



Avocats Sans Frontières

**AVOCATS SANS FRONTIERES WRITTEN SUBMISSION TO
THE JUSTICE LAW AND ORDER SECTOR ON
THE DRAFT TRANSITIONAL JUSTICE POLICY**

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ABOUT ASF

Avocats Sans Frontières (ASF) is a non-governmental organization committed to enhancing access to justice for the most vulnerable persons in society. The primary goal of ASF is to contribute to the establishment of institutions and mechanisms that allow for access to independent and impartial justice, and which are capable of guaranteeing the protection of fundamental rights. ASF has worked in Uganda for several years and focused its activities on promoting access to justice for vulnerable communities, supporting the transitional justice process in Uganda and promoting the application of international justice principles and obligations. ASF is a victim-oriented organization that promotes and defends victims' rights in conflict situations. As such, ASF is committed to supporting victim communities, and enhancing their voice and agency in policy and lawmaking processes.

Contacts:

KAMPALA OFFICE

Plot 832 Old Kira Road, Bukoto,

P.O. Box 36710 Kampala

Tel. +256 (0) 312 265 842

Ismene Nicole Zarifis, ASF head of mission: OUG-cm@asf.be

HEADQUARTERS

Rue de Namur 72 Naamsestraat

1000 Brussels - Belgium

Tel. +32 (0)2 223 36 54

Francesca Boniotti, ASF Executive Director: fboniotti@asf.be

Jean-Philippe Kot, ASF International and Transitional Justice Expert:
jpkot@asf.be

WWW.ASF.BE

EXECUTIVE SUMMARY

ASF would like to begin this submission with an expression of sincere appreciation of the drafters of the policy and to acknowledge the critical role of all the key stakeholders in the drafting process, especially JLOS member institutions in their efforts to prepare a comprehensive policy that is the product of years of consultations and concerted efforts. Uganda's efforts to develop a holistic and comprehensive draft Transitional Justice policy are truly commendable.

As an active participant in support of this process, ASF wishes to respectfully submit its constructive, technical and substantive input with the aim to further strengthen the policy document in terms of providing strategic policy direction and practical guidance that is critical in addressing a complex endeavor such as striving for accountability and reconciliation for conflict crimes.

This submission begins with general remarks on the policy document, and then proceeds to provide comments and practical suggestions on each of the substantive sections of the policy.

1. GENERAL REMARKS

The Transitional Justice Policy is an important opportunity for the Government of Uganda to provide strategic policy guidance on how it intends to handle justice and accountability for serious crimes, and at the same time, how it plans to balance this with serving the rights of victims to truth, justice and reparations, which together are critical for achieving national reconciliation and long-lasting peace in the region.

Overall, the draft transitional justice policy addresses most of the key issues that have been the focus of the transitional justice discourse in Uganda over the years. However, looking more closely at the document as a whole, the key aspects that would require further elaboration and clarification emerge as:

- (1) the need to sufficiently situate the policy and its proposals in the local, national post-conflict context of Uganda;
- (2) the need to clearly explain the role, function and merits of each mechanism being proposed, with emphasis on how these mechanisms can be best applied as part of a holistic and comprehensive approach to address victims' rights to justice and accountability in post-conflict Uganda;
- (3) the need to provide specific guidance on how the various mechanisms can and should work together in a complementary and mutually reinforcing manner so as to achieve the overall goal of the policy;
- (4) the need to elaborate in more detail on the integration of cross-cutting themes and the involvement (and protection) of special groups; namely, the need for more specific policy guidance on the treatment of vulnerable groups (women, children, the victim-perpetrator character of the child soldier), victims' rights, as well as witness protection.

In addition, an implementation plan for the policy would be a helpful addition. The plan would serve to provide a practical tool for key actors on their respective roles in the process, timeframes, and aid in building confidence in victims that the policy will be effectively applied and their concerns adequately addressed.

In light of the above, the policy does not seem to provide sufficient strategic and policy direction on the holistic modus operandi of the different mechanisms to achieve the complex formula of meaningful justice, accountability and reconciliation in Uganda.

Every country that experienced armed conflict has had to answer the same questions, and develop their own unique approach to handling the past legacy of war crimes and gross human rights violations. Many have made a choice between employing either a retributive justice approach or a restorative justice approach. The most successful processes of late have adopted aspects of the two, based on a process of consultation, debate, planning and consideration for the overall objectives and developing a combination of mechanisms to achieve both accountability for the most serious crimes and restorative justice for the majority of victims and minor offenders.

