



## **THE GAPS IN THE AFRICA LEGAL SYSTEM THAT RESTRAIN EFFECTIVE IMPLEMENTATION OF TRANSITIONAL JUSTICE (TJ) IN AFRICA: CASE STUDY MOZAMBIQUE**

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### ***Abstract***

The compliance with transitional justice mechanisms in Africa is still a challenge. From its struggle for independence in 1964 through its civil wars and ongoing armed conflict in the Cabo Delgado and Niassa provinces; Mozambique failed to implement adequate transitional justice mechanisms except its traditional Magamba spirit and amnesty laws. The African Union Transitional Justice legal architecture could not help because it does not impose any obligations to member states on how to manage post-conflict situations. Combining the African legal and policy framework for Transitional Justice with the steps taken in Mozambique can help to get out of the puzzle.

Through the perusal of contextual and thematic writings on the Mozambique case, this article finds that the African legal instruments have little contribution pertaining to Transitional Justice and lack the binding provisions obliging member states to comply and implement the mechanisms to tackle the past gross violations of human rights.

**Keywords:** Armed conflict, Transitional justice, Mozambique, African legal instruments, magamba, and amnesty.

## ***Introduction***

Armed conflict accompanied by serious violations of human rights and adding to other structural grievances among the people have been rampant in Africa for a long time. Among the most recent, one may recall the conflict in the Democratic Republic of Congo from 1996 to 1997 (First Congo War), 1998 to 2003 (the second war), 2012-2016 the Kasai conflict, 2016-2019 the political instability and currently the conflict between the government forces and rebels of the M 23 and Maimai armed groups.<sup>1</sup> In Rwanda, the genocide occurred from April 1994 to July 1994.<sup>2</sup> In Burundi, the armed conflict erupted from October 1993 to July 2005.<sup>3</sup> Somalia's armed factions fought for power and influence from 1991 to 2009.<sup>4</sup> In Central African Republic the conflict happened from 2003 to 2019. South Africa fought to get rid of the Apartheid regime from 1960 to 1994.<sup>5</sup> An armed conflict in Ethiopia took place from 1974 to 1991 (Eritrea border) and 2020 to 2022 in Tigray area.<sup>6</sup> In Sierra Leone, the conflict occurred from 1991 to 2002.<sup>7</sup> Mozambique did not escape the scourge of armed conflict because of its struggle for independence from 1964 until 1974 followed by a civil war fuelled by external interventions. One may rightly argue that the unaddressed consequences of war and localized citizens' grievances, among other factors, led to the ongoing armed conflict in Cabo Delgado and Niassa Provinces with no end in sight.

Informed by these armed conflicts in some African states highlighted above, in 2006, the African Union (AU) adopted a policy to deal with Post-Conflict Reconstruction and Development.<sup>8</sup> Thirteen years later in 2019, the AU, likewise, adopted another policy called the Africa Union Transitional Justice Policy

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<sup>1</sup> Noel Gavin, 'Timeline: Democratic Republic of Congo's crisis at a glance', February 8, 2020 <https://www.concernusa.org/story/drc-crisis-timeline/> (accessed 20 July 2022)

<sup>2</sup> Rwanda profile – Timeline, 17 September 2018, <https://www.bbc.com/news/world-africa-14093322> (accessed 20 July 2022).

<sup>3</sup> Burundi profile – Timeline, 3 December 2018, <https://www.bbc.com/news/world-africa-13087604> (accessed 20 July 2022).

<sup>4</sup> Somalia conflict timeline, March 15, 2010, <https://daraint.org/2010/03/15/769/somalia-conflict-timeline/> (accessed 20 July 2022).

<sup>5</sup> South Africa profile – Timeline, 4 April 2018, <https://www.bbc.com/news/world-africa-14094918> (accessed 20 July 2022).

<sup>6</sup> Timeline: Ethiopia's war in Tigray, 1 April 2022, <https://www.justiceinfo.net/en/89325-timeline-ethiopiass-war-in-tigray.html> (accessed 20 July 2022).

<sup>7</sup> The Sierra Leone Civil War (1991-2002), January 16, 2017, <https://www.blackpast.org/global-african-history/sierra-leone-civil-war-1991-2002/> (accessed 20 July 2022).

<sup>8</sup> African Union Policy on Post-Conflict Reconstruction and Development, adopted in Banjul, the Gambia, 14 July 2006

(referred to as the AUTJP) within the wider framework of the AU Policy on Post-Conflict Reconstruction and Development. The goals of these two policies are to improve timeliness, effectiveness, and coordination of activities in post conflict countries and to lay the foundation for social justice and sustainable peace, in line with Africa's vision of renewal and growth<sup>9</sup>, and to provide the policy parameters on holistic and transformational Transitional Justice (hereinafter TJ) in Africa.<sup>10</sup>

This article looks at Mozambique as a case study. This country experienced conflicts for a long time before a peaceful settlement could be reached. However, in the peace negotiation process, nothing or little was done to address the past violations of human rights and destruction of properties. The resumption of an armed conflict in the Cabo Delgado and Niassa provinces is evidence of an inadequate trajectory of TJ in Mozambique. The article points to the gaps in the continental legal system that hamper the effective implementation of TJ in Africa.

This article is essentially a doctrinal research based on qualitative inquiry and analysis of the AU legal instruments in the perspectives of the Mozambican conflicts and the TJ mechanisms. The article relies on primary data sources to gather relevant information; secondary data is also used. The researcher reviews documents to collect original information from the international, Africa legal instruments and African policies relating to TJ. Moreover, a questionnaire was administered to collect the relevant factual and legal information from some research institutes on TJ in Mozambique. Participants contributed voluntarily to this inquiry in full observance of required ethics guiding this kind of research.

