

***Peace, Justice and Accountability after War and Dictatorship-
Prospects for the African Context***

Workshop Report

7-8 March, Cape Town, South Africa



KINGDOM OF BELGIUM
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**Foreign Affairs,
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Peace, Justice and Accountability after War and Dictatorship- Prospects for the African Context

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Report on a workshop collaboratively convened by the Centre for the Study of Violence and Reconciliation, Belgian Federal Department of Foreign Affairs, and the Centre for Historical Research and Documentation on War and Contemporary Society.

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Report compiled by Leigh Hamilton and Hugo van der Merwe, Centre for the Study of Violence and Reconciliation.

Introduction

The Peace Building section of the Belgian Federal Department of Foreign Affairs, together with the Centre for Historical Research and Documentation on War and Contemporary Society (Belgium) and the Centre for the Study of Violence and Reconciliation (South Africa), hosted the workshop ***Peace, justice and accountability after war and dictatorship- prospects for the African context*** from 7-8 March in Cape Town, South Africa. The workshop involved a series of presentations and discussions in response to Luc Huyse's report *Transitional justice after war and dictatorship: Learning from European experiences (1945-2000)*. The workshop brought together 32 participants from 8 different countries (South Africa, Zimbabwe, Namibia, Mozambique, Uganda, Kenya, Ethiopia and Belgium) to engage with this report, review the findings and recommendations, and explore the possibilities and challenges of drawing lessons for the African context.



The workshop began with a welcome from Delphine Serumaga, the Executive Director of CSVR, and Johan Maricou, the Belgian Ambassador to South Africa. Drawing on his experience in working in various countries across Africa, Asia, Europe and South America over a number of decades, Ambassador Maricou observed that efforts to deal with histories of war and overcome legacies of oppression happen in every nation across the globe. The commonalities of this struggle make sharing lessons from local experiences with the rest of the world important. Ambassador Maricou argued that research on these histories should be done in order to positively influence the development of society. In this spirit, the workshop used Huyse's report as a springboard from which to share lessons within the African context,

learn from international lessons and share African lessons with the international community.

After Huyse presented the findings of his research, seven participants were given an opportunity to present their thoughts and experiences as researchers, practitioners, policy-makers and advocates in the field of transitional justice. These presentations reflected on aspects of Huyse's report and sought to encourage participants to think in new ways regarding transitional justice in Africa; highlight local similarities and differences with the European experience; assess the extent that implied lessons from the European context could be useful or misleading; and ask questions about key policy challenges and knowledge

gaps regarding transitional justice in the local context. The presentations drew from a broad range of experiences and contexts and stimulated insightful discussion among the workshop participants.

Luc Huyse's Research and Findings

Background to the Research Report and Key Findings

Luc Huyse, CEGESOMA

Luc Huyse's report was the result of a two year study on the ways European countries dealt with their legacies of war and dictatorship between 1945 and 2000 (Belgium, France, (West)-Germany and Holland after WWII; Greece, Portugal and Spain since the 1970's; Germany, Hungary and Poland after 1989). This broad temporal approach, which covers more than sixty years of transitional justice enables us to look at the long-term impact of policies; intergenerational consequences; and the successes and failures of sequencing of operations.

From in-depth research done by 15 historians on ten case studies in nine different European countries, Huyse identified five challenges common to each instance of transition, though reaction to each challenge varied in each country.

1. *A devil's choice: to punish or let bygones be bygones.* The question of accountability forced the transitioning countries to weigh the consequences of impunity against prospects for solid peace, democratization and national reconciliation. The European nations varied greatly in their choices regarding this question.
2. *Exclusion versus inclusion of perpetrators.* The question of whether to exclude perpetrators or reintegrate them into society sent the European countries in two different directions. Initially, some tried to be both swift and severe. However, initial severity gave way to clemency and reintegration in the face of shifting political interests, full prisons and the need for unity in the face of new colonial wars. Ultimately, "no post-WWII initial policy of exclusion was a success," but at the same time the "inclusion-



oriented measures...were no guarantee for a swift and easy reintegration” (Huyse, 11).

