope of the mandate of truth, justice and reconciliation commissions; the requirements for the use of conditional amnesty; and local and indigenous justice approaches and institutional reform measures, including vetting and lustration. These questions underline the necessity for and importance of the ACHPR guidance to State Parties regarding an African Charter-based formulation of TJ mechanisms that avail the most comprehensive options for resolving the causes and drivers of conflict, addressing the violations and overcoming the divisions that conflicts or repressive rule inflicted.
96. The analysis also provided a critical assessment of mainstream discourse on and practice of TJ on which much of the experience on the continent has relied. This analysis underscored not only the limitations but also the rich materials that the African Charter presents for rectifying the various drawbacks of the mainstream discourse on and practice of TJ.

PART III:

Review of Continental Legislative Framework Relevant to Transitional Justice

97. This chapter seeks to identify and discuss what ACHPR Resolution 235 calls the legislative framework of TJ in Africa, and thus is concerned only with continental rather than national legislations. Accordingly, it offers an analysis of the various legislative instruments, including the African Charter, the Maputo Protocol, and the African Children's charter as well as other relevant AU instruments, including the Constitutive Act of the AU. Based on this analysis, it explores ways in which the range and nature of human and peoples' rights issues canvassed in these instruments offer useful materials for a more holistic conception of TJ that can be implemented flexibly in particular transitional settings in Africa.

The African Charter on Human and Peoples' Rights

98. The foundation on which the edifice of the African human rights system is constructed is the ACHPR. Like similar founding human rights instruments, the African Charter provides for substantive rights, lays down enforcement procedures and has an established supervisory body. The African Charter is divided into three broad parts. Part one, from Article 1 through to Article 29, specifies the list of human and peoples' rights as well as individual duties in the various provisions. In part two, stretching from Article 30 to Article 63, the African Charter addresses itself to the establishment and organisation of the ACHPR. Finally, part three, from Article 64 to Article 68, sets forth general procedural provisions.
99. In terms of its articulation of substantive rights, the African Charter is unique. First, it is the only international instrument that has entrenched all three categories of rights. It enshrined in one legal instrument not only civil and political rights but also economic, social and cultural rights. Equally unique is also the recognition in the African Charter of the collective rights of peoples. Secondly, and probably more importantly, is the fact that all three categories of rights have the same legal validity and are, legally speaking, equally enforceable. Thirdly, it also provides for the duties of individuals, dubbed by leading African human rights scholars Makau Mutua as "the African cultural fingerprint".⁵⁹

⁵⁹ Mutua, M (1994-95) "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties", 35 *Va. J. Int'l L.* 339.

100. In enshrining such a rich catalogue of rights, the Charter provides “much fodder to a holistic reading of human rights theory and practice”.⁶⁰ In terms of addressing the human and peoples’ rights issues arising in transitional settings, the African Charter thus offers all-inclusive legal materials, which, if innovatively used, can offer a robust normative framework for a comprehensive conception of TJ able to cater for the needs and circumstances of African countries transitioning from violence and repressive rule to peace and democratic order.

Civil and political rights

101. The Charter includes a spectrum of civil and political rights that have direct and/or indirect bearing on the determination of the TJ agenda of State Parties to the African Charter. The most prominent of these include the rights to life and integrity of the person (Article 4); dignity, and freedom from slavery, the slave trade, torture, and cruel, inhuman or degrading punishment and treatment (Article 5); liberty and security of the person (Article 6); a fair trial (Article 7); freedom of expression and access to information (Article 9); and freedom of movement (Article 12). These guarantees seek to ensure that individuals are protected from institutional, political or social conditions that threaten the liberty and physical integrity of persons, their freedoms and procedural safeguards. They entitle them to protection from extrajudicial and arbitrary killings, unlawful detention or imprisonment, abductions or forced disappearance, torture and other physical or psychological abuses which are threats to the life, physical integrity and dignity of human beings.

102. The Commission has through its jurisprudence interpreted the right to life under the African Charter to protect citizens against summary executions,⁶¹ mass killings, genocide,⁶² the use of landmines,⁶³ “executions based on the authority of a defective trial,⁶⁴ denial of food and medical attention, and subjecting them to torture”.⁶⁵ Such an interpretation of this right (“respect for life”) has seen some of the most creative, far-reaching interpretations of the Commission. This creativeness emerges especially in making the intersections between this right and access to food, nutrition and health.

103. The right to life has also been addressed within contexts of mass violations. In *Organisation Modiale Contre la Torture and others v Rwanda*, the Commission found that “the pre-1994 massacre of a large number of Rwandan villagers by the Rwandan armed forces and the many reported extrajudicial

60 Oloka-Onyango, J (2002-3) “Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa”, 18(4) *American University International Law Review*, 851, 857.

61 Communication 223/98 – *Forum of Conscience v Sierra Leone*; Communication 205/97 – *Kazeem Aminu v Nigeria Resolution on Nigeria* (ACHPR/Res.70 (XXXV)(04); Resolution on Cote d’Ivoire (ACHPR/Res.67)(XXXV)04); Resolution on the Recent Violation in Kabylia, Algeria (ACHPR/Res.57 (XXIX)01); 64/92, 68/92, 78/92; *Krishna Achutan (On behalf of Aleke Banda)*, *Amnesty International (On behalf of Orton and Vera Chirwa)*, *Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*. Communication 155/96 – *Social and Economic Rights Action Centre v Nigeria*.

62 Resolution on the Situation in Rwanda, April 1994, ACHPR/Res.8(XV)94.

63 Communication 240/2001 – *Interights et al. v Botswana*; see also Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98.

64 Communication 137/94, 134/94, 154/96 and 161/97 – *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organization (On behalf of Ken Saro Wiwa Jnr) v Nigeria*; and Communication 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interfricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l’Homme v Mauritania*.

65 *Ibid.*

executions for reasons of their membership of a particular ethnic group is a violation of Article 4”.⁶⁶ Similarly, it was found that killings, disappearances and assassination by unknown people, which the government did not attempt to prevent or investigate afterwards, were violations of the right to life.⁶⁷ The ACHPR further held that the right to life is a fulcrum of all other rights and is a fountain through which other rights flow.⁶⁸ The right to life therefore requires the utmost respect and protection.

104. In a communication against Chad, the Commission held that the State had the responsibility to secure the safety and the liberty of its citizens, as well as to conduct investigations into murders even where it cannot be proved that violations were committed by government agents.⁶⁹ However, it is not just governments that have the responsibility of observing and ensuring observance of the human and peoples’ rights in the African Charter. In many of its resolutions, the ACHPR not only condemned the massacre of and violence against innocent civilians by armed factions but also expressed that they are bound to observe human rights and humanitarian norms.⁷⁰
105. With respect to the right to dignity, some of the relevant instruments developed by the Commission include the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002) (the Robben Island Guidelines). The Commission has also prepared a *General Comment on the Right to Redress for Victims of Torture or Ill-treatment under Article 5 of the African Charter on Human and Peoples’ Rights*. The General Comment is particularly significant as it addresses issues arising in conflict and TJ settings.
106. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa⁷¹ expand and provide further guidance on Articles 6 and 7 of the African Charter. While the Principles and Guidelines do not have the binding legal force of a treaty, they are considered to be “strongly persuasive”.⁷² These guidelines include a specific focus on criminal charges, and relate to all judicial bodies, thus any “dispute resolution or adjudication mechanism established and regulated by law and includes courts and other tribunals”.⁷³ While the Commission has not made specific pronouncements on institutions set up to facilitate TJ processes in terms of their adherence to or acceptance of the norms of the African Charter, in particular the right to a fair trial, the Principles and Guidelines could provide the Commission with a point of departure for developing guidelines tailored to the transitional settings of the judicial and non-judicial TJ bodies. In addition to the Principles and Guidelines, the right to a fair trial and the duty of States to guarantee the

66 Communications 27/89, 49/91 and 99/93, para. 24.

67 Communication 74/92 – *Commission Nationale des Droits de l’Homme et des Libertés v Chad*.

68 Communications 223/98 – *Forum of Conscience v Sierra Leone* 14th Annual Activity Report 2000–2001, para. 20.

69 Communication against Chad, supra n 67 at para. 22.

70 See *Resolution on Burundi* 9th Annual Activity Report ACHPR (1995–1996), Annex VII; *Resolution on the Situation in Rwanda* 7th Annual Activity Report ACHPR (1993–1994), Annex XII; *Resolution on Sudan* 8th Annual Activity Report ACHPR (1994–1995), Annex XII. It required armed groups, among other things, to immediately cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and to allow such assistance to be delivered.

71 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247.

72 Keetharuth, SB (2009) “Major African Legal Instruments”, in A Bösl & J Diescho (eds.) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, Windhoek: Macmillan, p. 201.

73 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part 5.

independence of courts have been the substance of a high percentage of cases decided by the Commission.⁷⁴

107. In relation to Article 9, the African Charter provides that “Every individual shall have the right to receive information [...]” and that “every person shall have the right to express and disseminate his opinions within the law”. This right extends to an aggrieved party seeking a State to disclose the facts/ records pertaining to particular violations, including the whereabouts of disappeared persons, the location of mass graves or the identity of perpetrators. Arguably, Article 9(1) could also be more broadly interpreted so that it prohibits the destruction of State documentation that may shed light on the facts and circumstances pertaining to gross human rights violations. Further, it could be interpreted to impose a responsibility upon States to take measures to ensure the preservation of such documents and testimonies relating to human rights violations. The Declaration of Principles on Freedom of Expression in Africa,⁷⁵ adopted in 2002, states that “[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law”. This very clearly applies to TJ processes, especially in terms of ensuring a society’s right to information, known in TJ parlance as the “right to truth”. Additionally, Article 9(2) should not be understood in transitional justice settings particularly where genocidal events took place as giving licence for people to deny the occurrence of genocide. Accordingly, limitations of freedom of expression with respect to denial of genocide as per established practice of democratic societies and regional human rights systems with similar experiences could be justifiable and acceptable under Article 9(1).
108. Finally, in relation to Article 12, the Charter provides for the right to freedom of movement and residence within the borders of a State as well as the right to seek asylum and the prohibition of mass expulsion of non-nationals. This right equally applies to persons who were displaced within or outside of their State due to conflict and the State thus has a duty to ensure that such persons are able to return to their place of origin.

Economic, social and cultural rights

109. The socioeconomic rights enshrined under the African Charter include the right to property (Article 14), which can also be considered a civil and political right; the right to equitable and satisfactory conditions of work (Article 15); the right to health (Article 16); and the right to education and culture (Article 17). The Guidelines for National Periodic Reports additionally define reporting guidelines, among others, on the rights to social security and social insurance as well as on the right to an adequate standard of living, which are not expressly mentioned in the African Charter.

⁷⁴ Keetharuth, *supra* n 74 at 195.

⁷⁵ See Declaration of Principles on Freedom of Expression in Africa, adopted at the 32nd Session of the African Commission on Human and Peoples’ Rights, 17-23 October 2002, Banjul, The Gambia, available at <http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html>.

110. Article 18(1) of the African Charter stipulates that “[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral”. The right to family imposes a duty on the State to “assist the family which is the custodian of morals and traditional values recognized by the community”.⁷⁶ In conflict situations, families are often separated, and some family members disappear, thereby necessitating family reunification and repatriation during a period of transition.
111. These are rights that guarantee protection to individuals and communities against destruction, through violent acts, of their homes, sources of livelihoods and infrastructures of public services on which they depend for their survival. In various communications, the ACHPR has dealt with violations of economic and social rights in conditions of armed conflicts or situations of political instability. In *COHRE v Sudan*, the Commission found several violations. It considered that the right to health under the African Charter had been breached, given that “the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells, exposed the victims to serious health risks”. The Commission also relied on the right to property in finding violations of the right to housing, in that “the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by article 14.”⁷⁷
112. Similarly in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*, the Commission stated that “the looting, killing, mass and indiscriminate transfers of civilian population, the besiege and damage of the hydro-dam, stopping of essential services in the hospital, leading to death of patients and the general disruption of life and state of war [...] are in violation of Article 14 guaranteeing the right to property”.⁷⁸
113. The UN notes that “transitional justice processes increasingly address economic, social and cultural rights issues, either as part of the root causes of conflict and repression or as violations occurring during the conflict”.⁷⁹ Although in most TJ processes socioeconomic rights issues are addressed only in the context of the analysis of the root causes, the foregoing review of the work of the ACHPR clearly attests that it is possible to address them as violations that arise in conflict situations or repressive systems in the same way as civil and political rights violations.
114. One of the key issues in TJ is related to the violations committed by non-State actors. The Commission’s decision in *SERAC et al. v Nigeria* held the Nigerian government responsible for the violations, which resulted from the actions of a private company. There have been numerous cases involving violations committed by multinational corporations which African organisations have taken to international jurisdictions, including cases

⁷⁶ Article 18(2) of the African Charter.