There was also a review of secondary data from books, journals' articles, reports, publications in media streams and unpublished materials like dissertations related to the area of the study. The information gathered from these sources has been assessed to be correct, relevant, and updated for the purpose of the current study. More materials have been obtained from the reputable search engines and websites particularly Google scholars, Research gate, Research for life, AJOL<sup>11</sup> and many others.

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<sup>9</sup> Article 8 of the AU Post-Conflict Reconstruction and Development (PCRD) Policy (adopted in July 2006)

<sup>10</sup> Article 9 of the Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>11</sup> African Journals Online (AJOL) is the world's largest and preeminent platform of African-published scholarly journals. AJOL is a Non-Profit Organisation that (since 1998) works to increase global & continental online access, awareness, quality & use of African-published, peer-reviewed research.

The article begins with a contextual definition of the concept of TJ, followed by a situational background focusing on Mozambique. It also pins the shortcomings of the African legal instruments pertaining to TJ from their application to the situation in Mozambique.

### ***The concept of transitional justice***

TJ refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and create conditions for both security and democratic and socio-economic transformation.<sup>12</sup> TJ is also defined as a set of processes designed as a response to the mass violations of human rights which resulted from political upheavals, state repression or violent conflict.<sup>13</sup> TJ is meant to assist societies with legacies of violent conflicts and systemic or gross violations of human and peoples' rights in their effort to achieve transition to the future of justice, equality and dignity.<sup>14</sup>

Therefore, TJ refers to various processes that include judicial, non-judicial and traditional justice mechanisms adopted by the state affected by an armed conflict aimed at managing uncovered past gross violations of human rights in order to ensure accountability via prosecutions and trials, serve justice through reparations for victims of abuses and achieve reconciliation through truth commissions and institutional reforms and any other such agreed upon mechanisms between and among various protagonists.

### ***Background on the transitional justice mechanisms in Mozambique***

The armed conflicts in Mozambique started in 1964<sup>15</sup> when citizens organized themselves and began an armed struggle against Portugal's colonial rule. The move was inspired by the wave of independence of other African countries. Before the liberation struggle, there were an underground movement to form a political party that could fight against the colonial administration for independence. In 1962, the Frente de

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<sup>12</sup> Article 19 of the Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>13</sup> V. Biljana, 'Transitional Justice: A Concept with Various Facets' (2020) *Faculté De Philosophie Skopje* (Faculty of Philosophy Skopje, Republic of Macedonia) 261-273 at 267

<sup>14</sup> Ibidem

<sup>15</sup> R. Stephanie, 'The resurgence of conflict in Mozambique. Ghosts from the past and brakes to peaceful democracy' (2017), *The institute francais des relations internationales* (Notes de l'Ifri) 01-28 at 6

Libertação de Moçambique, or 'Liberation Front of Mozambique' (FRELIMO)<sup>16</sup> was founded in Tanzania to fight against the colonialist. On 25 June 1975<sup>17</sup> Mozambique became independent. This followed the Lusaka Peace Agreement negotiated between Mozambique and Portugal, signed on 7 September 1974.<sup>18</sup>

The country lived a short period of unity before entering into a long post-independence armed conflict from 1975. The conflict was initiated by guerrillas known as “*Resistência Nacional Moçambicana*” (RENAMO) which later became a political party.<sup>19</sup> On 4 October 1992, the parties to the conflict (FRELIMO’s government led by President Joaquim Alberto Chissano and RENAMO, under Afonso Marceta Dhlakama) agreed to enter peace negotiations that culminated in a General Peace Accord (GPA) signed at San Egidio, Rome.<sup>20</sup>

Along with the peace process, communities inside Mozambique also undertook a healing journey. The community of Gorongosa, in Central Mozambique, decided to apply a traditional TJ mechanism called “*Magamba* spirits”, which are said to have healing powers. For those who believe in this practice, the traumatic or violent death of a human being is an offence that requires immediate redress and atonement rituals.<sup>21</sup>

The General Peace Agreement of 1992 was revoked in 2013 by RENAMO after the sporadic violence between its’ fighters and the government troops and police. The conflicts continued until a new ceasefire and peace accord was reached in 2014, between FRELIMO’s government led by President

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<sup>16</sup> FRELIMO was formed in neighboring Tanzania in 1962 by exiled Mozambicans who were seeking to overthrow Portuguese colonial rule in their country. The movement’s original leader was Eduardo Mondlane.

<sup>17</sup> Victor Igreja and Beatrice Dias-Lambranca, ‘Restorative justice and the role of magamba spirits in post-civil war Gorongosa, central Mozambique’ in Huyse Luc and Salter Mark (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm, International IDEA 2008) 61-82 at 62

<sup>18</sup> ‘Accord Reached on Independence for Mozambique’ *New York Times* (7<sup>th</sup> September 1974) available at <https://www.nytimes.com/1974/09/07/archives/accord-reached-on-independence-for-mozambique-portuguese-and.html> (accessed 22 February 2022).

<sup>19</sup> In the early of 1990s the paradigms shift during the process of negotiation between RENAMO and FRELIMO, the result of such negotiation RENAMO elevated to a political party and enable their leader to step out of their toots and adjust to city life.

<sup>20</sup> D. Jeffrey Pugh, ‘Eroding the Barrier Between Peace and Justice: Transitional Justice Mechanisms and Sustainable Peace’ (2019) 24 *International Journal of Peace Studies* 1-23 at 17

<sup>21</sup> N. Mpaka Masiko, *Policy Brief: Traditional Transitional Justice Mechanisms – Lessons from Africa* (Centre for the Study of Violence and Reconciliation 2020), p. 8

Armando Guebuza and RENAMO led by Afonso Marceta Dhlakama.<sup>22</sup> However, in June 2015, Dhlakama (RENAMO's leader) ordered an ambush in the Moatize District against the government forces, reportedly violating the ceasefire accord of 2014. In October 2015, the FRELIMO government ordered the disarmament of Dhlakama's bodyguards,<sup>23</sup> contrary to article 3(8)<sup>24</sup> which guarantee that RENAMO shall manage the immediate personal security of its top leaders.

