

PRACTICE NOTE

"We Have No Influence": International Discourse and the Instrumentalisation of Transitional Justice in Burundi

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Burundi may soon reach yet another crossroads in its tumultuous history and on its path towards transitional justice. A contentious draft law for a Truth and Reconciliation Commission awaits approval by the country's National Assembly, which has raised a number of concerns about the independence of the eventual commission, the likelihood of popular participation in the process and the prospects for criminal justice. But as this practice note seeks to demonstrate, the international community in Burundi may in fact be contributing to the instrumentalisation of the process. The note highlights how the discourse of the international community may partially facilitate a certain duplicity among influential figures within the current government, particularly with respect to compliance with stipulations under the 2000 Arusha Peace Agreement. Two common rationalisations in particular are explained that have seemingly emerged among the international community with respect to transitional justice and that are at the heart of this instrumentalisation: outside imposition and a lack of influence. The note argues that since transitional justice can no longer be regarded as an apolitical process, international actors must be more cognisant of their actions and discourse with a view to ensuring credible transitional justice processes in contexts like Burundi.

Introduction

At the time of writing, a draft law for the establishment of a Truth and Reconciliation Commission (TRC) is before the National Assembly of Burundi's Parliament awaiting approval. The thirteen years that have passed since a TRC was stipulated under the 2000 Arusha Peace and Reconciliation Agreement reflect the numerous obstacles impeding progress on transitional justice (hereafter, TJ) in Burundi.¹ The process of drafting the law has raised a number of concerns among

civil society organisations and international NGOs, as have provisions in the draft that look likely, if unchanged, to affect the commission's independence and impartiality, the likelihood of popular participation and the prospects for criminal justice. According to accepted international standards, these elements are basic prerequisites for a credible TJ process.²

Among the principle obstacles that have impeded TJ since Arusha is the calculated procrastination of successive Burundian governments. In the period following the first post-conflict elections that brought President Pierre Nkurunziza to power in 2005, this procrastination only increased, with the tacit approval of the international com-

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munity. Referring to the proposed TJ mechanisms in Burundi, Vandeginste (2012: 361) notes that the international community in fact 'deliberately delayed their establishment until they deemed conditions more conducive'. For a number of reasons the time has recently been judged as increasingly ripe for TJ in the eyes of the political elite, a consideration somewhat shared by international actors (Vandeginste 2012). But this move has effectively strengthened the hand of the CNDD-FDD,³ which now controls Burundi's state institutions after its victory in elections in 2010 during which the majority of the opposition pulled out citing fraud and intimidation (HRW 2010). Indeed the CNDD-FDD now controls the National Assembly, which will decide upon the draft law for the TRC.

It is important to remember that the CNDD-FDD and its coalition partners include individuals implicated in human rights abuses. These individuals were offered incentives to 'lay down arms in return for senior political, military or economic positions' (Vandeginste 2012: 359). Self-interest is thus a compelling argument to explain an apparent lack of political will for TJ, though it may be short-sighted to think that it is the only explanation (Rubli 2013). As critical voices are increasingly acknowledging, TJ is laden with values, struggles for power and ideological debates (Rubli 2013; Bell 2009; Sriram 2009), meaning that any TJ process will necessarily be political. This is especially so in Burundi, where denial, impunity and mistrusts have festered in the absence of credible attempts to hold anyone accountable or seek the truth. Hence control of the political landscape may facilitate the construction of a particular kind of truth, with TJ the main 'instrument to (re) make the social world' (Rubli 2013: 19). Considering that Burundi's short history since independence includes claims to at least two episodes of genocide, various Tutsi and Hutu massacres, the assassination of the first democratically elected Hutu President, numerous coups d'état and a 15-year civil war, 'victory in the metaconflict – the conflict about what the conflict was about' is ultimately at stake

(Bell 2009: 25). The spoils of this victory include who gets to claim political legitimacy, and to whose detriment.

For the purpose of this practice note, instrumentalisation is understood as the domestic use of the international norms of transitional justice to serve political goals, rather than fully putting the substance of those norms into practice. Subotić (2009: 29) has identified that domestic political actors employ 'rhetorical tools of argumentation and persuasion [using] international norms to validate their preexisting self-interested claims and to frame their preferences and actions as consistent with the norm'. In this sense the practice involves the ostensible compliance with such norms whilst being driven by other incentives (Subotić 2009: 35).

