

# NEGOTIATING TRANSITION

THE LIMITS OF THE SOUTH AFRICAN MODEL FOR THE REST OF AFRICA

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CSV<sup>20</sup>R

The Centre for the Study of  
Violence and Reconciliation  
20th Anniversary 1989 - 2009

# ACKNOWLEDGEMENTS

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# ABOUT CSVR

The Centre for the Study of Violence and Reconciliation (CVR) was founded in 1989, and has offices in Johannesburg and Cape Town, South Africa. CVR adopts a multi-disciplinary approach to understand and prevent violence, heal its effects and build sustainable peace locally, continentally and globally. The Centre's work includes a focus on transitional justice, peacebuilding, criminal justice reform, trauma studies and support, victim empowerment, and violence prevention with a specific focus on the prevention of gender-based, youth, and collective violence. The organization is increasingly working on a pan-continental basis to share expertise, facilitate learning exchanges, and strengthen the capacity of Africa's civil society and regional organizations.

## CSVr'S WORK IN TRANSITIONAL JUSTICE

The Transitional Justice Programme is one of six programmes within CVR. This programme continues to evaluate the impact of South Africa's Truth and Reconciliation Commission, as well as conduct advocacy and interventions on ongoing issues related to the need for truth, justice, reconciliation and healing within South Africa, and to share these lessons and experiences with partners in other countries. Thematically, the program works in the areas of accountability for past human rights violations; memory and memorialization; ex-combatant reintegration; civil society capacity strengthening; and research on violence in transition.

CVR has established itself as a leading voice in the field of transitional justice in Africa, and works with local civil society partners to create forums of reciprocal learning for African practitioners in order to further the development of context specific programmes on transitional justice that are locally informed and address identified needs. Currently, our work with partners is focused in particular on Zimbabwe, Kenya and Uganda. We also work with African regional bodies to strengthen

their capacity to engage with transitional justice issues on the continent.

CVR is the founder and leading partner of the African Transitional Justice Research Network, a network established to build the capacity of African civil society organizations to inform, monitor and conduct advocacy related to transitional justice policies in their respective countries, as well as to create new forums for the sharing of lessons and knowledge between civil society organizations on the continent. These forums include a website with relevant literature and information on transitional justice issues in Africa ([www.transitionaljustice.org.za](http://www.transitionaljustice.org.za)), a listserv with over 1,000 members where research and discussions on transitional justice are shared, capacity-building workshops and institutional peer reviews.

CVR is also the founder and host of the Oxford University Press publication, the *International Journal of Transitional Justice*.

# SEMINAR BACKGROUND & OBJECTIVES

South Africa's relatively peaceful transition from apartheid to inclusive democracy has been heralded as a 'miracle' outside of its borders, with the result that its model has had tremendous impact in African countries attempting to navigate their own political transitions, as well as amongst international mediators brokering peace processes.

This 'model' has focused in particular on two key mechanisms of the South African transition: the Government of National Unity (GNU), portrayed as a path to stability and unity at a political level, and the Truth and Reconciliation Commission (TRC), seen as a mechanism for promoting broader reconciliation and nation-building.

First in Kenya and now in Zimbabwe, the model of a GNU has been used to accommodate national political divisions and quell political violence in order to consolidate a shift to more inclusive government. Similarly, truth commissions have become a standard element of the 'transition package' globally. This is in no small measure a result of the international profile of the South African experience. Since the South African TRC, truth commissions in Africa have been established in Ghana, Liberia, Sierra Leone and Mauritius.<sup>1</sup> Kenya has just appointed the commissioners for its Truth, Justice and Reconciliation Commission, Togo is in the process of establishing a commission, and strong support has been voiced for a truth commission in other contexts, including Zimbabwe and Uganda.<sup>2</sup> Both bodies – a GNU and some kind of truth commission – were proposed as a way through the recent political impasse in Madagascar.<sup>3</sup>

In South Africa, the development of both these mechanisms was in response to a unique history and context. Moreover, the South African situation differed from that of Zimbabwe and Kenya in that the GNU was part of a pre-election agreement to ensure a more inclusive cabinet, rather than a post-election response to dissatisfaction with the election process and the threat of violence.

The model's application to Zimbabwe and Kenya establishes a dangerous precedent that where there is contestation over election results, coupled with weak institutions and mass human rights violations, elections are dismissed in favour of coalitions. The resulting compromises have been challenged as both unable to provide effectively for the basic needs of the countries' citizens and incapable of building confidence in the rule of law. These agreements are accused of limiting the possibilities for justice for past crimes and even rewarding violence and gross human rights violations with a stake in government.

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1 For a list of recent truth commissions, see, Nahla Valji, 'Truth Commissions and Trials: Seeking Accountability for Past Atrocities,' in *Handbook on Human Rights* (Friedrich Ebert Stiftung, 2009).

2 Both public awareness about and the perceived 'success' of the South African TRC have had a profound impact on transitions in other countries, as evidenced by the proliferation of studies that draw on the South African experience and the way in which the TRC continues to be largely uncritically lauded as a model for other states in the transitional justice literature.

3 See, Peter Clotey, 'AU to Open Peace Talks on Madagascar Crisis,' *Voice of America*, 27 May 2009.

The seminar, 'Negotiating Transition: The Limits of the South African Model for the Rest of Africa,' explored the impact that the South African model has had in other contexts, as well as the effect that compromised political deals such as GNUs have on the possibility for effective justice post-conflict.

Some of the questions posed included: Have these 'peacemaking tools' simply become tools for impunity? Have they shifted the peace and justice debate by lessening the likelihood of prosecutions and accountability, or hampering political will and conditions for real redress in return for a promise of short-term gains? Are they the only realistic options available to ensure an end to violence in internal conflicts?

The seminar examined the options available for political actors and transitional justice practitioners to widen the scope and timing of their engagement, by assessing the possibility for justice and impunity concerns to be addressed during the formulation of political settlements.

## SPECIFIC AIMS OF THE SEMINAR:

- Facilitate further reflection on the actual impact of the South African GNU and TRC 15 years after their creation and to discuss their limitations, successes and legacies;
- Contribute to an understanding of the influence of similar models on other contexts, with a focus on Zimbabwe and Kenya; in particular how they are introduced, by whom, what immediate impact they have, what options might fit more appropriately and what can be done to influence the range of options considered during negotiations;
- Improve our understanding of the longer-term consequences of GNUs on the transitional justice policies pursued, as well as the nature and quality of a transition – for example, the potential for elite agendas to be furthered through the transition, or the potential for ongoing violence;
- Provide a forum for dialogue and lesson sharing in pursuit of local and contextual solutions;
- Provide an opportunity for reflection on the work and role of South African NGOs over the past two decades, particularly in the field of transitional justice on the continent; and
- Examine the role of key actors in transitions, including political actors, civil society, African regional organizations and the international community.

# WELCOME

JACKLYN COCK | CSVR Board Member

Ms Cock welcomed all participants and panellists to the seminar and noted that the seminar was one of a number of events that CSVR will be hosting in celebration of its 20th Anniversary in 2009. These events are intended to reflect on the work of the organization and the political context in which it has operated for two decades as well as to identify the ongoing challenges and issues civil society is faced with today.

Ms Cock noted that the topic of the seminar was chosen to stress the importance of building partnerships outside of South Africa in order to counter the view that the country's history is entirely unique. She suggested that a better approach would be to identify 'lessons learned' in South Africa that would be useful in other contexts. It is in this regard that CSVR has played a pivotal role both inside the country and on the continent in the past 20 years.

In reflecting on CSVR's history, Ms Cock noted that the apartheid state was a terrorist state in which authority was maintained through fear, imprisonment and violence. In this context of intimidation and widespread violence, two people had the courage to found CSVR in

the late 1980s. One of them, Graeme Simpson, continued on to lead the organization for 15 years with a model of inclusive, innovative and courageous leadership – the kind of leadership that is also demonstrated by his successor, Adèle Kirsten.

Ms Cock noted that the key challenges for the organization today are to establish enhanced relationships with other African organizations, and to work in wider networks and as part of global movements on the core issues of violence prevention and sustainable peacebuilding. Exacerbated by a global crisis, both financial and environmental, vast inequalities are being entrenched between the global North and South. These social inequities, both in the country and globally, are fuelling new forms of violence, as shown by the recent xenophobic violence and service delivery riots in South Africa.

Ms Cock posited that now, more than at any other time, there is a need to work together to strengthen partnerships and grasp more tightly the values of social justice and our commitment to both peace and justice.



# INTRODUCTION

ADÈLE KIRSTEN | CSVR Executive Director

Ms Kirsten welcomed all participants and thanked them for being at the seminar. She particularly acknowledged Ministers Sekai Holland and Gordon Moyo of Zimbabwe, Commissioner Mumba Malila, of the African Commission on Human and Peoples' Rights, and Ms Betty Murungi of the Truth, Justice and Reconciliation Commission in Kenya. She extended a specific welcome also to Kader Asmal, former South African Minister for Education, Mac Maharaj, former South African Minister of Transport, Yasmin Sooka, former truth commissioner in South Africa and Sierra Leone, and Graeme Simpson, former director of CSVR.

