

**Statement by the United Nations Special Rapporteur on the promotion of truth, justice,
reparation and guarantees of non-recurrence**

Preliminary observations and recommendations

Bujumbura, 16 December 2014

Ladies and Gentlemen,

I had the opportunity to visit Burundi at a particularly timely moment, when the establishment of the long-awaited Truth and Reconciliation Commission was fully underway and the elections are only half a year ahead.

I would like to thank the Government of Burundi for the invitation and the cooperation extended to me during the visit. In Bujumbura, I had the opportunity to meet with Government officials, representatives of the legislative and judicial branches, law enforcement and other security officials, a broad range of civil society actors, the United Nations and diplomatic missions. I travelled to meet and discuss with victims of massive past violations of incidents that occurred in Bugendana, Gatumba, Itaba, Kibimba, Kimina and Nyambeho.

I would like to extend my appreciation to the Office of the United Nations in Burundi (BNUB) for providing logistical support. I am grateful to everyone who took the time to meet with me and shared valuable insights and important experiences.

The expressed interest in transitional justice issues I have encountered throughout my visit, stands in stark contrast to the lack of redress received for massive past violations, as reported by victims.

Before sharing some of the preliminary observations I derive from the conversations I had with government officials and civil society, including victims, I would like to highlight three relevant points I have made previously both during the last two years as Special Rapporteur and over the almost twenty years I have worked on transitional justice issues.

First, truth, justice, reparation, and guarantees of non-recurrence, should be conceived of as elements of a comprehensive policy, and not as items in a menu from which governments can simply 'pick and choose'. *Legally*, there are well-established rights to truth, justice, reparation, as well as to those reforms that enable the realization of these rights. *Practically*, the measures work best when they support one another. No single one can stand for the whole; truth alone for example is not sufficient to satisfy all the relevant rights and the legitimate expectations on the part of individuals. *Morally*, there is an obligation to redress in the most comprehensive way possible victims who have endured untold suffering and to do everything in our power to ensure that such suffering is not repeated.

For good reasons the Arusha Peace and Reconciliation Agreement was comprehensive in scope, with reference made to truth, but also to a justice mechanism, as well as to broad initiatives dealing with

institutional reforms. The discussion about transitional justice cannot be reduced to a discussion about the establishment of a truth commission only. Now that the law establishing the Commission has been enacted and the commissioners selected and sworn in, discussions about the implementation of the other measures need to resume in an earnest and timely fashion, and their relationship with one another clarified.

Second, the discussion about a commission should not be reduced to pardons or reconciliation. There is no shortcut to reconciliation. The idea that reconciliation can be achieved through one-on-one encounters in the form of pardon procedures involves at least two problems: first, it seems to reduce reconciliation to a question of attitudes or a state of mind. Reconciliation, however, is ultimately a question of *trust*, and trust is something that is *earned* not simply *bestowed*. Trust is an attitude that results from the commitment to shared norms *as manifested through action*. Such action needs to involve the disclosure of the truth, the sanctioning of those responsible, and mitigation of the consequences of great harms, accompanied by initiatives to prevent the recurrence of the violations. The second problem is that while it is important to achieve interpersonal reconciliation, particularly at the local level, massive violations are not simply symptomatic of problems between individuals or groups, but mainly reveal state failures and responsibilities that call for actions beyond encounters between individuals.

Third, transitional justice measures should never be used as instruments of ‘turn-taking,’ as measures to selectively benefit political allies and sympathizers and disfavour others, perceived opponents, included. Indeed, one can say that partial justice is not merely ineffective justice, but no justice at all. A comprehensive transitional justice policy can make a contribution to social integration, but only if impartially designed and implemented. Their socially integrative potential, as well as their failure to achieve that potential is explained by the same basic fact: transitional justice measures are both grounded in, and meant to foster fundamental human rights. Thus, transitional justice measures ought to be centered essentially on *rights* not mere interests or considerations of expedience. Therefore, factors such as ethnic identity, political affiliation, etc., should not be of determining relevance.