Past research has offered explanations for the instrumentalisation and thus politicisation of TJ in Burundi by examining the likely standpoints on TJ of the main political parties (see, for instance, Rubli 2013; Vandeginste 2012). The aim of this analysis is to highlight the international community's contribution to this dynamic, particularly in the period since the re-election of Pierre Nkurunziza as President in 2010. Although blame can in no way be credibly laid at the door of the international community (e.g., the UN and bilateral diplomatic actors) for the impunity that has now permeated into the legal, institutional, political and societal landscape of the country, certain actions have provided opportunities for the CNDD-FDD-dominated government to exploit the search for truth and continue stonewalling the pursuit of justice.⁴ A developing discourse on TJ is a particular case in point. Based on meetings in 2012 and 2013, the analysis focuses on the effects of two commonly used international rationalisations: concern at outside imposition and claims of a lack of influence.

Whilst it may make for uncomfortable reading, a marked shift in discourse can seemingly be detected among international actors. This deserves attention as an important dynamic in Burundi's still nascent TJ process, especially as instrumentalisation

becomes ever likely at a time when the country is already preparing for elections in 2015. Before examining this discourse a distinct duplicitous tendency on the part of the government is identified that is facilitated by international (in)action and which equally affects TJ.

Keeping Up Appearances

Burundi is party to a number of human rights treaties that provide the basis for its international obligations and the rights of the population, including the duty to provide a remedy to victims of serious violations of human rights.⁵ In 2004, Burundi ratified the Rome Statute of the International Criminal Court (ICC) creating obligations to fight impunity, though the jurisdiction of the Court effectively extends only to crimes committed after December 2004. Since Arusha, numerous other international agreements have been entered into that contain further pledges to provide effective redress for past crimes and for ensuring that conditions are put in place to guarantee that they are not repeated (Vandeginste 2010).⁶

Although it initially rejected the Arusha Agreement and is thus not a signatory to the original document signed in 2000, the CNDD-FDD endorsed the provisions concerning TJ mechanisms as part of the 2003 Pretoria Protocol to the Ceasefire Agreement that it signed with the then transitional government.⁷ As part of the same Agreement, the CNDD-FDD was later transformed from a rebel movement into a fully-fledged political party. After its 2005 election victory, the CNDD-FDD signed the Dar-es-Salaam Agreement with the last remaining rebel movement (the FNL⁸), again committing to 'put in place mechanisms to ensure that the mistakes of the past are never repeated.'⁹ Moreover, Organic Law No. 100/92 of 7 November 2005 implemented the Arusha Agreement within the national legal system, principally for the purpose of granting temporary immunities from prosecution during the transition. After protracted negotiations between the government and the UN on the

implementation of TJ measures, another agreement was signed in November 2007 to establish a tripartite steering committee composed of representatives of the government, UN and civil society to move the process of TJ forward. In spite of more ensuing delays, National Consultations on TJ were organised in 2009, and the report was finally published in December 2010. Thereafter, the government established a technical committee to advise it on the establishment of the TRC, which eventually led to the present situation whereby the controversial law for the TRC awaits Parliamentary approval.

Taken together, the various agreements demonstrate that the government is bound by clear international obligations and legal norms with respect to dealing with serious violations of international law and guaranteeing the rights of victims. Yet in practice the domestic political agendas of influential figures within the government appear to supersede these obligations, including those that the current government has bound itself to. Nevertheless the government has created the pretence of adherence to these obligations, skilfully managing to assert the rhetoric of the values they represent without genuinely committing to implementing them (Vandeginste 2011). In other words, the government is able to formally appear as if it is adhering to international obligations whilst disregarding the substance of those obligations. Practice to date thus indicates that other motives lie behind the government's international undertakings. These include the (successful) procurement of international legitimacy and financial aid, as well as domestic political considerations. The situation concerning TJ is just one example of these apparent double-standards, which have often resulted in the mere appearance of progress rather than genuine resolve.

Unfortunately much of the international community's engagements in Burundi has seemingly aided, rather than prevented, this state of affairs. Whilst international actors have played an important role in the country, the lack of a coherent approach to

dealing with the past linked to post-conflict reconstruction, has been exploited by the government for its own political benefit. The absence of coordinated and consistent efforts, combined with often short-term thinking, has meant that international efforts have frequently been fragmented, providing the government considerable room for manoeuvre. The lack of consensus among international actors regarding TJ, including the proposed TRC, also facilitates the government's political agenda. And so too does the failure to link policymaking in areas such as development and security to TJ as part of a more transformative justice approach. Attempting reform of state institutions, for example, without simultaneously addressing the abuses that contributed to the breakdown of those institutions will likely leave many unresolved problems (e.g., inadequate structural transformation and a lack of public trust in those institutions). The risk is that only one aspect of a multifaceted issue is dealt with.

