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BUILDING (REGIONAL) BRIDGES FOR TRANSITIONAL JUSTICE

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This brief is a summary report of the expert roundtable on 'Exploring Opportunities for Enhanced EU-AU Cooperation in Promoting Transitional Justice' held in Brussels on 28 September 2016. This event was jointly organised by the Egmont – Royal Institute for International Relations, the Leuven Institute of Criminology (Catholic University of Leuven), and the Belgian Ministry of Foreign Affairs, with the support of the European Commission Directorate-General for International Cooperation and Development.

EXECUTIVE SUMMARY

Both the European Union and the African Union have expressed a strong commitment to the promotion of transitional justice. On 16 November 2015, the Council of the European Union adopted its Policy Framework on Support to Transitional Justice, which affirms the EU's intent to play an active and consistent role in its engagement with partner countries and international and regional organisations in support of transitional justice processes. The African Union, in turn, declared 2016 the Year of Human Rights and is in the process of finalizing the AU Policy Framework on Transitional Justice, which will consist of a set of guiding principles on how to ensure justice and accountability, reconciliation and healing, and institution-building in Africa. This juncture in history offers a prime opportunity for the EU and AU to build on their respective expertise and approaches to transitional justice and should encourage the adoption of flexible and context-sensitive policies on transitional justice.

The expert roundtable convened in Brussels in September 2016 brought together EU and AU officials, alongside leading experts and transitional justice practitioners, to discuss challenges and opportunities for the EU and AU to promote transitional justice. Its main aim was to explore some of the key lessons to be drawn from experiences so far in four priority areas of transitional justice intervention, as identified by both the AU and EU in their policies: balanced justice approaches, truth-telling, victim-centered reparations and guarantees of non-recurrence.

The rich presentations and discussions during the Brussels meeting led the organisers to identify the following conclusions and recommendations (listed in non-hierarchical order):

Regarding the role of the EU and AU in transitional justice

i) Cooperation between the EU and AU should not only focus on the sharing of technical expertise and exchange of lessons learned but also explore opportunities for the establishment of joint programmes on transitional justice.

ii) While regionally divergent views about how transitional justice should be pursued need to be respected (thereby eschewing normative positioning about which transitional justice approach is 'best'), donors should aim for policy coherence when intervening in a same country. Integrating regular communications and dialogues on transitional justice issues at the diplomatic and field-level could help support this.

iii) EU and AU policies should not be limited to supporting transitional justice mechanisms properly speaking, but also include support (a) for measures that can be implemented before the formal establishment of transitional justice measures, such as the collection of evidence on human rights violations by local organisations in contexts where it is too early to set up a transitional justice mechanism, and (b) for follow-up measures, such as structures to monitor the implementation of truth commission recommendations and educational and cultural projects building on transitional justice efforts.

iv) While international donors have an important role to play in supporting civil society activities and providing expertise during the design and implementation of transitional justice measures, care should be taken to minimise the negative impact that their involvement can have on local ownership.

Regarding transitional justice implementation

i) Transitional justice policies should eschew 'one-size fits all' approaches and even step back from 'best practices' mind sets. Instead, the design of transitional justice approaches should be done with sensitivity to contextual specificity and awareness that not all transitional justice approaches are always adequate across differing contexts. The focus should therefore be on developing 'best fit' transitional justice policies.

ii) Choices about which transitional justice approach to implement should be aligned with the goals identified and pursued. These goals may differ from country-to-country and due consideration should be given to possible complementarities and conflicts between different goals.

iii) At the earliest design stage, victims and the wider population should be consulted about what they need and expect from transitional justice and about which transitional justice approach they favour – particularly with regards to reparations.

iv) Careful consideration should be given to identifying the various forms of harm inflicted upon victims of serious human rights violations, and finding an adequate balance between individual and collective reparations. Particular attention should be paid to the issue of land both as a component of reparation policies and a source of old and new conflict.

v) While no single transitional justice approach is able to satisfy the full spectrum of justice needs, the adoption of a comprehensive transitional justice approach poses challenges of coordination, overlap and possible conflicts between different transitional justice mechanisms. Therefore, at the earliest design

stage, deliberate consideration should be given to the relationship between parallel transitional justice mechanisms in order to minimise conflict and to encourage communication between these mechanisms.

vi) Expectations about transitional justice's contribution to rule of law and institution-building should be scaled-down and better grounded in existing knowledge about institution-building and development. This is particularly true in post-conflict and fragile environments characterised by institutional weakness.

vii) Reforming institutions in post-authoritarian or post-war settings are highly complex endeavours that require institutions to be grounded within the larger and overarching rule of law framework. Particularly in the case of judicial reforms, the institutional frameworks of the justice system need to be coupled with an overall culture of justice and human rights.