Preliminary observations

Allow me now to make my preliminary observations and recommendations concerning each of the four pillars of the mandate. I emphasize their preliminary status, to be elaborated in the report of this visit, which will be presented to the Human Rights Council in Geneva in September of 2015.

I. Truth

The adoption of the law establishing the Truth and Reconciliation Commission should be commended. Fourteen years after the Arusha Peace and Reconciliation Agreement was signed, one of the three measures relating to human rights violations mentioned in the agreement will finally start to see the light of day. Over the years, Burundians have been mobilizing in favour of it, and acquiring competencies on this topic.

With the 2009 national consultations, Burundi formed part of the trend to consult the population on various aspects of the design, mandate and operation of truth commissions, as well as the selection of commissioners. However, the government has chosen to disregard some of the conclusions that stemmed from that consultation. This includes important points regarding the selection of commissioners, the participation of civil society at various levels in the commission, as well as the participation of non-Burundian nationals.

This decision burdens the Commission in two ways: first, it deprives it of capacities and expertise that clearly exists in Burundian civil society, capacities that have been cultivated over time, with great effort, and from which the Commission could have benefited. More importantly, it deprives the Commission of a measure of confidence and credibility that will now need to be built. Commissions have in all contexts greatly depended on prior efforts made by victims and other organizations to collect and preserve evidence, organize, encourage, and support witnesses. No commission can afford to do without these and other forms of assistance, all of which depend on having the confidence of victims' and other civil society organizations. Instead of assuring that the commission would 'hit the ground running' having crucial stakeholders on board, civil society (as well as the international community) has for the time being been given reasons to remain vigilant.

It is to be hoped that in its further decisions the Commission will show awareness of the need to gain that confidence, to establish its independence from all political agendas, its readiness to incorporate expertise of civil society organizations, and its openness and accessibility to civil society in general and victims in particular, regardless of their ethnic identity or political affiliation.

Second, it is crucial for the Commission, from the very beginning, to do justice to its functions, including in the articulation of its internal procedures, structures, and operations. There is a widespread impression that this is a reconciliation commission, and, to be precise, a pardons commission. But there is a difference between pardons and reconciliation, as emphasized before.

There is a great concern that the truth-seeking function of the Commission will be replaced by overemphasizing pardons procedures. Most truth commissions (and now there have been more than 40 in different parts of the world) have not, in fact, had a direct link with reconciliation. Even those that have carried reconciliation in their name (including the South African Truth and Reconciliation Commission) have been very clear (a) about the fact that their primary function is to establish the truth, and (b) that whatever reconciliatory potential the commission may have depends on its ability to offer a thorough, compelling, impartial, and reliable account of the violations that took place.

Given the large universe of victims, among other factors, the Commission has an enormous task fulfilling its fact-finding and victim-tracing roles. Furthermore, there is no census or registry of victims in Burundi, or even a map of burial sites, let alone comprehensive accounts of how the violations took place. In setting up its truth-seeking functions, the Commission also faces a large task enabling the discovery of violations against women and girls, including sexual and gender based violence, a topic around which most of the work remains to be done. The Commission must further the inclusive participation of victims and survivors with special measures for women or marginalized groups.

Finally, a swift adoption of the victims and witness protection law will demonstrate the commitment of the State institutions. Once adopted, the law needs to be effectively implemented so that victims feel safe to come forward.

II. Justice

Burundi, through the Arusha Peace and Reconciliation Agreement, was also part of a very positive trend in international law, which expresses the idea that peace cannot be sought by sacrificing justice. This recognizes that a culture of impunity is itself at the heart of so many cycles of violence and affirms standing legal obligations to investigate and prosecute those responsible for genocide, war crimes, and crimes against humanity. In practice, however, the application of the regime of temporary immunities has become an obstacle to progress in the domain of criminal justice.