Different efforts were taken to find peace between FRELIMO and RENAMO. The negotiations continued and ultimately appeared successful, culminating in President Filipe Nyusi and Ossufo Momade<sup>25</sup> signing two widely praised agreements in August 2019. Officially the Maputo Accord for Peace and National Reconciliation is a peace agreement between the Government of Mozambique and RENAMO, signed on 6 August 2019, with the aim of bringing definitive peace to Mozambique.<sup>26</sup> The agreement was the result of years of negotiations.<sup>27</sup> It was preceded by the signing of the Agreement on the Definitive Cessation of Military Hostilities, on 1 August 2019, in Gorongosa.<sup>28</sup>

Therefore, gross violation of human rights has a long history in Mozambique since the first phase of the armed conflict from 1964 to 1975, the second phase of 1975 to 1992, the third phase of the post-civil war in 2013-2019 and the current ongoing insurgency in Cabo Delgado and Niassa provinces<sup>29</sup>.

Based on the above journey of armed conflicts, the literature shows that, unfortunately, the challenges caused by the violence of the colonial past, the needs of victims of colonial repression and the effect of the liberation struggle, such as massacres in the villages and other town areas, the destruction of

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<sup>22</sup> Britannica, 'RENAMO: Mozambican guerrilla organization and political party', *Encyclopedia Britannica*, available at <<https://www.britannica.com/topic/Renamo>> (accessed 3 November 2021).

<sup>23</sup> Regalia (n 15) 9-10.

<sup>24</sup> The Protocol V in the General Peace Agreement (adopted 4<sup>th</sup> October 1992 at Rome)

<sup>25</sup> Ossufo Momade is a Mozambican politician. He has served as president of the Mozambican National Resistance, the main opposition party of Mozambique since January 17, 2019, after the death of Afonso Dhlakama in May 2018

<sup>26</sup> Welcoming Signing of Peace Agreement in Mozambique, Secretary-General Applauds Commitment on Both Sides to Finalizing Peace Process, <https://www.un.org/press/en/2019/sgsm19693.doc.htm> (accessed 23rd February 2022).

<sup>27</sup> 'Historic' Mozambique final peace deal signed by President Filipe Nyusi and RENAMO leader Ossufo Momade' <https://www.scmp.com/news/world/africa/article/3021720/historic-mozambique-final-peace-deal-signed-president-filipe> (accessed 23th February 2022)

<sup>28</sup> Mozambique political leaders sign peace pact, DW News, (German 10<sup>th</sup> August 2019) <https://www.dw.com/en/mozambique-political-leaders-sign-peace-pact/a-49856229> (accessed 23th February 2022)

<sup>29</sup> M. Felix 'The Cabo Delgado Insurgency in Mozambique: Origin, Ideology, Recruitment Strategies and, Social, Political and Economic Implications for Natural Gas and Oil Exploration' (2020) 1 *African Journal of Terrorism and Insurgency Research* (AJOTIR) 59-72 at 60

civilian properties<sup>30</sup> and other forms of violence were never clearly articulated.<sup>31</sup> Nothing was done pertaining to TJ after independence in 1975 because no law or policy was enacted for implementation such as judicial mechanisms, reparative or restorative justice. Although there is a plethora of instruments alluding to TJ within the African legal system; none points to implementation mechanisms or enforceability, let alone sanctions for non-compliance.

### ***The African legal and policies framework on TJ***

Currently, there is no comprehensive instrument (s) specific on TJ in Africa. But this idea can be crafted through the interpretation and construction of a TJ block read from different Africa legal framework and the two specific instruments as discussed below.

Various African legal instruments address TJ in an uncoordinated and unharmonized manner. Moreover, these instruments lack the implementation and enforceability mechanisms and direct member states to comply with the principle and mechanisms of TJ to achieve retributive, reparative, and restorative justice without showing how these can be achieved in practice. Article 23 of the Constitutive Act of the Africa Union<sup>32</sup> imposes sanctions for non-compliance with the decision and policies of the Union. One may assume that non-compliance with the AU TJ mechanisms can call for sanctions. Yet, nothing has been done until today in this respect. The African Transitional Justice Policy is designed to deal with the environment of TJ in Africa, especially in the states affected by armed conflict.

Policy is defined as outlines of what a government is going to do and what it can achieve for the society as a whole. “Policy” also means what a government does not intend to do. It also include the principles that are needed to achieve the goal. Policies are only documents and not laws, but these policies can lead to new laws<sup>33</sup> either international or regional law.”<sup>34</sup>

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<sup>30</sup> A. Hastings, ‘Massacre in Mozambique’ [1973] American Committee on Africa Repot at 2 and 12

<sup>31</sup> Igreja and Beatrice (n 17) at 8

<sup>32</sup> The Constitutive Act of the Africa Union (adopted 1st July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>33</sup> Definition of Policy, <http://www.differencebetween.net/miscellaneous/politics/difference-between-law-and-policy/> (accessed 31 May 2022).

There are differences between law and policy. The difference is based on the degree of implementation and enforceability, and the binding nature of the instrument. “Laws” are sets standards, principles, and procedures that must be followed in society. The law is mainly made for implementing justice in the society while the policy is set as a plan of what a government or organization is going to do to fulfil a certain goal.

