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This year represents 60 years of the Universal Declaration of Human Rights and across the world people will be celebrating some amazing and remarkable achievements of the human rights movement particularly in the areas of standard-setting. There are treaties and charters, conventions and declarations that cover virtually every aspect of human existence. On the other hand, you can ask the honest question, ‘60 years since the Universal Declaration of Human Rights – what’s the state of the world we live in?’ A UNDP Report – perhaps a bit old but still very relevant and accurate – says the following, and I quote “It is essential therefore to step back a little and assess the state of affairs in the fifty years since the United Nations was created. What has emerged is an arresting picture of unprecedented human progress and unspeakable human misery. Of humanity’s advance on several fronts mixed with humanity’s retreat on several others. Of a breathtaking globalisation of prosperity side by side with a depressing globalisation of poverty.’

And so you have this enormous gap between the wonderful standards and global reality. Cynicism is sometimes expressed towards the human rights movement, and this cynicism was expressed quite strongly in a recent publication by UNESCO called “Freedom from Poverty as a Human Right” when Thomas Pogge said the following: ‘When they are vague and fuzzy, declarations of human rights easily become a substitute for real progress. Great battles are fought and glorious victories won over rhetorical details that in the end make precious little difference to the real world.’

Notwithstanding that cynicism, and notwithstanding the gap between standards and reality, I think it is still correct that we proclaim democracy and human rights as a vision for our people and as a vision for the future. They are the basis by which we can move our societies from conflict, from violence, to a society where there is peace and justice. So the ideal of democracy, the ideal of human rights, the ideal of justice, remain ideals and certainly ideals worth fighting for.

In this context, I think it is important to understand that democracy is not just about the adequacy of the ballot and not just about whether electoral systems work. Amartya Sen, the Indian Nobel laureate who came to South Africa a few years ago, distinguished between what he called the two perspectives of democracy. The one he called the public ballot perspective, and that is self-explanatory – the adequacy of the public ballot. The other he called the public reasoning perspective of democracy. What he meant by that was the ability of governments to respond to public reasoning; what he called ‘government by discussion’. I think when we understand democracy, we have to look at both components. Clearly, in the context of transitional justice, it certainly has the potential to move a society from a state of injustice to a state of democracy in the widest sense of the word, in respect of both perspectives that I have just described. The transitional justice discourse over the last few years has seen amazing developments. We have seen a large body of norms, of standards, of knowledge, of mechanisms that have been developed. There are a few features that are worth reminding ourselves about. On the one hand, the transitional justice discourse attempts to establish a fidelity to international human rights norms and standards. So issues of accountability, issues of fighting against impunity, victim participation, responsiveness, reparations, all have a resonance in instruments of international human rights norms and standards.

Secondly, we have gone way beyond the simplistic debates about truth vs justice, peace vs justice, as if we always have to make a choice between the two. I think we are now at the point where we recognize that it is not just about truth vs justice or peace vs justice, but justice is indeed an integral part of transitional justice processes. How we define justice, obviously, is another matter, but I think the argument is no longer stuck in the process of truth and peace at the expense of justice – I think we have moved significantly beyond that. Lastly, we have seen the development of a whole range of mechanisms, of tools to assist societies with regard to moving forward with transitional justice processes, whether they be truth commissions, payment of reparations, truth seeking, granting of amnesties, institutional and policy reforms. Those represent a whole array of mechanisms that are available to be used as part of a broad tool kit.

It is important, certainly in the context of my country, to recognize that transitional justice processes are not just about dealing with the past. For some people it is about fighting for a better past, as if that is possible, but it is also about moving from the past to the future. So the manner in which you deal with transitional justice almost begins to set the template for the future, it lays the foundation for the future, it creates the enabling environment and the enabling consciousness by which a society can move hopefully, seriously, from the past into the future. So it is not just looking back, it is looking back and looking forward and seeing the connection between the two.

While there is a large body of international norms and standards with regard to the transitional justice discourse, there is also the reality that these norms and standards have to speak to local realities, to the expectations of a society at national level, how that society must construct the various processes that enable it to move forward. So one of the difficulties and one of the challenges is finding the balance between the international language and the local reality. I am not suggesting that there is a

contradiction or an inconsistency, but there is a need to moderate, in a sense, the language and the tools that are available.