The Government has stated that it will wait until the Truth and Reconciliation Commission has concluded its work before deciding how to proceed with judicial investigations. Article 61 of the TRC law seems to suspend all proceedings until that time. It has taken almost 14 years since Arusha to establish the TRC, and it may take 5 more years before the Commission conclude its work.

It is well known that establishing the required judicial mechanisms, especially in cases of specialized mechanisms, is a time consuming enterprise. The passage of time increases obstacles to judicial procedures, including the death of witnesses, the disappearance and erosion of evidence. In order for the Truth and Reconciliation Commission not to be seen as part of a delaying tactic concerning justice obligations, I encourage the Government of Burundi to resume discussions about the implementation of concrete options of such judicial mechanisms, without waiting for the Truth and Reconciliation Commission to conclude its work. Those discussions need to be conducted with the participation of both civil society and international actors.

Judicial investigations and prosecutions always rest upon a great deal of preparatory work that is also time-consuming and time-sensitive. Such work includes foremost the gathering of relevant evidence and documentation, which should be immediately carried out in accordance with a systematic plan. This evidence gathering exercise should pay special attention to sexual and gender based violence.

Taking on these tasks would demonstrate that the pardons that the Truth and Reconciliation Commission refers to are not incompatible with justice, and would be consistent with the notion that reconciliation cannot be interpreted in a way that involves yet another inequitable transfer of burdens to victims, in this case, one that would sacrifice their rights to justice.

III. Reparation

Burundi has taken an important initiative to address land issues through the Commission on Land and other Assets, complemented recently by the creation of a Special Court. The Commission has reportedly decided on more than 40,000 claims. Even the supporters of these efforts, however, concede that the Land Commission cannot give full resolution to the delicate issue of land—an issue at the heart of many conflicts in the country. Doing so will require broader initiatives leading towards the rational use of land

that go beyond mere restitution. Efforts at restitution at best lead back to the *status quo ante*, which is important from the stand-point of the neutralization of unfair dispossession. However, from the broad standpoint of justice that outcome may lead to unfair results. As with other initiatives, it is critical to ensure that both the Land Commission and the new Special Court operate with impartiality and independence, in an even-handed way, and free from all considerations related to ethnic or political motivations or objectives.

I also encourage the Government to consider legislation that would promote gender equality in the ownership of land, through the adoption of gender sensitive land titling, registration, and inheritance procedures.

As for other forms of reparations beyond restitution, particularly, a comprehensive reparations programme, the resource-based constraints faced by Burundi are well-known. Within those constraints, however, there is space for action. The TRC Law empowers, in terms that will require further specification, the Commission to execute some forms of reparations as well as to make recommendations on this topic. I call on the Commission to carry out discussions about this issue in a way that places human rights violations at the center, rather than criteria related to identity or politics.

In the meantime, urgent attention should be given to victims' assistance programmes for elderly or infirm widows, orphans, internally displaced persons or other vulnerable groups. The needs of these groups are such that they cannot wait for the Truth and Reconciliation Commission to conclude its work. This assistance, as well as a future reparations programme should include support for education.

IV. Guarantees of non-recurrence

a. Security Sector Reform

It should be acknowledged that the very cessation of violence, the achievement of peace after decades-long violence, is in itself a crucial preventive measure, for conflict is one of the conditions that most enable rights violations. In the case of Burundi, this involved both the demobilization of ex-combatants, and the integration of large numbers of them into the military and police forces in accordance with parameters agreed upon in Arusha and subsequent agreements. This accomplishment should not be underestimated.

In order to effectively prevent future violations, however, further initiatives are required, namely, professionalization, including training in human rights and gender issues; democratization, in the sense of effective civilian oversight over the armed forces, the intelligence service and the police under the constitution (including international obligations); and third, efforts to screen or vet people with problematic records of human rights violations. The armed forces have reportedly gone further than the intelligence services and the police on these three areas.

b. Judicial Independence and autonomy

An independent judiciary is a crucial tool to address past and prevent future violations. The concerns in relation to the independence and autonomy of the judiciary in Burundi were the subject of discussions and proposals at the “Etats généraux” that took place last year. The results and recommendations of this meeting should be published in full length.

