

Open Debate on Transitional Justice
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I would like to thank the Belgian government for inviting me to participate in this important Open Debate on Transitional Justice.

I come from a country where during the years of apartheid, scores of detainees were said to have jumped out of windows at police headquarters, hanged themselves in cells, died hitting their heads against police filing cabinets or fatally slipping on bars of soap. Inquests held under the apartheid system found nobody responsible for their deaths. Two decades after South Africa's transitional justice process, these inquests are at last being reopened. Families now have hope for justice.

"I would like to know how and why he died," said Jill Burger, the sister of trade union activist and doctor, Neil Aggett, two weeks ago when she testified at the reopened inquest. The apartheid state responsible for his death in custody found that he had hung himself in his cell.

Many of those who were detained and tortured are now speaking out about their torture at the hands of South Africa's notorious security branch. This re-opened inquest is a symbol of hope for countless victims and their families all over the world in their long arduous struggle for truth and justice. The reopened inquests in South Africa and the latest report that Omar Al-Bashir may at last be transferred to the International Criminal Court to face genocide and war crimes charges, demonstrates the importance of addressing impunity which is directly linked to restoring the rule of law as a prerequisite for national healing and reconciliation.

"Transitional justice" suggests the drawing of a line between the past and the future. However, even the best transitional justice processes often exclude many people who are not yet ready to speak or who have not been given the opportunity to tell their stories. Like in my own country, it can take decades to deliver justice. And often the quest for the truth will be driven by the families of victims, assisted by a handful of determined civil society actors.

I was fortunate to be a part of South Africa's Truth and Reconciliation Commission established in 1995 by Nelson Mandela, South Africa's first democratically elected President. South Africa's process was deeply influenced by the Latin American experiences of building accountability while also ensuring stability and the continuance of the new government. As

an actor in the process I was however deeply conscious of the limitations of the narrow mandate which did not allow us to consider structural violations.

The Principles to Combat Impunity developed by Louis Joinet and later updated by Dianne Orentlicher advanced the field of transitional justice as Joinet posited that states are primarily responsible for ensuring that victims and their families realize their inalienable right to truth, justice and reparations.¹ Joinet's transformed transitional justice from a technocratic process of 'one size fits all' to a holistic approach which is context specific, inclusive and participatory, and centralizes the rights of victims. Joinet's work was premised on the recognition that gross human rights violations and atrocity crimes are rooted in state structures which manifest unequal power asymmetries and which shape contexts of extreme violence and repression.

African experiences have also challenged the narrow focus on civil and political rights violations in light of the legacies of violence and structural violations arising from their colonial histories and wars of liberation including land dispossession, corruption and economic crimes.²

Earlier transitional justice processes ignored the gendered dimension of conflict but have been emancipated by transitional justice processes adopted in countries like Sierra Leone, Peru and more recently Tunisia, where they adopted a gender lens deliberately focusing on the inclusion and participation of women and girls.

When they were consulted on the recommendations of the Truth Commission, rural women in Sierra Leone asked the Commission to ensure that the government allocate a percentage of the funds it received from the Heavily Indebted Poor Countries (HIPC) fund towards the secondary education of their girl children, since most families prioritized the education of boys. These women also recommended that the government implement constitutional reforms to improve their legal status regardless of whether they had been married under Islamic law or customary law.

The work of the Truth and Dignity Commission in Tunisia, has been ground-breaking including ensuring an independent budget to facilitate the inclusion and participation of women and girls.³

¹ The Joinet Principles and the Updated Principles to Combat Impunity. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (hereinafter 'Joinet Principles'); Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter 'Updated Principles to Combat Impunity').

² R. Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development', 2 *Journal of International Transitional Justice* (2008) pp. 253–265; McEvoy, *supra* note 5.

³ Elise Ketelaars, 'Gendering Tunisia's Transition: Transformative Gender Justice Outcomes in Times of Transitional Justice Turmoil?' *International Journal of Transitional Justice* 12(3) (2018): 407–426

Accountability for conflict related sexual and gender-based violence remains a challenge at both the domestic and international levels. My experiences in investigating sexual and gender based violence has convinced me of the importance of understanding the role that gender norms play in the fostering of violence and human rights abuses.