Transitional justice I must assume is about justice. And yet there are different understandings of justice and there are different approaches to justice. For some justice is defined by reference to the breach of a domestic legal framework. For others, justice is defined by reference to international human rights standards, treaties, charters and obligations. For yet others, justice is defined by reference to the lived reality of their daily lives. So people, depending on where they are situated within a society, may well have different ideas and different constructions of what justice is. Because of that, it raises significant challenges for transitional justice practitioners. In much the same way as you may take different approaches to what justice may mean, you may take different approaches to how you construct the transitional justice model within a society. This is not an easy issue. There have been significant debates at the international level as to whether transitional justice processes should be what is called ‘narrow’ or ‘broad’. Let me read briefly an extract from a publication called ‘Transitional Justice in the 21st Century’. I quote “The universe of transitional justice can be broadly or narrowly defined. At its broadest, it involves anything that a society devises to deal with a legacy of conflict and of widespread human rights violations. From changes in criminal codes to those in high school text books, from the creation of memorials, museums and days of mourning to police and court reform, to tackling distributional inequities that underlie conflict. And no view can be criticized for ignoring root causes and privileging civil and political rights over economic, social and cultural rights, and by so doing, marginalising the needs of women and the poor. On the other hand, broadening the scope of what we mean by *transitional justice* to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.’

Certainly, in the context of South Africa and in the context of many other societies, ordinary people don't make the distinction and don't frame the injustice they experience by relation to a particular legal framework. Certainly, when I practiced as a lawyer, when I worked for Lawyers for Human Rights, people didn't come into my office and say, what happened to me is a violation of South African rule, or is a violation of the international covenant on civil and political rights, or social, economic and cultural rights. People simply articulated a sense of injustice. People don't make the distinction in their own minds about whether their lived reality has any reference to any legal framework. It is almost an instinctive articulation of a sense of injustice. I am not saying that transitional justice processes must necessarily respond to that instinctive articulation, but that is a very real reality that one must take into account if indeed transitional justice is to move us as we want it to, from a state of oppression, of conflict, of injustice, to a state of justice.

In many societies, including ours, you would have torture, which in the context of South African law, would be a violation of domestic law. But you would have land dispossessions which in the context of South African law were not a violation of domestic law - it was sanctioned by domestic law. Over and above that, you would have had a variety of processes that simply marginalized and excluded people. So how do we make the choice of the kind of transitional justice model that we should embrace? Can it be a one size fits all? Certainly I hold the view that if the nature of the injustice within a society, and if the nature of the human rights violations experienced in that society, is inextricably linked to the economic, social and political system within that society, then it is difficult to imagine that you can deal with those violations without reference to the root cause which is in a sense, the economic, political and social system within that society. There is a causal link between them and the question that I would pose, if one took a narrow approach, would be, how sustainable would that be? If you saw apartheid purely as the excesses of the security forces, purely as something wrong that the police and

army did, without recognizing that those excesses, those criminal acts, were inextricably linked to the very system – the political, economic and social system – that was apartheid. If that was the connection, it is hard to envisage how a transitional justice process can ignore substantially or at all that relationship and an examination of the broader context.

My brief has been to also talk a bit about the South African experience. You all are probably aware that apartheid was declared to be a crime against humanity. It wasn't simply a system that created a hierarchy of humanity with whites at the top, Africans at the bottom, and Indians and Coloureds somewhere in between. That may have been the most distinct feature of the system, but the system was more widespread, it was pervasive. It tracked you from the cradle to the grave. It determined everything you did – where you would be born, where you could work, who you could fall in love with, and in fact where you would be buried when you died. It determined the economic choices you would be able to make in your life. It determined the family environment in which you would live. So it was pervasive in that sense, it was intrusive in every sense of the word. It also permeated virtually every institution within our society – government, the police, courts, the church, sports groups, youth groups – all of it was permeated and tainted by apartheid. It had this widespread effect.

One of the questions that we had to deal with was how were we to move beyond apartheid to this wonderful society that Archbishop Tutu called the rainbow nation, given the very widespread nature of apartheid, but also given the nature of the settlement that was arrived at in South Africa. We spoke earlier of the Truth and Reconciliation Commission. In the preamble to the legislation that provided for the establishment of the Commission, it clearly proclaims that the Constitution of South Africa provides a historical bridge, a bridge between its deeply divided past and a future founded on the recognition of human rights and democracy. So the Constitution was the bridge and I suppose the TRC

was the vehicle that was going to help us cross the bridge. The two important features of this process were reconciliation and reconstruction. We hear the word reconciliation used very widely and reconciliation has become a very nice buzzword, it has become the favoured word. Less so reconstruction. We had to both reconcile our society but also reconstruct it. There are similarities between the two, but there are quite significant differences as well.