Moreover, international engagements have often provided space for the government to ignore its own commitments due to weak insistence on those same commitments. This has often been combined with the propensity to too easily bestow praise on the government for minor concessions. The government has regularly attracted praise for its periodically-delivered commitments to TJ, whilst consistently failing to make good on these promises. The same is true with respect to the practice of announcing commissions of inquiry at times of increased international scrutiny that subsequently fail to produce any results once the level of scrutiny has waned.¹⁰ Likewise, recent praise for facilitating political dialogue with exiled politicians is problematic since at the same time freedom of the press was being curtailed by a repressive media law.¹¹

Essentially we find a situation whereby powerful elements within the government have been allowed to utilise the democratic space they have created for anti-democratic,

Machiavellian purposes, at least in part unwittingly aided by international actions.

The Myth of Outside Imposition

In spite of a lack of international consensus with respect to the nitty-gritty of how to deal with Burundi's transformation from violence, many within the international community have appeared united in the recent collective change of discourse on what should *not* be done in the country. This discourse now appears to reiterate that solutions must not be imposed upon Burundi.¹² Whereas national sovereignty to decide upon such fundamental matters as TJ is undoubtedly important, a number of reasons explain why its current invocation through this outside imposition discourse has little foundation.

For one – as already demonstrated – successive governments in Burundi have repeatedly committed to the need for TJ, including the current proposed mechanisms (a TRC and special tribunal). Recent commitments and pronouncements by the present government are no exception. The government is, furthermore, bound by conventional legal obligations and obligations resulting from other sources of international law, which ultimately create responsibilities with respect to truth, justice and reparations after violence (Vandeginste 2010). Though these responsibilities do not *per se* require that the government establish any particular mechanisms for fulfilling its obligations, the TRC and special tribunal have long been agreed upon as the viable choices. Indeed the emergence of these mechanisms originates from the negotiations that began under the guidance of former Tanzanian President Julius Nyerere in 1996 and that ultimately led to the Arusha Agreement under the leadership of Nelson Mandela. It is here that groundbreaking agreements on the issue of consociational power-sharing and ethnicity were reached (Lemarchand 2007) and that 'combating impunity during the transition' was envisioned through *inter alia* a TRC and an international judicial commission of inquiry

(the latter now replaced by the idea for a special tribunal). Once again, the government of incumbent President Nkurunziza has committed to this approach.

With respect to alleged outside imposition during the Arusha negotiations and in the course of subsequent peace negotiations, pressure and the threat of sanctions were certainly exerted on the various parties. Anecdotal accounts from Arusha even suggest that Mandela was often infuriated with what he considered to be the insipience and lack of urgency of various delegations, himself also accused of misreading the Burundian socio-political context in pushing for a South African-style TRC (Economist 2000). By all accounts the negotiations eventually descended into farce, with the various parties negotiating with the facilitator, rather than with each other (Wolpe 2011: 63). But such pressures are still not enough to provide evidence for the alleged international imposition of solutions on Burundi.

Moreover, whereas "international pressure" is often used synonymously with "western" governments, regional pressure has been just as determinative throughout Burundi's peace processes. Regional initiatives and sanctions after his bloodless coup in 1996 induced former President Buyoya to agree to the Arusha negotiations, in the face of dissatisfaction among many Tutsi hardliners (Cornwell and de Beer 1999). South Africa likewise assumed a prominent role in Burundi post-Arusha. This is not to claim that western, European governments and the UN have played no role, but the suggestion that outside imposition only through these actors provides reason for stepping back in the current context is disingenuous.