INTRODUCTION

Practices of transitional justice – that is, a variety of judicial and non-judicial means through which societies deal with past mass violence and human rights violations – have significantly expanded over the past couple of decades. Both the European Union and the African Union have expressed a strong commitment to the promotion of transitional justice. On 16 November 2015, the Council of the European Union adopted its Policy Framework on Support to Transitional Justice, which affirms the EU's intent to play an active and consistent role in its engagement with partner countries and international and regional organisations in support of transitional justice processes. The African Union, in turn, declared 2016 the Year of Human Rights and is in the process of finalizing the AU Policy Framework on Transitional Justice, which will consist of a set of guiding principles on how to ensure justice and accountability, reconciliation and healing, and institution-building in Africa.

The adoption of these transitional justice policies offers the prospect not only of creating greater inducement for states to address violent legacies of the past but also of greater coherence in how both institutions support transitional justice. Although transitional justice is not a new field of operation for the EU or AU, such policies have in the past been implemented in a piecemeal fashion and been scattered across different institutional competences. Moreover, transitional justice has not always received sufficient attention in processes of peacebuilding, democracy promotion, and conflict mediation supported by either organisations, remaining instead on the fringe of policy-making.

As both regional organisations move ahead with the elaboration and implementation of their respective transitional justice policies, opportunities for cooperation to promote this shared agenda need to be explored. This may involve the sharing of technical expertise, the establishment of joint programmes on transitional justice, and exchanging lessons learned. It will, however, also require a frank discussion on possible regional divergences about how transitional justice is best pursued and what its main aims should be. Transitional justice, as both a concept and a practice, is not strictly delineated—it is therefore inevitable that divergences will emerge around its implementation. Rather than seeing this as an obstacle though, it may be seen as a prime opportunity for the EU and AU to build on their respective expertise and approaches to transitional justice and should encourage the adoption of flexible and context-sensitive policies on transitional justice.

In this context, the expert roundtable convened in Brussels on 28 September 2016 came at a very timely moment in history. It took place at the initiative and support of the Egmont-Royal Institute for International Relations and the Belgian Ministry of Foreign Affairs, in collaboration with the Leuven

Institute of Criminology (Catholic University of Leuven) and the European Commission Directorate-General for International Cooperation and Development. It brought together EU and AU officials, alongside leading experts and transitional justice practitioners, to discuss challenges and opportunities for the EU and AU to promote transitional justice.

The aim of the workshop was to explore some of the key lessons to be drawn from experiences so far in four priority areas of transitional justice intervention, as identified by both the AU and EU in their policies: balanced justice approaches, truth-telling, victim-centered reparations and guarantees of non-recurrence. Through this, the workshop hoped to identify areas in which AU and EU actions are most needed and most likely to make an effective contribution to transitional justice. This is however an ongoing reflection and follow-up events will look to continue discussions about how the EU and AU can strengthen their actions on transitional justice.

The following sections present a summary of the discussions that took place at the roundtable, and some of the main findings or controversies that emerged from the debates. As the meeting was held under Chatham House rules none of the speakers and participants are referenced by name. However, the authors of the present report gratefully acknowledge their invaluable contribution to the roundtable and attribute the insights reported below to them, at the same time taking responsibility for any mistake in the representation of the participants' thoughts.

PURSUING BALANCED JUSTICE APPROACHES

A central characteristic of transitional justice processes is that they encompass measures that can be implemented at the international, national and local level. A fundamental question therefore is if and how an appropriate balance can be found between these different levels of action. The Colombian case offers an example of how international level action (through the ICC) can - with time and diplomatic skill - help to reinforce national efforts at justice. The Colombian experience also highlights that another type of balance - that between peace and justice - can be achieved without it resulting in impunity when a flexible and context-sensitive, rather than a principled, approach to transitional justice is adopted. However, one should be careful not to generalise too much from the Colombian case as its experience would be difficult to replicate in other, very different contexts such as the Central African Republic, Yemen or South Sudan.