In Uganda's case, the approach is holistic and comprehensive, suggesting a combination of approaches, and therefore the comments that follow are meant to provide suggestions on how best to operationalize this holistic approach in the policy.

2. SPECIFIC REMARKS

2.1. CONTEXTUAL DEFINITIONS

Transitional justice, as well as its terms, is a specialized field of law which includes particular terms that carry specific meanings, which differs from layman terminology and understanding of such terms. As this is a national policy document on transitional justice, it is very important that the terms are in line with internationally accepted definitions within the transitional justice field.

As such, it is suggested that the definitions be revised and defined in light of international established definitions which are grounded in the context of achieving accountability and reconciliation for mass crimes (war crimes, gross human rights violations) in post-conflict settings.

In addition, it may be helpful to include the sources from which these definitions are derived in order to enable stakeholders to properly situate the document. The definitions are what grounds the document in international law and practice which is the most developed in the field of transitional justice. Simplified definitions may be included in a simplified version of the policy for outreach purposes.

Specific suggestions for reformulation are as follows:

- a) **Transitional Justice:** The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms; with differing levels of international involvement (or

none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹

- b) **Truth Telling and Truth Seeking:** (*A combined definition is proposed because these two are closely related and are often used inter-changeably*) Truth Telling and Truth Seeking have their bearings in the inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes recognized in international law.² Truth telling and truth seeking denote the processes adopted to give victims of past grave human rights violations and the society at large the opportunity to share their experiences in the hope of coming to grips with their past pain and suffering.
- c) **Traditional Justice:** traditional justice refers to localized, informal approaches by communities to attain justice and reconciliation arising from community-based conflicts; it encompasses all community driven approaches that are developed and utilized in resolving such disputes. In transitional justice settings, traditional justice mechanisms serve an important purpose in achieving social reintegration and reconciliation between victims and perpetrators at the local level.
- d) **Reparations:** Symbolic and non-symbolic repair and redress given to victims in cases where *gross human rights violations* or *serious violations of international law* are committed.³ States become responsible for ensuring reparations to victims in circumstances where those responsible for the crimes are unwilling or unable to meet their obligations.⁴ Reparations come in five forms, including: (1) restitution-restoration of a victim's rights, property, citizenship status; (2)

¹ "Secretary-General's report to the Security Council "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (S/2004/616) Found at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>>

² E/CN.4/2005/102/Add.1

³ UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Right to a Remedy and Reparations for Victims of Gross Violations of International Humanitarian Law.

⁴ UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Right to a Remedy and Reparations for Victims of Gross Violations of International Humanitarian Law.

compensation-monetary form for material damages; (3) rehabilitation-psychological and physical support;(4) satisfaction-acknowledgement of guilt, apology, burials, construction of memorials, etc; (5) and guarantees of non-repetition-reformation of laws and civil and political structures that led to the violence.

e) **Amnesty laws:** Legal measures that have the effect of: (1) prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or (2) retroactively nullifying legal liability previously established.⁵ In conflict settings, amnesties are typically used as a peacemaking tool to achieve an end to hostilities with the opposing party to the conflict, in exchange for 'no prosecution' of war criminals. They are used to negotiate the first stages of peace after conflict, and based on such objectives, are meant to be short-term in nature.

f) ASF recommends the inclusion of a specific definition of Blanket amnesty laws: Laws which provide amnesty without exception to the commission of international crimes. Under international law, blanket amnesty laws conflict with international justice and human rights principles, which include a duty of the State to prosecute war crimes and gross human rights violations. As such, they have the effect of perpetuating impunity for gross human rights violations and war crimes, as well as depriving victims of their right to truth, justice and reparation.

2.2. EXECUTIVE SUMMARY

The executive summary should be split to include the sub-heading "**Statement of Purpose and Necessity**". This subheading should appear after the fourth paragraph of the executive summary. This is important to clearly highlight the policy's purpose as well as the importance of its implementation.

⁵ UN Rule-Of-Law Tools for Post-Conflict States: Amnesties, 2009

2.3. BACKGROUND

- a) The background should be more representative of Uganda's national history of conflict by delving into the different conflicts that have taken place in the country over the years. Without this representative genesis of conflict, there is a risk of the policy being perceived as a document primarily meant to address concerns for the Greater North and not Uganda as a whole.
- b) It needs to be clearly highlighted that the Juba Peace Agreement provisions are being actualized in the transitional policy document as a sign of good will on the part of the Government and not necessarily as a legal obligation since the Juba Peace Agreement was never signed by both parties-to wit, the Lord's Resistance Army and the Government of the Republic of Uganda.