Sexual and gender based violence is too often still framed narrowly as a matter of gender identity, with insufficient attention given to its causes. This obscures the fact that the drivers of conflict-related sexual violence are similar, irrespective of the victim's identity. In fact, the evidence shows that perpetrators use prescribed gender roles to punish and terrorize women and employ the same tactics to humiliate and emasculate men.

Focusing on women and girls is critical but ignoring the violations perpetrated against men and boys limits our analysis of how gender norms fuel the use of sexual violence in conflict and stymies our efforts at prevention. This is evidenced by the testimony that is emerging from many war zones.

Fragile states emerging from conflict have not always been able to implement the ambitious transitional justice programmes. In many instances they lack technical capacity and the political will to do what is necessary. In both of these instances, the United Nations should be required to provide vital support for the implementation of such processes.

Since 2004, the UN Security Council has referred to or prescribed rule of law and transitional justice interventions in more than 160 resolutions.⁴ For example, the transitional justice-related role of peacekeeping missions such as UNMISS in South Sudan, MINUSCA in Central Africa, MINUSMA in Mali has been critical for international peace and security. Peacekeeping operations are also the best fora to promote transitional justice through their support programmes for the disarmament, demobilization, and reintegration of former combatants and also institution building contributing to prevention.

A recent research report by the Security Council Report,⁵ focusses on how impunity has been responsible for some of the world's most devastating conflicts, exploring in great detail four country situations: Myanmar, Syria, Ukraine, and Yemen.⁶ The report notes that *"ending impunity is not only a matter of principle, but for the Council, is also a practical tool to maintain international peace and security. Lack of action on accountability in conflicts where mass crimes are committed risks hampering the Council's ability to address and resolve these*

⁴ UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* (UN Doc. S/2011/634), para. 10 (2011 Report)

⁵ Independent non-profit organisation

⁶ Security Council Report, 'The Rule of Law: Retreat from Accountability', Research Report: 23 December 2019, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_rule_of_law_2019.pdf (last visited 13 February 2020).

*conflicts more broadly, in a way that ensures long-term stability and avoids the resumption of conflict”.*⁷

Continental bodies like the African Union have also begun to play a critical role in promoting transitional justice, as evidenced by the African Union’s role in 2006 in the prosecution of Hissène Habré, the former President of Chad.⁸ The AU and the IGAD, have also been instrumental in facilitating the peace process for South Sudan⁹ as well as the revitalized peace agreement.

African Union Member States also recently adopted the AU’s Transitional Justice Policy on 12 February 2019. This policy is meant to guide Member States to achieve sustainable peace, justice, reconciliation, social cohesion, and healing after experiencing mass atrocities.¹⁰ While the policy is to be welcomed, policies alone cannot substitute for the lack of political will to deal with accountability for grave crimes.

The Security Council’s fifth report explores in great detail the response by various organs of the United Nations to the crisis in Yemen, Syria, Myanmar and Ukraine but notes that the UN Security Council has as yet been unable either to bring justice to victims or seriously affect the course of the conflict.

The UNSC must address impunity using a prevention lens to ensure the non-recurrence of violations; but also needs to address the indirect causes of conflict or factors that exacerbate conflict i.e. structural violence, discrimination, economic exploitation, unequal power relations and climate justice. In crafting the road ahead, the Council needs to be more innovative, taking decisive approaches towards current conflicts on its agenda, in concert with other UN Bodies including the Human Rights Council, OHCHR, the General Assembly and continental bodies such as the African Union, so as to enhance its legitimacy as well as its effectiveness in maintaining international peace and security. This is true too for a continental body like the African Union, especially if we are to “Silence the Guns by 2020”.

As we take forward the transitional justice agenda, it is essential to ensure that peace and justice are seen as mutually reinforcing imperatives and not replaced by erroneous notions that peace must come first before accountability. Prevention, and building sustainable peace require that we address mass atrocity crimes which are the legacy of violent conflict and restore the trust deficit between the state and its citizens so that the state works for all citizens irrespective of ethnicity, religion, gender and race.

⁷ Ibid

⁸ Habre, was convicted by the Extraordinary African Chambers for crimes against humanity committed during his presidency

⁹ Intergovernmental Authority on Development (IGAD) 2015. Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), 17 August 2015. Addis Ababa, IGAD

¹⁰ <https://au.int/en/pressreleases/20190212/african-union-adopts-transitional-justice-policy>

While we have to acknowledge the constraints we operate under, we must focus our efforts on ensuring that victims and their families are able to access justice and have their dignity restored.