But while holistic or comprehensive approaches to transitional justice are currently widely advocated, we should not assume that compatibility always exists between different justice approaches. In Rwanda, for instance, the operation of a multi-tiered justice system encompassing international and local-level justice approaches did not run smoothly. The different courts held widely different, and sometimes clashing views, about what their roles were (the promotion of a global order vs. truth-telling vs. strengthening domestic judicial capacity) and were also driven by different legal cultures. This not only affected cooperation between the different justice mechanisms but also perceptions of their legitimacy. It is also important to remember that even when international, national and local justice interventions are formally independent of each other, they do not operate in a vacuum. Instead they are likely to influence each other, the perception that institutions have of themselves, and the perceptions of these institutions by victims and local communities.

Two policy implications can be drawn from the above reflections: (i) that there is a need to have open channels of communication between transitional justice mechanisms—not only in terms of information exchange but also exchanges about what objectives they seek to achieve, and (ii) that before entering the playing field, external transitional justice interveners should consider what assets and capabilities already exist at the local level and what measures may have already been implemented (even if they do not fall strictly within the 'classic pantheon' of

transitional justice mechanisms) which can achieve the desired transitional justice objective.

A related consideration is that care should be taken to align the choice of transitional justice approach with the aims that are being pursued. All too often little planning goes into how different transitional justice mechanisms are created alongside each other. It is important not to implement a comprehensive approach to transitional justice as a matter of principle, but to clearly define which goals are being pursued through transitional justice in a particular context and, based on this, to make a deliberate selection of which transitional justice approach can best deliver on this goal.

A balanced approach to justice should be an approach that is based on exchanges between different stakeholders and on a broad and locally-driven understanding of what the justice aims are. However, this emphasis on flexibility needs to be balanced with a due consideration for equitability and balancing the wide spectrum of expectations that victims have with regards to transitional justice. For instance, some victims expect reparations to contribute to a redefinition of the national identity, while others simply want the violations to stop, and yet others fail to formulate demands for reparations. Thus, some victims will have expectations that cannot be satisfied while other people hugely underestimate their entitlements. The resort to somewhat standardised responses may therefore be inevitable to ensure equitable treatment of victims across contexts.

Pursuing a balanced approach to justice further raises subsidiary questions about the timing and context of interventions (i.e. questioning the usefulness of applying the transitional justice framework to contexts such as Burundi or Yemen); the need to understand how to build the legitimacy of transitional justice interventions; and the potential tensions between the normative conceptions of transitional justice promoted by external transitional justice interveners or civil society groups and the more political approach to transitional justice adopted by domestic elites.

With regards to criminal justice processes, it was also pointed out that it should not always be assumed to be the most appropriate response in all circumstances. For instance, after armed conflicts the focus may first need to be on the strengthening of domestic justice capacities. It is also important to consider to what extent sufficient resources are available to prosecute the necessary number of individuals (prosecuting a few symbolic cases may not always be sufficient to produce a sense of justice) and to provide the required legal aid, protection measures, and socio-psychological support to victims. Therefore, for donors the provision of technical assistance to strengthen domestic justice capacities might sometimes be a necessary precursor to supporting transitional justice criminal process (whether through domestic, hybrid or international institutions).

TRUTH-RECOVERY

Truth and reconciliation commissions (TRCs) have become increasingly popular as measures to accompany transition and peace processes, yet the scope of their impact remains underexplored. Three important elements need to be taken into consideration when analysing the impact of TRCs.

The first is that TRCs can have unintended and unexpected consequences and it is therefore difficult to have guarantees that they do the things we expect them to do. For instance, while the politics surrounding the creation of a TRC may sometimes hamper the commission, in other instances commissions have asserted their autonomy and engaged in investigations that have upset political actors (as illustrated by the South African TRCs decision to also investigate ANC violence). TRCs are thus able to move beyond their initial narrowly defined political intentions.

Second, there is a need to distinguish between the short-term and long-term impact of TRCs. Even when the immediate findings produced by a TRC are contested or rejected by some groups within society, as often happens immediately following the publication of a TRC report, this does not necessarily preclude that it will be able to transform memory narratives over the longer-term. The focus should be on creating the conditions that will make the latter possible.