The policy lacks the binding character and how the state can comply with it. For instance, Article 117 of the Africa Union Transitional Justice Policy<sup>35</sup> provides that compliance depends on the will of the member state. This means that the state has the discretion to comply with the policy or not. Therefore, Article 23 of the Constitutive Act of the AU cannot be relied on to implement and enforce the principles of TJ contained in the AUTJP. The lack of implementation of TJ creates a room for non-compliance with international criminal justice principles, which is why since the Mozambique faced the gross violation of human rights, neither the national courts nor the International Criminal Court (ICC) can hold the perpetrators criminally accountability of their violations.

Like the African TJ legal framework, the ICC also lacks strong teeth to deal effectively with atrocities committed in Mozambique. This situation is probably another reason why the country failed to use its internal courts based on the complementarity principle provided for in Article 17 of the Rome Statute.<sup>36</sup> This article stipulates that “the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. However, this reason is probably unfounded as the criminal justice systems in Mozambique may have implementation challenges.

Since the liberation struggle and after independence, no one has ever been charged with war crimes nor crimes against humanity or other serious violations in Mozambique. The perpetrators enjoy life while the victims of gross violations of human rights since 1964 to date are grieving the pain and

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<sup>34</sup> The difference between policy and law, <https://careers.uw.edu/blog/2019/10/13/law-vs-policy-whats-the-difference/> (accessed 31 May 2022).

<sup>35</sup> The Africa Union Transitional Justice Policy (adopted on 12 February 2019)

<sup>36</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Treaty Series, vol. 2187, No. 38544 [Rome Statute]



remembering the suffering they endured throughout the war, the loss of loved ones, property and shelter; all of which have not been considered in establishing criminal responsibility.

Although Mozambique is not a state part to the Rome Statute of the International Criminal Court, it can, through other means, still cooperate with it to bring perpetrators to account. On the one hand, Mozambique signed the Rome Statute on 28 December 2000.<sup>37</sup> The country did not ratify the Statute and its amendments of 2010 known as Kampala Amendments.<sup>38</sup> Moreover, Mozambique has not signed the Agreement on Privileges and Immunities of the Court (APIC). It instead signed a Bilateral Non-Surrender Agreement with the USA in June 2003, approved by Council of Ministers in February 2004, and subsequently published in the official gazette in March 2004.<sup>39</sup> But this fact cannot excuse Mozambique to take a step forward to cooperate with the ICC to start an investigation for all perpetrators of international crimes committed since the adoption of the Statute to date.

An alternative provided under Article 12(3) of the Rome Statute<sup>40</sup> states that the non-member of ICC can accept the jurisdiction of the court “by a declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”. The accepting State shall cooperate with the Court without any delay or exception.<sup>41</sup> Such a State can also, in accordance with Article 93(10) (c), provide that the Court may, under the conditions set out in the Statute, grant assistance if requested by a State which is not a Party to the Statute.<sup>42</sup>

On the other hand, the United Nations through the Security Council has not taken any serious action against the crimes committed in Mozambique although it has the mandate to refer the matter to the ICC under Article 13 (b).<sup>43</sup> This provision says that “A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” This provision gives mandate to the UNSC to refer a

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<sup>37</sup> Mozambique and the Rome Statute, <https://www.pgaction.org/ilhr/rome-statute/mozambique.html> (accessed 05 June 2022).

<sup>38</sup> Ibidem

<sup>39</sup> Idem

<sup>40</sup> The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Treaty Series, vol. 2187, No. 38544 [Rome Statute]

<sup>41</sup> Article 12(3) of the Rome Statute.

<sup>42</sup> The Rome Statute of the International Criminal Court

<sup>43</sup> Ibidem

situation to the prosecutor of ICC if crimes have been committed within the territory of a non-member State of the Rome Statute.

History shows that only two cases involving non-state parties have been referred to the ICC by the UNSC: the case of Darfur and Libya. In the Darfur situation in 2005 under resolution 1593, the UNSC issued a presidential statement expressing concern over the humanitarian crisis.<sup>44</sup> This was followed by several resolutions condemning the violence that had taken place and declaring the situation in Sudan a threat to international peace and security by identifying that there was criminal responsibility for the violent acts. In 2011 through Resolution 1970, based on the findings of the UN Human Rights Council, the situation in Libya was likewise referred by the UN Security Council. The findings described the Libyan security forces' attacks on peaceful protests in Tripoli and Benghazi, with hundreds of casualties<sup>45</sup> as a threat to international peace and security.

In addition, other acts that the Council condemned included extrajudicial killings, arbitrary arrests, and the detention and torture of peaceful protestors. In the referral, the UNSC decided promptly – by unanimous vote of all 15 members – to mandate the ICC to investigate Libya. The prosecutor decided on 3 March 2011 that there was a reasonable basis to start an investigation.<sup>46</sup> The crimes committed in Mozambique fall in the categories of referrals alluded to above.

In the case of the AU, no action has been taken to pressurize Mozambique to apply TJ mechanisms contained in the AU policies of 2006 and 2019. Therefore, the AU legal framework that addresses TJ has many shortcomings that to render them implementable and enforceable.

### ***The African legal architecture that addresses TJ viewed in the lens of the Mozambique situation***

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<sup>44</sup> D Ayad 'The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace' (University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 1, Winter 2008, 1)

<sup>45</sup> See the Resolution of United Nations Security Council, S/RES/1970 (2011), Geneva, adopted 26 February 2011, <https://www.un.org/securitycouncil/s/res/1970-%282011%29> (accessed 05 June 2022).

<sup>46</sup> Bethel Aregawi 'The Politicization of the International Criminal Court by United Nations Security Council Referrals' Conflict Trends 2017/2, <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/> (accessed on 03 February 2022).