3. *Blending realpolitik and respect for the rule of law.* If a transitioning society opts for prosecutions and purges, it must make sure that the rule of law is not derailed by violating principles of the legal system. At the same time, it must attempt to meet the victims’ expectations of justice. In Europe, most transitioning countries prioritized political order over the rule of law. Semi-legal measures were taken, driven by the firm conviction that the chaos of transition needed to be replaced by order as quickly as possible.
4. *Perpetrator- or victim-centered attention?* All of the countries in the report chose perpetrator-focused policies. In a number of countries, perpetrators began to think of themselves as victims of retributive ‘justice’. Financial and symbolic reparations for victims were carried out, but selectively and without enthusiasm. After WWII, it would take almost twenty years before the public and political acknowledgement of all victimhood.
5. *To forget or to remember?* The past is an extremely chaotic world of facts and events. In the European countries, each narrative that ordered the past was a negotiated mix of selective remembering and selective forgetting. In every context where a country sought to forget, memory re-asserted itself.

Huyse was also able to identify four contextual factors that shaped the reactions of the European countries to these five challenges. These contextual factors shaped the significant contextual heterogeneity in policy making and implementation.

1. *The preceding regime.* The type of preceding regime (military occupation, indigenous or mixed), the duration of the previous order and the gravity of the crimes committed by that previous order all influenced the decisions of the new regime regarding transitional justice.
2. *Earlier experiences with transitional justice.* Previous experiences with accountability for state crimes, reintegration, and patterns of remembrance form a legacy or set of precedents that shape subsequent current transitional justice processes.
3. *The type of transition.* Europe experienced two different types of transition: military coup/victory or negotiated compromise between governing and opposition groups.

The first guarantees the largest choice of strategies while a negotiated compromise entails implementing transitional justice measures that avoid confrontation with the outgoing regime.

4. *The international context.* After WWII, supranational codes and institutions with regards to human rights were infantile, weak or absent. The range of transitional justice mechanisms was limited and did not yet include truth-commissions. The international context since then has changed. There has been tremendous growth and support for human rights law, and norms regarding human rights and accountability have changed. Moreover, the Latin American and other subsequent experiments with truth and reconciliation have broadened the choices of instruments for nations currently facing transition.

While there are differences in the experiences of these European nations in transition, the research revealed that there are also six commonalities. Through the diversity, Huyse and his team could not avoid seeing similarities in the longer-term process of dealing with the past. In addition to these six patterns, the presence of the aforementioned common challenges and the significant impact of the international context in each nation were also noted.

1. *A chaotic start.* Transitions from war to peace, from dictatorship to democracy, are complicated and necessitate attention in many areas of society. The reality is that transitional justice is just one of many aspects of rebuilding or transforming a nation recovering from war. A recurring problem is the absence of a clear framework for coordinating programs and action undertaken on the ground. Instead, many country reports indicate “improvisation, ad hoc measures, failing legislation, extrajudicial measures, uncontrolled purges, and problematic military and political ‘domestication’ of former resistance movements” (Huyse, 17).
2. *Pragmatic and adaptive decision-making.* From this chaos, almost all of the countries had managed to adapt their transitional justice policies and respond in some way to the five common challenges.
3. *Perpetrator-centered policies.* Policies that focused on perpetrators caused the *de facto* marginalization of victims. Moreover, because many perpetrator-centered policies were carried out badly, the European countries also experienced a badly organized reintegration process.



4. *Selectivity in accountability and reintegration measures, and in reparation policies.* The lower ranking or poorer perpetrators often encountered severity in their punishments while the administrative and economic elites often encountered clemency, producing grave inequality in treatment. Victim policies were also selective due to the inevitability of scarce resources and competition for

recognition among victims.

5. *Politico-strategic concerns dominated.* Political strategy trumped moral considerations in policy decisions.
6. *A long-term process.* Dealing with a painful past is a process that happens over several generations. All of the countries in the study believed that they could deal with the past in a few years and 'move on'. However, from the beginning, transitional justice processes were flawed because of the many compromises decision-makers must make, compromises between truth and justice, accountability and peace and so on. Over time, new options and opportunities became possible. Moreover, with new global legal measures with regard to human rights (including the right to truth and the right to justice), children and grandchildren were retroactively injecting the new visions of human rights, accountability and truth on the past. The relatives of those who experienced the transition can exact this inter-generational justice without fear of the intense emotional repercussions that could accompany digging up the past.

Challenges in Drawing and Transferring Lessons

Luc Huyse, CEGESOMA

Do these experiences in Europe have any relevance for other current or future cases of justice after transition, particularly in Africa? Uncritically applying the lessons from one context to another can be disastrous. It is rarely the 'experts' that feel the effects of their own policies, but rather the local populations in a transitioning society. Before unpacking the potential lessons learned from Europe, Huyse asked the participants to think about how experts can responsibly transfer lessons from one context to another.