And so the TRC was established in part as the vehicle to assist South Africans to move forward. The idea was that we would all, as ordinary South Africans, have to be part of and be responsible for this process of reconciliation and of reconstruction. But it didn't happen in that significant way. The Promotion of National Unity and Reconciliation Act, the Act that established the TRC, clearly spelled out the objectives of the TRC. They were to establish as clear a picture as possible of gross human rights violations, facilitate the granting of amnesty, establish the fate of victims and compile a comprehensive report. One of the critical issues was how it would define violations of human rights. The TRC was not responsible for the definition, Parliament was responsible for passing the legislation. It defined gross human rights violations as "a violation of human rights through the killing, abduction, torture or severe ill treatment of persons." So already there we see a narrow definition. In the criticisms of the TRC many have said that it did not focus substantially on social and economic rights. I think the difficulty was that if it did so, it would have been accused of acting outside its mandate and there may well have been a successful legal challenge if someone sought to bring such a challenge.

So the work of the Truth and Reconciliation Commission was largely focused on the violations of gross human rights as defined in the Act. But the TRC chose to be creative as well and beyond looking at gross human rights violations as defined in the Act, it also convened what were called institutional hearings where there were special hearings that looked at a whole range of sectors and subject matters

within society. There were hearings on business and labour, on the faith community, the legal community, the health sector, the media, prisons, compulsory military service, children and youth, women. I think what this did was to enable to some extent the picture to be a broader one. To understand that apartheid wasn't simply about bad police, bad soldiers, acting against their orders or acting outside the law, but indeed the system was wider and much more pervasive, much more comprehensive. I think those hearings gave South Africans – to the extent that they were not aware of this – and the world, a bigger picture of how the state was structured.

But what the process did not do was to look at the violations of social and economic rights, for example, the dispossession of land. This is central to millions of people. Land is not just an economic asset, certainly in the context of Africa. Land has a cultural significance, it has a religious significance, it is the way in which we speak to the ancestors. It is inextricably linked to the identity of individuals and their communities. We did look substantially at forced removals, the policy of forcibly removing people. It wasn't just the physical effect of a forced removal, it was the amazing destruction that a forced removal had on the cohesion of a community, on the functionality of families and on communities. We didn't look at general patterns of distribution, of the way the resources of the land were allocated, the skills base, anything you can think of was shaped and defined by this horrendous policy.

The limitations had consequences, and they had serious consequences and that is what I want to move to. It is simply not an academic exercise to say we looked at some things but we were not able to look at others. I think we need to ask, what effect did that have on our society today, if it had any effect? I think it is important to explain the historic compromise and the effect that the limitation had. Apartheid was by and large a system for the benefit of white people. The transition to democracy meant that we

would transfer political power to the majority but that the economic transformation of our society would follow later. So the Constitution was a promissory note for the future, a promissory note saying there will be a better life for all. In order for that promissory note to be honored, many processes were required. You needed government policies that were redistributive, but importantly you needed the beneficiaries of apartheid to understand what they benefited from and to get them to participate in this new process of what you might call redistributive justice. In a voluntary way, because we didn't have a policy that said that we were going to take away land, take away houses, take away people's jobs, and give it to those who never had them. It was meant to be part of this process of reconciliation and reconstruction.

So we required both state and non-state actors to be active participants in this process of reconciliation and reconstruction, dealing with the land, with the economy and with the redistribution of the abundant resources that we had in this country. I think the problem with the limited mandate of the TRC was because there was a limited focus, the engagement with the key actors within the society was necessarily a limited one, and so much of the work was around the security forces, the granting of amnesty - understandably so - and listening to the voices of the victims of human rights violations. But I almost had a sense that as the focus on civil and political rights unfolded, there wasn't an opportunity for ordinary South Africans, white and black, to look at their own role in this. So for the large majority of white people, because there was no focus on social justice in a substantial way, there was no opportunity for them to reflect on what was my role in the system? How would I become part of the reconstruction processes? Rather, it was easier for them to say, "this apartheid was really bad and those are the bad people, the soldiers, the police." Whether active or passive, the fact of the matter is that they were beneficiaries of apartheid and they were expected to be part of the process of reconstruction.

And so, despite efforts to broaden the debate, it remained pretty narrow I think and forced the work of the TRC – again, the TRC wasn't meant to start and finish this process – we were meant to take these processes forward. We almost saw the TRC end with a sigh of relief, with many people saying thank God that's over, can we get on with our lives. People who never reflected on what it meant, what did the TRC's work mean for us as ordinary South Africans? What is expected of us? People challenged its findings and political parties challenged its findings. I am disappointed that many institutions never seriously looked at the amazing work that was done there and said, how does this take us forward? It was almost saying, that was a wonderful opportunity for us to take a peep into the past, thank you, let's close the curtain and let's move forward.