Firstly, the Constitutive Act of the AU,<sup>47</sup> ratified by Mozambique on the 25<sup>th</sup> of May 2001,<sup>48</sup> has Article 4(o) which provides for the principle of respect for the sanctity of human life and the condemnation and rejection of impunity.<sup>49</sup> Furthermore, Article 23 provides for the sanction for failure to comply with the decision and policies of the Union. However, the provision is not sufficient to impose obligation on the state to undertake and implement TJ mechanisms.<sup>50</sup>

Due to the weaknesses and shortcomings of this Act on TJ, the results are the continuation of impunity, gross violations of human rights, and non-compliance to international criminal justice. With this, a succession of all other linked perspectives is also lacking; they include reparative justice, sustainable peace, and lack of acknowledgment of individual suffering as consequences of armed conflicts and associated violations. What happened in Mozambique since the struggle for independence through an armed conflict to date fit well in this AU legal vacuum.

Secondly, the African Charter on Human and People's Rights,<sup>51</sup> ratified by Mozambique on 22<sup>nd</sup> February 1989,<sup>52</sup> considers the enjoyment of rights and freedoms which also implies the performance of duties on the part of everyone. It is also essential to pay particular attention to 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.<sup>53</sup>

The Charter provides nothing concerning TJ except in article 23 which provides that every person is entitled to live in peace and security. The Banjul Charter is silent on the application of TJ mechanisms as a process to ensure peace and security in the country as the way to uncover gross violations of human rights and to fight against impunity to achieve sustainable peace.

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<sup>47</sup> The Constitutive Act of the Africa Union (adopted 1<sup>st</sup> July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>48</sup> <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280089269> (accessed 13<sup>th</sup> March 2022)

<sup>49</sup> Article 4(o) of the Constitutive Act of the Africa Union (adopted 1<sup>st</sup> July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>50</sup> Article 23 (2) of the Constitutive Act of the Africa Union (adopted 1<sup>st</sup> July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>51</sup> The African Charter on Human and People's Rights (adopted 27<sup>th</sup> June 1981, entered into force 21 October 1986)) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [African Charter]

<sup>52</sup> <https://www.achpr.org/ratificationtable?id=49> (accessed on 13<sup>th</sup> March 2022).

<sup>53</sup> Paragraph 7 in the preamble of the African Charter on Human and People's Rights (adopted 27<sup>th</sup> June 1981, entered into force 21 October 1986)) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [African Charter]

Thirdly, the AU Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa, <sup>54</sup>ratified by Mozambique in December 2019,<sup>55</sup> aims to promote universal respect for and observance of fundamental human rights and calls for the protection of all persons from enforced disappearance as adopted by the General Assembly of the UN in its resolution 47/133 of 18<sup>th</sup> December 1992.<sup>56</sup>

According to Article 7,<sup>57</sup> the members of armed groups shall be held criminally responsible for their acts that violate the rights of IDPs under international law. However, the convention does not articulate well the matters of criminal responsibility of perpetrators vis-à-vis the amnesty laws that can be passed by the state as the way to broker peace among the conflicting parties. Mozambique enacted four-piece of amnesty laws; namely Law No. 15/1987 of 9<sup>th</sup> December 1987,<sup>58</sup> the Amnesty Act No. 15/1992 of 14<sup>th</sup> October 1992, the Amnesty Act No. 17/2014 of 12<sup>th</sup> August 2014,<sup>59</sup> and Amnesty Act of 2016,<sup>60</sup> with the aim of excluding the criminal liability for perpetrators of crimes committed during the independence struggle, post-independence civil war, and other abuses including the crimes related to violation of IDPs rights.

Fourthly, Mozambique is a party to the Protocol Establishing the Peace and Security Council of the Africa Union.<sup>61</sup> The protocol focuses on preventing further conflicts in the African continent and ensuring the promotion and protection of human rights and the restoration of democracy and rule of law.

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<sup>54</sup> The AU Convention for the protection and assistance of internally displaced persons (IDPs) in Africa (adopted on 22<sup>nd</sup> October 2009, entered into force on 6<sup>th</sup> December 2012 [Kampala Convention])

<sup>55</sup> List of Countries Which Have Signed Ratified/Acceded to The Au Convention for the Protection and Assistance of Internally Displaced Persons (IDPs), <https://au.int/sites/default/files/treaties/36846-sl-af%20union%20convention%20for%20the%20protection%20and%20assistance%20of%20internally%20displaced%20persons%20in%20africa%20%28Kampala%20Convention%29.pdf> (accessed on 13 March 2022).

<sup>56</sup> Paragraph 4 in the preamble of the AU Convention for the protection and assistance of internally displaced persons (IDPs) in Africa (adopted on 22<sup>nd</sup> October 2009, entered into force on 6<sup>th</sup> December 2012 [Kampala Convention])

<sup>57</sup> AU Convention for the protection and assistance of internally displaced persons (IDPs) in Africa (adopted on 22<sup>nd</sup> October 2009, entered into force on 6<sup>th</sup> December 2012 [Kampala Convention])

<sup>58</sup> V Igreja, 'Gamba Spirits and the Homines Aperti: Socio-Cultural Approaches to Deal with Legacies of the Civil War in Gorongosa, Mozambique, Building A Future on Peace and Justice Nuremberg, 25 – 27 June 2007 Workshop 10 Report, at 4

<sup>59</sup> Lawyers without boarder Canada, 'Impact of the armed conflict on the lives of women and girls in Mozambique' field research report on the Provinces of Nampula, Zambezi, Gaza and Sofara, 16

<sup>60</sup> Human Rights Watch Report, Submission to the Universal Periodic Review of Mozambique, October 2020, 02

<sup>61</sup> The Protocol establishing the peace and security Council of the AU (adopted on 9<sup>th</sup> July 2002, entered into force on 26<sup>th</sup> December 2003 [PSC Protocol])

Briefly the Protocol addresses the TJ. However, the Protocol does not touch the roots and purpose of TJ after the end of armed conflicts such as ending impunity through prosecution of perpetrators of international crimes, compensation for victims, truth commission or anything of the like.