Huyse's answer is to choose *predictive* lessons over a 'lessons learned' approach. Huyse maintains that a comparative analysis produces 'predictive lessons' because "*what* happened in these countries and *why* it happened is relevant; that there is, in other words, a strong eventuality that it may and likely will occur again" (Huyse, 25). This means that stakeholders can react proactively to predicted challenges, not that they should blindly adopt the policies from another context of transition.

Huyse presented a list of predictive lessons for short- and long-term processes aimed at local stakeholders and international actors. Each predictive suggestion is to be read as 'an event, a fact, a process, a development that can be expected'.

Predictive lessons for short-term processes for local stakeholders:

1. *The likelihood of a chaotic start.* Local stakeholders must be aware that disarray and confusion have characterized the initial policies of most of the project countries. Unfortunately, there is no reason to think that countries in the Global South are better equipped to respond to this chaos. Especially in Africa, post-war, post-genocide and post-authoritarian contexts are complicated and devastating.
2. *The prospect of coordination problems.* A close look at the decision-making on transitional justice processes in the European countries reveals that coordination was totally missing. The successor regime, in its search for the restoration of the state's power, usually took control over the various transitional justice processes but did a poor job at promoting justice, truth and reconciliation in a cohesive manner. The predictive lesson here is that the absence of a clear framework for coordinating the transitional justice programs can at best complicate the impact of these programs, at worst critically undermine them.
3. *A problematic reintegration may be expected.* After less than two years Belgium, France, the Netherlands and Portugal had exchanged a policy of exclusion of perpetrators for a policy of inclusion. Hungary and Poland have followed a zigzag course. In some European countries, exclusion led to the development of counter-culture political parties. Reintegration is a blind spot in transitional justice practice and research today.
4. *The need for provisional measures.* Immediate measures to address justice and accountability can sometimes be put off. However, provisional measures are incredibly important to ensure that evidence is preserved for when the time is 'ripe' for a more accountability-orientated confrontation with the past. Safe storage of archives, particularly incriminating documents and testimonies, or small-scale truth

seeking initiatives are some of these options. Memorialisation processes (such as museums and monuments, identifying mass graves, exhumations and reburials) can also serve to ease the pain of the victims. Civil society and local NGOs often play a huge role in shaping and implementing provisional measures.

5. *The confrontation with critical challenges.* The issue of justice after transition confronts successor elites and their society with a set of unavoidable challenges. No project country escaped these crossroad choices: prosecute or forgive, exclude or include perpetrators, prioritize political rationale or respect for the rule of law, develop a perpetrator-centered or a victim-oriented approach, forget or remember. A striking finding is that some project countries often have, especially in the early phases of transitional justice decision-making, meandered between opposite choices to finally arrive in what can be called a third, more or less balanced policy. The same challenges and the trajectory of the policies they provoked will, with high probability, appear in future cases of justice after transition.
6. *The prospect of selectivity in programming accountability, victim acknowledgment, and reparation measures.* The selectivity of policies addressing victims' needs was the product of the inevitability of scarce resources and the outcome of victim competition. These factors have not disappeared, and similar problems regarding fairness and equity are likely to recur.
7. *Expected influential outside factors.* International interference is likely to influence the decision-making process at the local level. Such interference comes in a number of forms. It can be close (as in the domino-effect of events in neighboring countries or in the figure of a UN-facilitator) or remote (for example through the reports of international NGO's). It can be direct (for example in the pressure that international criminal law exerts) or indirect (via aid conditionality).

Predictive lessons for long-term processes for local stakeholders:

1. *The return of the past:* The country studies demonstrate that coming to terms with a tragic past looks like a process that is never complete, even after many decades. The unwanted impact of war and dictatorship continuously requires additional corrective measures and new narratives. This long-lasting looking back is regularly colored by outbreaks of heated emotion and bitter controversies. All things pass, except the past.
2. *Revisited challenges:* Most countries reviewed the initial choices they made nearly a quarter of a century later, retroactively implementing values that developed after

the initial period of transition. This reality should generate practical suggestions from countries currently transitioning regarding how to handle the likely turns in history of justice after transition.