2.4. REGIONAL LEGAL FRAMEWORK

The Great Lakes Pact is also a relevant instrument to be noted with regard to post-conflict justice and protection of women and children victims of conflict.

With respect to the African Charter on Human and Peoples' Rights referred to in paragraph 16 and 18, specific reference to rights and obligations of States in these instruments would be helpful to draw linkages between the policy and the duties applicable in this context.

2.5. INTERNATIONAL LEGAL FRAMEWORK

It is important to clarify the status of the listed instruments in terms of their binding nature on Uganda, perhaps as an introduction to the section.

Other relevant instruments to include and explain their relevance to the policy would be: UN Basic Principles and Guidelines on Victims Right to a Remedy for

Gross Violations of Human Rights and Serious Violations of International Law (stipulating victims' right to truth and reparations); UN Principles on Impunity (stipulating State obligations to prosecute serious crimes and victims' rights to truth, justice and reparations); the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; all the relevant UN resolutions on the issue of protection of women from sexual violence in conflict settings.

2.6. POLICY RATIONALE

- a) Reference to the Juba Peace Agreements is relevant for this section as the policy was in part intended to operationalize the provisions set forth primarily in the Agreement on Accountability and Reconciliation;
- b) Reference to Uganda's national, regional and international obligations would be relevant to reinforce this section. It is important for the policy to recognize the harms done to victims, the commission of gross violations of human rights and serious violations of international law and its duty and commitment to delivering justice and a remedy to victims. It is also important to emphasize that targeted efforts through a specialized policy such as this one have been lacking, as such, the TJ policy is meant to address the specific or peculiar conditions of victims of mass crimes and the effects this has on their lives.

FORMAL JUSTICE SYSTEMS, TRADITIONAL JUSTICE, TRUTH TELLING, REPARATIONS & AMNESTY

As it stands, this section focuses mainly on the challenges of each of the proposed transitional justice mechanisms. However it is important to start out by clearly stating the role and function of each mechanism, strengths and weaknesses if applicable, and how they should be designed or applied in the Ugandan context.

In terms of challenges, there is need to clearly highlight how the challenges presented by each mechanism will be addressed, and how the other mechanisms can play a role in complementing and meeting the gaps/weaknesses of the others to lead to a comprehensive and holistic process.

It is critical for the policy to give stakeholders a sense of direction on the role each mechanism is meant to play vis-à-vis the others and how they will complement each other.

2.7. FORMAL JUSTICE

- a) It is important to mention the existing formal justice mechanisms such as the International Crimes Division of the High Court of Uganda and the DPP War Crimes division and their role as the primary mechanisms designed to address criminal accountability for serious crimes committed in Uganda and the limitations these mechanisms face in the context of seeking accountability for mass conflict crimes.

2.6. TRADITIONAL JUSTICE MECHANISMS

- a) It is important to clearly spell out the limited jurisdiction of traditional justice mechanisms to handle grave war crimes. This will provide clarity on the kind of disputes that are likely to be effectively resolved through the traditional justice system.
- b) An indication on how the policy intends to bring together the varying traditional justice mechanisms across Uganda into one policy or legal framework needs to be provided. This will have a direct impact on the acceptability of the use of a national legal framework on traditional justice if necessary.

2.7. TRUTH TELLING

- a) In this section, a key challenge of truth telling that is omitted is that of how far back we intend to go as a country in establishing the truth.
- b) In as much as reports of truth telling commissions of the past are mentioned, it is not clearly brought out how the proposed truth telling and truth seeking mechanisms sought today, will either complement or rely on the reports from the past. From a reading of the policy document, it appears that a new process is being proposed altogether which ideally might not be cost effective given the other competing needs of Uganda as a country.

2.8. REPARATIONS

- a) In this section, there is no discussion provided on the prospect of establishing interim or urgent measures to award reparations prior to the establishment of a comprehensive and permanent national reparations program.
- b) In this section, a clear position is needed in the policy on whether or not the different Government programs and impromptu monetary awards made by the President to various victim groups in conflict areas qualify as “reparations”.
- c) From the policy document, no section mentions how we intend to actualize the participation of already amnestied persons in the reparations process. A clear highlight on the circumstances under which such persons will be required to pay reparations should be clearly spelt out.

2.9. AMNESTY

- a) There is need to highlight the controversy that surrounds the issuance of amnesties and have a step by step account of the legal and judicial processes that have been made since the enactment of the Amnesty Law in 2000. This is important particularly because it will provide us with an indication of the necessary reforms that are required to strike that critical balance between peace and justice which is essentially what the amnesty debate presents.
- b) This section also needs to focus on the reintegration component that comes with the award of amnesties under the Amnesty Law of 2000.
- c) ASF recommends that amnesties be reserved for persons who are least responsible for committing grave international crimes and should be conditional upon such persons participating in truth telling processes which are beneficial to the affected communities and the country at large.