And now we are moving forward with quite sad consequences, if I can say that. Because we were not together in defining the nature of the injustice that was apartheid, determining our role in it, and not from a perspective of guilt or innocence, but simply how the system worked and developing a common and shared vision of the future. Because we didn't do that in a substantial way, because we didn't focus substantially on socio-economic justice, post-apartheid we see the fault lines in our society. And let me give you some examples of what the consequence of that approach has been to date. We battle to deal with land reform in South Africa. We fall woefully short of our targets. We battle to deal with employment equity in South Africa. We haven't yet transformed the workplace to represent the demographics of our population. We have amazing battles on things like affirmative action, on changing names of our airports, of our towns. So at various levels in society where you would expect support for the process of reconstruction, there is resistance. And we wonder why this resistance is so strong. Is it because those constituencies were not part of this process of looking at the past, of determining the nature of the injustice, of this broader approach to justice, to social justice, that today we are stuck in the phenomena that President Thabo Mbeki referred to when he said, "White South

Africans fear the future because of what they think they may lose; black South Africans look forward to the future because of what they know they must gain.” I think we are still stuck in this process of fear and expectation.

I don't think we can blame it purely on how narrowly we constructed the processes of our transitional justice discourse, but I think there is an important argument there and an important question in my mind whether, if we adopted a wider approach, would we unfold differently as a society? Not just in terms of those who benefited from apartheid but I wonder how state policy would have unfolded, if any differently?

We look at healthcare in South Africa today, we look at education in South Africa today, we look at justice in South Africa today. Notwithstanding this wonderful notion of a society committed to equality, you have a system of parallels. You have one healthcare system for wealthy people and one healthcare system for poor people. You have a very good functioning education system for people who are wealthy and a very poor education system for those who are not wealthy. You have a justice system that by and large works in the same way. So Mark Thatcher was implicated in arranging a coup in Equatorial Guinea. From the luxury of his house in Constantia he was able to negotiate a plea-bargaining agreement while there are people languishing in jails in South Africa today who have stolen a bar of soap or a loaf of bread. And so you have this parallel system. So we are quite far from this ideal of a society united in its diversity.

So the question is, as you as transitional justice practitioners go back home and as you in the next few days embark on these debates, I think it is important, and in my own view it is inevitable, that we have to cast the net wide if the nature of the injustices we are dealing with are as wide and pervasive as ours

were. I don't think it comes without difficulties. The wider you go, the more fraught with difficulties becomes the process because you may well have to investigate and implicate other actors within a society, international actors, governments, banks and private institutions. But I don't think those represent insurmountable obstacles in terms of how you move forward. I think if you don't take a wide approach where it is warranted, you run the risk that transitional justice processes are equated with criminal justice or legal processes.

In South Africa today there is a very important debate, for example, on whether we should prosecuting apartheid era criminals and there is a very important debate on whether victims should participate in that process. I think those are all fantastic and important debates but there isn't a very important debate around social and economic justice. There is, but in the context of the present, not about social and economic justice with regard to its history and its genesis. I think attempts by some South Africans to move us along have not met with success. A former commissioner on the TRC, Mrs Mary Burton, and others, tried what was called A Home For All campaign. It was a campaign that said, as white South Africans we benefited from this state. Whether we were actively part of this or not, let us develop a campaign that says that we want to give back, we want to contribute. That campaign never succeeded in getting support. And I don't think it is because people are bad. I simply think there wasn't this opportunity, there wasn't this process.

So perhaps, to conclude, I think that some of the mechanisms available – truth seeking, reparations, perhaps in a different form, constitutional and policy reform – may all be applied to the context of social and economic rights with variations. But I don't think that looking at social and economic justice represents insurmountable obstacles. I think at the end of the day, if we believe that human rights are indivisible and inter-related then the challenge for transitional justice practitioners is how we respond

to this indivisibility of human rights. Asjorn Eide, a Norwegian human rights expert asked the question: “What good would we have achieved if we saved someone from death by arbitrary execution, only to see the same person die as a result of illness or disease that could have been avoided?”

I think that is the challenge for us and I hope that some of the issues I’ve raised will be the subject of your discussion over the next few days and I once again thank you for the invitation and say how much I enjoyed talking to you.