Predictive lessons for international actors:

1. *Points of awareness.* The international actors should be aware of the likelihood of a chaotic start; the prospect of coordination problems; the risk of a continued perpetrator-centered approach; the negative effects of victim competition; reintegration problems; selective accountability and reparation measures; and the case-specific contextualization of policies.
2. *Capacity building.* International actors play a crucial role in forming and implementing provisional measures, whether directly or indirectly. Countries from the South, in particular those that come out of a devastating civil war or repressive regime, lack even the most elementary resources to record the past. Here is a domain where donor countries, even small ones, can play an important role with a minimum of costs. They can train local people for record-keeping, develop digital techniques for the storing of data, provide provisional housing for vulnerable documents to secure their survival, initiate audits of archives and sponsor local NGO's that compile data inventories or map human rights violations. All these initiatives are best seen as short-term assistance, until local policymakers and civil society have clarified policies and developed local capacity.
3. *Looking in the mirror.* Assisting the Global South in moments of transition creates an important opportunity for practitioners and experts in the North to reflect on the colonial legacies that exist in the South. There is a need for humility in two ways. First, the European project countries were not themselves immediately able to create policies of accountability and justice. Why do they now expect countries in the Global South to succeed where they had failed? Second, it is becoming increasingly important for those from the North to acknowledge a degree of complicity in the current situation of the Global South.

Huyse's presentations generated discussion around the similarities and differences between these findings and the participants' own experiences. Various similarities and learning opportunities were noted, but four key contrasts between the European context and present African TJ challenges were highlighted in the discussion.

First, the role of identity and nation-building was absent in many of the European experiences. In Africa, issues of identity seem to infiltrate every aspect of transitional justice, especially issues of economic reparations. Second, civil society plays a greater role

in transitional justice today by organizing, initiating and implementing programs than it did in Europe, particularly in the post WWII era. Third, culture and tradition play a larger role in transitional justice processes in Africa today than seems to have been the case in Europe. Justice in Europe was closely tied to the idea of formal trials, which contrasts with the use of traditional mechanisms of justice, accountability and reconciliation, which are seen as more in line with African cultures and traditions. Finally, it was also noted that the debates about transitional justice in Europe were often not focused on human rights violations as much as on issues of international aggression and betrayal. The human rights lens appears much more dominant in more recent TJ debates.

Presentations and Discussions

Rapid/Interim vs. Long-Term TJ Interventions **David Hofisi, Zimbabwe Lawyers for Human Rights**

Hofisi's presentation drew primarily from his own experience with transitional justice interventions in Zimbabwe. Initially, there was chaos in Zimbabwe surrounding the formulation of a transitional justice program, and subsequently there were great delays. But one week after the workshop (16 March), Zimbabwe was set to vote on a new constitution, one that would mandate the establishment of a truth and reconciliation commission. As the political process moves forward in Zimbabwe, decisions about TJ have adapted. In the short-term, Zimbabwe has sought to weigh the benefits and potential drawbacks of different types of transitional mechanisms. There is an assumption that African traditional measures involve the entire community whereas mechanisms developed by the European Union, or even the African Union, are considered imperial. However, these traditional processes are often manipulated by local elites to avoid prosecution. Different views have been expressed about the appropriate time frame to be covered by TJ, and the legacy of the colonial past along with very recent abuses both demand attention. These are sometimes competing demands. ZANU PF (the governing party) wants to start by addressing the abuses that happened during the colonial era, but seems to avoid dealing with its own more recent abuses.



The current transitional justice debate in Zimbabwe is integrally related to historical

processes of transitional justice in Europe. In particular, Hofisi points out that the failure of European states to acknowledge their responsibility for abuses during the colonial era and the subsequent legacies those abuses produced bolsters African governments' attempts to shirk responsibility for current human rights problems. A critical challenge is the question of who must compensate victims—is it the former colonial power or the current Zimbabwean government?

Hofisi's presentation generated discussion around the issue of timing. Are traditional justice processes being introduced too soon in Zimbabwe and elsewhere in Africa? There are many experiences that suggest that waiting for an appropriate time is important. In Zimbabwe, where unemployment and immediate concerns about food security are uppermost in people's minds, there may be cause for delaying certain measures. Moreover, the integrity of many of those in positions of power in Zimbabwe, particularly in the judiciary, is compromised, and there is limited trust in them overseeing a transitional justice process. The current regime may use the transitional justice process to guarantee themselves *de jure* amnesties. They may close many doors before the process even begins. Governments have used transitional justice in the past to justify their own legitimacy, especially in the eyes of the international community. Adopting transitional justice measures might be used to give the 'illusion of resolution', while doing little of substance. On the other hand, the moment of transition carries impetus that will not always last. Victims are suffering *now* and their voices must be heard.