Ms Kirsten said that the aim of the seminar was to provide an opportunity to reflect on South Africa's transition, as well as on the work of CSVR through this period, as the two are closely related. The key milestones for the country are reflected in the work that CSVR has done and how the organization has responded to the shifts in the broader context. CSVR was founded during the final days of apartheid, when violence was spreading rapidly and taking on new forms. Beginning as just one project on the nature and forms of violence and state repression, the 'Project for the Study of Violence' was initially based at the University of the Witwatersrand. Even in these early days, the organisation placed specific emphasis on gender-based violence and efforts to understand the relationship between the public and private, the political and personal.

These initial years were followed by the four years of formal negotiation leading to the transition from apartheid to democracy in 1994. In terms of violence, these were some of the most difficult years in South Africa's history. As the political terrain changed, the Project continued to document and publicize the shift from 'political' violence to new forms of social and criminal violence through the transition.

Ms Kirsten noted that the post-1994 period provided both new opportunities and challenges, in particular with regard to the relationship of civil society to the new government. Taking on a new role as both partner to and critic of the state, CSVR played an integral role in developing a human rights framework for the new policing body, influencing and drafting reforms, and pushing for institutional transformation of the security sector. It also played a central role in the development of the Truth and Reconciliation Commission, civil society's interaction with the Commission and the mobilization of victims to ensure their centrality to this process.

By the end of the 1990s, South Africa started to grapple with the notion of a culture of violence as it became apparent just how deeply embedded violence had become in society, and how injustices continued to manifest in new ways with clear links to, and roots in, the past. This provided the foundation for one of CSVR's flagship projects, the Violence in Transition Project,



which has run for the past decade. Taking forward its own research and analysis, the organization began to place a greater focus on the prevention of violence and alternative ways of dealing with conflict.

In 1996, CSVR left the University of the Witwatersrand and established itself as an independent entity, growing to meet the new challenges of research, advocacy and intervention that were needed to make sense of and prevent the kinds of violence that were taking place. It was during this period that the organization took its present form, developing different programmes dealing with, amongst others, gender, youth, trauma and transitional justice. CSVR also began to form regional partnerships, which is reflected in the nature of this seminar. This period was the beginning of an emerging regional partnership, as well as a global one.

It is evident in South Africa today that the transition process is not complete. Ms Kirsten suggested that the key issue for CSVR is reflection on the changing nature of violence in the country. Examples include the collective violence of the last 18 months, including the

xenophobic attacks of May 2008 and the service delivery riots taking place in townships almost every day. This kind of violence is a consequence of the inability and failure of not just the state, but all of us to address the issue of social inequality and the gap between rich and poor. Ms Kirsten pointed out a need to conduct more research and form increased partnerships with organizations dealing with these issues.

Of note in the field of transitional justice has been the increasing awareness of the failure of transitional justice processes to link political and socio-economic injustices, as well as their failure to grapple with the continuities of injustice that have persisted into the new democracy. In its work, CSVR is conscious of both the successes and the limits of the South African transition, and strives to ensure that it does not promote the South African 'model' as transposable to other countries. Ms Kirsten noted that CSVR is rather using its position and experience to document and share lessons learned and equally to learn from the experiences of other countries and contexts.

**'Of note in the field of transitional justice has been the increasing awareness of the failure of transitional justice processes to link political and socio-economic injustices, as well as their failure to grapple with the continuities of injustice that have persisted into the new democracy.'**

# SESSION 1

## POLITICS OF NEGOTIATION

**MODERATOR/DISCUSSANT | Brian Kagoro | Action Aid International**

*This session explored the issue of political negotiations aimed at ending violent conflict, including how negotiation processes are shaped, what factors influence their outcomes and what impact these outcomes – particularly power-sharing models and governments of unity – have on the possibilities for pursuing a justice agenda during a transition.*

**SPEAKER 1 | Mac Maharaj | Independent Analyst**

**‘The benefits and pitfalls of using the South African experiences of peacemaking, power sharing and delivering justice in other contexts.’**

In his comments, Mr Maharaj noted that the Truth and Reconciliation Commission (TRC) has been discussed more outside South Africa than inside. A question remains about whether the country has really come to grips with the issue and consequences of its transition.

Reflecting on the nature of the transition, he noted that apartheid had become impossible to sustain after 1990, even for an authoritarian state, and that violence was widespread in South African society. Questions arose at that time as to what kind of democracy was wanted and what type of process and outcome was needed. This led to the negotiations. Mr Maharaj noted that there is no such thing as an absolutely legitimate process or outcome. South Africans decided to take full ownership of the negotiation process, to the exclusion of external interventions. They decided that any political party, legitimate or not, would be allowed to sit at the negotiating table. They defined the concept of acceptable consensus so that each step in the process provided increased legitimacy.

Regarding outcomes, Mr Maharaj observed that there were two options debated in South Africa: negotiating an interim constitution, or negotiating a bridge leading towards a final constitution. A compromise with several

components was reached. One was an agreement on the interim constitutional principles to be binding on the final constitution, which would be written by a broad constitutional assembly that included all parties. Another component was the creation of a Constitutional Court to ensure the principles were incorporated into the final Constitution. This could not be left up to the existing and compromised legal system. Also, central to the new constitution was a Bill of Rights.

He summarized that the key features of the negotiation included power sharing, national unity and a truth commission, but there was uncertainty regarding how best to deal with the past. Mr Maharaj shared that the issue of amnesty was central to the bilateral talks between the African National Congress (ANC) and the National Party (NP). For the ANC it was unclear how those in prison would manage to take part in the negotiations. The government refused a blanket amnesty, as it wanted to control the whole process and to grant amnesty individually. But, as the negotiations continued, the NP changed its position and asked for a general amnesty, which the ANC refused.

It became central to deal with human rights violations as the negotiations continued. The ANC had long

accepted the rules of war, and had strategically signed the Geneva Conventions as early as 1980. In part, the ANC did this to signal to the apartheid state that it respected international laws related to human rights in conflict, hoping to prompt the NP government into doing the same. In 1990, a commission was charged to look into atrocities committed in ANC camps, and the question of how to handle these violations entered public discourse. Kader Asmal was one of the first to deal with the problem around this time. He raised the matter within the framework of those contestations, proposing that the country look at the model of a truth commission.

Thus the ANC called for a commission that would examine all violations of human rights since 1948.

results in a contradiction in the process itself.

The South African model was not created in the context of disputed election results. Kenya's Government of National Unity, for example, is a marriage forced from the outside – a 'grand coalition' created by the international community. It is unknown what the implications will be for a democratic process. Questions arise regarding justice and impunity when there is a forced marriage between the main actors in a conflict. Also, the process and its impact on the next elections should be determined, particularly regarding government legitimacy.

In Zimbabwe, the main – as yet unaddressed – issue in Mr Maharaj's view is the role of the security forces.

## **'The need to find a balance between justice and democratic governance is clear.'**

However, this issue stayed on the sidelines at the negotiation table. On 16 November 1993, the post-amble of the constitution was drafted, stating that there would be amnesties, but the mechanism for assigning amnesties was not specified and was left for the democratic Parliament to determine.

In the context of the violence that dominated the negotiation period, there was also a political agreement to establish a Peace Secretariat. This served as a fire-fighting mechanism in some respects, creating a space for dialogue that prevented violence from becoming the main preoccupation of the negotiations.

Mr Maharaj then noted that when one looks at other countries, great concern arises. The context in which power sharing and new truth commissions are being introduced in Zimbabwe, Kenya and elsewhere is that of disputed election results. Therefore, there is a lack of agreement on the democratic character of the process itself. A unity government is formed, which when coupled with the issue of human rights violations,

There is a global political agreement only. Elections are said to be unlikely before 2013, and no constitution will be drafted beforehand. The probability of moving forward in that context seems small. Mr Maharaj argued that pressure should be applied in both Kenya and Zimbabwe for constitutions to be written first. The same context holds true for Madagascar. The emphasis should be on free elections, as stated in the African Union's Charter.

Mr Maharaj concluded his remarks with the recommendation that the relevant parties in all transition contexts should be pushed to recognize the legitimacy of elections first, instead of rushing into creating a coalition government like those in Zimbabwe and Kenya.

Mr Maharaj also cautioned that the need to find a balance between justice and democratic governance is clear. He argued that placing the issue of justice too high on the agenda may block the process of democratic transition.

## **SPEAKER 2 | Gorden Moyo | Honorable Minister in the Prime Minister's Office, Zimbabwe**

### **'Zimbabwe's negotiated settlement and transitional justice processes: prospects, challenges and current context.'**

Mr Moyo began by noting that the Inclusive Government of Zimbabwe is implementing four key components of the Global Political Agreement (GPA). Because another unity government in 1997 failed, the name 'Government of National Unity' was not used; the name 'Inclusive Government' (IG) was used instead.

One of the main priorities of the IG is to deal with the economy. Another is democratization. Mr Moyo argued the need for creating a plurality of voices in Zimbabwe, mostly through media reform. The constitution was drafted in 1979 over a period of 91 days in Lancaster, England. It has been amended 19 times since, and is still a source of contestation. The GPA adopted in September 2008 declared the need for a new constitution. Mr Moyo said that while many challenges face the country, he is confident that the current process will succeed.

Mr Moyo argued that the transition began as a result of two central factors. One was that Zimbabwean civil society and the opposition pushed very hard against the existing dispensation through demonstrations, lobbying, elections, and other means. In many respects they forced the government to the negotiation table. The other factor was economic dislocation. The economy became central in the struggle in Zimbabwe. There was almost no economy in existence. The government had to choose between creating a coalition government and not paying soldiers anymore. The latter option would have created chaos and more violence. The government's bank accounts were frozen as a result of the sanctions imposed by the European Union and United States and it could not print money because of a paper shortage. It was thus forced to negotiate because of the combination of economic crisis and internal mobilization.