⁷⁷ *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications Nos. 279/03 and 296/05, decision of May 2009. See in particular paras 9–14, 205, 209 and 212; UN Office of the High Commissioner for Human Rights (2014) *Transitional Justice and Economic, Social and Cultural Rights*, HR/PUB/13/5.

⁷⁸ Communication No. 227/99.

⁷⁹ UN Office of the High Commissioner for Human Rights, *supra* n 77 at 58.

directly linked to mass violations of human rights in conflict.⁸⁰ In the light of legal developments captured in the Maputo Protocol, the AU Anti-Corruption Protocol and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), there is now enhanced legal basis for probing violations by businesses, including multinationals, and establishing their responsibility as part of TJ processes.

115. As noted in the previous chapter, socioeconomic rights are important not only in expanding the focus of TJ beyond physical violence to address damages to sources of livelihoods and social and economic infrastructure. They are also significant in as far as they offer the basis for elaborating redistributive justice measures that address the structural causes of conflict, including socioeconomic marginalisation and inequality.

People's rights of the African Charter

116. The most important departure of the African Charter from other human rights instruments is its elaboration of the collective rights of peoples. It has recognised a wide range of rights as peoples' rights, including those that have not previously found any recognition in treaty form. The peoples' rights enshrined in Articles 19 to 26 of the African Charter include the right of people to existence, self-determination, political sovereignty over their natural resources, the right to development, the right to peace and the right to a general satisfactory environment. The Commission has not restricted the interpretation of "people" in order to enable a broad scope depending on circumstances, and has within its rulings identified subnational groups, including minority groups or those identified as indigenous populations within a State (e.g. Black Mauritians) as "peoples".
117. Article 20 of the African Charter provides for the right of all peoples to existence and self-determination. At a minimum, this article prohibits measures that would amount to genocide according to international law. "Article 20 also prohibits what is known as 'cultural genocide', that is, acts that, although not physically destroying a group, have the effect of destroying the group as such." *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda* revealed that many people of the Tutsi ethnic group were arbitrarily arrested, massacred and had their villages destroyed.⁸¹ Despite the finding of the Commission that these violations were directed against individuals on account of their ethnic membership, and hence the aim of the violence was against the Tutsi as such, the Commission treated the violations as merely individual rights issues. In so limiting the scope of the analysis to individual rights issues, the Commission failed to take full account of the group dimension of the violations and to affirm the massacre of a large number of Tutsis and their extrajudicial executions as violations of the right to existence under Article 20.

⁸⁰ Wasinski, MJ (2013, October 14) "South Africa Apartheid Lawsuit: The End of the Epopee?" *AfricLaw*, available at <https://africlaw.com/2013/10/14/south-africa-apartheid-lawsuit-the-end-of-the-epopee/> (accessed 7 April 2019). The article notes *Kiobel v Royal Dutch Petroleum Co.* and the apartheid lawsuit using the Alien Torts Statute in the US as a tool to seek redress from international companies for their conduct undertaken in Africa.

⁸¹ See Communications against Rwanda, supra n 66.

118. Article 21 of the African Charter, which guarantees the right of all peoples to freely dispose of their wealth and natural resources, offers a framework for addressing the use of natural resources in conflict situations. – *Democratic Republic of Congo v Burundi, Rwanda, Uganda*,⁸² the ACHPR held that the illegal exploitation/looting of natural resources during the occupation by neighbouring countries of Eastern DRC constituted a violation of Article 21 of the African Charter. The ACHPR accordingly recommended that adequate reparations be paid to the Complainant State for and on behalf of the victims of the violations.
119. The right to existence as well as other cultural rights in the Charter (particularly Article 22) provide a framework for societies in transition to take into consideration the needs of historically marginalised ethno-cultural groups or regions in reshaping their political arrangements. As pointed out in the foregoing paragraph, this right, when coupled with the right of non-discrimination, also provides support for a broader conception of redress to include such issues as language policies as well as other protective measures and institutions for addressing issues of marginalisation. In cases where ethnic cleavages exist and have resulted in cycles of conflict (e.g. Rwanda, Burundi, Kenya, South Sudan), collective rights together with other rights such as the right to non-discrimination and the right to participate in government can be interpreted to articulate key aspects of governance, institutions and policies to address collective marginalisation and promote group equality and non-discrimination. This again would be an innovation for the TJ field, which continues to struggle with the intersection of justice and governance.
120. Article 22 provides for the right of peoples to development. This right provides a lens through which to grapple with and address the systemic nature of violations – the most vexing of issues for TJ. In 2010 one of the first publications to explore the synergies between TJ and development noted that “[i]t is not enough to broaden transitional justice and simply include economic, social and cultural rights. Rather, the focus should move beyond a narrow legal individual rights paradigm to define the justice we seek in transition as one of social justice”.⁸³ It is clear that the African Charter has always provided the scope for a social, redistributive justice, although States engaging in TJ have as yet to make adequate use of the framework of the Charter to this end. If this broad conception of justice could guide TJ developments on the continent, we would go a long way towards building sustainable peace. In addition, rather than being only an analytical tool to explore the causes of other violations, the African Charter provides for the right to development to be protected.
121. The right to development can also give expression to a broader right to reparation, by focusing not only on individual rights to compensation but also on community rights to rehabilitation and redress for the violation suffered.⁸⁴ However, reparation taking the form of reconstruction and rehabilitation

82 Communication 227/99.

83 Servaes, S & Zupan, N (2010) *New Horizons: Linking Development Cooperation and Transitional Justice for Sustainable Peace*. Presented at International Conference, Berlin, 27-28 January.

84 Communication 276/03 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, para. 298; Application 006/2012 – *African Commission on Human and Peoples’ Rights v The Republic of Kenya* (Ogiek case), paras 208-210.

activities in this context is specific to redressing violations suffered and should not in any way be equated with wider development processes which are a responsibility of governments in democratic societies.

122. In the context of TJ, another substantive right of particular importance is the right to peace provided for under Article 23 of the African Charter. In a series of communications brought before the ACHPR against Mauritania,⁸⁵ the Commission held that “the unprovoked attack on the villages [of black Mauritians] constitutes a denial of the right to live in peace and security”.⁸⁶ This right demands, among others, that measures are taken to prevent conflicts and, where conflicts have erupted, all steps are taken to manage, resolve and bring them to an end. For countries in conflict, the right to peace and security imposes the obligation on parties to seek peace negotiations and achieve a compromise for ending the conflict and the attendant human and peoples’ rights violations. The Commission has in various resolutions underscored this point when calling upon parties to various conflicts to unconditionally engage in initiatives for peace-making. Clearly, the quest through peace-making processes for realising the right to peace and security under Article 23 may at times necessitate compromises on the ways and means of addressing the violations that occurred in the course of conflicts.
123. As various conflict situations that Africa has experienced have shown, violence tends to be organised and mobilised along ethnic, religious or regional lines or a combination thereof. Any attempt to redress the violations that such mobilisation of violence occasions purely on the basis of the individual rights conception of TJ would be and is often utterly inadequate. Removing the individualism bias of the mainstream TJ approach and expounding a more comprehensive conception of TJ that addresses this group dimension of mass violations represents a distinctly peoples’ rights contribution to TJ. Accordingly, going beyond retributive justice that emphasises the individual both as perpetrator and victim, peoples’ rights allows and enjoins those seeking to address the group dimension of violations to apply ethno-cultural justice.

Duties of individuals

124. Although not unique to the Charter, the conception of individual “duties” is still a somewhat novel development.⁸⁷ Articles 27 to 29 of the African Charter provide for individuals’ duties towards their “family and society, the State and other legally recognised communities and the international community”, while being called upon to exercise their rights “with due regard to the rights of others, collective security, morality and common interest”.⁸⁸
125. It is now established in the jurisprudence of the Commission that although the African Charter does not have a standard limitation clause, the section of the Charter on the duties of individuals, specifically Article 27(2), serves the

⁸⁵ See Communications against Mauritania, *supra* n 64.

⁸⁶ *Ibid.*, para. 140.

⁸⁷ For example, duties are found in the American Declaration on the Rights and Duties of Man, as well as in Chapter V: Personal Responsibilities, Article 32: Relationship between Duties and Rights, of the American Convention on Human Rights, both of which predate the African Charter (in Keetharuth, *supra* n 74).

⁸⁸ African Charter, Article 27(1).

purpose of a limitation clause. The duties, and particularly Article 27(2), thus offer a useful framework for assessing the consistency of certain limitations that may be put on rights as part of the process of negotiating TJ in societies emerging out of conflicts or systematic repression.

126. Both peoples' rights and the duties of individuals draw on and cherish African cultural philosophical thoughts about rights and justice. As Mutua perceptively points out, in highlighting the interdependence of rights and duties and thereby offering a different meaning for individual/State–society relations, the language of duties entails that “t[he] resolution of a claim was not necessarily directed at satisfying or remedying an individual wrong. It was an opportunity for society to contemplate the complex web of individual and community duties and rights to seek a balance between the competing claims of the individual and society”.⁸⁹ Thus, going beyond the retribution on which mainstream TJ processes put a premium, in terms of addressing wrongs, these African cultural and philosophical thoughts additionally emphasise restorative forms of justice that underscore reparations for the wronged person, the responsibility of the community to which the wrongdoer belongs, conciliation, restoration of the social equilibrium that the wrong disturbed and community participation.

The Maputo Protocol

127. As with the African Charter, the Maputo Protocol incorporates all three generations of rights. The Maputo Protocol contains innovations in relation to women's human rights, including the obligation of States to incorporate a gender perspective in national development procedures and ensure participation by women “at all levels”.⁹⁰ The Protocol also moves beyond the definition provided in the UN Declaration on the Elimination of Violence against Women, by including violence against women in conflict situations.⁹¹
128. Under the right to peace, the Maputo Protocol also enunciates the obligation for States to increase the participation of women in various aspects, including “in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels”.⁹² This is a critical aspect on which countries continue to lag in their TJ processes. Under Article 11, “State Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.”
129. The Women's Protocol also articulates a broader conception of reparation that includes an emphasis on the right to rehabilitation. It notes under Article 5 that victims of harmful practices should be provided with support, including “basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting”. This principle could be used in relation to other violations under the African Charter.

⁸⁹ Mutua, *supra* n 59 at 344–345.

⁹⁰ Maputo Protocol, Article 19(a).

⁹¹ Keetharuth, *supra* n 74 at 185.

⁹² Maputo Protocol, Article 10(2)(b).

The African Charter on the Rights and Welfare of the Child

130. The African Children's Charter became the first – and, to date, only – regional children's rights document in the world, applying to all persons under the age of 18.⁹³ The Charter also explicitly sets the minimum age for marriage at 18 years, and provides for the same full encompassing rights as the African Charter, and even provides more extensive protection to children in certain situations.⁹⁴ In its preamble, the Children's Charter particularly notes that the situation of most African children remains critical, inter alia due to armed conflicts.
131. The Children's Charter also specifically deals with the rights of children in the context of armed conflict, in Article 22, including the duty on the State to ensure that children do not take part in hostilities, and that they are not recruited as child soldiers, as well as taking all measures feasible to ensure the protection and care of children who are affected by armed conflict. The Commission, drawing on these guarantees, could highlight a range of issues facing children during conflict – such as recruitment as child soldiers,⁹⁵ participation in hostilities,⁹⁶ separation from family due to displacement or forced disappearance of family members, and Statelessness,⁹⁷ among others – as subjects of particular interest in TJ processes. This theme has been explored at the international level and has had particular manifestations within TJ processes on the continent with regards to defining when a child soldier can be regarded as a perpetrator. The Commission could pronounce on some of the practices of TJ mechanisms to ensure that the rights enshrined in the African Charter and the African Children's Charter are respected.

Constitutive Act of the African Union

132. A range of provisions of the Constitutive Act of the AU represent the legal framework upon which TJ can be grounded. In addition to the general objective to “promote peace, security and stability on the continent”,⁹⁸ the Act makes reference to principles such as “peaceful resolution of conflicts” and “respect for the sanctity of human life, condemnation and rejection of impunity”.⁹⁹ Article 4(h) of the Act permits intervention by the AU in member States in cases of grave circumstances, namely war crimes, crimes against humanity and genocide. It also provides for the principles of peaceful resolution of conflicts and the prohibition of the use of force as well as respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. The ACHPR held in *Democratic Republic of Congo v Burundi, Rwanda, Uganda* that a breach of similar principles under the OAU and UN systems constituted a violation of Article 23 of the African Charter.¹⁰⁰

93 Article 2 of the African Children's Charter.

94 Keetharuth, *supra* n 74 at 211.

95 Article 22 of the African Children's Charter, which prohibits recruitment of children.

96 *Ibid.*

97 See General Comment No. 2 on Article 6 of the African Charter on the Rights and Welfare of the Child addressing the right to nationality of children in Africa.