For instance, article 6 (a) and (e) articulate that the Council shall promote peace security, stability, peace building, and post-conflict reconciliations. Article 14 provides that, at the end of hostilities the Council can assist the member state that has been adversely affected by violent conflict and undertakes the following activities, namely the consolidation of the peace agreement that has been negotiated; the establishment of conditions of political, social and economic reconstruction of the society and government institutions; the implementation of disarmament, demobilization and reintegration programs during those conflicts for child soldiers; the resettlement and reintegration of refugees and internally displaced persons and assistance of vulnerable persons including children, elders, women and other traumatized groups in the society. However, the protocol is silent on the implementation of TJ mechanisms and whether the state has a legal obligation to include TJ mechanisms in the peace accord as the best way to restore sustainable peace, justice, democracy, and rule of law.

Fifthly, the Maputo Protocol,<sup>62</sup> ratified by Mozambique on 9<sup>th</sup> day of December 2005<sup>63</sup> insists that the state parties shall increase the participation of women in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation as provided by the article 10 (2) (e).<sup>64</sup> The provision only requires the state to apply TJ process to increase women participation in the process of peace building. However, the protocol does not impose a direct state obligation to use any of the TJ mechanisms in the process to ensure that international criminal justice is upheld and protect further against gross violations of human rights.

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<sup>62</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11<sup>th</sup> July 2003[The Maputo Protocol])

<sup>63</sup>List of Countries Which Have Signed Ratified/Accessed to The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, <https://Au.Int/Sites/Default/Files/Treaties/37077-SI-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed on 13 March 2022).

<sup>64</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11<sup>th</sup> July 2003[The Maputo Protocol])

Furthermore, article 11(3) of the Protocol provides that the state parties take measures to ensure perpetrators of all crimes such as war crimes, crimes against humanity, genocide, sexual exploitation committed during armed conflict are brought to justice before a competent criminal authority. However, the provision provides nothing in the circumstance when the state does not comply.

The AUTJP<sup>65</sup>, likewise, provides some parameters on holistic and transformational TJ in Africa. It is a set of guidelines to translate comprehensive strategies for TJ into specific actions that empower affected countries to take the lead in providing restorative and transformational justice concerning not only the legacies of conflicts and violations but also governance deficits and developmental challenges.<sup>66</sup>

Among other things the policy recognizes the TJ mechanisms such as truth commission,<sup>67</sup> traditional justice,<sup>68</sup> reconciliation and social cohesion,<sup>69</sup> reparation,<sup>70</sup> memorization,<sup>71</sup> justice and accountability that the states are recommended to adopt. The transitional process should not allow “blanket” or unconditional amnesties that prevent investigation particularly of the most serious crimes for the purpose of fighting against impunity as provided under article 4(o).<sup>72</sup> However, the policy is not a law, and it is impossible to create a legal obligation to the AU member states. Indeed Article 117<sup>73</sup> provides that the implementation of the AUTJP depend on political willingness of the state. Thus, the policy remains a toothless dog in the field of TJ regardless of its helpful provisions toward TJ process.

Moreover, the AU Post-Conflict Reconstruction and Development (PCRD) Policy<sup>74</sup> is intended to serve as a guide for the development of comprehensive policies and strategies that elaborate measures that seek to consolidate peace, promote sustainable development, and pave the way for growth and regeneration in countries and regions emerging from conflict. Given the peculiarities of each conflict

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<sup>65</sup> The Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>66</sup> Article 11 of the Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>67</sup> Article 50 of the Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>68</sup> Article 56 *ibidem*

<sup>69</sup> Article 60 *ibidem*

<sup>70</sup> Article 64 *ibidem*

<sup>71</sup> Article 75 of the Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>72</sup> The Constitutive Act of the Africa Union (adopted 1<sup>st</sup> July 2000, come into force in 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>73</sup> The Africa Union Transitional Justice Policy (adopted in February 2019)

<sup>74</sup> The AU Post-Conflict Reconstruction and Development (PCRD) Policy (adopted in July 2006)

situation, this policy is conceived as a flexible template that can be adapted to and assist affected regions and countries in their endeavours towards reconstruction, security, and growth.<sup>75</sup>

Among other things, the policy provides in detail the importance of adopting TJ in a post-conflict situation. For instance, Article 41 (d) (i) - (iii)<sup>76</sup> provides that, there is a need for policy development across the three elements, namely, develop mechanisms for dealing with past and ongoing grievances; provide for the enhancement of legislative mechanisms aimed at strengthening the rule of law, and incorporate human rights into all policy frameworks; and provide for remedies and reparations to victims of conflict. The success of both the AUTJP and the PCRD policy will ultimately be determined by the political will and ability of states as provided for under article 56.<sup>77</sup>

In this perspective, one may also mention the Malabo Protocol for the purpose to amend the jurisdiction of the African Court of Human and People's Rights which enables the court to manage criminal offences including international crimes. However, the Protocol has not yet come into force in addition to not expressly addressing the TJ mechanisms. The AU TJ framework does not show how the commitment of AU member states shall be evaluated to ensure its implementation. It does not either have the mechanisms that can be used to deal with parties to the conflict, both the government and the rebels who refuse to engage in peace building initiatives.