Mr Moyo reflected that when the negotiations started, settlement appeared to be the best option for four reasons:

- 1) An IG was the best way to rehabilitate the economy. The opposition Movement for Democratic Change agreed to lobby against sanctions and embargoes only after the IG was formed. The elite in Zimbabwe run many of the country's industries, so the bans and restrictive measures on industries and individuals had a strong influence on the negotiations.
- 2) The former regime's desire to retain power was also a factor, as the Zimbabwe African National Union-Patriotic Front (ZANU-PF) was losing dominance after 28 years. The IG appeared as a way for it to keep a grip on power.
- 3) Members of the government had participated in gross violations of human rights, and many were direct perpetrators. The former government therefore had an incentive to participate in the negotiations and in the new government, to ensure that those people would not be prosecuted.
- 4) Because of the need to forge consensus and create stability, the IG has focused on national healing. The people are afraid to vote, as the whole country was traumatized by events surrounding the last elections. This is a serious challenge as there cannot yet be talk of justice per se. For now, the emphasis is on 'national healing, reconciliation and reintegration', as well as on security sector reforms. Mr Moyo noted that that the IG would not exist if the issue of justice had been highlighted prematurely.

Mr Moyo observed that it will take some time before a true government of the people emerges in Zimbabwe and that the present government is one of compromise only. Only once a democratically elected government is established, will a discussion about justice and accountability be possible. If these issues are brought into discussion without cognisance of the context, the country's stability and potential for a new constitution would be at risk.

With regards to the numerous human rights violations that occurred in 2008 surrounding the

elections, Mr Moyo remarked that there is a need for a process of national healing, but that agreement on its implementation has thus far been difficult to reach. He argued, however, that it is necessary to garner ideas for dealing with the fears and expectations of the victims of human rights violations, as well as of ensuring that the people do not perceive the IG as a government that fails to take care of the issues that matter to them. He noted that a balance needs to be achieved between the victims receiving justice and the fears of perpetrators, in a manner that would ensure the stability of the IG.

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## DISCUSSION

The discussion began with a question concerning the pros and cons of including international actors in a truth commission, as opposed to only local actors, as well as the potential role of both. It was noted that many international actors believe that a truth commission is the solution to all problems in a transition, which is problematic. Truth commissions have become a mechanically applied industry. Healing necessitates an internal process and a locally relevant solution, with attention paid to the specific problems and costs in each context. Mozambique, for example, chose not to have a truth commission, but healing has still occurred. In Rwanda, the gacaca courts are playing a healing and justice role, without the use of a truth commission. Many societies have moved forward without a truth commission.

The discussion then turned to Zimbabwe. With reference to the current status of the negotiations there, it was noted that important steps have been taken. The government is moving slowly, but this is to be expected given the suspicions of the people. The constitution is still being discussed. The economy is still under restrictive measures and sanctions. The MDC's president, Prime Minister Morgan Tsvangirai, has tried to engage with foreign governments concerning the lifting of sanctions. He has also been engaging with some strategic companies whose investments could have a strong impact on the lives of citizens.

### **‘Truth commissions have become a mechanically applied industry.’**

A seminar participant's suggestion that opposition members of the IG have been systematically removed in the past few months was acknowledged, as many members have been threatened and some have been arrested, which bars them from holding public office. It was also noted that the outstanding cases of people arrested during the last election still need to be resolved.



It was argued that elections are needed in Zimbabwe, despite fears that it is too early for them. In addition, the importance of adopting a constitution in Zimbabwe, even one that is a compromise, was stressed. It was argued that without a new constitution institutional reform, especially of the police, judiciary, attorney general and the election commission is unlikely.

Discussion turned to the role of the international and regional community in Zimbabwe. It was noted that it had been a political choice to use the word 'global' in the GPA, as this was aimed at making the agreement binding at the level of the international community as well. This was in particular the stance of ZANU-PF, who wanted to ensure that the issue of sanctions would be addressed. It was also noted that the external players in this 'global' agreement include the African Union and the Southern African Development Community, who act as guarantors.

In further comments, it was agreed that it is important to focus on the legitimacy of institutions established before and after a coalition government as well as the issue of institution building, as this provides insight into the opportunities open to civil society to resolve problems that persist beyond the term of the coalition government. It was suggested that these were also some of the cornerstones of the South African transition, for example the establishment of various independent commissions, many of which flow from the constitution.

**‘The danger of the power-sharing model is that it makes elections and constitution drafting a receding target, which can result in people losing confidence in the process.’**

The discussion then turned to justice, which becomes a bargaining stick at the negotiation table, and the complicated issue of getting perpetrators to sit at the table. It was reiterated that there is no magic formula; it is all about power politics. It was further noted that in both Zimbabwe and Kenya, a constitution must be drafted as quickly as possible. The danger of the power-sharing model is that it makes elections and constitution drafting a receding target, which can result in people losing confidence in the process.

Returning to a topic raised earlier the discussion centred on the influence exerted by non-South African scholars on the South African transition, for example in their promotion of the notion of consensual democracy. It was noted that the role of intellectuals and foreign scholars in transitions, and how they can be beneficial, should be examined. Ultimately, however, a decision must be made regarding what the people within a country in transition really want. Foreign ideas can be influential, but should not be deciding factors. It was also mentioned that sometimes academic ideas have limited relevance when dealing with concrete issues during transitions.



# SESSION 2

## THE TERRAIN OF TRANSITION: IMPLICATIONS FOR PEACE AND JUSTICE

**MODERATOR/DISCUSSANT | Kader Asmal | University of the Western Cape**

*This session examined the factors that shape justice responses for past violations during a transition, including the terrain of political settlements and power-sharing governments, the influence of external actors and the use of models from other contexts.*

*Mr Asmal began the session by stressing the importance of the context that gives rise to a settlement - the level of trust between parties, their capacity to compromise, ability for coexistence, reciprocity, amongst others. He suggested that for some, transition and transitional justice is an industry – but, he argued, it is actually an art.*

**SPEAKER 1 | Betty Murungi | Kenya Truth, Justice and Reconciliation Commission**

**‘The politics of justice in Kenya and its local and international influences.’**

Ms Murungi began with the observation that the problems in Kenya did not start in 2007. The country has a long history of mismanagement, corruption, distrust and lack of confidence in state institutions. Some important institutions, such as the judiciary, are deeply corrupt, and previous regimes have embedded a culture of impunity. In 2002, following a general election, ‘a small window opened’ presenting an opportunity for reform. Instead, a regime change occurred that led to the eruption of violence. Kenya’s general elections have always been characterized by political clashes and violence that has been described as ‘ethnic.’ After 2003, the government kept a grip on power and did not make the anticipated structural changes. The window for change was closed by 2004.

Noting that transitional justice is an important tool in facilitating change, Ms Murungi asked: What is Kenya’s transition? What is the country moving to? The situation raises important issues around legitimacy and ownership. What is the structural departure that is sought? Who is putting that question on the table? What is the role of international and local actors? She observed that immediately after the 2008 election

violence, a Panel of Eminent African Personalities (the Panel) led by former United Nations Secretary-General Kofi Annan was created. Within two weeks of the violence, five African former state presidents visited the country, as did African Union representatives. The United States and the European Union also wanted to influence the transition processes, as did the United Nations Development Programme. All were concerned with the risk that Kenya could go the way of Sudan or Somalia. Ms Murungi noted that the discredited election was a symptom, a trigger, in that the violence was always going to explode and the question was simply when and how.

The Panel negotiated an agreement that is now referred to colloquially as the ‘ceasefire agreement.’ The agreement was created to end the violence, deal with the humanitarian crisis (including the internal displacement of 500,000 people), reconstruct the country’s social fabric, reconcile communities and build cohesion. The Panel also sought to ensure long-term constitutional and institutional reform in order to deal with problems concerning the police force, the security sector, the judiciary and land. The power-sharing agreement was

the first to be reached, and it was the basis on which the coalition government was created. Ms Murungi noted that the government is a large and bloated one so as to accommodate all sides. For every minister, there are currently two assistant ministers from each political party.

Ms Murungi argued that many people in Kenya want to see foreigners included as part of the new commissions and institutions being established. Many South Africans are part of the processes, for example the Kriegler Commission was headed by South African Judge Johann Kriegler. The Commission of Inquiry into Post Election Violence, known as the Waki Commission, also included foreign commissioners. This Commission, akin to a 'baby TRC', looked into the root causes of the violence and recommended, amongst others, the creation of a local tribunal to try the perpetrators. It added that if the local tribunal was not created within a certain time frame, the list of alleged perpetrators which

had been compiled out of its investigations should be handed over by the Panel to the International Criminal Court for prosecution. The Waki Commission report was widely accepted by Kenyans.

In 2002-03, the Government of Kenya convened the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Based on research conducted, the Task Force found that 83 percent of Kenyans wanted a TJRC to look at human rights violations and economic injustices, and did not want amnesties but rather called for prosecutions. The support for the TJRC seems to have waned in the intervening years however. When the TJRC was formed in July 2009, there were protests, and many people were against its composition. Ms Murungi also noted that there is a growing rhetoric of extremism which seems to put into question whether Kenyans are serious about national unity. This also makes the context within which the TJRC operates difficult and complex.