98 Article 3(f) of the AU Constitutive Act.

99 Article 4 of the AU Constitutive Act.

100 Communication 227/99, para. 68.

Protocol establishing the Peace and Security Council of the AU and subsidiary instruments

133. The pursuit of the right to peace and security provided for under Article 23 of the African Charter and in the Maputo Protocol is given institutional expression through the Protocol Relating to Establishment of the Peace and Security Council of the African Union (PSC Protocol). Apart from outlining the steps that should be taken for achieving peace and security through conflict prevention, management and resolution efforts, Articles 6 and 14 of the PSC Protocol articulate the requirements with respect to restoration of the rule of law and establishment of conditions for rebuilding a society after conflict.¹⁰¹
134. The AU Post-Conflict Reconstruction and Development (PCRD) Policy of 2006, as a subsidiary instrument to the PSC Protocol, also outlines certain elements that have a bearing on TJ. Recognising the intersection of human rights, justice and reconciliation within post-conflict societies, the PCRD policy notes that “The pursuance of human rights, justice and reconciliation is critical because abuse of human and peoples’ rights resulting from policies of marginalisation, identity-based discrimination, and perceptions of injustice can trigger or perpetuate conflicts”.¹⁰² It notes further that countries emerging from conflict should “guarantee opportunities for the use of traditional mechanisms of reconciliation and/or justice, to the extent that they are compatible with national laws, the African Charter and other human rights instruments”.¹⁰³
135. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (the Malabo Protocol) is underpinned by the principles and values of respect for human rights and sanctity of life; condemnation, rejection and fighting of impunity; strengthening of AU’s commitment to promote sustained peace, security and stability; and prevention of serious and massive violations of human rights.
136. The Malabo Protocol introduces international crimes under international law and transnational crimes to the jurisdiction of the African Court of Justice and Human Rights (ACJHR), and also establishes the international criminal law section of the ACJHR. Through the Malabo Protocol, the ACJHR will have jurisdiction to try genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

¹⁰¹ In Communication 157/96, the ACHPR found that diplomatic and coercive measures taken for maintaining peace and security are legitimate within the framework of the African Charter.

¹⁰² PCRD, Article 38.

¹⁰³ *Ibid.*, Article 41(c)(iii).

Kampala Convention

137. The AU Convention for the protection and assistance of internally displaced persons (IDPs) in Africa (Kampala Convention) entered into force in 2012. It places an obligation on State Parties to the Convention not only to refrain from, prohibit and prevent arbitrary displacement, but also to prevent political, social and other forms of exclusion that are likely to cause displacement, and to ensure the accountability of non-State actors concerned, for acts of arbitrary displacement. In particular, under Article 7, the Kampala Convention provides that in relation to armed conflict, members of armed groups shall be held criminally responsible for their acts which violate the rights of IDPs under international and national law.

PART IV:

Mechanisms and Procedures for Pursuing Transitional Justice in the African Human Rights System

138. The foregoing chapters helped trace the contours of both the human and peoples' rights issues arising in Africa's experiences of TJ processes and the legislative framework of TJ in Africa within the African human rights system. The discussions in these chapters highlighted several points. The human and peoples' rights issues in TJ are not only very pressing for the affected societies but also often very complex and vexing. As such, they are not amenable to being addressed through the ordinary application of human rights instruments and mechanisms that are used for "normal" times. Simultaneously, it has also emerged that the African human rights system is endowed with rich legislative materials. These offer normative and conceptual elements for not only enriching and expanding the narrowly formulated mainstream conception of TJ but also for articulating an African conception of TJ in much the same way that the African Charter articulated an African conception of rights.
139. In this chapter, the focus is on examining the available institutional mechanisms and procedures of the Commission. Through these, the existing rich legislative materials can be interpreted and applied, both for shaping and informing TJ processes in Africa and articulating an African Charter-based conception of TJ. Apart from identifying these mechanisms and procedures, this chapter focuses on examining their potential roles in shaping the practice and discourse of TJ in Africa, drawing on the extant jurisprudence of the Commission.
140. The African Commission is vested with both protective and promotional mandates. While the African Charter has given the Commission expansive latitude in terms of choosing the mechanisms for the implementation of its mandate, including the use of any investigative method of its choice, there are established mechanisms and procedures for discharging its mandates. As far as its protective mandate is concerned, the available procedures and mechanisms include the communications procedure, fact-finding missions, resolutions, urgent letters of appeal and the Article 58 procedure. Its promotional mandate is implemented through its norm elaboration works, examination of State reports under Article 62 of the African Charter and Article 26 of the Maputo Protocol, special mechanisms and promotional missions.

Communications procedure

141. The African Charter in Chapter III provides for communications from States, also known as inter-State communications, as well as other communications, also known as individual communications. In relation to inter-State communications, where a State Party to the Charter has good reason to believe that another State Party has violated the provisions of the Charter, it may bring a communication against that State to the Commission, who can provide its good offices for the settlement of the matter, and, if that is unsuccessful, can make a decision on the violation of the Charter and make recommendations to the State concerned.
142. Under the individual complaints procedure, Articles 55 to 59 of the Charter provide the process to be followed for communications other than those of State Parties. Individual complaints can be lodged by victims of violations of the rights guaranteed under the African Charter or by another person or institution on their behalf. Victims could include individuals as holders of individual rights; groups such as indigenous populations/communities; ethnic, religious and linguistic minorities; or indigenous populations/communities as holders of collective rights under the African Charter.¹⁰⁴ Communications before the Commission may also be brought in the interests of society as a whole.
143. The communications procedure is the embodiment of the Commission's quasi-judicial mandate. Through the communications procedure the Commission deals only with specific cases of violations contained in the application of individual or group complainants. As a judicial process, this procedure is also set in motion only on the initiative of claimants and never on the Commission's own motion.
144. From the jurisprudence of the communications procedure of the African Commission, one of the most useful pronouncements relevant to the adjudication of issues of interest for TJ concerns the exhaustion of local remedies.¹⁰⁵ Accordingly, in relation to communications revealing mass violations, the Commission held that "[i]n accordance with its earlier decisions on cases of serious and massive violations of human rights, and in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that local remedies need not be exhausted and, as such, declares the communications admissible".¹⁰⁶ The Commission reaffirmed this position excluding the application of the requirement of exhaustion of local remedies in a number of cases.¹⁰⁷

¹⁰⁴ See Dersso, SA (2012) *Taking Ethno-Cultural Diversity Seriously in Constitutional Design: A Theory of Minority Rights for Addressing Africa's Multiethnic Challenge*, Leiden & Boston: Martinus Nijhof Publishers; Dersso, SA & Palermo, F (2013) "Minority Rights", in M Tushnet, T Fleiner & C Saunders (eds.) *Routledge Handbook of Constitutional Law*, London & New York: Taylor and Francis; Dersso, SA (2012) "The African Human Rights System and the Issue of Minorities in Africa", *The African Journal of International and Comparative Law* 20(2).

¹⁰⁵ The requirement of exhaustion of local remedies is provided for in Article 56(5) of the African Charter.

¹⁰⁶ Communication 27/89-46/91-49/91-99/93 - *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, para. 18.

¹⁰⁷ Communication 299/05 - *Anuak Justice Council v Ethiopia*, para. 59.

145. The exclusion of the application of the requirement of exhaustion of local remedies is a clear acknowledgement that for situations of mass atrocities of concern to TJ the rules that ordinarily apply for human rights violations in normal times could not be followed strictly.
146. Yet, in terms of the Commission's established jurisprudence on the exclusion of exhaustion of local remedies in situations involving mass violence, one issue related to TJ is whether the launching of TJ processes can be considered as offering victims an avenue for seeking local remedies. Although it is reasonable to believe that the launching of TJ processes offers an opportunity for victims to seek remedies locally, it remains open for the ACHPR to review the adequacy and effectiveness of such remedies, albeit having regard to the limitations that transitional settings put on availing full remedies that usually apply in ordinary circumstances.
147. Similarly, Article 56(6) would be interpreted to apply to violations in normal and peaceful settings and its application may be limited in relation to extraordinary situations in transitional settings. In relation to the Extra Ordinary African Chamber, an ad hoc tribunal hearing the case of former Chadian President Hissène Habré, the Committee of Eminent African Jurists on the Case of Hissene Habre determined that "in view of the nature and gravity of the crimes alleged against him, Hissène Habré cannot benefit from any period of limitation".¹⁰⁸
148. Beyond the jurisprudence on exhaustion of local remedies, as already noted in earlier chapters, although the Commission has, through the communications procedure, dealt with situations of direct concern for TJ, in many of the cases, particularly in the 15 years of its existence, its jurisprudence did not go beyond establishing violations of various rights in the African Charter. When the Commission outlined remedies for redressing such violations, not only was the scope of remedies limited and poorly developed but it also made little or no attempt to outline the parameters of how such violations may be remedied through a TJ agenda.
149. The African Commission has also in some cases dealt with matters relating to TJ directly. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,¹⁰⁹ the Commission grappled with the question of unconditional amnesty in the Clemency Order No. 1 of 2000. While recognising the potentially positive role of clemency in reconciliation, the Commission concluded that by enacting Decree No.1 of 2000 without qualifications and not putting in place alternative adequate mechanisms to ensure that perpetrators were held accountable, and victims duly compensated, the State reneged on its obligation in violation of Articles 1 and 7(1) of the African Charter. This view was reiterated in *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*.¹¹⁰
150. In other cases, the Commission has taken cognisance of ongoing reconciliation processes in a State when making its determination on a communication. This

¹⁰⁸ Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, para. 14.

¹⁰⁹ Communication 245/02.

¹¹⁰ Communication 246/02, para. 98.

happened, for example, in *Mouvement ivoirien de droits de l'Homme (MIDH) v Côte d'Ivoire*. In this case, during the 41st and 42nd Ordinary Sessions of the Commission, the State requested the Commission to defer its decision on the merits on the grounds that the current reconciliation process in Côte d'Ivoire would take care of the subject of the dispute.¹¹¹

151. In its decision, adopted at the 43rd Ordinary Session, while finding a violation of Articles 2 and 14 of the African Charter, the Commission further took note of “the current reconciliation process and of the ongoing negotiations in Côte d'Ivoire”. It furthermore urged the State, within the framework of the national reconciliation process, to 1) evaluate the damages suffered by the victims and pay them fair and equitable compensation; and to 2) pursue the amicable settlement of all the disputes arising out of the application of the former discriminatory laws. This demonstrates the extent to which the communications process can engage with TJ processes at the national level, including making recommendations on how the process can be improved in relation to specific victims.
152. In relation to the granting of reparations, the Commission has also in some cases made recommendations as to the specific compensation which should be given to victims of human rights violations. For example, in *Egyptian Initiative v Egypt*, the Commission held that compensation should be paid to each of the victims in the amount of 57,000 Egyptian Pounds, as requested by the complainant, for the physical and emotional damages that they suffered.¹¹²
153. It is clear that the communications procedure avails opportunities for victims in TJ settings. In particular, those who are not satisfied with the remedies available through TJ processes or who did not get access to such remedies, can make use of the communications procedure to bring their complaints challenging TJ processes before the African Commission.
154. The African Commission can develop its own approach drawing on existing practices on the continent and, as relevant, learning from elsewhere, such as from the Inter-American Human Rights System (I-AHRS). The experience of the I-AHRS can be instructive if adapted to fit the exigencies of the transitional setting under consideration. The I-AHRS engagement on issues of amnesty in a number of States (Argentina, Uruguay, El Salvador, Peru, Brazil) has resulted in well-developed international standards that set limits on the amnesty laws.¹¹³ Similarly, the Inter-American Commission on Human Rights (IACmHR) has clarified the scope and relevance of truth commissions within the parameters of the American Convention.¹¹⁴ The usefulness of the lessons from these experiences of the Americas may not go far enough given that much of the experience of the Americas has been in relation to transitions from repressive systems of government rather than violent armed conflicts, which are dominant in Africa.

¹¹¹ Communication 262/02, paras 30, 33.