Questions around timing prompted discussion around sequencing. Initially, transitional justice agendas are broad. In addition, countries in transition are also under pressure to achieve stable peace, restore political infrastructure, establish political legitimacy both domestically and internationally, draft new constitutions, stabilize currencies, and dispense emergency services to victims. The priorities of the international community on the transitioning nation may actually contradict the nation's own agenda to the detriment of all reconstructive efforts. Instead of tackling too much at once, countries can sequence their responses and carry out provisional measures in the meantime.

Windows across Time: Intergenerational Dynamics and Trans-temporal Transitional Justice

Undine Whande, CSV

The past is a living story, and dealing with the past is the ongoing effort to restore and create a coherent narrative of who we are in the here and now. Each generation asks itself what it feels called to change or create in relation to the past.

Whande stressed to the participants that there are many ways of dealing with the past, and in this way transitional justice is actually very broad. Many people are engaged with transitional justice but would perhaps not call it that. The dimensions of dealing with the past lay along a spectrum:

Legal- Judicial	Political	Economic	Socio- Cultural	Psycho- Emotional	Religio- Spiritual
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Narrow transitional justice measures lay within the legal-judicial, political and economic dimensions. However, broad transitional justice goes beyond the symptomatic discussions of immediate problems and the politics of quick-fix solutions. The broader transitional justice measures that lay within the socio-cultural, psycho-emotional and religio-spiritual dimensions are needed to address the root causes of a conflict and transform that conflict, even though most of these processes are not visible or public.

Communication between actors is crucial as we heal those that can be healed now and create spaces for future healing. You must ask yourself, “Where am I situated? What space do I choose to hold? What is my focus? What are other doing in other sectors or disciplines?



How do I engage with people whose outlooks are different to mine in order to build common ground?” Events must be written and recorded for future generations. Plural voices and contestations over memory are productive if non-violent ways to share space are found.

Whande’s emotive and participatory presentation generated discussion about the lasting legacies of colonial culture and language; setting goals for the present within the space you hold; and engaging youth with the past. Xenophobia is the consequence of many factors, but the persistence of colonial language that distinguishes between ‘us’ and ‘them’ is one of them. This pattern of ‘othering’ is a devise that governments often use to assert power. Especially if you have been ‘othered’ in the past, you will look to blame other people in the future. In this way, victims become perpetrators. Transitional justice can engage people with language, and writing literature is a particular way that Africans can form identities that transcend their colonial past.

Transitional justice is incredibly broad, and it would be impossible for one actor to accomplish everything within one generation. For that reason, you must decide which space you are going to hold and define your goals within that space.

Finally, participants asked how we can engage youth with the past. African youth may feel that they've been sold 'stale dreams'. They are told of change after transition but everything feels the same. A university lecturer noted that her students feel disempowered and disenfranchised, and unable to relate to the South African TRC process. What will give these students a voice? There is a tendency to avoid 'burdening' the youth with the past, a tendency of parents to avoid telling their children stories about the past. How do we engage with them?



Regional/International Authorities and International Civil Society Influence
David Kigozi and Lucy Hovil, International Refugee Rights Initiative

David Kigozi presented the participants with the positive influences of international interventions on transitional justice using his experience in the Great Lakes region of Africa. There are many international and regional organizations that work in the Great Lakes region. Various Western governments and donors also provide significant support directly to specific countries, such as in the reform of the security sector. The multiplicity of organizations presents opportunities for collaboration; however, working together also poses significant challenges, including overlapping mandates and duplication. The various legal and policy frameworks in the region (e.g. under the IGCLR, COMESA, EAC, etc.) sometimes overlap and need harmonization to be more effective.

In the past, the international community for the most part upheld the principle of non-interference in the affairs of other states. However, the international community is currently able to justify interventions in the affairs of individual states, sometimes even

military interventions. While the burden of transitional justice falls primarily on the national authorities, pressure from the international community is increasingly becoming one of the most important factors affecting transitions. First, international frameworks and protocols set a minimum standard for peace and transitional negotiations. For example, the ICGLR's Pact on Security, Stability, and Development in the Great Lakes Region has several protocols,



including the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, as well as the Protocol for the Prevention and Suppression of the Sexual Violence Against Women and Children. Some of the other protocols relate to the property rights of internally displaced persons and returning populations, as well as on democracy and good governance. The AU also plays a pivotal role in influencing and designing transitional policies on the continent. Various AU instruments contain important norms and standards that are relevant to the application of 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. Unfortunately, so far there has been minimal use of most of the continental or regional legal and policy frameworks, leaving most of the potential untapped. Evidence of effective engagement with transitional justice objectives from continental and regional organizations is neither very strong nor widespread.