## **SPEAKER 2 | Yasmin Sooka | Foundation for Human Rights**

### **'The impact of the South African Truth and Reconciliation Commission on transitional justice processes elsewhere in Africa.'**

Ms Sooka began her remarks with a number of questions: Is South Africa's Truth and Reconciliation Commission (TRC) really a textbook model of a truth commission for other countries? Fifteen years down the line, what went wrong? There is peace, but not an end to violence. There is a constitutional court, but who uses it? Corruption is endemic to both the public and the private sector. So, what role did the TRC play in all this?

Ms Sooka noted that the amnesties in South Africa were meant to be conditional, based on individual applications and full disclosure, and proving that the violation concerned was a political act. She went on to argue that the TRC sounded good on paper but was a nightmare in reality, with few commissioners conversant in international human rights law. In addition, the TRC perpetuated the inequality that prevailed in the political

compromise made during the transition. She noted that the South African constitution does not say that apartheid was a crime against humanity because it was a compromised document. Further, the government could not be forced to implement anything, as the TRC's mandate was only to provide a report with recommendations.

Ms Sooka suggested that in order to face the problem of national unity and reconciliation, and the underlying causes of the violence, the country needed to deal with the systemic nature of apartheid and the ways in which it had affected each aspect of citizens' lives. Civil and political violations were only manifestations of wider structural violence. This was not looked at by the TRC because of the compromised nature of the constitution and the negotiated peace agreement itself. Ms Sooka



said that reconciliation became another word for the absence of redress, a code word for impunity.

Ms Sooka argued that in order to draw lessons for other countries, each particular context must be examined. She noted some central questions: Can Kenya and Zimbabwe afford this trade-off between justice and peace? Should they seek reconciliation at all costs?

When addressing the underlying causes, impunity has to be examined. Ruling elites easily experience amnesia around the ideas for which the liberation was fought. Far from popular democratic legitimacy, a discourse of entitlement based on liberation wars has become a basis for African elites' legitimacy. As a consequence, social and economic justice is marginalized.

**‘Far from popular democratic legitimacy, a discourse of entitlement based on liberation wars has become a basis for African elites’ legitimacy. As a consequence, social and economic justice is marginalized.’**

Is reconciliation really the key to peace? Of course, a government cannot be founded on lies about the past, but whose truth should be voiced? How much truth is enough? Why is punitive justice not enough? There are many tribunals, ad hoc bodies and special courts in Africa, including the International Criminal Court. Can Africa really afford these models and how can they be adapted to local contexts?

Ms Sooka pointed to Chad and Zimbabwe as examples of contexts in which very little has been done by the African Court on Human and Peoples' Rights or regional bodies such as Southern African Development Community, arguing that impunity still reigns on the continent.

Added to this, is the dominant western discourse which is not based on socioeconomic rights; but advocates the dominance of the neoliberal free market paradigm as the only path to development. South Africa is one of the only countries in the world to ensure these rights in its constitution. And even with that, there is still a long way to go to achieve social and economic justice.

Ms Sooka concluded that the South African transition teaches us that the present-day problems in Kenya and Zimbabwe are not only about electoral violence but also about the underlying socioeconomic causes that led to them, especially in regard to land issues.

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## DISCUSSION

The discussion began with a further interrogation regarding the key elements that did work in the South African TRC, given the country's particular post-apartheid context, colonial legacies and balance of political forces. It was acknowledged that the TRC did many things right, such as listening to the voices of victims and designing a reparations policy with the aid of economists and social scientists.

It was noted, however, that victims had to wait until 2003 for the government to begin talking about reparations. With regard to the reparation issue, the government continually argues that everyone was a victim of apartheid, and yet the Reparations Programme has collapsed and remains incomplete, and the Land Commission has not dealt with all land claims. The obligation of addressing the needs of the most marginalized victims has not been met.

Also, in regard to amnesty, the implication was that people would be prosecuted if they did not apply for amnesty, yet only a few individuals have been prosecuted. In 2006, the government published a set of prosecution guidelines that provided even more impunity for perpetrators. Recently, another attempt was made to use the presidential pardons process to ensure impunity once again. Both of these have been challenged in court by activists.

It was also noted that transitional justice as a field has not yet examined the blurred line between ordinary criminality and gross human rights violations. If victims' lives have not changed since the transition, it is natural that they feel anger, which explains the current violence in South Africa. The same can be said about the country's former security agents and ex-combatants who have not been properly reintegrated. Many of these actors have stopped trusting state institutions and have the sense that the state does not work for them, regardless of age or race.

As for community reconciliation, it was said that Timor-Leste is a powerful example of a community reconciliation process mainstreamed as part of state policies for dealing with the past. In South Africa this did not work, as once perpetrators were let off the hook, there was no incentive to do more for, or engage with, victims.

## **‘The framework of transitional justice is being influenced by contexts such as Uganda, where these issues are being addressed without regime change.’**

In response to a question about whether Kenya has thought out fully its approach to transitional justice, the speakers noted that the TJRC should not be seen as a mechanical structure. The Commission must travel to the people and reach out to them in order to conclude whether the violence there was systematic, organized and a policy of the state. Documenting this is in itself very powerful. Caution was raised, however, that Kenyans may be expecting the TJRC to address all the ills in the society. The TJRC cannot be successful unless other reforms occur at the same time, including the finalisation of a new constitution and judicial and police reforms.

The discussion then turned to how the TJRC has dealt with attempts to give it prosecutorial powers, presumably in order to counter the involvement of the International Criminal Court (ICC). It was noted that the TJRC had issued a statement that it did not have a mandate that included prosecutions. The Commission would like to strengthen its implementation mechanisms without expanding its mandate. The Kenyan Minister of Justice has also not made any proposal for such an amendment.

Concerning the involvement of local and international civil society, it was said that it is critical to engage with civil society on the ground. Many civil society organizations (CSOs) have been engaged in designing a TJRC for Kenya since at least 2002. However, now that the TJRC has been created, opposition has emerged and many have criticized the Commission's mandate, while some CSOs continue to engage. Relations with international CSOs are even more complex because Kenyan civil society sees the process as a Kenyan one only. It was noted, however, that international civil society with relevant expertise and experience has lessons to offer Kenya.

A seminar participant argued that Kenya is facing a general disconnect, a separation between people and the political elite, which is translating into localized community-level violence. The country's transitional justice mechanisms, meanwhile, are creating new conditions that allow violence to continue. The participant asked whether violence is

inevitable in the post-conflict context, and whether reconciliation is within the ambit of a truth commission and whether it means talking about the needs of political elites or about perpetrators and victims. Pointing out that the Zimbabwe crisis is linked to the lack of legitimacy of the government, another participant questioned the TJRC's effectiveness in the similar context of Kenya and noted the risk of the Commission being a whitewash, allowing perpetrators to go free.

A participant also argued that the framework of transitional justice is being influenced by contexts such as Uganda, where these issues are being addressed without regime change. Uganda, which already has an Amnesty Commission, is looking at the possibility of domestic war crimes chambers, a traditional justice process, as well as ICC indictments. In response it was said that the issue of reintegration of ex-combatants in Uganda still needed further engagement.

The issue of the ICC and addressing impunity in the Kenyan and Uganda situation was also expanded upon, noting that the ICC operates in terms of the principle of complementarity. Kenya was now taking forward judicial reforms to enable local capacity for addressing impunity. Interestingly, some Kenyan ministers have affirmed that if nothing is done locally by September 2009, the case will be given to the ICC. The ICC has entered popular discourse with Kenyan citizens naming bars after Mr Moreno-Ocampo and naming restaurants 'The Hague.' It was noted that even if there is no ICC indictment for Kenya, the issue of perpetrators will still have to be addressed. The need for domestic institutions for addressing impunity was also reiterated, especially given that the African Court of Justice is not yet functioning. A call was made for further analysis and exploration of the timing and sequencing of various transitional justice approaches.

Having previously raised the concern that the transitional processes in Kenya and Zimbabwe could have a negative effect and worsen the violence, the discussion turned to the issue of institutional reform, and Zimbabwe in particular. It was said that the opposition Movement for Democratic Change (MDC) should not be expected to make miraculous changes in government as it is not the ruling party. Despite the compromise government, the MDC is attempting to push through reforms and the drafting of the constitution. Elections must close the transitional IG, even if some members of the IG want to see it continue forever in the name of 'state security.'



It was mentioned that the leadership of the MDC must engage with civil society to draft the constitution. A comment was also made by a speaker that constitutions must not be conceived of as final; constitutions drafted by compromised governments can be amended. A concern is that transitional arrangements must be precise, but in Zimbabwe many elements were left unclear. It was also argued that amnesty provisions must be dealt with quickly.

The discussion then turned to the South African transition. A participant noted that a main problem with South Africa's experience is the lack of government response to the TRC, as well as the incapacity of those involved in past violations to bring closure to the issue of past white privilege. No moments have been created in which white people could come forward and acknowledge the privileges they were given. Today, this still haunts South Africans. The participant argued however, that even with their shortcomings, TRCs should not be completely dismissed, especially since there are few alternative processes.

It was agreed that the issue of privilege must be acknowledged and that the South African government has not done this. The possibility of community reparations was raised in 2007, but not followed up. The contribution to reparations of businesses that benefited from apartheid should also be considered.