However, there is also a need to be realistic about the kinds of impact TRCs can have. For instance, the ability of TRCs to transform the views and beliefs held by those who were responsible for the violence is limited. Perpetrators are often not inclined to participate in TRC processes. When they do, this tends to be driven more by specific incentives (such as the promise of an amnesty or receiving demobilisation benefits) than by guilt or a genuine desire for truth-telling. That said, TRCs can "set the tone" of debates on the basis of facts, thereby leading groups and individuals "in the middle" who are not strongly affiliated politically with one or the other side to rethink their perceptions about past violence and human rights violations.

Thirdly, civil society actors play a central role in strengthening the impact of TRCs— providing support to them should therefore be a central component of promoting truth-telling efforts. Through their engagement with TRC processes, civil society actors can contribute to disseminating information about the work and findings of the commission, provide support to the commission's investigations, and put pressure on the government to implement the commission recommendations.

The latter is particularly important as the implementation of TRC recommendations have often lagged. A key consideration therefore for external transitional justice interveners is the need to invest in appropriate follow-up measures. While providing adequate material and financial support for TRC operations to enable them to carry out their investigations is central to their success, post-TRC support should also be provided. This may include setting up mechanisms to monitor the implementation of TRC recommendations; providing technical support to parliament and the government to put in place an implementation framework; funding projects aimed at the dissemination of TRC findings and their integration in education projects; and supporting national, local and community-driven memorialisation and arts projects that can build on the work of the TRC to help broaden societal debate and engagement with the past.

TRC impact is further strongly conditioned by issues of participation and legitimacy. In both Kenya and the Ivory Coast, for instance, challenges to the credibility of some TRC members negatively impacted the legitimacy of the commissions as it created perceptions of politicisation and bias. Lack of early engagement with victims and civil society actors at the time of establishment of the TRC and weak outreach programmes may further serve to hamper the legitimacy of TRCs. Ensuring broad participation throughout the life-cycle of a TRC is important but may face important challenges, as illustrated by the Ivory Coast case, where lack of confidence in the TRC, local cultural obstacles, the role of community gate keepers (who, most often, were ex-combatants), and a lack of clarity on the relationship between the TRC and domestic courts made both victims and perpetrators reluctant to participate in the TRC process. It is also important to ensure that power imbalances and the marginalization of certain groups of victims is not reproduced at the level of the TRC.

A final consideration raised during the workshop discussions was the need to critically reflect on the scope of TRC mandates. Over time, TRCs mandates have expanded temporally (i.e. they are mandated to investigate broad time periods), functionally (i.e. they are not only tasked with fact-finding about human rights violations and victim tracing but also with historical truth-telling) and thematically (i.e. TRCs are now also expected to address root causes of human rights abuses, structural violence and socioeconomic injustices). There is a risk that this overburdens TRCs, creates unrealistic expectations of what they can achieve, and leads them to formulate unrealistic recommendations. It is furthermore important to remember that across contexts victims might have different expectations about what TRCs should do. While in Ivory Coast victims valued reparations more than truth-telling, this may not necessarily be the case in other countries. When designing a TRC it is therefore important to clearly define the objective pursued, to consider local contexts and preferences, and to formulate realistic ambitions for the TRC.

VICTIM-CENTERED REPARATIONS

Although reparations for victims have been the object of substantial research and policy-making, it remains important to make some crucial distinctions from the outset. A first distinction relates to the criminal vs. the institutional approach to victim reparations, which deal in different ways with the multidimensional forms of sufferings, and have different scopes, potentialities and results. Within a criminal approach reparations are the result of criminal justice proceedings and depend on the conviction of the perpetrators. Within the institutional approach reparations are the result of civil or administrative proceedings, which have a more inclusive impact because they cover a wider range of abuses and deal with diverse groups of victims. In both approaches, the participation of victims is essential to achieve full and effective reparation programs, either as right-holders in criminal proceedings or as persons involved in identifying the desirable balance and compromise between different forms of reparations.