Several of the inter-governmental and regional/continental organizations have legal and policy frameworks with strong preventative and early warning dimensions, features (along with the fight against sexual and gender-based violence) that did not prominently come out in the European experiences.

Second, international civil society pressure and engagement have contributed significantly to the establishment of transitional justice measures, including criminal prosecutions, memorialization, truth-seeking and reparations. International civil society has also assisted with early warning, crisis response, conflict resolution and management, gender justice and institutional reform.

Lucy Hovil presented an overview of the negative influences of international interventions. Hovil pointed out that the transitional policies of the European countries noted in Huyse's study were constantly being changed or reformed, and in some cases reformation is still

ongoing. Western governments are thus hypocritical in the demands placed on African countries when dealing with transitional justice. They impatiently expect African nations to quickly adopt transitional justice frameworks and begin implementation almost immediately. Hovil pointed out that these expectations are too high and in some sense may set African nations up to fail from the outset. In reality, reconstruction takes a zigzag course. If you are trying to mop up the legacy of war, you can't do it in a straight line. For this reason, Hovil argues that there actually needs to be more leniency granted to African nations; they should not be straight-jacketed into a certain approach but allowed to change approaches as necessary to address the local context.

Second, international actors sometimes fail to act accountable in relation to their own abuses. There is a need to implement measures that ensure accountability across the board. Finally, the normative frameworks of existing transitional justice measures rely on Western ideals of justice. These ideals can be difficult to apply to the African contexts given all of its political, cultural and social complexities. International involvement can be a good thing, but ultimately the process has to be locally driven – it must present a home-grown solution to the specific challenges of a country.

Kogozi and Hovil's presentation generated much discussion around how international authorities can override local practitioners and policymakers to the detriment of the transitional justice process. We speak of a transitional justice 'toolbox', from which international authorities create transitional frameworks for African countries. Too often, international actors do not seek to understand local complexities in consultation with local actors. They use a language of justice, truth and reconciliation that does not generally make sense to the local population. The frameworks are thus inappropriate in these contexts, and push for the implementation of measures too soon after transition, before the infrastructure is in place and the climate is not yet right. When these transitional justice measures are implemented poorly, however, they have effects detrimental to the local population but not to the international actors that promoted them.

The participants also agreed that coordination between international and local actors is often poor. Political actions of the international community sometimes undermine local efforts of conflict resolution, humanitarian assistance or peace building. International intervention such as the indictment of Omar al-Bashir, or the establishment of 'peace villages' as part of a 'reconciliation' program in Burundi did not take the consequences for local communities into account.

Finally, there was recognition of the hostilities that exist within international civil society. Tensions at the international level can occur to the detriment of the local. For this reason, it

is important to address horizontal as well as vertical tensions.

In closing, the participants spoke positively about the need for international authorities and international civil society to conduct proper pre-consultations with those they are assisting. Pre-consultations can be simple and inexpensive, and can make a huge difference in the design and implementation of creative, appropriate transitional justice mechanisms. The participants also acknowledged the unfortunate but inescapable reality of donor funding. The acknowledgment that our work would not be possible without funding drives home the importance of improving collaborative efforts with donors.

TJ Policy Coordination - National, Regional and International

Salah Hammad, Human Rights Department, African Union Department of Political Affairs



The African Union's Department of Political Affairs (DPA) promotes good governance, democracy and human rights in Africa. It does this on a political level with various other organs in the AU. The DPA leads the process of creating norms, promoting legal initiatives at the level of state government and following the implementation process of those norms and processes by member states.

Currently, CSVJ is working with the AU to create an AU Policy Framework on Transitional Justice. According to Hammad, the policy framework has been an opportunity to really learn from the experiences that took place in a number of African countries and also from international experiences in transitional justice.

Why an African framework? The DPA decided it would be beneficial to have a policy framework at the continental level because it may assist in convincing member states to adopt TJ measures. Then, as some member states begin to implement TJ measures, other member states will compare their measures to these states and the continental framework and fill the gap. It is not fear of not implementing these that would motivate their adoption, but respect for the continental organization and its moral decisions. We are stronger

together than we are apart. Hammad also explained that the DPA's interactions with member states revealed the importance of ownership. In order to strengthen the commitment of African states to adopting a transitional justice policy framework, the framework must be African.