¹¹² Communication 323/2006, para. 275; see also Communication 314/05 – *Zimbabwe Lawyers for Human Rights, Human Rights Trust for Southern Africa v The Government of Zimbabwe*, where reparations were ordered in relation to evictions.

¹¹³ Abramovich, V (2009) “From Massive Violations to Structural Patterns: New approaches and classic tensions in the inter-american human rights system”, *Sur. Revista Internacional de Derechos Humanos* 6(11).

¹¹⁴ 36/96, Case 10.843, *Hector Marcial Gary Hemosilla et al. v Chile*; 13/96, Case 10.948, *Comdres v. El Salvador*; 1/99, Case 10.480, *Lucio Parada Cea et al. v El Salvador* referenced in Rodriguez-Pinzon (2011), “Selected Examples of the Contemporary Practice of the Inter-American System in Confronting Grave Violations of Human Rights: United States and Colombia”, in *Making Peoples Heard: Essays on Human Rights in Honour of Gudmundur Alfredsson*, Asbjorn Eide et al., eds., Martinus Nijhoff Publishers, p 65: 204–205.

155. Cases challenging TJ processes would avail the ACHPR the opportunity for reviewing the conformity of TJ processes to the standards of the African Charter. In such cases, as the experiences from TJ processes in South Africa and the I-AHRS show, what is decisive for determining whether the TJ mechanisms meet the standards of the Charter is not necessarily the availability or lack of judicial remedies. There are both procedural and substantive considerations that should be assessed in evaluating TJ processes.
156. The procedural consideration is whether the various TJ mechanisms instituted in a country are arrived at based on an inclusive consultative process with adequate representation of victims and victim groups. The substantive consideration includes an assessment of the extent to which such TJ mechanisms offer victims various options for getting redress within the TJ process and the range of measures envisaged as part of the TJ process for addressing violations. Accordingly, as the South African experience shows, the mere fact that there are provisions for amnesty and clemency as part of the TJ arrangement by itself alone does not render it inconsistent with the African Charter. As the African Commission authoritatively explained in a landmark decision,¹¹⁵ what matters is the nature and scope of the amnesty clause whereby blanket amnesty is outlawed and whether the clemency processes followed due process and were justified by legitimate public interest. Also of importance is the need for recognition of the constraints of the transitional context, thereby allowing a measure of margin of appreciation in the design and implementation of TJ within the limits of the requirements of the standards of acceptable limitations (public interest and proportionality) adapted in application to a transitional context.

State report review process

157. States parties to the African Charter have undertaken to submit, every two years, “a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter”.¹¹⁶ The review of State reports is thus another avenue through which the ACHPR supervises the implementation of the rights guaranteed.
158. Unlike the communications procedure where the African Commission, in exercising its judicial function, cannot on its own motion introduce issues outside of those presented in the communication, the State reporting procedure allows the Commission to raise questions at its own initiative. Though it is less binding in its effect than the communications procedure, this procedure thus affords opportunities for reviewing human rights issues that arise in relation to TJ processes in Africa.
159. When Algeria presented its third and fourth periodic reports at the 42nd Ordinary Session of the Commission, members of the Commission sought answers to the call for justice in relation to the forced disappearance of

¹¹⁵ See details in Communication 431/12 – *Thomas Kwoyelo v Uganda*, paras 283-293.

¹¹⁶ Article 62 of the African Charter.

persons during the conflict. The Commission in its concluding observations also called on Algeria in general terms to “find an appropriate solution to the problem of the missing persons and ensure that a fair compensation is paid for their legal successors”. Responding to this observation in its fifth and sixth periodic reports, Algeria stated that in adopting the Charter for Peace and Reconciliation, the people of Algeria “have chosen freely their strategy to resolve the crisis, based on the strengthening of national cohesion and the promotion of national peace and reconciliation in order to put behind them, once and for all, the serious crisis that occurred in Algeria”. Although it provided no details on how the amount for reparation was determined, the report also stated that “the legal successors have been granted, without any discrimination, compensation in the form of lump-sum death benefits or monthly allowances paid from the State budget”.

160. It is clear that for this process to fully realise its full potentials in relation to shaping and informing TJ processes in countries under review, there is a need for the Commission to be adequately informed of the issues of concern for the African Charter in those processes. In preparing for reviewing State reports, the Commission should update itself about the prevailing human rights issues in the country under review, going beyond what is provided in the official report of the country. This can be achieved both through the Commission’s own review of the country situation, including the reports of the National Human Rights Institutions (NHRIs) and the submissions that civil society organisations provide by way of shadow reports.
161. NHRIs are charged with the responsibility of promoting and protecting human rights at national level in their respective countries. NHRIs with observer status at the ACHPR play the important role of assisting the Commission in promoting human rights at country level, thereby enhancing the protective and promotional activities of the Commission. Among other things, they attend and participate in the Commission’s public sessions and are required to submit reports on their activities to the Commission every two years – a process which can present the Commission with additional information on the country situation of African countries under review.
162. Clearly, civil society organisations play an important role in terms of using the State report review process for addressing the human and peoples’ rights issues arising in TJ processes in the country under review. This role can be of material benefit only to the extent that the shadow report that civil society organisations submit to the ACHPR adequately captures those issues.
163. Apart from countries where TJ processes are under way or being considered, the African Commission would need to pay enhanced attention to country reports from States in or emerging from conflict or violent repressive rule. In this regard, some practices are indicative of both the potentials of the State report review process and the wide room for improvement. The following paragraph offers a sample of this practice, with observations for further improvement.
164. The African Commission has noted that conflicts result in serious violations of human rights and emphasises the need to resolve them. In its concluding observation on the periodic report of the DRC, the Commission expressed its

deep concern over the continued conflict, which has resulted in numerous deaths, destruction of property and displacement of many people. It thus recommended that urgent measures be taken to stop the conflict “so as to ensure the security of the people”.¹¹⁷ However, this has been done rather generally and without sufficient conceptualisation of the ways by which human rights can be observed in situations of conflict and how they should be integrated in all processes, including mediation and peace-making initiatives for resolving conflicts. Although it observed that “[b]loody and devastating armed conflicts which have been going on for decades in some parts of Sudan have resulted in often serious violations of human rights and represent a major obstacle to the implementation of the rights and freedoms prescribed and guaranteed by the African Charter”, it failed to offer specific recommendations on the need to observe human rights by all parties involved for promoting the security of civilians in conflicts and in peace processes for resolution of the conflicts.

165. In framing review questions, the Commission should go beyond and above the items captured in the report submitted by the State under review. In the current review practice of the Commission, review questions are often formulated along the thematic areas of interest of the existing special mechanisms of the African Commission. While this approach allows in-depth examination of the themes that those special mechanisms cover, it is also susceptible to omitting those parts of the Charter and such themes that are not adequately covered by the special mechanisms. It is therefore possible that issues of concern for the African Charter in TJ processes are not fully owned by and integrated in any of the existing special mechanisms and hence are not meaningfully discussed in the review process.
166. There is thus a need for entrusting issues of concern in TJ to a dedicated special mechanism, either by assigning TJ to an existing mechanism or by designating a new mechanism dedicated to TJ. This determination is, however, to be made taking into account the extent of the need for engaging in TJ and the ways by which any particular choice can best advance the African Charter’s rights agenda.

Promotion missions

167. At the core of the promotional mandate of the Commission is promotion missions. One limitation on the effectiveness of this mechanism is that promotion missions can only be undertaken with the consent and support of the State concerned, with States that are faced with conflict situations or just recovering from conflict periods often not amenable to allowing such visits. Where promotion missions do take place, however, they have the potential to allow the Commission to engage with the different sectors of society and make specific recommendations as to how each can contribute to ending the conflict as well as participate in the TJ process. Unfortunately, from the record, the Commission has not employed this mechanism to its full potential in dealing with conflict and post-conflict societies.

¹¹⁷ ACHPR, Concluding Observations on the Periodic Report, 11, 12, 13 of the DRC, 2005–2015.

168. In a 2002 mission to Angola specifically focused on the rights of women, the Commission as one of its objectives included the collection of first-hand information on the human rights situation in Angola in the post-conflict period. However, its recommendations to the State in this regard are limited in scope. Thus, of the 34 recommendations to the State, one relates to the involvement of women in the peace process, and a second relates to implementation of the policy of national reconciliation with all factions of the opposition. The main recommendations on the post-conflict situation are made to the international community. They are urged to: continue to assist Angola in its efforts to ensure a permanent return of peace, and for the national reconciliation of all Angolans; support Angola in the country's reconstruction process and the relaunching of activities in all vital sectors, in order to improve the living conditions of the population, in particular women and children; and to closely monitor developments in the general situation of Angola, in particular the humanitarian aspects.
169. A similar trend is seen in the 2000 concluding observations on a promotion mission to Burundi. Here the Commission recommended that the State ensure greater involvement of civil society, especially the youth and women, in the Arusha negotiations and in the implementation of the arising agreement, dismantle the regroupment camps and ensure the reintegration of the people. However, it recommended that the Commission request the OAU to: assist Burundi in the peace efforts and reconciliation; support Burundi in the process of reconstruction and recovery activities in all sectors of society to improve the living conditions of the people; urge the States in the subregion to contribute positively to peacebuilding in their respective countries; and urge the rebels to stop attacks against civilians and voice their demands by participating in negotiations.
170. In an early engagement with conflict during a promotion mission to Sudan in 1996, after recommending that the government should intensify its efforts to bring an end to the war, the Commission urged the government of Sudan to learn from the examples of failed governments on the continent in building their new nation. However, it did not proceed to make any constructive recommendations in this regard.
171. In recent years the Commission has begun to give more detailed recommendations to specific sectors within the State concerned. Apart from the government, they thus also address contributions to be made by national human rights institutions, civil society organisations, bar associations and even the media. This is a positive development which could be fruitfully employed also in making recommendations on TJ. Furthermore, some of the recommendations which are made to the international community, such as support in rebuilding the society, would be greatly strengthened if there is also a recommendation to the State to work on the reconstruction of its own society in the context of TJ. While this was done to some extent in the Angola concluding observations, for example through the inclusion of a recommendation to draw up a national programme for the eradication of poverty, no such corresponding recommendations are made to the State in the

Burundi concluding observations.¹¹⁸ Specific recommendations could also be made as to reparation, criminal prosecutions and truth and reconciliation processes.

Responding to violent conflicts, series of serious and massive violations: On-site investigations, resolutions and good office of the African Commission

172. One of the mandates of the ACHPR is to respond to series of serious or massive violations of human rights. As an important component of the protection mandate of the African Commission, Article 58 of the African Charter laid down procedures for responding to grave and emergency cases of violations of the rights guaranteed in the African Charter identified in the course of examining communications before it. Article 58 of the African Charter provides the following:

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and people's rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairperson of the Assembly of Heads of State and Government who may request an in-depth study.

173. It is clear from this that one mechanism of responding to serious or systematic violations of the rights guaranteed in the Charter is to refer the situation to the AU Assembly. Although the AU Assembly may opt to choose from a range of policy responses to address such violations, including intervention under Article 4(h) of the Constitutive Act, Article 58 of the African Charter specifically envisages as an option the mandating of the Commission to undertake in-depth investigation of the cases and make a factual report.

174. The African Commission can also respond to such large-scale and urgent violations and conflict situations through various mechanisms, including on-site investigations and good offices. There is ample room for the African Commission to make use of these mechanisms for making significant contributions for dealing with conflicts and other circumstances presenting threats of or actual violations in at least two ways. First, the ACHPR can serve as one of the bodies with the competence to deal with human rights violations

¹¹⁸ Another crucial mission which took place was the 2016 promotion mission to Nigeria. However, at the time of writing, the report of this mission had not yet been adopted by the Commission.

in situations of violent conflicts. Thus, for example, the ACHPR can respond to such situations through on-site investigations, establishing focal points and collecting information to warn of impending problems and producing a report on the situation. The African Commission can further serve as a fact-finding mechanism where there are allegations of risk or occurrence of special cases or an emergency case envisaged in Article 58(1) and (3) but outside of communications before the Commission.