Another distinction relates to individual vs. collective reparations, with the second type raising a number of interesting issues, including the following: (i) collective reparations are unlikely to work if victims do not feel themselves part of a collectivity and do not share a collective identity; (ii) collective reparations can be instrumentalised politically, e.g. for electoral benefits; (iii) the distinction between collective reparations and regular development aid is not always clear-cut; (iv) collectivizing victims expands the scope of reparations but may also pose a risk to efficiency. In Ivory Coast, reparations further raised a number of issues relating to the time for reparation and the link with other transitional justice measures. It was highlighted that in Africa collective reparations are very relevant both in theory —because of the strong collective identity as a result of the connection between human and people's rights— and in practice —as in the case of land restitution or land reform (which may also constitute the root causes of conflicts).

Whether individual or collective, several ongoing controversies in relation to reparations were highlighted: (i) who are the victims of the violations, and the claimants and beneficiaries of reparations (e.g. victims of political and civil rights violations vs. economic and social rights violations); (ii) who are the ones responsible for the victimization and the duty-bearers of reparations (particularly relevant in the case of historical injustices such as slavery); (iii) what are reparations in the first place and what is their scope, given the scarcity of means. In relation to

this last point, the meeting also ventured to identify a number of successful reparation practices for victims that had been implemented in contexts with limited resources. Some prime examples included the reparations policies in Argentina (more expensive but not more efficient) and Chile (less expensive and more geared towards the acknowledgement of the victims).

In terms of policy-making and practice the design of reparations continues to pose very important challenges, such as: (i) how to assess the damage of war and violent conflict, as these entail a wide range of impacts on people and society and produce many forms of damage; (ii) how to promote the transformative approach to reparations to increase victims' empowerment, develop agency and capacity in claiming their rights, and avoiding a return to the status quo ante of human rights violations and abuses; (iii) how to link reparations and redress, and create a context for victim reparations as a long, difficult and multi-stage process; (iv) how to envisage reparations processes in the context of development programs in general (e.g. in the case of the re-integration of ex-combatants in society); (v) how to assess the perceptions of people in general and victims in particular concerning the definition(s) and typology of reparations and on the question "who is in and who is out".

Finally, attention was given during the workshop to the question if international donors should be involved in reparation policies. It was suggested that, although such donors could have a negative impact on the local ownership of reparations policies, they can also support the strengthening of civil society, provide specialized knowledge and offer expertise during the design and implementation of transitional justice measures (e.g. in creating trust funds).

PROMOTING INSTITUTIONAL REFORM

The roundtable participants agreed that institutional reforms pertained to the most under-researched aspect of transitional justice and went on to unravel some of its most salient components. They were particularly interested in the state of affairs regarding institutional reforms and their relationship with other types of reforms like DDR and SSR.

Firstly, it was acknowledged that the concept of transitional justice is often stretched to encompass all kinds of reforms, including in the justice sector, constitutional reform, SSR, which are all subsumed under the general and vague heading of 'guarantees of non-recurrence'. It seems advisable to downscale the ambitions and focus on the specific and supporting role of transitional justice in promoting institutional reforms. The record thus far seems relatively weak, as illustrated by the limited follow-up in the case of truth commission recommendations, the frequent manipulation of or outright opposition to vetting procedures, etc. A major reason could be found in the unrealistic application of concepts and measures of transitional justice that were designed for post-authoritarian contexts with strong institutions to totally different post-conflict situations characterised by weak institutions.

Given this bleak record, the question was raised how to increase the effectiveness of transitional justice mechanisms in the latter contexts (i.e. of post-conflict and weak institutions). Here, transitional justice could learn from extensive research on institution-building in fragile and conflict states as illustrated by the World Bank's two pathways to institutional success: (i) by aligning institutions with elite incentives (e.g. political settlements), and (ii) by using connections with civil society to promote buy-ins from the elites. Whatever the pathway used, institutional design remains of crucial

importance and some of the following recommendations could be useful in this regard: (i) understanding that less rapid design equals more sustainable institutions, as it provides time to determine and accommodate political settlements; (ii) setting up public consultation and participation at the design stage can help bring civil society on board; (iii) making transitional justice mechanisms as public and transparent as possible can increase their normative signalling; (iv) avoiding institutional borrowing can downplay the negative effects of legal and other transplants; (v) eschewing the notion of 'best practices' (related to the form) and adopting the notion of 'good fit' (related to functionality) may increase the chances of sustainable solutions.