The African Policy Framework on Transitional Justice will be the first continental framework ever created. It is important to recognize that Africa can play a role in teaching the world about norms and rights.

At the beginning of the process, some member states were opposed to a continental framework for transitional justice. They thought there was no need, especially those member states who did not anticipate facing a political transition. Others thought that a framework might impose 'one size fits all' model. Today, many member states that previously believed they wouldn't need a transitional justice policy are asking the AU for help in implementing such measures. The AU now has full support from all member states to move this project forward.

The fear of course is that member states will shelve the policy framework once it is completed, but the AU is adamant that it wants the policy framework ratified and implemented. But implementation is a bigger issue than ratification.

Regarding implementation, coordination between the AU and the national governments of member states is key. Another critical element is the role of civil society; civil society represents one of the strongest avenues for the AU to connect with African citizens. This is particularly important to the AU because the leadership of the AU has declared the AU a people-centered organization. They do not represent the nations but the people of Africa. Finally, Hammad emphasized the importance of engaging with the media in this project. The AU needs to the media to play a different role than it does in monitoring and reporting on conflict. The media now needs to switch gears to play a role in informing people about transitional justice developments.

TJ Role in Dealing with Colonial Legacy

Andrew Songa, Kenya Human Rights Commission

What role does transitional justice play in dealing with Africa's colonial legacy? In Kenya, colonial boundaries were established by the British and very independent communities were compelled to live together within artificial borders, in some instances breaking up unified communities. Communities that were formerly independent found themselves in competition for scarce resources often exacerbated by artificial ethnic identities constructed by the British.

Politically, one of the most harmful legacies of colonialism is that of indirect rule. The British hand-picked leaders who would advance the colonial agenda to take the place of legitimate leaders. Indigenous people were racialized and ethnicized. Though the primacy of race was removed at independence, the constructed ethnic differences lived on. Ethnic tensions remain high in Kenya and sometimes erupt in violence, most notably after the 2008 elections.

British colonial economy in Kenya set the stage for systemic economic inequality and marginalization. At independence there was no effort to redistribute this land to reverse the forced migration that had been imposed on various communities. Instead, political and economic power in Kenya today still works to benefit only a small elite, and development programs only benefit select groups. The violence in Kenya surrounding the 2008 elections revealed the ongoing legacies of divide-and-rule policies and the clear failure of the successive independence government to address and correct these legacies.

The introduction of Christianity also played a role in dismantling African culture. Christianity was manipulated by the colonial rulers in order to sculpt more obedient Africans. Colonialism as a whole ruptured peoples' sense of belonging.

So how can transitional justice help Kenya cope with its colonial legacy? In this day in age, can you trace the thread of colonialism to the current TJ issues? Can you then take the TJ framework/agenda to address the legacies of colonialism? Can some of the processes of TJ reach into the past and address the repression, marginalization and exclusion of the victim? Asking these questions raises more questions about which types of transitional measures Kenyans should adopt, especially considering the failure of the Kenyan TRC. Given Huyse's report, we can see that many of these challenges were indeed predictable.

Also reflecting Huyse's report, there is a loud silence about acknowledging victims, as they are sacrificed as the price for building and unifying the nation. What do we want to remember and what do we want to forget? A key component of a transitional justice project would be a memory project, a documentation of a more accurate historical record. As for now in Kenya, memory is a compromise that is continuously changing because of the never-ending conflict between native and settler. Who owns the transitional justice process? Does the elite work in collaboration with the majority?



Across the continent, colonial legacies remain un-confronted and unmanaged. For any nation undergoing transition or rebuilding after war, the legacy of colonialism is still apparent at the 'transitional moment'. The workshop participants felt that transitional justice must play a role in dealing with Africa's colonial past, especially because other mechanisms prefer to forget that the past happened for the benefit of current nation-building and unifying measures. TJ can unlock the debate with these unmanaged issues.

The discussion raised questions about the role transitional justice plays in addressing colonial legacies. First, it was noted that the people who advocate for moving on from colonialism and largely forgetting the colonial past are elites who benefit from this legacy, not the majority of the population. At independence, colonial political structures are superficially reformed but certain issues such as land ownership are often ignored, resulting in the entrenchment of certain privileges. This sets the foundation for a new cycle of exclusion and conflict.

Second, economic inequality is one of the greatest legacies of colonialism, but it is often overlooked by transitional justice mechanisms in favor of dealing with issues of civil and political rights. Economic power in many cases remains in the hands of former colonizers. It seems that political power and economic power have been cleverly separated, but the two are in fact inextricably linked.