175. The use of a fact-finding mission by the African Commission is not one that is expressly mandated by the African Charter. Rather, it can be deduced from the broad mandate of the ACHPR to ensure the promotion and protection of human rights,¹¹⁹ and its authority to resort to any form of investigation.¹²⁰ In those cases where it made a finding of serious or massive violations, the ACHPR has conducted a number of on-site visits to investigate the situation of human rights in particular countries. These include the fact-finding mission to Mauritania, the mission of good offices to Senegal and the fact-finding mission to Zimbabwe.
176. While the undertaking of the on-site investigation by the Commission of its own motion is commendable and can usefully be applied to deal with serious or massive human rights violations, clear guidelines on the conduct of the mission are essential both to ensure that the mission achieves its objectives and to save the Commission from confrontations with States under its investigation. It is also important that the Commission develops a follow-up mechanism not only to ensure the implementation of its recommendations but also to help the State concerned in addressing the root causes of conflicts and violations.
177. The latest such investigation that the ACHPR undertook was on the request of the AU Peace and Security Council. This was the mission to Burundi that took place from 7 to 13 December 2015. It highlighted the opportunities that fact-finding missions offer for an in-depth examination of the range of issues arising in transitional settings or countries involved in crisis situations. Indeed, the Commission in its report outlined recommendations that frame the agenda for TJ in Burundi.¹²¹

Statements and resolutions

178. Apart from the above processes, the Commission also has a more flexible avenue for responding to and engaging in transitional processes through the adoption of resolutions and statements. This avenue is particularly useful for responding to urgent or emergency situations. Ordinarily, it is through the instrumentality of statements and resolutions that the Commission highlights areas of concern and urges States concerned to undertake specific measures.

¹¹⁹ Article 30 of the African Charter.

¹²⁰ Article 46 of the African Charter.

¹²¹ African Commission (2016) *Report on the Fact-Finding Mission to Burundi*, paras 170–173.

179. Resolution 235 on Transitional Justice in Africa, which authorised the current study, set out the main concerns of the Commission, including the scourge of armed conflicts and political crises in Africa, accompanied by serious and massive human rights violations often characterised by impunity, and also stressed the Commission's view that TJ mechanisms play an important role in combating impunity and promoting reconciliation in countries emerging from political crises and violent armed conflicts.
180. In relation to specific cases where the Commission engaged with conflict and TJ, the Commission in 1994 issued Resolution 8 on the situation in Rwanda, urging the parties to the conflict to immediately cease hostilities and work towards a peaceful settlement through dialogue between all the peoples of Rwanda. It further issued Resolution 12 on Rwanda, which condemned the crimes committed during the conflict, expressed its support for the establishment of an international tribunal to try those responsible, and called on all stakeholders, including the government, civil society and the OAU, to take measures for reconstruction and long-term solutions. Similar resolutions were adopted in relation to other conflicts on the continent, for example Resolution 32 of 1998 on the peace process in Guinea Bissau; Resolution 44 of 2000 on the peace process in the DRC; Resolution 74 of 2005 on the situation in Darfur, Sudan; and Resolution 139 of 2008 on the human rights situation in the DRC. In each of these cases, the Commission called on parties to the conflict to cease the conflict, enter into negotiations and promote dialogue towards a peaceful resolution of the conflict and return to peace, security and stability in the country.
181. The Commission has also reacted to sporadic violence which arises as a result of electoral disagreements. In February 2008, the Commission adopted Resolution 130 to, among other things, raise concerns about the violations of human rights that were perpetrated in the wake of the 27 December 2007 presidential and legislative elections in Kenya.¹²² In the same vein, the Commission adopted Resolution 357 in November 2016 to address concerns about the political impasse and the human rights violations in Burundi resulting from the controversies surrounding the July 2015 elections.¹²³ In 2017, the Commission also issued statements raising concerns relating to the general elections in Kenya in August of that year.
182. In order to strengthen its involvement in peace negotiations, the Commission in 1999 adopted Resolution 40 on the human rights situation in Africa, in which it decided to establish cooperation with the OAU Mechanism for Conflict Prevention, Management and Resolution as well as the OAU Secretary General's special representatives in the countries in conflict. Resolution 332 of 2016 on human rights in conflict situations underscored this commitment through its decision to collaborate with the AU Peace and Security Council and other relevant stakeholders working on issues of peace and security, towards enhancing the role of the Commission, as well as its coordination with other continental processes, in addressing human rights issues in conflict situations.

¹²² <http://www.achpr.org/sessions/4th-ec/resolutions/130/>

¹²³ <http://www.achpr.org/sessions/59th/resolutions/357/>

183. While resolutions are generally adopted only during sessions of the Commission, press releases and statements are issued continuously, and are thus more effective in dealing with emerging issues. For example, the Commission's press statement on the human rights situation in North Africa in February 2011 highlighted concerns about human rights violations in several North African countries in the wake of the Arab Spring.¹²⁴ During the election period in Kenya during 2017, the Commission also remained apprised of the situation, inter alia calling on the AU Peace and Security Council to initiate engagement with the Government of Kenya on steps that should be taken to ameliorate the mounting tension and normalise the political and legal environment.
184. As can be seen from the above, a multitude of statements and resolutions have been adopted by the Commission through the years, particularly engaging in specific cases of conflict or peace negotiations, but also to set out its understanding of TJ more broadly and enhancing its cooperation with bodies working towards conflict resolution on the continent. The most concrete engagement with TJ was in the case of Rwanda, where the Commission expressed support for the establishment of a tribunal to bring the perpetrators to justice, and also focused on how various role players can contribute to rebuilding the justice system and restore rule of law and human rights. Later resolutions and press statements dealing with conflict and peace processes did not engage with the specific situations to the same extent, mostly making relatively vague recommendations. Recently, most of the resolutions and statements also focus on ongoing conflicts, which are seen as being of more immediate concern than the rebuilding process in the post-conflict stage. The Commission has thus not made use of the full potential of the resolutions and statement processes for engaging with TJ processes.

Special mechanisms

185. The Special Rapporteur on Freedom of Expression and Access to Information can in particular be used for engaging issues relating to what has come to be called the "right to truth" in TJ. As noted in Chapter 3, this special mechanism could also engage more substantively with the issues of access to information in relation to transitional processes, particularly in terms of public access to and the protection of documents, reports and decisions of TJ institutions.
186. The Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced People expressed particular concern about the increasing number of refugees, asylum seekers and IDPs due to political instability and conflict. In so doing, it highlighted the plight of refugees and displaced persons in the DRC, Sudan, Mali and Somalia. The Special Rapporteur has also sent urgent appeals to countries in conflict, urging them to cooperate with the AU and the UN in finding solutions.¹²⁵ In January 2008, the Special Rapporteur issued a statement condemning the Kenyan post-election violence leading to the displacement and suffering of tens of thousands, including women and

¹²⁴ <http://www.achpr.org/press/2011/02/d9/>

¹²⁵ 21st Activity Report, para. 45.

children.¹²⁶ The Special Rapporteur was also responsible for a study adopted by the Commission in 2014 on the right to nationality in Africa, which took note of the role in nationality disputes in wider conflicts. From this flowed the development of the Draft Protocol to the ACHPR on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa. The rights highlighted in this draft instrument could address some of the challenges faced by people displaced by conflict. This mechanism also has the potential for highlighting the issues of refugees and IDPs and how they can be taken on board in transitional processes.

187. The Special Rapporteur on Rights of Women in Africa is cognisant of the fact that women suffer disproportionately from the consequences of armed conflicts¹²⁷ and has expressed concern that the health and food situation of women and children is more precarious in countries in conflict. In response, the Special Rapporteur has joined the appeal for emergency assistance and political and financial support to resolve the crises.¹²⁸ The Special Rapporteur can also play a critical role in responding to and collaborating on the concerns relating to violations of women's rights on the continent raised by other AU mechanisms such as the AU Commission Special Envoy for Women, Peace and Security, and the Women, Gender and Development Directorate.

188. The Working Group on Economic, Social and Cultural Rights has issued press statements with respect to countries in conflict. In 2011, a press release on the transition process in Tunisia and Egypt was published¹²⁹ urging the authorities to undertake a process of democratic transition and institutional reform, taking due cognisance of the economic, social and cultural needs of the population after engaging in open and transparent consultations.¹³⁰ In 2012, expressing its concern over the destruction and desecration of the mausoleums of Muslim saints and other ancient sites of the mythical city of Timbuktu, the Working Group stated that it was monitoring with concern the prevailing state of insecurity in the north of the Republic of Mali. The Working Group has also visited the DRC and encouraged the government, corporate and civil society actors to collaborate in their efforts to strengthen the economic framework and to ensure a judicious and equitable use of national resources for the benefit of all Congolese citizens.¹³¹ Clearly, this Working Group could take on a more visible role in relation to TJ. As Chapter 3 notes, the rights enshrined in the Charter provide a strong basis on which the Commission can develop new jurisprudence on the intersections between TJ, development and socioeconomic and cultural rights. In fact, other organs have identified a clear role for this Working Group, for example in relation to traditional justice mechanisms.

126 See "Statement by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants on the Violence of the Republic of Kenya", 29 January 2008, available at http://old.achpr.org/english/Special%20Mechanisms/IDP%27s/Press%20releases%20or%20statements/press%20release_situation_Kenya.htm.

127 29th Activity Report, para. 129.

128 Intersession Activity Report of the Special Rapporteur on Rights of Women at the 50th Ordinary Session of the Commission in June 2011, paras 29-31; Intersession Activity Report of the Special Rapporteur on Rights of Women at the 45th Ordinary Session of the Commission in May 2009, paras 29 and 44.

129 See para. 4 of the Working Group's Intersession Activity Report to the 49th Ordinary Session, available at <http://www.achpr.org/sessions/49th/intersession-activity-reports/escr/>.

130 See 32nd and 33rd Combined Activity Report, para. 4; and "Press Release on the Transition Process in Tunisia and Egypt", March 2011, available at <http://www.achpr.org/fr/press/2011/03/d100/>.

131 Intersession Activity Report of the Working Group on Economic, Social and Cultural Rights (ECOSOC) (29 February 2012), paras 2 and 3.

189. In February 2014, the chairperson of the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa formed part of an AU delegation to the Central African Republic which met with officials to raise awareness about the need to create an effective synergy towards a successful transition, as well as discuss the urgent and crucial human rights situation in the country. The delegation had the opportunity to discuss with the then recently elected authorities of the transitional government various issues concerning the organisation of democratic, transparent and inclusive elections, the adoption of a new Constitution, and restoring peace, security and social cohesion.¹³² The Working Group has also expressed concern regarding extrajudicial, summary and arbitrary killings that take place during times of armed conflict. For instance, it has expressed concern about the killing of civilians, including aid workers, by armed groups during intercommunal and ethnic violence in the Central African Republic, Sudan and Somalia.¹³³ Another concern raised by the Working Group is the imposition and execution of the death penalty by military tribunals.¹³⁴ Realising that accountability is fundamental to the protection of any right, the Working Group has supported the establishment of TRCs such as those in Ivory Coast and Tunisia, which are mandated to investigate gross human rights violations.¹³⁵ The Working Group has also generally called on States to adopt effective measures to combat and put an end to extrajudicial, summary or arbitrary killings in their territories.¹³⁶
190. The Committee for the Prevention of Torture in Africa (CPTA) is the focal point for the Commission in addressing issues of torture and other ill-treatment. At the 56th Ordinary Session in April/May 2015, the CPTA initiated the process of developing General Comment No. 4 on Article 5 of the African Charter, focusing on redress for victims of torture and ill-treatment in Africa. General Comment No. 4 further strengthens existing provisions on the right to redress on the Robben Island Guidelines. The General Comment has specific provisions on redress and TJ, thereby acknowledging large-scale torture occasioned by conflict and repressive rule. The General Comment also tackles the issue of torture committed by non-State actors, a common phenomenon during conflict situations in Africa, and provides guidance on the same. General Comment 4 was adopted at the 21st Extra-Ordinary Session of the Commission held from 23 February to 4 March 2017 in Banjul, The Gambia.
191. In addition to the development of authoritative comments providing legal guidance and interpretation of Article 5 of the African Charter, the CPTA also undertakes in-country missions to support the effective implementation of the Robben Island Guidelines by State Parties, and further engages African States on their obligations to prohibit and prevent torture during sessions of the Commission.¹³⁷ To this end, the CPTA has called upon State Parties to the African Charter to take concrete measures to respect their commitments with regard to the right of victims to an effective remedy for the human

¹³² See the intersession activity report of the 55th session, para. 18, available at <http://www.achpr.org/sessions/55th/intersession-activity-reports/death-penalty/>.

¹³³ *Ibid.*, paras 46 to 54.

¹³⁴ *Ibid.*, para. 43.

¹³⁵ *Ibid.*, paras 59 to 60.

¹³⁶ *Ibid.*, para. 62.