Similarly it is a misconception to claim that the notions and mechanisms of TJ being advocated in Burundi are merely the inventions of outside actors. This line of argument has been commonly cited with respect to the alleged incompatibility of international justice with African realities and has now found its way into international discourse

on Burundi. To cite just one authoritative opposing example, in a February 2013 report of the African Union Panel of the Wise, the authors begin by affirming that '[j]ustice and reconciliation are antidotes to impunity, the condition where powerful individuals and institutions act as they desire without fear of reprisals, reproach, retribution, or recrimination' (AU 2013: 1). Whilst accepting that there are 'legitimate concerns and reservations' in Africa about international justice in particular, the authors fundamentally uphold the 'core principles that undergird international law' and the basic values that animate calls for TJ in countries like Burundi (AU 2013: 3). Besides, the National Consultations on TJ in Burundi provide evidence of support among the population for the proposed mechanisms. Methodological flaws notwithstanding, the Consultations organised jointly by the government and UN demonstrate that the current options for TJ have sizeable local grounding. And though academic studies on the subject may suggest different levels of support (e.g. Samii 2013; Taylor 2013; Ingelaere 2009; Uvin 2009), recent research among the local population confirms that truth, justice and reparations are key concerns for many Burundians (Impunity Watch 2013a; THARS 2012).

"We Have No Influence"¹³

The second rationalisation that has gained traction among a number of actors within the international community is the assertion of a lack of influence. The implication is that the shape of the TJ process is a purely national concern. This is a convenient rationalisation, but one that holds little weight in practice.

As a number of recent engagements have demonstrated, the international community has considerable influence over the current government. On the very issue of the TRC, progress towards its establishment appeared to have stalled by 2011 until the abrupt announcement in May 2011 that a technical committee would begin preparations

for the commission. At least some measure of pressure from donor countries has been cited as having had a decisive impact on this announcement. Similarly the recent decision by the Dutch government to suspend its support for training of the Burundian security forces, prompted by alarm at extra-judicial killings in the country, forced the government into at least partially accounting for the killings and providing evidence of efforts to tackle them.¹⁴ Each case indicates that the international community indeed has influence over domestic political actors.

Burundi derives a considerable percentage of its national budget from foreign development aid. Thus in the words of one senior policymaker, 'donors have the leverage, especially those providing budget support'.¹⁵ Though not suggesting that these actors should hold the government to ransom over their TJ commitments, the discourse of zero influence is clearly misleading. But at the same time, the lack of coordination and unity on the question of dealing with the past in Burundi also plays a determining role for this discourse. To all intents and purposes it appears as if UN decision-makers are waiting for their diplomatic and donor counterparts to clarify their position, while the latter similarly await the UN's official stance. The game of chicken that this in effect yields creates the best possible outcome for many within the government: inaction and indecision by international actors.

Conclusion

In the absence of more concerted and sustained efforts on the part of international actors to insist that the government fulfils its own commitments, transformation from violence in a manner that serves the interests of Burundians rather than a powerful core among the ruling authorities will remain unlikely. Through their hitherto action and inaction, international actors create opportunity for those with powerful interests in the government to instrumentalise TJ and avoid any transformative processes within an ostensibly democratic space.

The short analysis has highlighted how the absence of insistence and follow-through in ensuring that the government fulfils its national and international commitments enables the authorities to give the formal appearance of adherence whilst neglecting the actual substance of its obligations. This is partly aided by the uncoordinated, fragmented approach to TJ among international actors.

Although Burundi has in recent years 'regained its sovereignty' including the 'renationalization of the TRC process' (Vandeginste 2012: 360–361) after being shepherded through a fragile peace process by the international community, none of this provides reason for the international community to disengage. In fact, having recourse to the myth of outside imposition and misguided claims of a lack of influence provides space for powerful actors among the CNDD-FDD-dominated government to instrumentalise the process to serve its self-interests and perhaps gain victory in Burundi's meta-conflicts (Bell, 2009).

To insist on a law for a truth-telling process that guarantees independence, impartiality, and popular participation is not to impose 'outside' standards, but rather to insist on respect for basic democratic principles and rights. These are indispensable standards that neither encroach on national sovereignty, nor represent outside interests. To quote the AU Panel of the Wise once more, 'African experiences of managing impunity via justice and reconciliation reveal the importance of institutional innovations that give prominence to *participation, impartiality, and the search for truth and healing*' (AU 2013: 62).¹⁶ On the related question of amnesty and the urge to at least not exclude the possibility of criminal prosecutions from the TRC law, the issue is of course more contentious. Again however we can point to the crystallisation of a universal norm that prohibits amnesty for the most serious crimes under international law, the views of many Burundians, as well as the clear need to break cycles of impunity in Burundi as

compelling arguments to contradict claims of outside imposition.