2.10. GOALS AND OBJECTIVES

- a) ASF reiterates the need to include the recommendations that were made in the submission by the CSO Platform Members for TJ in Uganda on the policy's goal and objectives and supports the rephrasing according to this submission.
- b) ASF further recommends the inclusion of a specific objective which highlights the need for Uganda to honor its international obligations and commitments.

2.11. GUIDING PRINCIPLES

- a) In this section, cognizance is made of the important role played by victims in the transitional justice processes and the intention to involve them in the design, implementation and the oversight of transitional justice programs. For this reason, in order to realize this objective, it is important that **victims & victims' groups** are given independent recognition as key stakeholders in the transitional justice process. It is important to move away from the notion that civil society organizations work for victims and should, therefore, be given the mandate to speak for them in all circumstances.

- b) **Complementarity subsection:** This subsection should make reference to how international justice mechanisms such as the International Criminal Court (ICC) will relate to the proposed TJ policy.

2.12. POLICY STATEMENTS

Formal Justice:

- a) There is need to clearly indicate that in light of Uganda's obligations to try international crimes, and the obvious limitations presented by the formal justice system, only persons who are most responsible for committing crimes will be brought before the Courts of Law. It should also indicate that lesser offenders will be handled through the other TJ mechanisms such as truth-telling and traditional justice.
- b) The policy needs to provide guidance on how the formal Courts will deal with the "victim-perpetrator" scenario as was presented by the *Thomas Kwoyelo case* where the accused was both a victim through his abduction and also a perpetrator since he took up a commandeering position in the Lord's Resistance Army that was largely responsible for committing atrocities against the people of Northern Uganda. This guidance will be critical for the implementation of the policy and the development of any future accountability mechanisms or procedures. Suffice to note that this dilemma is not new in the broader TJ discourse and, therefore, Uganda could learn from international practice and precedent by the Special Court of Sierra Leone and the ICC proceedings whereby such individuals (commanders) are not absolved from liability, but their 'victimhood' is taken into consideration in the sentencing phase of the trial.
- c) This section should stipulate that special protection will be afforded to women and child witnesses to enable their participation in proceedings (before, during and after).
- d) This section should clearly state that criminal accountability measures should be applied to both State and non-State actors, and appropriate mechanisms and procedures should be established to achieve this goal.

Traditional Justice:

- a) ASF recommends the inclusion of key guiding principles to indicate the intended role of TJS in dealing with mass conflict crimes. There is much that can be drawn from the JLOS study on traditional justice to inform this section and which can provide critical guidance on the implementation of these mechanisms in context of dealing with mass crimes. This is the added value of having a TJ policy that specifically addresses the role of TJMs.
- b) As such, the policy could indicate clearly that TJMs' jurisdiction prevents them from dealing with the punishment of mass crimes, and their focus should be primarily reconciliatory.
- c) The section can indicate how TJMs complement formal justice and national truth-telling processes by providing the component of reconciliation at the community level and social reintegration of the parties (victim and perpetrators).
- d) TJMs should be voluntary given the differences in their applicability across the sub-regions and inherent weaknesses regarding their ability to respond to mass crimes and the limited involvement of women and children. *It should be clear that they are meant to complement either/both the formal justice process and the national truth-telling process.*

Truth Telling:

- a) It should be stipulated that a national truth-telling body will be established and indicate the overall goals or functions of this body, including that this body will primarily deal with victims, and all offenders in seeking the truth about what took place during the conflict; documentation of conflict

crimes; uncovering the root causes of the conflict; giving a voice to victims to explain their suffering et cetera.

- b) This section should also indicate the relationship of the truth telling process with the other mechanisms. In particular, given the limitations of formal court processes, it is recommended that the national truth-telling body be the predominant mechanism to achieve accountability and reconciliation for post-conflict crimes. The process is intended to be open, participatory and inclusive of all, and meant to meet a restorative justice goal which is intended to promote sustainable peace.