¹³⁷ See CPTA strategic plan, available at http://www.achpr.org/files/special-mechanisms/cpta/cpta_strategic_plan.pdf.

rights violations suffered as a result of torture and other ill-treatment, as well as the right to full redress, including compensation and rehabilitation.¹³⁸ It has stressed that States “must go beyond the simple prohibition of torture in their constitutions and adopt specific legislation criminalizing torture that provides for adequate sanctions and a framework where victims of torture can be compensated and rehabilitated”.¹³⁹

192. The Special Rapporteur on Human Rights Defenders engages with the plight of all human rights defenders, including in conflict and post-conflict situations. The Cotonou Declaration on strengthening and expanding the protection of all human rights defenders in Africa, adopted on 1 April 2017, specifically identifies human rights activists working in conflict and post-conflict States as a group that warrants special protection. In June 2017, the Special Rapporteur issued a press statement on the situation of human rights defenders in the DRC, expressing concern about the worsening situation in the country, including the killing of a human rights defender working on reintegration of child soldiers, and another human rights defender shot dead by the DRC armed forces. Also in relation to the DRC, the Special Rapporteur in a press statement on 11 August 2014 called on the Government of the DRC to “step up efforts towards protecting women human rights defenders in conflict areas and ensure that they work under good conditions without fear for their physical and moral integrity and reprisals”.
193. The Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, adopted during the 56th Ordinary Session of the Commission, also aims, among other things, to ensure that responses to terrorism do not lead to undue restrictions of civil society space. In the context of TJ, it is crucial that the discourse of countering terrorism steers the conversation away from the legacy of oppression, thereby undermining structural reforms.
194. The contribution of the Working Group on Extractive Industries, Environment and Human Rights could be in relation to the role that is played by the control of natural resources as an underlying cause of conflict, in financing and sustaining conflict, as well as the role that natural resource governance can play in peacebuilding after conflict. In this regard, the Working Group has closely followed the developments in the DRC, and during February 2018 issued a press statement on the adoption of new mining legislation in this country. While the resolution did not make specific reference to the link between resources and the ongoing conflict, it reiterated that the right to natural resources is vested in the people of the DRC. As the 2015 peace agreement of South Sudan highlighted, there is huge room for further engagement with the question of the role of natural resources in transitional contexts.
195. Finally, the Working Group on Indigenous Populations/Communities in Africa is concerned with the plight of indigenous people on the continent characterised by, among others, marginalisation, exploitation, dispossession,

¹³⁸ See “Press Release: International Day in Support of Victims of Torture”, issued jointly by the ACHPR and the CPTA on 26 June 2010, available at <http://www.achpr.org/press/2010/06/d21/>.

¹³⁹ See the CPTA’s Intercession Activity Report to the 52nd Ordinary Session, available at <http://www.achpr.org/sessions/52nd/intercession-activity-reports/cpta/>.

harassment, poverty and neglect. As discussed above, it is often marginalised groups that are most harshly affected during conflict periods and indigenous groups and minorities clearly fall into this category. The right to cultural identity and to self-determination as protected in the African Charter is also of particular concern, both to indigenous populations and in transitional phases in States. As the report of the Kenya TJRC clearly revealed, issues related to land, which are also often central to conflicts in Africa, particularly concern indigenous groups.

Conclusion

196. This chapter has aimed to give an exposition of the main mechanisms and procedures for pursuing TJ in the African human rights system. In doing so, it has considered the most important mechanisms at the disposal of the Commission, including its communications procedure, State reporting procedures, promotion and investigative missions, statements and resolutions, as well as all the various special mechanisms within the Commission. The appraisal in this chapter has highlighted not only the Commission's contribution to TJ matters on the continent, but in particular also the immense potential for further application of these various mechanisms to the matter at hand. The next chapter is dedicated to further expanding on the concrete ways in which these various tools and mechanisms may be applied in the context of TJ in order to ensure that the Commission follows a holistic approach to engaging with this matter and makes full use of its available resources to support States in transition.

PART V:

Charting a Comprehensive and Systematic Approach of the ACHPR to Transitional Justice in Africa

197. This study of the ACHPR has examined in some detail the human and peoples' issues arising in Africa's experience with TJ processes and the discourse on TJ. It has identified and analysed the TJ legislative framework of the African human rights system. Additionally, it has reviewed the relevant mechanisms and procedures of the ACHPR and the work of the Commission vis-à-vis TJ. In so doing, the study has identified the opportunities available and the limitations in the extant approach to TJ, particularly in the African Commission. We have now reached a point at which we need to identify the major lessons to be distilled from the foregoing on how best to engage TJ in Africa.
198. In this final substantive chapter, the study outlines, from the vantage point of the African Charter, a comprehensive and systematic approach to TJ in Africa. To this end, it offers not only an outline of its conception of the African Charter-based TJ in Africa but also the broad parameters for ensuring a coherent approach across and active engagement of the entire spectrum of the Commission's protection and promotion mandates. On the basis of both the analysis thus far and the various relevant norm-elaborating works of the African Commission, this chapter also identifies and elaborates a set of African Commission principles on TJ in Africa.

African Charter-based approach to transitional justice in Africa

199. For purposes of the work of the African Commission, TJ refers to the judicial and non-judicial measures that transitional societies adopt for advancing rehabilitation and reparations of victims, holding perpetrators of violence accountable, restoring social harmony and national cohesion, and transforming institutions, policies and processes aimed at achieving a just political and socioeconomic system, having particular regard to the gendered and generational burden of violence. Such a transformative conception of TJ allows and calls for combining contextually relevant criminal justice processes and restorative and redistributive as well as structural justice approaches.

200. Apart from addressing physical and psychological violence, this conception of TJ, abstracted from the rich legislative materials of the African human rights system, additionally addresses violations of socioeconomic rights, including, among others, the destruction of or losses caused to property, sources of livelihood, infrastructures of social services and the physical environment. It also involves social and political justice dimensions aimed at redressing the structural injustices that facilitated violence, including political and socioeconomic inequality and marginalisation, as well as gender-based oppression.
201. Taking account of the peoples' rights and individual duties dimension of the African Charter, the transformative conception of TJ characteristic of the African human rights system entails that TJ should both draw inspiration from, and adapt for use, the African traditional justice or dispute settlement mechanisms. Going beyond individual-centred and retributive forms, this highlights TJ approaches emphasising conciliation, community participation and dialogue, and restitution. Such an approach caters not only for the individual dimension of violations but also for violations that result from the organisation and mobilisation of violence based on ethno-cultural, religious or regional collective identities.
202. Having due regard to the Maputo Protocol and the gendered nature of the burden of violence in conflict situations entails that all TJ interventions must draw on and be informed by critical gendered analysis and approaches. Similarly, the formulation of TJ processes should also take account of and provide appropriate responses to the ways in which children and youth have been affected by violence.
203. Overall, the legislative contents of the African human rights system taken together entail that the legitimacy of TJ processes consists of both procedural and substantive components/principles.
204. The procedural components/principles are:
- Broad consultation with all affected individuals and groups, in order to ensure that the transitional process is the result of and reflects the will of all the people;
 - Inclusive process with active participation and role of victims and vulnerable groups to ensure both the active involvement of these groups and to forestall the risk of transitional processes leading to marginalisation;
 - The use of all existing legal and non-legal resources of the society, including from local and indigenous justice mechanisms, with the necessary adjustments required by the demands of the situation;
 - Freedom of speech, press and association – the existence of the necessary environment and space for debate and discussion through which citizens shape the process of elaborating TJ processes and participate in these processes;
 - Protection from and guarantee of non-reprisal;
 - Democratic decision-making/approval/certification of the TJ approaches, either through a legitimate parliamentary Act or a judicial process, such as through judicial review by the Constitutional or appropriate Supreme Court of the land;

- Sequencing and balancing of various forms of TJ processes/objectives for ensuring that the fragile peace has the best chance of becoming sustainable, but such balancing should be subject to requirements of “justifiable limitations” without impinging on the TJ project as a whole; and
- Gender mainstreaming.

205. The substantive components/principles are:

- The right to peace and protection from ongoing violence: Bringing an end to any ongoing violence and removing the threats of further violence that result in violations of human and peoples’ rights and international humanitarian law. It covers the cessation of violations and provision of protection and security guarantees to civilians in the conflict- or violence-affected areas, including those specific to the security needs of women and children as well as other vulnerable groups;
- Accountability and non-impunity: The (formal and local/indigenous) legal measures that should be adopted for investigating and establishing accountability and giving judicial remedy for and acknowledgement of the suffering of victims. Alongside its focus on holding perpetrators accountable (retribution), in the African transitional setting the accountability and non-impunity element should involve conciliation and restitution, with procedures that involve granting of compensation for victims and facilitate full participation of victims and community members in proceedings and reconciliation and healing;
- Restorative justice: Using independent investigative processes, establish the facts surrounding the violations perpetrated. This includes creating a forum to collectively examine the conflict in all its manifestations; to establish a full historical record through the discovery and documentation of various truths about the conflict, including the experiences of different groups such as women, children and youth; to uncover the violations perpetrated; to identify the victims and perpetrators; to determine the role of various State and non-State institutions; and to provide for measures of reconciliation and healing;
- Reparative justice: Measures for healing the wounds and divisions arising from violence consist of both effective and adequate financial or material as well as non-material provisions such as compensation, reparation or restitution for past violations or losses suffered, as well as socioeconomic measures designed to rectify structural socioeconomic marginalisation and exclusion in order to achieve (prospective) social justice;
- Redistributive/socioeconomic justice: Forward-looking redistributive measures that contribute to preventing a relapse to violence should be adopted, involving inclusive and equitable fiscal and development strategies as well as wealth-sharing and power-sharing arrangements;
- Ethno-cultural justice: Addressing the group dimension of conflicts and violations where violence was organised and perpetrated along ethnic, religious or regional lines or a combination thereof. It demands recognition of the group dimension of conflicts or violence and the adoption of policies and institutions that promote national cohesion, tolerance, inclusivity and accommodation between members of different communities;
- Political and institutional justice: Through constitutional and other relevant institutional reforms, this aims at reforming or creating the political and

institutional arrangements, practices and values that ensure democratic and socioeconomic transformation and the prevention of the emergence of future violations;

- Gender equality and addressing sexual and gender-based violence: Addressing gender inequality and violations of women's rights, as well as implementing strong policies for gender equality and the criminalisation of sexual and gender-based violence.

Integrating transitional justice in all the Commission's work

Communications procedure

206. In terms of the communications procedure, this study has highlighted two ways in which the Commission engages in addressing and shaping TJ processes in Africa. The first is where the Commission is apprised with communications on violations relating to situations of violent conflicts. The other instance is where the Commission receives complaints that challenge the adequacy of, or conformity with, the Charter standards, of remedies provided for as part of a country's pursuit of implementing TJ.

207. With respect to cases relating to situations of armed conflict, it is important that the Commission situates and examines the alleged violations within and together with their broader context of armed conflicts. As proposed in the Commission's General Comment on the Right to Life, upon establishing the existence and character of violations complained of, the Commission as part of the elaboration of the measures that should be taken for remedying the violations should look into whether such remedies could be implemented outside of the resolution of the conflict situation that produced the violations. Apart from making a determination of whether Article 58 of the Charter may be invoked, the Commission needs to outline a TJ agenda and the parameters for the pursuit of such an agenda as part of the remedial measures that should be followed. In so doing, the Commission can set the framework for the resolution of the conflict and hence address the violations arising from such conflict.

208. In the case of the second instance, as suggested earlier, there are both procedural and substantive considerations that should be used. The procedural consideration is whether the various TJ mechanisms instituted in the country concerned are arrived at based on an inclusive consultative process with adequate representation of victims and victim groups, and hence represent the most possible reasonable compromise, and whether they were endorsed through democratically established decision-making, such as the procedure of certification by the Constitutional Court provided for in the transitional Constitution of South Africa. The substantive consideration includes the extent to which such TJ mechanisms offer victims various options for getting redress within the TJ process and the range of measures envisaged as part of the TJ process for addressing not only physical violations but also the conditions that created such violations. Accordingly, as the South African experience shows, for example, the mere fact that there are provisions for amnesty and clemency as part of the TJ arrangement or

the exclusion of such issues from the jurisdiction of ordinary courts by itself alone does not render it inconsistent with the African Charter. What matters is the nature and scope of the amnesty clause whereby blanket amnesty is outlawed and whether the clemency processes followed due process and were justified by legitimate public interest.

209. In cases involving systematic violations taking place in repressive regimes, the African Commission would draw on the jurisprudence from its engagements in these two instances.
210. The current practice of the Commission shows that its approach to the determination of remedies, and particularly the formulation of reparation measures such as financial compensation, is ad hoc and hence lacking legal clarity and predictability. It is accordingly recommended that the Commission should develop a framework that guides its determination of the appropriate remedy/reparations to be granted in the communications procedure, rather than relying on ad hoc determinations.