A business trust was set up, but nothing more was done. People like Mary Burton and Charles Villa-Vicencio started the Home for All campaign in order for people to acknowledge benefiting from apartheid and to help with reparations, but the initiative received very bad responses from the white community.

In response to these criticisms, a speaker wondered whether the standard was set too high for the TRC, in light of, for example, the limited transitional process in Mozambique and the speed with which Chile's truth commission was designed (two weeks) in comparison to South Africa's TRC (a year). Another panellist suggested that the problem

## **‘Negotiations during a transition must include a measure that ensures that the government will address and implement a truth commission’s recommendations.’**

with the TRC's design was that the people themselves were not adequately involved. The discussion dwelled on the notion that the TRC in South Africa was driven by a correct sense of idealism, but that its flaws need to be seen outside of the huge frame of socioeconomic injustices, as this is too huge an issue to be solved by a truth commission. The main problems with the TRC were a lack of leadership and a lack of clarity on goals – truth, justice or punishment – which created significant confusion in the population. Because a transition was being managed, there were limits to what could and could not be done. For instance, a hearing for judges was never held, even though judges were at the front line of enforcing apartheid laws.

It was agreed that the benefits of the TRC process in terms of documentation and findings should not be underestimated. Today, no one can deny that the apartheid state was criminal, that there were death squads and so on. At the same time, it was observed that expecting that the TRC's recommendations be implemented is not unreasonable.

A participant noted that South Africa did not adequately address issues of inter-ethnic tensions between black people, or the conflicts they created. The same can be said of Zimbabwe. Is the aim to unite or to reconcile different groups? The two terms are often used interchangeably, but they are not the same, as unity is not a form of reconciliation. Unity means that political circumstances have made people work together and that there is a postponement to the resolution of differences until political problems are solved. Instead, critical Judeo-Christian assumptions about forgiveness and reconciliation are made. The speakers argued that one must be careful not to romanticize the notion of reconciliation, given the limited outcomes of the transitional justice measures. An evaluation of whether truth commissions exacerbate tensions is also needed.

Wrapping up Session 2, the speakers argued that negotiations during a transition must include a measure that ensures that the government will address and implement a truth commission's recommendations. In South Africa, the government was not challenged to address and implement the TRC's recommendations. For example, it took many years to address the reparation issue; and there is a lack of bona fide acknowledgement of every victim of apartheid, not only those who testified but also those who suffered the daily system of oppression. This problem however is not restricted to Africa or South Africa. Finally, it was reiterated that there must be clarity about what a country wants at the time of transition or there will be confusion, as in South Africa today.

# SESSION 3

## THE ROLE OF DIFFERENT ACTORS

**MODERATOR/DISCUSSANT | Ibrahima Kane | Open Society Justice Institute**

*This session explored the role of different actors in influencing the political and justice outcomes of transitions, particularly the role and responsibility of various regional and subregional human rights mechanisms with regard to ensuring outcomes in political negotiations; the relationship between these bodies and international and domestic actors such as the International Criminal Court; the role of African civil society domestically; and the role that South African civil society does or should play in the transitions of other African countries.*

Mr Kane opened Session 3 by noting that local, international and continental actors can play a role in transitional justice in Africa, but that regional actors should be the most important. Article 3 of the Constitutive Act of the African Union (AU) concerns the role of the AU and its organs in ensuring peace, stability and democracy in Africa. Article 4 sets the principles to be followed by African states regarding respect for the sanctity of human life and rejection of impunity. The AU has even created a specific body to help civil society get more involved.

At the sub-regional level, the Southern African Development Community, the East African Community, the Economic Community of West African States and other bodies, play a role in trying to stabilize the region and make sure that the rule of law and human rights are respected. All have specific mechanisms through which they operate.

Also, African states have signed a number of agreements with the rest of the world, for instance, on human rights with the European Union. More than 30 African states are party to the Rome Statute. In providing a context for the session, Mr Kane asked: While all these actors are important, are they well equipped to deal with issues on the ground, and do they have the resources, both financial and intellectual, to do so?

### **SPEAKER 1 | Mumba Malila | African Commission for Human and Peoples' Rights**

**'The role and responsibility of African regional mechanisms and the international community in securing justice and peace during political transitions.'**

Mr Malila began by complimenting the outcomes of Session 2, and noted that the goal now must be to look at how transitional justice can fit with the African Commission on Human and Peoples' Rights (ACHPR) and how the ACHPR can further the goals of transitional justice.

He noted that some of the main issues in transitional justice are ensuring that perpetrators are held accountable for their violations, promoting the rule of law and combating impunity. To that extent, the AU clearly has a role to play; the issue then is to assess

which are the most appropriate regional players to take this forward. The three most relevant institutions in this regard are the ACHPR, the African Court on Human and Peoples' Rights and the Peace and Security Council (PSC) of the AU. Mr Malila observed, however, that transitional justice scarcely figures in the vocabulary of these institutions.

The AU Charter defines the mandate of the ACHPR in Article 30. The broader mandate is that of promotion of human rights on the continent. The Commission visits all 53 states that have subscribed to the Charter and



advocates for better respect of human rights. He went on to describe the ACHPR's protective mandate, which is similar to the promotional one, and which allows the ACHPR to hear individual complaints against states. Parties are heard and an assessment is made based on evidence. However, Mr Malila said it is imperative not to equate the Commission with a criminal tribunal, but with a softer role that is more similar to that of a civil court.

The ACHPR can only recommend actions which need to be taken, including reparations and prosecutions. There is also provision allowing the ACHPR, wherever

which was established to complement the work of the ACHPR. The protocol establishing the African Court allows it to make binding decisions. In this regard, the Court would be in a better position to further the goals of reconciliation and transitional justice generally.

The third key regional mechanism for pursuing transitional justice objectives is the PSC. The protocol establishing the PSC notes that it is 'the decision-making organ of AU responsible for the prevention, management and resolution of conflicts.' Its role is to prevent security problems and to make sure that conflict does not occur. If conflict does occur, the PSC

## **‘There is still space to engage the various AU institutions on transitional justice.’**

there is evidence of massive human rights violations, to bring this to the attention to the heads of state and to make recommendations on how those violations should be addressed.

Mr Malila suggested that these two mandates – the promotion and protection of human rights – give the ACHPR leverage to engage in transitional justice in a meaningful way. He also noted that Article 19 of the Protocol establishing the PSC includes a provision that the ACHPR must bring any information relevant to the PSC's mandate to its attention. This also gives the ACHPR additional leverage in the transitional justice arena. Mr Malila asserted that even if the AU Charter does not provide for transitional justice per se, the body clearly does have a role to play in recommending transitional justice measures. The second institution of relevance to transitional justice is the African Court,

is obliged to take steps that promote peacebuilding and post-conflict reconstruction. It is legally empowered to intervene in any African Union (AU) member country in order to prevent, manage or resolve conflict. Mr Malila argued therefore that it is within the PSC that transitional justice is best placed.

Mr Malila concluded, however, that even if the PSC is the body specifically mandated to deal with post-conflict reconstruction, other AU organs, such as the Court and the ACHPR, must work to ensure transitional justice is done especially in terms of holding perpetrators accountable. He noted that within the ACHPR transitional justice has not been looked at in a comprehensive manner, and that there was still space to engage the various AU institutions on transitional justice.





### **‘The role of civil society in shaping developments in transitional justice in Africa over the past two decades’**

Mr Simpson began by indicating that most transitional justice initiatives are driven from below. He noted that one thing that has evolved in the last 20 years, related to the way the field itself has evolved, is the creation of a potentially damaging divide between international organizations and international civil society on the one hand and local actors on the other. Organizations like CSVR have worked to create space for dialogue in order to bridge this divide and build national and international engagement on transitional justice.

Mr Simpson said that the focus of transitional justice is not only retrospective but also about the future. Noting that Archbishop Desmond Tutu described the TRC as ‘a way of putting the past behind us’, Mr Simpson asked whether it isn’t actually about putting it in front of us.

in place. Constitution-making, for example, is often excluded as a mechanism of transitional justice. In a way, it is believed that this is the terrain of politics and policy.

In relation to transition processes, Mr Simpson posited that it is important to consider who is in and who is out. During the South African negotiations, 23 political parties were at the table; there is never talk of who was not present. If civil society is not proactively organized to shape what is happening at the negotiating table, it will not be heard. He also noted the importance of being mindful of the fragility of a state in formation, which does not necessarily have the capacity to implement recommendations which flow from transitional justice processes. The same things cannot be expected

### **‘If civil society is not proactively organized to shape what is happening at the negotiating table, it will not be heard.’**

He observed that many challenges face civil society operating in the area of transitional justice on the continent today. The South African case is now treated as an iconic case globally. This model has played a central role in the evolution of the transitional justice industry. Truth commissions are gaining popularity, despite the contrary tendency of postmodernists to question the very value of ‘truth.’

Mr Simpson noted a need to reflect critically on the South African truth process, which he intended to do through several lenses, including the hidden liabilities of political negotiations, the challenges and dilemmas that negotiated transitions present for civil society organizations (CSOs) and the implications for who owns the transitional justice mechanisms that are put

in fragile states as in established states. Transitional justice started in specific post-totalitarian contexts, not post-conflict ones. In the latter, for instance, states are much more fragile than they were in Latin America and Eastern Europe.