### ***The shortcomings of the African legal framework that addresses TJ***

This article found that the African legal instruments relating to TJ face several shortcomings that somehow affect and hinder the implementation of TJ in the state that are affected by armed conflicts, particularly non-international armed conflicts. Mozambique for example, implement TJ in a way that cannot achieve sustainable peace and avoid the resurgence of armed conflict, due to the ineffectiveness of all African instruments on TJ. The African legal instruments and framework failed to deal with the situation in Mozambique because of mainly the lack of an adequate procedure to follow up on

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<sup>75</sup> Article 1 of the AU Post-Conflict Reconstruction and Development (PCRD) Policy (adopted in July 2006)

<sup>76</sup> The AU Post-Conflict Reconstruction and Development (PCRD) Policy (adopted in July 2006)

<sup>77</sup> The AU Post-Conflict Reconstruction and Development (PCRD) Policy (adopted in July 2006)

implementation and enforcement of TJ mechanisms, a lack of sanctions for non-compliance and the inexistence of institutional monitoring.

A close analysis of the African legal instruments relating to TJ shows that there is no provision(s) to describe the adequate procedures to be followed in a post-conflict situation. These are some of the consequences that prove that there is little effectiveness in African law on how best to deal with the aftermath of an armed conflict.

In this context, this article, after examining the various literature and responses from the respondents, has found the shortcomings that undermine the efforts and wishes of certain countries to take the right path of TJ. Perhaps this was among the reasons that caused Mozambique and other African countries to fail to use the judicial mechanism to hold perpetrators accountable for gross violations of human rights as part of the TJ mechanisms.

It was important to include procedures to be followed in the TJ process in the treaty relating to this matter to avoid hitting the wall when it comes to implementation and enforcement. The peace process in Mozambique seems to be dominated by the combatants from both sides with little involvement of victims through Magamba spirit, civil society, or representatives of affected communities. Victims and community needs were not presented in the peace process. Had there been adequate procedures set out in the African instrument pertaining to the TJ process, Mozambique would now be better positioned and an inspiring experience for the rest of the continent.

Not only in the African continent, but also in international treaties no specific or standalone treaty- based TJ instruments exist. In the African legal system, there is no law that is specific for TJ except some sketchy provisions. For instance, Article 4(o) and 23 of the Constitutive Act of the AU,<sup>78</sup> Article 23 of the African Charter on Human and People's Rights<sup>79</sup> and Article 7 of the AU Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) in Africa.<sup>80</sup> Also, Article 6 (a) and

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<sup>78</sup> The Constitutive Act of the Africa Union (adopted 1<sup>st</sup> July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>79</sup> The African Charter on Human and People's Rights (adopted 27<sup>th</sup> June 1981, entered into force 21 October 1986)) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [African Charter]

<sup>80</sup> The AU Convention for the protection and assistance of internally displaced persons (IDPs) in Africa (adopted on 22<sup>nd</sup> October 2009, entered into force on 6<sup>th</sup> December 2012 [Kampala Convention]



(e) and 14 of the Protocol Establishing the Peace and Security Council of the AU.<sup>81</sup> Furthermore, Article 10 (2) (e) and 11 (3) of the Maputo Protocol.<sup>82</sup>

These provisions touch on the issues of TJ but not in depth as to create an obligation to African member states to comply and implement it to address the war legacies and cure all grievances within the community by providing criminal and reparative justice, building a strong nation with unity, political stability, democracy, and rule of law.

As discussed above there is no implementation and enforcement mechanism that can create a state obligation to comply with the TJ process immediately after the end of a devastating armed conflict. This finding is supported by the responses from various contributors when asked about whether the current African legal instruments impose obligations on member states to comply with the implementation of TJ mechanisms. All together answered that there is no clause compelling member state to comply and implement the TJ process.

One of the respondents argues that due to the weakness of the African instruments on TJ nothing has been done to cater for the human rights abuses committed during the liberation struggle. Mozambique could not manage itself to avoid the civil war because of the fragmented environment of TJ in the continent. More should have been done to document the abuses and acknowledge the scope and nature of the harm done – and perhaps seek international support to address these needs. But Mozambique was in a difficult legal, political, and financial situation that made it difficult to deal with these needs.

Another one responded that there is neither obligation nor penalties for non-compliance with TJ imposed by the AU instruments. Moreover, there is no political will within the AU to impose such penalties other than a reprimand. This will only happen if there is effective advocacy by civil society to raise these issues. A further response is that even if obligations could be interpreted from the reading of some legal instruments, there is still no mechanisms for enforcement. States are locked in the classical nation-state sovereignty mode.

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<sup>81</sup> The Protocol establishing the peace and security Council of the AU (adopted on 9<sup>th</sup> July 2002, entered into force on 26<sup>th</sup> December 2003 [PSC Protocol]

<sup>82</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11<sup>th</sup> July 2003[The Maputo Protocol])

The above African legal and policy framework on TJ lacks the mechanism(s) that can steer the implementation of TJ mechanism to address the victims' legitimate claims, society and national needs including peace, justice, reconciliation, unity, and solidarity. That is why the state affected by an armed conflict decides to use its means to manage the situation without legal backup or justification. In Mozambique, only amnesty and Magamba practice were thought of as the only mechanisms for TJ without considering the remaining crucial mechanisms that touch directly on the victim's needs and the national wellbeing.

The literature and the responses also show that, in Mozambique, the authority never set up a truth and reconciliation commission or investigation and prosecution of perpetrators of gross violations of human rights. The reason is that there is no implementation mechanism that is provided by the African legal instruments that can be used to bind the member state to comply and implement in the aftermath of an armed conflict.

The researcher pressed to know why the gross violations of human rights through conflicts continue in Mozambique despite the existence of the AU legal instruments and Mozambique's peace initiatives. This question was answered to by respondents from different backgrounds.