State periodic report review process

211. As part of the review process, the ACHPR can seek answers on human rights issues relating to TJ processes. In its concluding observations, the Commission can also highlight the issues of concern for Charter rights that should be addressed and make specific recommendations on how TJ processes can be made to conform to **the fundamentals** of the rights in the African Charter. Going beyond and above the items contained in the periodic report under consideration, the Commission should be able to adequately articulate how the African Charter rights should shape and inform the objectives and implementation of TJ processes.
212. In relation to countries in transition, the Commission should ensure that it also raises questions related to reparations, particularly as these concern individual redress and redress for communities affected by the conflict. Some principles to guide such discussions include that reparations should be able to in fact remedy the violations committed during the conflict and should take into account the different degrees of suffering and individual experiences, rather than constituting a lump sum payment to all identified victims. The Commission should also pay particular attention to the institutions which are put in place to determine the required reparations and to make sure that the State takes responsibility to ensure that such institutions are well resourced and have the political will behind them to guarantee just and equitable remedies for all victims.
213. In reviewing the reports of States where systematic violations are observed, the Commission should also be sure to engage the State on the processes which are in place for transitioning to peace, and should make substantive recommendations to this effect.
214. Given that in the current practice, review questions are often formulated along the thematic areas of interest of the existing special mechanisms of the African Commission, the Commission should find a way of ensuring that

questions of interest for the African Charter rights with respect to the TJ discussion or process of the country are adequately examined as part of the review process.

215. Apart from countries where TJ processes are under way or being considered, the ACHPR would need to pay enhanced attention to country reports from States in or emerging from conflict or violent repressive rule. In its concluding observations, it should make comments on the ways in which human rights can be observed in situations of conflict and how they should be integrated in all processes, including mediation and peace-making initiatives for resolving the conflict/s. The Commission would also need to frame in broad terms items for an agenda for TJ, with some guidelines on how such an agenda may be pursued by the country concerned.

Resolutions and statements

216. The adoption of resolutions and the issuing of statements have huge potentials for the Commission to express its views on emerging issues relating to peace and TJ processes. The Commission can make use of resolutions/statements to inform and shape emerging or ongoing discussions on TJ in a State Party to the African Charter. This the Commission may accomplish through highlighting the principles and parameters that should be applied in dealing with the major issues being debated in such a State.

Promotion missions and investigative missions

207. Missions provide an excellent opportunity for the Commission to go on the ground in a particular country and to gauge from interaction with various stakeholders how an ongoing TJ process is progressing, or, where a society is just emerging from conflict or repressive rule, whether the parties are ready to start discussions around TJ. It also provides an opportunity for on-site investigations and enables the Commission to make specific recommendations based on the situation encountered there, as well as to address recommendations to specific stakeholders. While the aim of promotion missions is more towards engaging with stakeholders and promoting human rights during the mission itself, investigative or fact-finding missions are geared towards gathering information which may be of use to the State and national stakeholders, but which may also be used by the AU and other international players in their engagement with the State.

Special mechanisms of the Commission

218. The strength of the Commission's special mechanisms as highlighted above lies in the fact that they are each focused on a very specific concern, and thus each mechanism approaches TJ from a different perspective. If brought together, these perspectives result in a holistic view of TJ which takes into account all of the concerns arising in this context, from women's rights to concerns of freedom of expression, torture and resources. It is thus important that each of the special mechanisms of the Commission should assess the contribution which it makes to addressing their specific concerns in a TJ context, and that guidelines are developed to give direction to special

mechanisms in doing so. The special mechanisms have all the tools of the Commission at their disposal to raise awareness and address, together with the State, concerns in the area where their mandate overlaps with TJ.

Conclusion

219. This chapter set out the procedural and substantive principles which, taken together, represent the kind of criteria processes which should be used in the various tools and mechanisms of the African Commission, in order to ensure that all areas of concern within the TJ context are covered. In addition, it provided some guidance as to some of the ways in which the various procedures and mechanisms of the Commission can be applied towards a holistic TJ framework within the Commission.

PART VI:

Conclusion and Recommendations on Institutional Mechanism for Transitional Justice in the Commission

Conclusion

220. It is clear from the foregoing that the African human rights system avails rich legislative materials having direct bearing on TJ in Africa. At the core of these is the African Charter. In terms of substantive rights, one of the most interesting aspects of the African Charter, as discussed in detail above, is its institutionalisation of the indivisibility and interdependence of the various so-called generations of rights. As pointed out in the Preamble to the African Charter, the catalogue of rights in the African Charter is founded on the premise that “the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”. It is only logical that the provision of all these rights offers normative and conceptual materials for broadening the reach of and approaches to TJ beyond the narrow confines of its mainstream forms, as conflicts or repressive systems affect all these rights simultaneously.
221. The additional instruments, particularly the Maputo Protocol and the African Children’s Charter, further expand the scope and depth of the human rights issues to be addressed and how some of them are best addressed as well as the modalities for addressing them. Most notably, both draw attention to the fact that women and children are usually not only among the most vulnerable to violations but also often the most affected members of society in conflict situations. Both instruments also highlight the need for TJ processes to pay particular attention to violations affecting women and children and to be sensitive to those violations in formulating TJ processes and designing remedial measures.
222. The provisions in the AU Constitutive Act and the PSC Protocol highlighted the imperative for a holistic approach taking both peace and justice seriously and complementarily and for a more enhanced role of the African Commission. Apart from providing legal materials that can be used for purposes of interpreting the Charter, notably its Article 23 on the right to peace, those

provisions envisage the necessity of and the available opportunity for leveraging the Commission's engagement in TJ through informing and shaping the policy actions of the AU policy-making bodies, including the PSC whose policy actions shape TJ processes in Africa.

223. One of the avenues for pursuing the TJ role of the ACHPR is to mainstream TJ into its various mechanisms, as elaborated in the preceding chapter. However, the approach of the various ACHPR tools and processes to TJ-related matters has been ad hoc and lacks a consistent strategy. At the very best, the current situation represents a piecemeal approach to TJ whereby many of the concerns that need to be addressed are not dealt with comprehensively and with sensitivity. The establishment of a dedicated capacity within the Commission could help in this situation by encouraging a more holistic and consistent approach. For example, it has been noted that even with State reports, questions are posed largely in relation to the mandate of special mechanisms as opposed to the full scope of the rights of the Charter, thereby leaving gaps for reviewing transitional processes.

Recommendations

224. With regards to the question of a dedicated special mechanism for TJ, there is no doubt that the UN Human Rights Council's (UNHRC) special mechanism on Transitional Justice – the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-Recurrence – adds value to the Council's work in this area. As some commentators observed, the “creation of the mandate is significant as it demonstrates a commitment on the part of the Human Rights Council to justice and accountability for gross human rights violations and serious violations of international humanitarian law”.¹⁴⁰
225. The ACHPR could explore a number of ways for such dedicated capacity, viz. designating a focal point or defining a new special mechanism or starting with a focal point that is elevated to a special mechanism. Each of these is discussed below.
226. Having a designated focal point on TJ will facilitate a more coherent response of the Commission. Having someone as the designated focal point will enable more efficient engagement with other organs of the AU as well as with external stakeholders such as the UN Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-Recurrence. The focal point could also be supported by a legal officer (or intern) specifically dedicated to TJ. Such a position would then perform a cross-cutting role by servicing all existing mechanisms and communications that raise issues and concerns of TJ. In the context of minimal expertise existent in the Commission, the focal point could complement and support existing special mechanisms by highlighting the critical TJ issues under consideration.

¹⁴⁰ See Asaala, E & Dicker, N (2013) “Transitional Justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from Here?” 13 *AHRLJ* 331.

227. A further option would be the development of a new special mechanism in the form of a special rapporteur or working group. There could be clear arguments for the establishment of a new special mechanism. While the Commission has defined only the principle of establishment through consent, we would venture some other arguments that could be taken into consideration when arguing for a special mechanism. One criterion would be the gravity of the issue. As noted in earlier chapters, TJ has animated the global arena, and even though African countries have been at the forefront of developments in this regard, the ACHPR has not played as significant a role as it could and needs to. There is clearly a need for African voices to provide meaning and interpretation and to lead engagements around the scope of rights that need protection in transitions and how such rights can innovatively be given application in transitional settings. Indeed, the ACHPR could provide innovative interpretation around key tensions in TJ, especially with the African Charter's approach to social, economic, cultural and collective rights. Enabling the foremost continental human rights body to begin defining the scope and interpretation of rights has surely gained currency.
228. The African Commission, with such dedicated capacity, could also serve as a continental repository or archive for TJ documentation and other documents that have major implications for TJ. This can be supported by national archives or documentation centres that systematically collect and classify data on TJ, not only for the African Commission's use, but also for researchers, students, practitioners, civil society and the public at large.
229. One challenge which would need to be considered in establishing a special mechanism is that, unlike the UNHRC and the IACmHR, which are capacitated to engage independent experts (potentially with long-term expertise in the area), when the ACHPR creates special mechanisms, it is limited to looking inwards, either to one of its members doing it alone or leading a group of experts. The presence of expertise and energy already in the Commission, as with the decision to undertake this study, could also be harnessed to ensure an effective mechanism.
230. Considering all the aspects noted above to ensure the effective promotion and protection of human rights within a context of transition, we recommend that the Commission establish a dedicated capacity on TJ within the Commission in the form of a special rapporteur assisted by experts.
231. With this intervention, we believe that the Commission would be able to have a more meaningful impact within the current continental and global discourse, by providing transitional situations with normative frameworks grounded in the full and comprehensive use of the rights of the African Charter in order to ultimately enable societies to choose and implement effective and inclusive TJ processes.
232. The dedicated capacity would have the following core functions:
- Develop guidelines on TJ similar to the guidelines of the Commission on fair trial, based on the outlines highlighted in paragraphs 204–205 in this study report (procedural and substantive principles);

- Track TJ processes on the continent and provide guidance to the Commission to pronounce itself on their consistency with the African Charter and the TJ conception of the ACHPR as articulated in this study;
- Perform a cross-cutting role by servicing all existing mechanisms and communications that raise issues and concerns of TJ;
- Periodically assess the state of transitional processes and develop studies, recommendations, guidelines and general comments on issues or concerns of continental importance on TJ;
- Serve as the mechanism for operationalising the role of the ACHPR in relation to the AUTJP; and
- Potentially serve as a platform for the engagement of affected groups and other relevant stakeholders in the work of the Commission on TJ.

Annexures

Annex A:

List of Members of the Advisory Panel

Annex B:

Resolutions on Transitional Justice

Annex C:

Obiter dictum of the Commission in Communication 431/12 -
Thomas Kwoyelo v Uganda

Annex A: List of Members of the Advisory Panel

The Advisory Panel for the preparation of the study comprised the following persons:

1. Shuvai Nyoni
2. Jackson Odong
3. Andrew Songa
4. Gaye Sowe/IHRDA
5. John Caulker
6. Rose Hanzi

As well as members from CSVR, the Secretariat of the study:

7. Hugo van der Merwe
8. Annah Moyo
9. Sufiya Bray

And the ACHPR:

10. Commissioner Solomon Ayele Dersso
11. Abiola Idowu-Ojo

Annex B:

Resolutions on Transitional Justice

235: Resolution on Transitional Justice in Africa

The African Commission on Human and Peoples' Rights (the Commission), meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia;

Recalling its mandate to promote and protect fundamental human rights;

Deeply concerned by the scourge of armed conflicts and political crises in Africa, accompanied by serious and massive human rights violations, which are often characterised by impunity;

Considering that the various African legal instruments contain several norms and standards relating to transitional justice in Africa, including the Constitutive Act of the African Union, the African Charter on Human and Peoples' Rights and the African Charter on Democracy, Elections and Governance;

Considering new developments in Africa such as the development of a Transitional Justice Policy Framework by the African Union and the possibility of extending the mandate of the African Court on Human and Peoples' Rights to include international crimes;

Stressing the need to include human rights violations as part of a comprehensive effort to combat impunity and achieve lasting peace, the rule of law and governance;

Stressing the role played by transitional justice mechanisms in combating impunity and promoting reconciliation in countries emerging from political crises and violent armed conflicts, as well as the specific context of each post-conflict situation on the continent;

Convinced that the undertaking of a study on transitional justice in Africa will contribute to identifying the Commission's capacity and challenges in supporting transitional justice processes and mechanisms in Africa;

Decides to task Commissioner Pacifique Manirakiza with preparing a study on transitional justice in Africa, with the objective of:

- Identifying the various existing transitional justice mechanisms in Africa;
- Identifying the transitional justice legislative framework in Africa, in accordance with the Commission's mandate to promote and protect human rights in Africa;
- Determining the Commission's role in implementing the AU Transitional Justice Policy Framework;
- Analysing the opportunities and challenges of the Commission in encouraging and supporting transitional justice processes and mechanisms in Africa; and
- Analysing the possibility for the establishment by the Commission of a special mechanism on transitional justice in Africa;

The Commissioner responsible may request any form of assistance, including technical and logistical support, in order to complete the study within the required timeline.