The need for the revision of existing constitutional and legislative provisions for the establishment of an independent judiciary was recognized in that meeting. Subsequently, a constitutional reform project altering the composition of the Superior Council of the Magistrature, to diminish the possibility of executive interference in the administration of justice was presented to Parliament, but not adopted. Reforms leading to strengthening the principle of the separations of powers should be prioritized in the legislative agenda. The judiciary also needs to be equipped with the necessary resources and be granted administrative and budgetary autonomy.

Given the high poverty rate in Burundi and the costs involved in appealing to the justice system, which the average citizen finds virtually impossible to meet, the creation of legal aid schemes are paramount to ensure that all Burundian can pursue their claims on an equal footing.

c. Education, memorialization, and archives

I am gratified that the TRC law includes reference to these three topics, all of which are important both to deal with past human rights violations as well as to prevent new ones. While announcing that those topics will be covered in detail in my forthcoming country visit report, I would like to stress the need for further work on the following aspects.

The absence of the teaching of the history of Burundi since independence, in particular in relation to periods of violence, has led to various parallel narratives that are transmitted at the family and community level.

While truth commissions on their own are not the best instruments for a ‘final’ rewriting of history, they can establish, through independent and impartial investigations and meticulous attachment to respectable methodology, a threshold of deniability, a factual basis for shared histories. The Truth and Reconciliation Commission can catalyze important curricular reforms and lay the basis for the production of teaching materials, as well as of appropriate pedagogical methods.

The limited number of existing memorials in Burundi stands in sharp contrast to the very large number of violent acts in its recent history. The Government should refrain from interfering with memorialization initiatives and actively promote citizen-led initiatives in a framework that guarantees even-handed support for such initiatives.

There is an urgent need for the mapping of mass burial sites throughout the country. The knowledge of civil society should be fully utilized. Efforts to preserve mass graves, to make them accessible to survivors should be undertaken.

Beyond the issues relating to the disposition of the Truth Commission's own archives, the Commission, or the Government in consultation with it, and availing itself of international expertise on this topic, should put in place a policy on national archives in line with international standards (including on both accessibility and data protection).

Much can be done to document massive violations in the immediate term. The preservation of documentary and other evidence is crucial for all transitional justice initiatives. Efforts to gather and preserve oral testimonies are urgent given the advanced age of some of the victims and witnesses.

V. Concluding Remarks

In closing, allow me to reiterate my gratitude to the Government of Burundi not just for the invitation to make this visit, but for the support it has given to it. To the many civil society organizations that contributed immensely, and to the many victims that were willing to share both their experiences and their insights, sometimes at the price of reliving painful memories. Their endurance in the face of indescribable pain is a source of inspiration and strength, and should be the basis of unrelenting commitment to the cause of justice and human rights to the rest of us.

Burundi has made great strides in order to overcome conflict, efforts that are recognized both here and abroad. With great efforts on the part of all branches of power, of civil society that has been indefatigable in its search for justice, of the endurance and determination of victims who have admirably not only reconstructed lives torn by conflict but contributed to the reconstruction of community and national life, as well as with the support and accompaniment of international partners, Burundi has achieved some degree of stability that can act as the foundation of future development, but that remains still fragile, in particular in the context of the upcoming elections.

Burundi has claimed for itself the status of a 'normal' developing country. I take the opportunity to remind everyone that development is not only a question of economic growth, but that justice and human rights are at the core of any defensible conception of development: human rights stand in an instrumental relationship to development, they allow individuals and communities to give concrete content to the notion, and ultimately, they are part of the definition of development: they contribute to a proper understanding of development. Living in a developed society *means* living in a society that respects and promotes human rights. As the country moves on its developmental path, it is important that it, as well as its international partners, keep this in mind.

I would like to thank you for your attention.