Mr Simpson noted the necessity of deciphering what is possible and what is not possible in the peacebuilding process. Transitional justice is not only about political negotiations and constitution making, but also about how to redefine the social fabric and rebuild relationships, both between citizens and between citizens and their state. Therefore, the exclusion of CSOs and specifically victims’ groups from negotiations is problematic. Civil society acts as an intermediary between vulnerable groups and the government; thus, it

must not forget this role and become purely focused on lobbying and advocacy. The big challenge for CSOs and nongovernmental organizations (NGOs) is preventing detachment from the social groups and movements on behalf of whom they speak.

Mr Simpson also pointed out the risks of the globally expansionist approach and of opportunism, which can turn organizations into marketing tools. This is problematic for the building of an open and reciprocal process with locally based organizations.

He suggested that when thinking about civil society, we inherently assume a progressive and reformist agenda. He warned that not all civil society is progressive, and some can become party to the sanitizing of the past and entrenching a single view.

Over the last 20 years, dramatic changes have occurred in the global and legal environment. Transitional justice has become an embedded framework, both in law and in human rights. Mr Simpson observed that a gap still exists between this normative legal framework and the

implementation and practice of local actors confronting the messiness of very fragile peace processes on the ground. Too many CSOs are focused on naming and shaming at the expense of grappling with the dilemmas of such messy contexts. This is also linked to the sometimes tense relationships between international and local organizations.

The challenge for civil society organizations today is in identifying the taxonomy of crimes and assigning priorities. The ICC talks of crimes against humanity, war crimes and genocide only, not about economic crimes or environmental injustices.

Mr Simpson argued that the transitional justice agenda should engage with the fault lines of conflict and its root causes, and concluded that we need to be asking how a truth commission can be better equipped to deal with historical and structural injustices, as well as what traditions in the global human rights discourse can shape transitional justice tools in the task of expanding jurisdictional boundaries.

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## DISCUSSION

Thanking the speakers, Mr Kane reiterated that Africa has the institutional framework to promote transitional justice, and that CSOs must engage more deeply with transitional justice issues as well as the continent's existing structures. He noted that it is important to look at some of the conceptual questions that were raised, but also at practical ones, asking about the costs of peace and justice, what the end goals of transitional justice are and what success might look like.

The discussion began in relation to a question regarding sovereignty and transitional justice tools and human rights in general. It was noted that many mechanisms are available for integrating international agreements into national law and that sovereignty is not a problem if national actors act within the framework of the UN Charter. It was noted that the AU Charter is also aligned with the UN Charter. The sovereignty issue was described as a political one. It was

also argued that transitional justice as a field must begin articulating a progressive agenda in order to prevent the taint of colonialism on work by international actors. One option suggested was the building of civil society partnerships and the creation of platforms to initiate interaction between multilateral institutions and local actors. It was agreed that civil society is essential in building such alliances. The African Transitional Justice Research Network and the *International Journal of Transitional Justice* were offered as good examples of opportunities and spaces created to ensure practitioners and academics engage each other.

The danger of reinforcing rather than challenging the very conservative peace versus justice debate was noted. This dichotomy only exists if we think of peace as only ending hostilities and obtaining mediated settlements, and of justice as pertaining only to prosecutions. If peace is thought of as peacebuilding, as a continuous process, rather than as peacemaking, and if justice is thought of as more than prosecutions, then there is opportunity for sequencing and complementarities, for thinking of the collaboration between peace and justice, both as practitioners and as social strategists.

It was argued that when it comes to the issue of accountability in Africa, the ICC's indictment of Sudan's President Omar al-Bashir is instructive, as almost all international organizations agreed that he should be tried. However, if Mr Bashir is indicted and arrested, the whole region around Sudan and East Africa may go to war. When the AU made a request that the United Nations deal with the situation, all that international organizations considered was the impossibility that Mr Bashir should be allowed to go free. The panellists suggested that human rights fundamentalism is a problem for international organizations in general.

## **‘Human rights fundamentalism is a problem for international organizations in general.’**

A comment was made that the principle of complementarity entails thinking about accountability, local ownership and innovation. This thinking must also be premised on the functionality of a peace process itself, which is not the case for Sudan at the moment. A clear engagement for peace must be had before local innovations are considered.

Many argue that, since 9/11, the human rights architecture has been eroded by the way in which torture is perpetrated. This is a regression from everything activists have built up since the Geneva Conventions. African leaders use this context as an excuse to oppose accountability. At the same time, accusations of double standards must be addressed.

A participant observed that in the next few years, many African countries will be undergoing elections that may offer the mirage of power transfer, including Burundi, Ethiopia, Rwanda, Zambia, the Democratic Republic of the Congo, Uganda and Kenya. South Sudan will hold a referendum. Given increasing violence in each electoral context, and given that politicians and business people have significant interests in the outcomes of elections in neighbouring countries, the participant asked what the role of regional civil society may be. It was noted that the PSC, based on its

mandate, should deal with such issues and CSOs were encouraged to forward information about potential violence to the PSC.

In response to a question regarding the role of civil society and other non-state actors in transitional justice, particularly in advocating for international criminal justice, the view was presented that the African Court has a very limited mandate and that although a portion of the Court could be arranged to deal with international criminal justice, this essentially would mean expanding its jurisdiction. It was noted that the AU works closely with civil society organizations and benefits from research done by those institutions and universities. The key role of civil society is to continue to carry the torch of accountability, seeking the transformation of affected societies in general.

Referring to the example of northern Uganda, a participant spoke about victims advocating for amnesty and forgiveness for Joseph Kony and the Lord's Resistance Army in groups (articulating it in terms of local culture or Christian faith), but in private they argue for Kony going to the ICC. This raises questions about collectivities and the social role of fear. People appeared to be talking not about culture or faith, but about the only way in which the war in the area could stop. The Ugandan constitution says that there will be amnesty, or war will continue and lives will be lost – future generations may judge us harshly on that. Ugandans might have to rewrite history and later get the kind of acknowledgment they need for the violations. The participant asked whether Uganda was an example of African exceptionalism, or whether the crimes of western leaders, such as George W. Bush, will ever be acknowledged.

The speakers acknowledged the problem of double standards and the resulting threat to global human rights achievements, adding that these developments are all the more reason for global South-based CSOs to push for justice and accountability. The quest for justice that is most accessible and relevant to people in post-conflict or transitioning countries, is not the same as cultural relativism. The risks of romanticizing local systems of justice, as well as of demonizing them, were noted; and the need to build sustainable relations between the local and the global emphasized.

Returning to the South African experience, the discussion touched on the idea that the TRC's failings relate to the way in which civil society was caught up in a state-centred discourse and the TRC was perceived as an extension of the state. The challenge may not be about expanding the mandate, which will still limit the nature of the conversations; it is more about extending the space for discussion that builds a sense of citizenship. The objective for civil society should be about moving away from a state-centred institution and its challenges.

Another participant noted that Kofi Annan made it clear that issues of impunity were being considered in the negotiation in Kenya. The problem in that country therefore is not that civil society did not engage enough but that political actors did not want to listen when framing the process. The AU could seize the initiative and monitor the Kenyan TJRC. It was also mentioned that a challenge is that there is no money for the ACHPR to undertake a promotional mission Kenya.

The session wrapped up with the observation that the AU is keenly interested in the Kenyan transitional process and monitors developments. This indicates that it may play a more active role in transitional justice in the future.

# OPEN DISCUSSION

MODERATORS/DISCUSSANTS | Nahla Valji and Carnita Ernest | CSVR Project Managers

The open discussion focussed particularly on the role of civil society in transitions, with participants reflecting on a range of issues to ensure that civil society was more effective in its engagement. It was noted that there is a need for civil society to invest time in appreciating and understanding the realities on the ground, as well as to undertake research to understand the environments in which it works. Avenues for continuing dialogue are also necessary in order to share lessons and experiences.

The divorce between the messy context on the ground and the principles of transitional justice, as seen with the issue of internally displaced persons in Burundi, necessitates that civil society balance the two. The reality should be recognized in its entirety. The divorce is less one between civil society and political actors than one between those who are inside a context and those who are not.

While the African Union (AU) has tried to open space for civil society to engage with the body and some baby steps have been taken to realize this engagement, this can be built upon. It was agreed that civil society dialogue on the direction of the AU needs to be expanded, so that negotiations do not only become about political elites, as was the case in Zimbabwe and Kenya. There is also a need to work more with the Pan-African Parliament.

It is also necessary to increase communication and activities between the many African civil society

coalitions that operate at a regional level. Collaboration between organizations is crucial, which makes determining how to improve relations among all parties – not ignoring the views of local nongovernmental organizations – important.

The discussion then focused on the responsibility and capacity of regional bodies to engage with transitional justice. It was suggested that not enough emphasis has been given on putting in place an international criminal court in Africa. The African Court on Human and Peoples' Rights was initially created as a court of human rights, but it may become more of a court of justice and international criminal law, which could pose some potential problems. Seminar participants noted the value of discerning and creating complementarity between the Court and the ICC.

Returning to the South African Truth and Reconciliation Commission (TRC), the discussion dwelled on the importance of the coalition of CSO's formed in the early stages of the design of the TRC. It was noted, however, that once the TRC was created, the human rights constituency did not really exist anymore to deal with the results. The victims' organization, Khulumani Support Group, and a sprinkling of other organizations struggled for many years to follow up on the TRC and resolve remaining issues in court. Most human rights and church organisations, were caught up in internal issues instead of addressing those of the TRC.