Decides that a report on the study should be presented to the Commission for consideration in May 2014.

Banjul, The Gambia, 23 April 2013

278: Resolution on the extension of the deadline for the Study on Transitional Justice in Africa

The African Commission on Human and Peoples' Rights (the Commission) meeting at its 55th Ordinary Session, in Luanda, Angola, 28 April to 12 May 2014;

Recalling its mandate to promote human and peoples' rights in Africa in accordance with the African Charter on Human and Peoples' Rights;

Recalling further Resolution ACHPR/Res.235(LIII)13: Resolution on Transitional Justice in Africa, adopted during the 53rd Ordinary Session of the Commission, held in Banjul, The Gambia, from 9 to 23 April 2013, mandating Commissioner Pacifique Manirakiza to prepare a study on transitional justice in Africa;

Mindful of the need to consolidate and finalize the research undertaken as part of the study;

Considering that the one-year deadline fixed for conducting the study will expire in May 2014;

Decides to:

Extend the deadline of the study by two years;

Request that the report of the study be submitted for consideration by the Commission in May 2016.

Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014

326: Resolution on the Appointment of a New Commissioner for the Transitional Justice Study in Africa - ACHPR/Res.326 (LVII) 2015

The African Commission on Human and Peoples' Rights (the Commission), meeting at its 57th Ordinary Session in Banjul, The Gambia, held from 4 to 18 November 2015:

Recalling its mandate to promote human and peoples' rights in Africa in accordance with the African Charter on Human and Peoples' Rights;

Recalling Resolution ACHPR/Res.235 (LIII) 2013: *on Transitional Justice in Africa*, adopted by the Commission at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia, mandating Commissioner Pacifique Manirakiza to prepare a study on transitional justice in Africa;

Further recalling Resolution ACHPR/Res.278 (LV) 2014: *on the extension of the deadline for the Study on Transitional Justice in Africa*, adopted by the Commission at its 55th Ordinary Session, in Luanda, Angola, 28 April to 12 May 2014, extending the deadline of the study by two years and requesting the report of the study in May 2016;

Considering that the mandate of Commissioner Pacifique Manirakiza as the Focal Person for the Study has come to an end;

Recognizing the importance of the work of the Focal Person and the need to consolidate and finalize the research;

Decides to task **Commissioner Solomon Ayele Dersso** as Focal person for the Study;

Further Decides that a Report on the Study be presented to the Commission for consideration in May 2016.

Adopted at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 4 to 18 November 2015

337: Resolution on the Extension of the Deadline for the Study on Transitional Justice in Africa – ACHPR/ Res. 337(LVIII) 2016

The African Commission on Human and Peoples' Rights (the Commission), meeting at its 58th Ordinary Session, held from 6 to 20 April 2016 in Banjul, Islamic Republic of The Gambia:

Recalling its mandate to promote human and peoples' rights in Africa in accordance with the African Charter on Human and Peoples' Rights;

Recalling Resolution ACHPR/Res.235 (LIII) 2013 on Transitional Justice in Africa, adopted by the Commission at its 53rd Ordinary Session, mandating Commissioner Pacifique Manirakiza to prepare a study on transitional justice in Africa (the Study);

Further recalling Resolution ACHPR/Res.278 (LV) 2014 on the extension of the deadline for the Study, adopted by its 55th Ordinary Session, extending the deadline of the study by two years and requesting the report of the Study in May 2016;

Also Recalling Resolution ACHPR/Res.326 (LVII) 2015, appointing a new Commissioner – Commissioner Solomon Ayele Dersso as the focal person for the Study;

Mindful of the update on the Study provided by Commissioner Dersso to this 58th Ordinary Session, and the need for him to consolidate and finalize the Study;

Considering that the deadline fixed for conducting the Study will expire in May 2016;

Decides to:

- i. Extend the deadline of the Study by two (2) more years;
- ii. Request that the report of the Study be submitted for consideration by the

Commission in May 2018.

Done in Banjul, Islamic Republic of The Gambia, on 20 April 2016

Annex C:

Obiter dictum of the Commission in Communication 431/12 – *Thomas Kwoyelo v Uganda*, adopted at its 62nd Ordinary Session held from 25 April to 9 July 2018 (paras 283–293)

Obiter Dictum

283. As it is evident from the analysis above on Article 3 of the African Charter, the amnesties granted in relation to the conflict in Northern Uganda was a bone of contention. In the light of that, in this obiter dictum the Commission addresses the issue of blank amnesties vis-à-vis the international and regional human rights obligations of States Parties to the Charter.
284. One of the issues at the core of this Communication is concerned with the application of amnesty as an instrument of conflict settlement. In the case at hand, the Commission has confined its analysis to the issue of whether the application of the Amnesty Act complied with the requirements of the right to equality. Accordingly, the Commission did not examine the question of compatibility of the use of amnesty with the rights guaranteed in the African Charter. However, pursuant to Article 60 of the African Charter, the Commission deems it fitting that it pronounces itself on this issue given the lack of clear guidance on ensuring compliance with the requirements of the African Charter when States resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace. This is further necessitated by the position that the Commission took herein above in finding violation of Article 3 of the Charter in the application of amnesty, which, unless it is read carefully, may be wrongly interpreted as sanctioning blanket amnesty.
285. While amnesties have a long pedigree in peace negotiations and have historically been commonly used as part of peace settlements even for armed conflicts manifesting most atrocious acts,¹⁴¹ developments in international law have in recent years laid down rules regulating the use of amnesties in peace settlements. These rules of international law aiming at giving force to human rights and IHL international humanitarian law principles prescribe the conditions that should be met when societies have to have recourse to amnesties as a necessary means of ending the continuation of armed violence and the violations that inevitably accompany such violence.
286. Amnesty¹⁴² can be defined as the legal measures that are used in transitional processes, often as part of peace settlements, to limit or preclude the application of criminal processes and, in some cases, civil actions against certain individuals or categories of individuals for violent actions committed

141 O'Shea, A (2002) *Amnesty for Crime in International Law and Practice*, The Hague: Kluwer Law International, p. 1.

142 The word "amnesty" is derived from the Greek word *amnestia*, which is closely linked with another Greek term *amnestikakeia*, which means forgetting legally wrongful acts. Today, amnesty is generally understood as immunity in law from either criminal or civil legal consequences or from both for wrongs committed in the past in a political context.

in contravention of applicable human rights and IHL rules. While amnesties are usually applied for conduct committed before they have been established, there have been instances where they have been used to retroactively nullify legal liability previously established.¹⁴³ Amnesties commonly specify a category or categories of beneficiaries, such as members of rebel forces, State agents or political exiles. Although they can be adopted as unilateral acts of the State including as executive decrees, amnesties are usually established as part of a peace settlement that is given a force of law.

287. The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specific event or circumstance, usually in armed conflict. Typically, these are not normal or ordinary circumstances. Rather, they are characterized by a lack of political and socio-economic stability, weak or dysfunctional institutions and diminished security. In such conditions, the compatibility of measures amounting to amnesties with the African Charter can be looked at in two ways. First, as noted in the substantive part of this decision, instead of the direct application of human rights standards that is ordinarily done in normal times, it is the standards of IHL, which apply in times of conflict that are used to assess the existence of violation of Charter rights. Second, such measures have also to be examined on the basis of the limitations clause and hence on the basis of whether they are justifiable and proportional limitations acceptable under international law.
288. Amnesties may exclude some or all conduct, including those that may be deemed crimes under international law. It is now common to make a distinction between blanket amnesties and conditional amnesties. Blanket amnesties, also known as unconditional amnesties, can be defined as those that “exempt broad categories of serious human rights offenders from prosecutions and/or civil liability without the beneficiaries’ having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on individual basis”.¹⁴⁴ As they have the effect of excluding any form of accountability and hence enabling impunity, blanket amnesties are deemed to be incompatible with human rights and IHL rules. Conditional amnesties are those that usually offer relief from criminal conviction or criminal prosecution altogether for a defined category of actors and on meeting certain preconditions including full disclosure of what they know about the conducts covered by the amnesty and acknowledgement of responsibility.

¹⁴³ Office of the United Nations High Commissioner for Human Rights (2009) “Rule-of-Law Tools for Post-Conflict State: Amnesties”, New York: OHCHR, p. 5.

¹⁴⁴ *Ibid.*, 8.

289. A number of widely ratified international human rights and humanitarian law treaties¹⁴⁵ explicitly require States Parties to ensure that criminal proceedings are instituted against suspected perpetrators of prohibited acts in these instruments. It is generally accepted that an amnesty that completely foreclosed accountability measures for such prohibited acts would be in contravention of these instruments. Amnesties are also deemed to be incompatible with human rights treaties like the African Charter that do not explicitly address prosecution but which have been understood to require State Parties to institute judicial measures when serious violations occur unless such amnesties meet the requirements of justifiable restrictions acceptable in human rights treaties. Amnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, particularly for individuals with senior command responsibility, also violate customary international law.
290. The Inter-American human rights system has a rich jurisprudence relating to national amnesties as a result of its historical context where a number of countries in Latin America had adopted amnesties following periods of human rights violations by repressive regimes in an effort to shield officers from accountability for violations. In this regard, the Inter-American Court of Human Rights declared invalid a blanket amnesty in Peru in 2001, which was found to discourage investigations and deny any remedy to the victims.¹⁴⁶ Following the precedent that it set in the blanket amnesty in Peru, the Inter-American Court has since declared the amnesty laws in Chile, Argentina and El Salvador to be incompatible with the States' duty to prosecute crimes and human rights violations.¹⁴⁷
291. While it is acknowledged that many types of amnesties have been adopted across the world, unconditional amnesties with no accompanying accountability measures are particularly problematic in terms of States' compliance with international obligations, most particularly relative to their duties to respect and protect human rights. Although this is the first instance where the African Commission addresses the issue of amnesties in reasonable detail, there have been instances in particular communications in which the Commission found legal measures completely excluding prosecution with no alternative measures of accountability as being incompatible with the provisions of the African Charter. For example, the Commission held that amnesties could be contrary to the right of individuals to have their cause heard under Article 7(1) of the African Charter,¹⁴⁸ unless

145 Uganda is party to the Genocide Convention as well as the four Geneva Conventions and its additional Protocols. It has ratified all of the core international human rights treaties, with the exception of the International Convention on the Protection of All Persons from Enforced Disappearances, as well as other significant treaties like the Optional Protocol to the Convention on the Rights of the Child on the use of Children in Armed Conflict. Uganda ratified the ICC Rome Statute in 2002 and has also supported and signed important international instruments including the Paris Principles and Commitments of 2007 on the role of children in armed forces or groups. Uganda has also ratified important regional treaties that impose certain human rights obligations such as the constitutive acts of the AU and the East African Community, the International Great Lakes Conference Protocols and, most significantly, the ACHPR, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) 10 and the African Charter on the Rights and Welfare of the Child and its corresponding protocol.

146 Inter-American Court of Human Rights, *Barrios Altos v. Peru* (2001), paras 41-44; *Loayza Tamayo v Peru* (Reparations) para. 168: "states [...] may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law."

147 Human Rights Watch (2009) *Selling Justice Short: Why Accountability Matters for Peace*, Report, p. 17.

148 See Communication 245/02 - *Zimbabwe Human Rights NGO Forum v Zimbabwe*.

they are conditional and constitute justifiable and proportional limitations acceptable under international law.

292. In its normative elaboration of the provisions of the African Charter as well, the African Commission advanced the view that blanket amnesties constitute violations of specific rights of the African Charter. A case in point is its General Comment No. 4 on prohibition of torture. In this General Comment, the Commission held that States are precluded from extending blanket amnesty for torture as a gross violation of international human rights law, as a crime against humanity and as a war crime. It violates the victim's right to judicial protection and to having his cause being heard.¹⁴⁹
293. It is, therefore, the considered view of the Commission that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in Article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter.¹⁵⁰ African States in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law. When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honour their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.

¹⁴⁹ ACHPR, General Comment on the Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment under Article 5 of the African Charter on Human and Peoples' Rights, para. 28.

¹⁵⁰ See para. 7(1) of the African Charter.