Reparations:

- a) It is important to indicate some guiding principles in the design and implementation of a reparations program, for example, does the policy recognize the importance and need for delivery of both individual and collective reparations? What forms of reparations are recognized under the policy—the five forms, and not just monetary compensation? Does the policy recognize the victim (direct and indirect) right to a remedy?
- b) It is important to include recognition of the urgent need for assistance by certain victims, especially those suffering from physical wounds/ailments and psychosocial traumas, as such, the policy should indicate clearly that urgent/interim measures will also be instituted to cater for the gap between the TJ policy adoption and the establishment of the reparations program.
- c) It is important to stipulate how a reparations body will relate to the other TJ mechanisms, in particular, reparations can be issued upon recommendations by a truth-telling body and formal court processes, but also, as an administrative body, it will adopt its own rules and procedures on repairing victims regardless of their participation in these processes. International practice shows that reparations bodies develop their own

mandates, criteria, rules and procedures for delivery of reparations that are meant to be inclusive and to repair harm to all potential victims.

- d) It is recommended that the design and implementation of a reparations program for victims of human rights and humanitarian law violations in Uganda rely on previously published studies and policy papers by stakeholders and experts in the field so as to build on the research and recommendations already existing on this issue (no need for duplication).
- e) There is need to have a two-pronged approach to the award of reparations, that is, through the Court systems and through a reparations body that can award reparations based on the needs of a certain categories of victims.

2.13. FRAMEWORK FOR IMPLEMENTATION/ INSTITUTIONAL GUIDING PRINCIPLES

- a) ASF recommends that one of the functions of the autonomous Commission be to:

- v. Oversee the amnesty process.

In light of the establishment of this new autonomous Commission, ASF recommends the disbandment of the Amnesty Commission. This will create a new legacy in the transitional justice discourse in Uganda.

- b) ASF recommends the creation of sub-committees under this autonomous Commission to handle specific TJ components.

2.14. LINKAGES

Inter-linkages:

- a) It is important that we ensure that the different institutions we are giving a role to play in the transitional justice process are already familiar with the transitional justice discourse in Uganda and will therefore be able to contribute effectively to implementing the different transitional justice mechanisms.
- b) In this section, the judiciary is given the role of promoting reconciliation which ideally should be the mandate of the non-formal transitional justice mechanisms.

Intra-linkages:

There is need to clearly spell out:

- a) the jurisdiction of each of the TJ mechanisms;
- b) the category of persons who will be subjected to each mechanism; and,
- c) the way we see this ensemble of mechanisms being implemented (simultaneously or sequentially) in a complementary and mutually reinforcing manner.

In particular, ASF aligns itself with the position in the CSO Platform on TJ in Uganda's submission regarding Intra-linkages. That said, a reparations program should not function exclusively on recommendations by the other bodies and should develop its own mandate, functions, rules, regulations, procedures and criteria for delivering individual and collective reparations based on an in-depth study, analysis of the needs of victims in war affected regions.

Finally, traditional justice mechanisms should not be stand-alone processes but complement the national truth-seeking body and formal criminal court proceedings. This complementary relationship ensures that each mechanism's

role or value is not compromised, and that the TJMs, which are voluntary processes, serve their purpose of encouraging reconciliation and social reintegration.

There is need for a clear discourse on how to ensure that legal principles such as that of the rule against double jeopardy are respected in the implementation of the different transitional justice mechanisms.

Persons who are most responsible for committing grave human rights violations must be subjected to the formal processes. Unique circumstances such as the “victim-perpetrator” scenario should inform the sentencing process but not necessarily lead to the complete exoneration of a perpetrator.

Reparations should be the transitional justice mechanism that cuts across the different mechanisms.

3. RECOMMENDATIONS FOR ADDITIONAL SECTIONS

3.1. TRANSITIONAL JUSTICE: KEY TJ CONCEPTS AND EMERGING PRINCIPLES

ASF recommends that the TJ policy incorporates a section under ‘International Legal Framework’, or alternatively, a stand-alone section, that summarizes key TJ concepts and principles as a precursor to launching into the substantive content of the policy.

This section would serve to orient the masses on the understanding of transitional justice, and in particular, it will serve to frame the policy in light of leading international principles and developments on transitional justice.

For example, the UN Secretary General has issued two world reports on Transitional Justice in Post-conflict settings that provide critical guidance on key policy issues that this national policy is intended to address. The UN has also established a Special Rapporteurship on the Right to Truth, which is the most

relevant of the UN special procedures, setting forth international standards, principles and practice on the right to truth (which we call at the national level 'truth-telling'). These documents refer to the use of multiple mechanisms to achieve a comprehensive response to mass crimes and explains the roles/functions of each and the importance of adopting a holistic approach to meet a variety of objectives.

Reference to these instruments, key concepts and principles and latest developments in the TJ field would make the National Policy more relevant. Where considered, these principles can also provide critical guidance to Uganda on complex questions that the policy is still grappling with, that is, treatment of the victim-perpetrator character (retributive or restorative justice for child soldiers).