**‘Civil society must see the continuum between peacebuilding, the rule of law and democracy.’**



It was agreed that civil society must see the continuum between peacebuilding, the rule of law and democracy. It is not surprising that the South African model has been exported, given the important role that South Africa plays in Africa and within the Southern African Development Community.

The discussion then turned to the problem of language and the limitations this poses to collaboration between civil society organizations from Anglophone, Lusophone and Francophone countries. More generally, it was suggested that the language used in peace accords and political agreements is important. For example, the manner in which the Zimbabwe peace agreement was written clearly legitimizes President Robert Mugabe's leadership.

It was noted that many local organizations and networks on the ground do fantastic transitional justice work without calling it 'transitional justice' specifically. The organizations and networks that do this type of work can provide essential knowledge and information, although language would pose a problem in this context as well. Similarly there are networks not specific to transitional justice that may be useful to engage with, especially given the multi-disciplinary nature of the field. An example was given of the African Security Sector Network.

In relation to Kenya, it was argued that the government should fund the Truth, Justice and Reconciliation

Commission, rather than having support come from NGOs, themselves funded by foreign aid. It was argued that there is a need for better cooperation between the TJRC and civil society, but that these should not be forced by donor governments.

Although civil society's engagement with transitional justice should be promoted, seminar participants noted that it is important to know who defines the terrain, how to design the debate on transitional justice in a local context and how to enforce the agenda of social justice and transition.

The discussion ended on the important issue of documentation and information sharing within and among civil society organizations and other actors. It was noted that this problem increases the time organizations take to engage with each other on issues and affects processes on the ground, undermining the work of civil society and the potential benefits of a more comprehensive approach to transitions. A call was also made for activists to nurture the culture of writing and reflection so that there is continuous learning in the field.

Hugo van der Merwe, CSV's Transitional Justice Programme manager, concluded the seminar by extending thanks to all who attended, and especially to those who organized the seminar. He also thanked the seminar's funders, in particular, for enabling CSV's civil society partners from other countries to attend.





# PANELLIST BIOGRAPHIES

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## Adèle Kirsten

Adèle Kirsten has been a non-violent, social justice activist for more than 25 years in South Africa. She assisted in establishing, through the National Peace Accord structures, a rapid response network of unarmed young people who were trained in conflict resolution and emergency services to operate in areas particularly affected by high levels of violence in the period leading up to the first general election of 1994.

In late 1994 she was one of the founding members of the organization, Gun Free South Africa (GFSA), and became its director in March 1995. She was responsible for helping build this organization into a national nongovernmental organization (NGO), with branches across the country in both rural and urban areas.

Ms Kirsten left GFSA in June 2002 for a sabbatical period to reflect on and record the experiences of GFSA and its role in social mobilization, public policy change and media advocacy during South Africa's political transition. She has published her book, *A Nation Without Guns? The Story of Gun Free South Africa*. During this period she was also a research associate at the Institute for Security Studies. She is well regarded in the small arms control community as a researcher and analyst and has been involved in a number of global initiatives, including the World Health Organization's Report on Violence in Africa. In addition she is an advisory board member for the United Kingdom Department for International Development's Armed Violence and Poverty Initiative, as well as a member of the critical review panel for the Organisation for Economic Co-operation and Development's Development Co-operation Directorate on developing guidelines for Armed Violence Reduction Programming.

Ms Kirsten was named the South African Woman of the Year in 2000 under the media and communications category as a result of the public awareness work done by her organization, Gun Free South Africa. Ms Kirsten was appointed CSV's Executive Director from January 2008.

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## Betty Murungi

Betty Kaari Murungi is currently Vice Chairperson of the Kenyan Truth, Justice and Reconciliation Commission. She is the founder and former director of Urgent Action Fund-Africa – Nairobi, an organization that aims to advance the human rights of women and girls in areas of armed conflict or escalating violence. Ms Murungi has over 23 years' experience in the practice of law at the national, regional and international levels, and an extensive background in international human rights in the context of violent conflict and experience in international criminal justice and accountability mechanisms.

Since 2002, Ms Murungi has served as an expert consultant on matters of transitional justice and human rights for national, regional and international governmental and nongovernmental organizations as well as multilateral bodies. From 1998 to 2009, she monitored the trials at the International Criminal Tribunal for Rwanda in relation to the investigation and prosecution of gender crimes. In 2004, she provided training and other technical support to commissioners and staff of the Sierra Leone Truth and Reconciliation Commission on international gender crimes and mechanisms for victim and witness support and protection ahead of the Commission's hearings. She also worked

with the Sierra Leone Commission as a United Nations consultant to develop the conclusions and recommendations drawn from the testimonies and submissions. She has served as Legal Advisor to the Coalition on Women's Rights in Conflict Situations – Women's Rights Program, Rights and Democracy, Montreal, Canada.

Ms Murungi has authored several book chapters and journal articles in the field of transitional justice, focusing on topics including truth commissions, women's participation in transitional justice processes, human rights organizations in Kenya and the role of the International Criminal Court in Africa. In December 2003, Ms Murungi was awarded the Moran of the Order of the Burning Spear, Kenya's national honour for distinguished service in the field of human rights.

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## **Brian Kagoro**

Brian Kagoro is a human rights activist and constitutional and international economic relations lawyer. He is a founding member of the National Constitutional Assembly (NCA) and Crisis in Zimbabwe Coalition, where he served as Spokesperson and National Coordinator, respectively. He is a board member for Amani Trust and is also legal advisor to the Zimbabwe Congress of Trade Unions. Mr Kagoro is a frequent writer on human rights, constitutional reform and political affairs. He holds a Masters degree in Law from Warwick University in the United Kingdom. He is currently working for Action Aid International, Africa Regional office, as the Pan African Policy Manager.

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## **Carnita Ernest**

Carnita Ernest is a Senior Project Manager in the Transitional Justice Programme at CSV. She joined CSV in 1999 and has managed a range of research and training projects, mostly focused on the issues of transitional justice and health and human rights. She was involved in research evaluating the South African TRC's 'Human Rights Violations' and 'Amnesty' public hearings. She managed a cross-country capacity-strengthening project from 2002 to 2007, enabling sharing of experiences of civil society engaging with transitional justice and reconciliation in Africa.

Other areas of focus have included projects on the impact of the TRC on the health sector and on a human rights approach to torture. Ms Ernest is currently the Manager of the 'Transitional Justice and Accountability in Africa' project, which aims to strengthen the capacity of African civil society organizations to engage more effectively with programmes and policy development on transitional justice at the local, national, continental and international levels. Ms Ernest holds a BA (Hons) from the University of Cape Town. Before joining CSV, she was a policy researcher and trainer at the National Progressive Primary Health Care Network.

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## **Gorden Moyo**

Gorden Moyo was appointed Minister of State in the Prime Minister's Office, in the Inclusive Government of Zimbabwe in February 2009. Minister Moyo holds a BA from the University of Zimbabwe (UZ); a Diploma in Education from Gweru Teachers College; an MA in Leadership Studies from the University of Exeter in the UK; an MA in Peace Studies from the University of Bradford in the UK; and an MBA from the University of Zimbabwe. He is currently reading for a PhD in Peace and Conflict Studies.

Min Moyo cut his political activism in the mid-1990s with the Imbovhane Yamahlabezulu, a Bulawayo-based pressure group which campaigned against the marginalization of the Matebeleland region by the government. He worked

as a British Council international facilitator for leadership. He resigned as director of the Bulawayo-based forum Bulawayo Agenda in order to take up political office.

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## Graeme Simpson

Graeme Simpson was a founder and, from 1995 to 2005, Executive Director of the Centre for the Study of Violence and Reconciliation in Johannesburg. He has worked extensively on issues related to reconciliation and transitional justice, including work with the South African Truth and Reconciliation Commission, and on the transformation of criminal justice institutions in South Africa. He was one of the drafters of the National Crime Prevention Strategy, adopted by the South African Cabinet in May 1996, as well as being a member of the drafting team for the South African White Paper on Safety and Security. He has worked as a consultant to both governmental and nongovernmental organizations in various countries and has published widely in books and journals on diverse issues ranging from youth violence in South Africa to the interplay between peace and justice in conflict states. Mr Simpson is also co-editor of the book, *Commissioning the Past*, which provides a critical analysis of the South African Truth and Reconciliation Commission.

In 2005, Mr Simpson was appointed as the Director of Country Programs at the International Center for Transitional Justice (ICTJ), headquartered in New York City. In that capacity he oversaw the organization's work in more than 30 countries around the globe. Currently, he is the Director of Thematic Programs at the ICTJ and oversees work on prosecutions, reparations, truth-seeking, security system reform, memorials, gender and a newly established program on peace and justice. He serves on the editorial board of the *International Journal of Transitional Justice* and is a member of the International Advisory Board of INCORE (International Conflict research) in Northern Ireland. He is also a lecturer at Columbia University Law School, where he teaches a seminar on transitional justice.

Mr Simpson has an LLB and a history Master's degree from the University of the Witwatersrand, South Africa.

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## Hugo van der Merwe

Hugo van der Merwe is the Transitional Justice Programme Manager at CSV. Since joining CSV in 1997, he has developed and managed numerous research projects evaluating the work and impact of the Truth and Reconciliation Commission (TRC) and managed various research, advocacy and intervention projects relating to transitional justice in South Africa and the African continent. Mr van der Merwe is the Co-Editor-in-Chief of the *International Journal of Transitional Justice*. He is the co-editor of *Assessing the Impact of Transitional Justice* (USIP Press, 2009), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008) and *Conflict Resolution Theory and Practice* (Manchester University Press, 1993).