Third, the participants agreed that it is important in any African context that the former colonizer acknowledges its role as a perpetrator. Currently, there is a disjuncture between colonial perpetration and recent conflicts, but the two are undeniably related. This is especially important when the former colonizer is part of the transitional justice process, either as an advisor or a donor. There is a need for former colonizers to formally acknowledge their complicity in current African conflicts, and transitional justice mechanisms can offer the colonizers a vehicle for apology and restitution.

Politics and Memory - How to Remember and How to Forget

Nicky Rousseau, University of the Western Cape

Memory projects are rarely the first transitional justice measure that policy-makers adopt. It is only after prosecutions and reparations are attempted that the people in charge turn to memorializations or exhumations. This unquestioned sequencing of events, Rousseau argues, reveals an alarming lack of creativity. Policy-makers pull 'ready-made' solutions from a transitional justice 'toolbox' consisting of transitional justice measures that have been implemented by other nations in the past. This lack of creativity means that we are just consolidating what we know instead of tailoring new mechanisms that are context



specific. Even more alarming, however, is that we have little proof that the mechanisms from the toolbox work in the way we intend them to.

There is a need to remain creative, and for this reason memory projects deserve particular attention.

Memory projects also deserve more attention because they are often done badly to the detriment of the victims. There is a delicacy to how acknowledgment needs to occur that is

usually lost in the process. Moreover, governments are selective in their acknowledgment, usually due to a shortage of funds, which in turn breeds competition among victims.

Finally, memory projects deserve more attention as we recognize that memory is not fact. Memory is a balance between remembering and forgetting. Forgetting is an active process, and perhaps one doesn't forget but actually transforms a negative memory into a more positive, more manageable one. Memories can be conflicting. It is important to recognize the complexity of memory. But who decides what we remember and what we forget? Who gets to decide what the correct balance is? In the wrong hands, memory can be a question of power and exclusion.

Rousseau's presentation generated discussion around the importance of historical facts, despite history's subjective nature. It was noted, for instance, the common narrative is that the human rights advocates unanimously rejected amnesties during the TRC negotiations in South Africa. But, in reality, the human rights lawyers were some of the strongest supporters of amnesty. The proof is in the historical documents. These kinds of myths and misinformation have become part of our memory and the SA TRC process. So what do we accept as history?

This subjectivity of history is one of the reasons for caution when African scholars, practitioners and policy-makers 'learn lessons' from Europe. Before learning lessons, the first questions should be "What's the truth?" and "What actually happened?"

But memory, though subjective, remains important. Who creates and takes ownership of collective memories? Often it is the people at the top. For example, in Rwanda, there are memorials commemorating the genocide against the Tutsis, but what of the others who were slaughtered? There is a need to distinguish between formal and informal memory initiatives, and there is also a need to support informal, local memory initiatives that are often more meaningful for relatives and local communities.

Ultimately, memory projects do not fit neatly into any transitional justice 'toolbox'. Memory is perhaps more edgy, more ambiguous. Memory reminds us to tread carefully and to always be mindful of the real, the lived, and the local.

Way Forward

So, what can Africa learn from the European experiences with transitional justice? What is uniquely African? What issues on the African transitional justice agenda are important?

The first issue is temporality. The participants of the workshops agreed that the legacies of colonialism are still alive in Africa and these legacies are felt acutely by the African people. Transitional justice mechanisms on the continent should address these legacies, and the European nations that assist Africa in transition should acknowledge their complicity as former perpetrators. In addition, the participants of the workshop recognized that transitional justice is a long-term process. The implementation of transitional justice mechanisms often simply gives the *illusion* of resolution, but each successive generation keeps the process alive.

The second issue is the need for flexibility. Flexibility first refers to temporality, to the 3 Ts:



time, timing and tempo. Time: when is the right time to start transitional justice processes? How soon do we begin after the transition has occurred? What of transitional justice measures that begin while a conflict is still ongoing? Timing: in what order do we sequence the transitional justice mechanisms? What needs to come first, and what can and should wait until later? Tempo: how fast do we want to go with the process? Flexibility also refers to the ability to choose which transitional

mechanisms are most appropriate in a given context. It highlights the importance of local ownership over the transitional process.

Who is making the decisions? Who owns the agenda? It is of course important to remain wary of international authorities. There is a need to create accountability measures for the international community. But, it is also important to recognize that competition for ownership can occur at the local level. There is even competition between victim groups.

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