There is no doubt that any attempt to deal with decades of violence in Burundi is a daunting prospect, riddled with an often bewildering number of challenges. However the current rationalisations used by a number of actors in the international community not only fail to give due attention to the potential instrumentalisation of TJ by powerful members of the ruling authorities that can already be detected, but effectively make such instrumentalisation more probable. Such rationalisations call into question the standards of justice, human rights and democracy that international actors seek to uphold and that many Burundians have also put their faith in. By failing to recognise how TJ can be used for political gain the risk is increased that the root causes of violence in Burundi will remain unaddressed. Consequently, rather than building a stable rule of law and legitimate state institutions based on a clear demarcation from the past, the vested interests of a few powerful actors may become constitutive elements of Burundi's post-conflict reconstruction.

At a time when the elite are already positioning themselves for elections in 2015, forthright international engagement is vital. In the current political context international actors must continue to provide the checks and balances that Burundi lacks as a result of the disputed 2010 elections. At the very least there should be an insistence upon the basic conditions for an independent, impartial and participatory TRC process that does not exclude the possibility of criminal prosecutions at a later date. This engagement should be premised upon an awareness of the opportunity that TJ provides for political actors to construct a version of the past that is favourable to themselves, in turn legitimising political claims (Rubli 2013). Above all, the international community in Burundi should seek to support the interests of a population that has already waited decades for peace, stability, truth and justice after a long history of violence often characterised

by the instrumentalisation of the past for political gain.

Notes

¹ Article 18(2) of Protocol II, Chapter I of the Arusha Agreement states: 'In accordance with Protocol I to the Agreement, a National Truth and Reconciliation Commission shall be established to investigate human rights abuses, promote reconciliation and deal with claims arising out of past practices relating to the conflict in Burundi.'

² For a more detailed analysis of the draft law, see: Impunity Watch 2013b. Other concerns include the apparent intentions of the drafters to use the TRC process as a way to guarantee amnesty for serious crimes under international law, with the draft law providing for an imprecise process of 'pardons', avoiding any reference to criminal prosecutions, and excluding a provision to lift temporary immunities from prosecution that were only intended to secure a peaceful transition.

³ Conseil National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie (CNDD-FDD).

⁴ Burundian civil society may also be contributing to this process through certain actions and discourse. Space restrictions prevent further exploration of this issue.

⁵ This includes the 1948 Convention on the Prevention and Elimination of Genocide, the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR).

⁶ In addition to its obligations arising from international legal conventions, the government has customary obligations under international law and is subject to the standards established from soft law sources, including UN resolutions. The right to truth, for example, has emerged as a customary international legal norm supported by the UN Updated Set of Principles Against Impunity and numerous UN resolutions, including UN Security Coun-

cil Resolution 1606 (2005), in which the Security Council requested the Secretary-General to initiate negotiations on transitional justice mechanisms in Burundi.

⁷ The Protocol on Outstanding Issues of Political, Defence and Security Power Sharing in Burundi (Pretoria II Protocol) was signed as an addition to the 2002 Cease-fire Agreement between the Transitional Government of Burundi and the CNDD-FDD in 2003.

⁸ Forces Nationales de Libération (FNL).

⁹ Dar-es-Salaam Agreement on Principles Towards Lasting Peace, Security and Stability in Burundi, June 2006. It should be noted that the Agreement stated that the TRC should be renamed the 'Truth, Forgiveness and Reconciliation Commission' and specifically referred to truth-seeking with a view to 'forgiveness and reconciliation'.

¹⁰ A good example is a commission of inquiry set up to investigate the spike in extra-judicial killings widely acknowledged to have been perpetrated in the country in 2012. Though the commission – unlike many before it – made its findings known, the conclusion that no such killings had taken place attracted severe criticism (Radio Netherlands 2012).

¹¹ The new media law was signed into law by the President on 31 May 2013. The law seriously erodes press freedom through a number of restrictions on reporting and other undue requirements. Among the widely criticised provisions are those that, with the threat of heavy fines, require the disclosure of sources in certain circumstances and restrict the right to report on anything related to state and public security. International actors have openly criticised the law, but as yet with few consequences for the government.

¹² This stepping-back by international actors also partly reflects a particular fatigue with the process, revealing the gulf between transitional justice discourse and its practical implementation. This is-

sue will be discussed further elsewhere owing to space restrictions. My thanks to Selim Mawad for highlighting this issue.

¹³ Meeting with a senior policymaker, Bujumbura, April 2013.

¹⁴ This suspension was only temporary, however, with claims that the government did only the bare minimum to ensure the resumption of support.

¹⁵ Meeting with a senior policymaker, Bujumbura, April 2013.

¹⁶ Emphasis added.

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