Mr van der Merwe received his doctorate in Conflict Analysis and Resolution from George Mason University (1999) and a BSc from the University of Cape Town (majoring in Statistics and Sociology). He was previously employed at the Centre for Applied Legal Studies (Johannesburg), the Centre for Conflict Resolution (Cape Town), the Institute for Conflict Analysis and Resolution (USA) and the National Institute for Dispute Resolution (USA). He specializes in research design and management, and his content expertise extends to transitional justice, conflict resolution, disarmament, demobilization and reintegration, restorative justice, rule of law and reconciliation. He also teaches transitional justice courses at the University of Stellenbosch.

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## Kader Asmal

Prof Kader Asmal is Professor Extraordinaire in the Faculty of Law of the University of the Western Cape, Cape Town, and Honorary Professor in the Faculty of Law at the University of Cape Town and Chairperson of the Nelson Mandela Museum Council. He is a former Minister of Education (1999–2004) and Minister of Water Affairs in the Mandela Government (1994–1999). He was a Member of Parliament from 1994 to 2007. Prof Asmal was a founding member of the British Anti-Apartheid Movement in 1960; founder and chairperson of the Irish Anti-Apartheid Movement, 1964 to 1990; and rapporteur of United Nations international conferences on apartheid in Havana, 1976, Lagos, 1977, and Paris, 1986. He was a founder and chairperson of the Irish Council for Civil Liberties from 1976 to 1991 and legal advisor to the South African Non-Racial Olympic Committee.

Prof Asmal was an African National Congress (ANC) delegate to the Convention for a Democratic South Africa (Codesa) in 1992, a member of the ANC's negotiating team at the Multi-Party Negotiating Forum in 1993 and a founding member of the ANC's Constitutional Committee in 1986. He was a member of the National Executive Committee of the ANC from 1991 to 2007. He has been awarded seven honorary degrees by universities in Ireland and South Africa and is an Honorary Fellow of the London School of Economics, the Colleges of Medicine of South Africa and the Royal College of Surgeons in Ireland. Prof Asmal has written or co-edited eight books, written over 40 chapters in books, and 60 articles on apartheid, decolonization, Ireland, labour law and the environment. Over 30 of his lectures have been published.

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## Ibrahima Kane

Ibrahima Kane is the African Union Advocacy Director at the Open Society Initiative for East Africa (OSEIA). He qualified as a lawyer in Senegal and France and ran a human rights programme focused on public education and women's human rights in five West African countries (Cap Verde, Republic of Guinea, Republic of Guinea-Bissau, Mauritania and Senegal) for six years. He is a founding member of Rencontre Africaine pour la Défense des Droits de l'Homme, a Senegalese human rights organization, and was the senior lawyer in charge of the Africa programme at the International Centre for the Legal Protection of Human Rights from 1997 to 2007. Mr Kane joined OSIEA at the end of 2007. His particular interest areas are economic, social and cultural rights, fair trial issues, women's rights, group rights in Africa and African regional human rights bodies and institutions. He is an associate lecturer since 2005 at the Law Faculty of the University of Essex and author of various articles on the African Union, the African Commission on Human and Peoples' Rights and the protection of human rights by regional economic community bodies. He has collaborated very closely with the African Commission on Human and Peoples' Rights and the African Union Commission for the last eight years.

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## Jacklyn Cock

Jackie Cock is professor of Sociology at the University of the Witwatersrand, Johannesburg. She has written extensively on gender, militarization and environmental issues. Her latest books are *Melting Pots and Rainbow Nations: Conversations on Difference and Disadvantage* (with Alison Bernstein) (University of Illinois Press, 2002) and *The War Against Ourselves: Nature, Power and Difference* (Wits University Press, 2007).

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## Mac Maharaj

Mac Maharaj became active in the South African freedom struggle in 1953. He has been an activist, a political prisoner and exile, an underground commander, a negotiator in the multi-party talks that resulted in South Africa's transition to democracy and a Cabinet minister during South Africa's first democratic government, led by President Nelson Mandela.

Mr Maharaj edited *Reflections in Prison* (Zebra Press, 2001), which contains essays written clandestinely in Robben Island Prison in 1976 by Nelson Mandela, Walter Sisulu and several other fellow prisoners. His biography, written by Padraig O'Malley and entitled *Shades of Difference: Mac Maharaj and the Struggle for South Africa*, was published by Viking in 2007. Mr Maharaj writes a weekly column entitled 'In Confidence' in the Sunday Times of South Africa. His wife, Zarina Maharaj, published her memoirs, *Dancing to a Different Rhythm*, in 2006 (Zebra Press).

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## Mumba Malila

Mumba Malila is a member of the African Commission on Human and Peoples' Rights and serves as Special Rapporteur on Prisons and Conditions of Detention in Africa. He is also the Attorney General of the Republic of Zambia.

Mr Malila holds a Bachelor of Laws degree from the University of Zambia, a Master of Laws degree from Cambridge University and a Certificate in Human Rights from the International Institute of Human Rights in France. He is admitted to practice as an Advocate of the High Court and Supreme Court for Zambia and is also a Member of the Chartered Institute of Arbitrators. He taught law at the University of Zambia, practiced law as a private practitioner and served as Legal Counsel for the Meridian Group of Companies. He was also the Company Secretary for the Emerging Market Group of Companies.

Mr Malila has served on many commissions and boards, including the Judicial Service Commission in Zambia, as Vice President of the Human Rights Association of Zambia, as a Member of the Zambia Law Development Commission, as Chairman of the Human Rights Commission of Zambia and as Honorable Secretary of the Law Association of Zambia. He is married and has three children.

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## Nahla Valji

Nahla Valji is a Senior Project Manager in the Transitional Justice Programme, CSVr. She manages the African Transitional Justice Research Network, a network that focuses on building capacity amongst researchers and transitional justice activists on the African continent to inform, monitor and conduct advocacy concerning transitional justice policies in their countries. She is also the Managing Editor of the *International Journal of Transitional Justice*, published by Oxford University Press.

Recent publications include a book chapter on 'Gender Justice and Reconciliation'; a chapter on truth commissions and trials for a handbook on human rights; and an evaluation for United Nations Development Fund for Women (UNIFEM) of its gender and transitional justice programming in Rwanda since the genocide. She has also published widely on gender and asylum processes, including co-authoring the 'Gender Persecution Guidelines' for asylum determination officers of the Department of Home Affairs of South Africa.

Ms Valji was previously Gender Project Officer and Researcher at the Centre for Human Rights, University of Pretoria, and prior to that was employed as a Researcher at the Community Agency for Social Enquiry in Johannesburg. She holds a BA from the University of British Columbia and an MA in International Relations and Joint Diploma in Forced Migration Studies from York University, Toronto.

## Yasmin Sooka

Yasmin Louise Sooka is the Executive Director of the Foundation for Human Rights, one of South Africa’s premier indigenous grantmakers to the human rights sector. Prior to joining the Foundation, Ms Sooka served as commissioner on the South African Truth and Reconciliation Commission, as the Deputy Chairperson to the Human Rights Violations Committee. In 2002 she was appointed by the United Nations High Commissioner for Human Rights to serve as international commissioner on the Sierra Leone Truth and Reconciliation Commission.

Ms Sooka is widely regarded as an expert on both transitional justice and gender. She regularly consults internationally to governments, commissions, civil society and multilateral organizations. Ms Sooka also serves as an executive member to the Niwano Peace Foundation and is a trustee member of the Centre for Conflict Resolution and the Black Sash Trust.

# LIST OF PARTICIPANTS

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| Adèle Kirsten  | Centre for the Study of Violence and Reconciliation         |
| Andre du Toit  | University of Cape Town                                     |
| Betty Murungi  | Kenya Truth, Justice and Reconciliation Commission          |
| Bheki Moyo     | TrustAfrica                                                 |
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| George Mukundi | Centre for the Study of Violence and Reconciliation         |
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| Gordon Moyo    | Honorable Minister in the Prime Minister’s Office, Zimbabwe |
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|                        |                                                                                         |
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| Mac Maharaj            | Independent analyst                                                                     |
| May-Elin Steiner       | Norwegian Embassy                                                                       |
| Marc Labrom            | Canadian High Commission                                                                |
| Father Michael Lapsley | Institute for the Healing of Memories                                                   |
| Moses Okello           | Refugee Law Project, Makerere University                                                |
| Mumba Malila           | African Commission for Human and Peoples' Rights                                        |
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| Nokukhanya Mncwabe     | Centre for the Study of Violence and Reconciliation                                     |
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| Prisca Kamungi         | Nairobi Peace Initiative                                                                |
| Ruth Dix               | British Consulate                                                                       |
| Sekai Holland          | Honorable Minister of National Healing, Reconciliation, Unity and Integration, Zimbabwe |
| Shirley Gunn           | Human Rights Media Centre                                                               |
| Shuvai Nyoni           | Institute for Justice and Reconciliation                                                |
| Tafura Chisina         | Aide to Honorable Minister Moyo                                                         |
| Tim Murithi            | Institute for Security Studies                                                          |
| Vuyiswa Sidzumo        | Charles Stuart Mott Foundation                                                          |
| Yasmin Sooka           | Foundation for Human Rights                                                             |
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The Centre for the Study of  
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20th Anniversary 1989 - 2009

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