In terms of sequencing, it was suggested to start with transitional justice mechanisms that require fewer preconditions to be established (like truth commissions) in the hope that they can foster the favourable conditions for other transitional justice mechanisms later on. In this way, more substance can be given to a holistic and comprehensive approach to transitional justice and the chances for long-term success can be increased.

In the same vein, it was highlighted that achieving true institutional transformation could take up to 15 or more years of international assistance, which is likely to sit uneasily with the much shorter operational time frames of many donors. This also connects with the notion of 'transformative justice', which puts greater emphasis on the process (victim-centered, participatory and bottom-up) and on the scope (more emphasis on socio-economic inequalities) of change. If transitional justice aims at being transformative in the long run, it may have to look for closer links with other fields and initiatives, including development studies which have put forward legal empowerment as a combination of access to justice on the one hand and a rights-based approach to development on the other hand. In such contexts, legal empowerment can become a form of rehabilitation and help survivors and victims to formulate concrete claims.

Despite the insistence on a long-term time frame, some types of institutional reforms could be achieved within a shorter time frame. The example of several countries in the Southern and Central African region (like South Africa, Rwanda and others) which have managed to rebuild themselves relatively quickly after long periods of devastating violent conflict, also draws attention to issues of national vision and committed leadership. Other countries are still struggling to overcome the many challenges of governance, economic performance and human rights in the aftermath of the colonial legacies.

Overall, for institutional reforms to become embedded and sustainable, the roundtable experts emphasised the multiple connections with other aspects of transitional justice, including: (i) accountability for serious past human rights violations, because the presence or persistence of impunity is likely to undermine any efforts at preventing future human rights violations; (ii) vetting of persons involved in or applying for positions in core state institutions like the police, the military, the justice system, etc. In relation to the latter, it was also highlighted that judicial institutions need to be grounded within the larger and overarching rule of law, in order to combine the institutional frameworks of justice with a culture of justice and human rights.

Regarding the relationship between judicial reforms and the development of the rule of law, it was highlighted that transitional justice practitioners and scholars tend to have a very thin and underdeveloped understanding of this

concept, which is in dire need of depth and width. One of the areas is to understand the existence and functioning of structural impediments to (re-)constructing the rule of law, like extreme poverty of the population or the extreme richness of the elites. Such impediments may be exacerbated by the need of post-war regimes to reconcile short-term conflict management and security with long-term change. Overall, the roundtable emphasised that developments in the global south are very likely to be radically different from developments in western countries and that any transitional justice approach should be open enough to context-specific solutions.

CONCLUSION

The commitment of the EU and AU to strengthen their role in supporting transitional justice - including as part of their broader justice, security, democracy and human rights promotion agendas - is a welcome development. The expert roundtable held in Brussels set forth a tentative agenda of the areas and means through which both organisations may best support transitional justice. However, the discussions also brought to light various areas in which important knowledge gaps remain regarding the scope, nature and impact of transitional justice. Four stand out in particular.

First, more reflection is needed on how a comprehensive approach to transitional justice can be effectively implemented in practice. While as a principle comprehensiveness is a laudable objective, in practice conflict, competition and overlap often occurs between parallel transitional justice mechanisms, which risks undermining both their effectiveness and legitimacy. More reflection is therefore needed on how to operationalise a comprehensive approach.

Second, empirical evidence of the impact of donor interventions on the effectiveness of transitional justice is currently limited and mostly anecdotal. A better understanding of the conditions under which donor interventions might be most effective or what form of donor support is likely to produce the greatest effect should be pursued.

Third, more attention needs to be paid to the temporal aspect of transitional justice. Key questions in this regard relate to (i) the exact timing for setting up and implementing particular institutions like courts, truth commissions and reparation schemes, and (ii) the sequencing of adopting and operating such institutions. Much more in-depth knowledge about the strengths and weaknesses of various models is needed to enhance successful outcomes.

Fourth and final, transitional justice should refrain from being seen and used as another 'tool box' for all kinds of situations without distinction. Because it emerged in specific historical, geographical and political contexts, transitional justice should become more aware of the context-specific character of its premises, institutions and mechanisms. As a result, it should become more creative in designing new answers to old questions, which are firmly rooted in local circumstances without losing sight of the general framework of dealing with a horrendous past and constructing a better future.

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