One argues that it does not appear that the AU legal instruments are being implemented in Mozambique. No one can expect any impact from those instruments. This happened because there are no implementation mechanisms that bind Mozambique to comply with the TJ in the acceptable standard that include judicial and non-judicial. The other one argues that the AU instruments are weak and cause havoc to compel parties to respect peace agreements. Such uncertainties have made parties to the conflicts to even disregard the peace accords and agreements the signed. Mozambique has fallen victim of the malfunction of the AU criminal justice.

The implementation and enforcement challenges of TJ mechanisms in Mozambique is also partly due to the lack of sanction for non-compliance. Only one instrument tries to impose sanctions for non-compliance with the AU decisions and policies. Article 23(2) of the AU Constitutive Act<sup>83</sup> says that;

[...] Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with the other Member States, and other measures of a political and economic nature to be determined by the Assembly.

The provision does not specify what amounts to “other sanctions” or the kind of “transport and communication links with other member States” are envisaged. It is also not imaginable if the Assembly which is made of heads of states can have the courage to impose any sanctions to a defaulting member State in the current configuration of the AU. It is true that some attempts to suspend member states in which a military coup has taken place happened; but not beyond that. However, the implementation and enforcement of other policies remain only on paper. For example, Article 117 of the AUTJP<sup>84</sup> requires that compliance with the policy depend on the will of the member state. One may ask how the AU Assembly can issue sanctions for non-compliance with the implementation of TJ while the policy gives discretionary powers (will) to the State concerned. It is indeed left to the state to take one direction or the other. The State will, obviously, take the direction that is in the best interest of the ruling class of the moment; but which is not necessarily in the interests of TJ as defined. These two provisions are, therefore, meaningless in the lenses of legal jurisprudence. By its nature, a policy is not an obligatory and enforceable law. It lacks the legal binding character. It is just an indication of what a state can opt to do or not to do.

Therefore, with the nature of these provisions, it is difficult to impose any sanctions on an African member State for non-compliance with the implementation of TJ. This has been confirmed in Mozambique since the liberation struggle and the civil war. There has been no legal nor economic or political sanctions imposed by the AU against this country for not implementing both judicial and non-

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<sup>83</sup> The Constitutive Act of the Africa Union (adopted 1 July 2000, come into force on 26<sup>th</sup> May 2001) OAU Doc. CAB/LEG/23.15 [AU Constitutive Act]

<sup>84</sup> The Africa Union Transitional Justice Policy (adopted on 12 February 2019)

judicial TJ mechanisms beyond Mozambique's own choice for Magamba and amnesty mechanisms. This evidence proves beyond doubt that the issues of non-implementation of TJ have no legal effect in Africa.

They also do not provide for any continental institutional framework or specific committee to ensure the implementation and enforcement of TJ mechanisms in areas affected by armed conflicts. Perhaps this committee or institutional arrangement would be very helpful in closely monitoring the implementation or advising the AU member states to see the importance of TJ. But all of this cannot be done if the relevant TJ law does not set up this committee or institution and give it operational powers and enforcement mechanisms.

Therefore, the above shortcomings of the African instruments relating to TJ create a room for non-compliance to implement the mechanisms for the purpose of rendering justice to all affected parties and ensuring long lasting peace and stability. These shortcomings led Mozambique which, after experiencing separate times of armed conflicts, took its own easy initiatives for peace building but failed to apply judicial mechanisms to hold the perpetrators liable. This begs the question of the lessons to be drawn from the Mozambique experience.

## ***Conclusion***

From the review of the literature above, the study has shown that it is crucial to implement TJ mechanisms such as judicial and non-judicial mechanisms including; the establishment of a truth and reconciliation commission (TRC), reparations, prosecution and trials and institutional reforms in addressing gross violations of human rights. The implementation of these mechanisms should be supported by a comprehensive and focused continental legal foundation that provides for the state obligation for adherence to the implementation of TJ in the area affected by armed conflict and provides clear processes, sanctions for non-compliance, and a monitoring mechanism.

Taken as an example, Mozambique went through tumultuous periods of armed conflicts accompanied by serious violations of basic human rights. In normalizing the situation through peace negotiations, the country missed the opportunity to carefully resort to TJ mechanisms such as prosecution, reparation, reconciliation and truth-seeking in its trajectory to deal with the legacy of its ugly past.

To address past gross violations of human rights and achieve sustainable peace in Africa, Mozambique needs serious measures that can be supported by the law, in the application of both judicial and non-judicial mechanisms. All these processes cannot be workable in the fragmented legal architecture as shown by the analysis in this article.

Regardless of the consequences of armed conflicts like; death, permanent injury, destruction of properties, loss of habitat and trust, poverty, unemployment, and psychological effects; the African continent in general and Mozambique in particular, still need a workable and comprehensive TJ process which can be benchmarked. The legal framework of TJ in Africa is like a nightmare because the above discussion showed that there are neither implementation mechanisms nor sanctions for non-compliance of TJ mechanisms in African instruments relating to TJ.

Non-implementation of TJ mechanisms especially judicial mechanisms perpetuates the culture of impunity. The perpetrators of gross violations of human rights enjoy the national whereas the victims are in the trauma of the effects of armed conflicts. This situation fuels new conflicts because of the many unaddressed legitimate grievances. Impunity leads to injustice and the resurgence of armed conflicts as what happened in Mozambique. After entering the general peace accord still, the country experienced different atrocities as well as currently, there are disparate attacks in the Cabo Delgado and Niassa provinces.

This situation in Mozambique added to the structural weakness of the African legal instruments relating to TJ and the domestic criminal justice in that country. This article was a wakeup call to improve the dispensation of TJ mechanisms from a strong legal foundation that can lead to a sustainable implementation and enforcement to allow the countries that experienced upheavals to address the war legacies, social grievances, avoid injustice, and the resurgence of armed conflicts.

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