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促进和保护所有人权——公民权利、政治权利、
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寻求真相、司法、赔偿和保证不再发生问题特别报告员关于过渡时期司法问题全球研究的报告*

秘书处的说明

寻求真相、司法、赔偿和保证不再发生问题特别报告员根据人权理事会第 18/7 号决议提交关于过渡时期司法问题全球研究的报告。报告的目的是描述过渡时期司法方面最重要的进展，评估其实施目前面临的挑战，并提出应对这些挑战的建议。

在第一部分中，特别报告员介绍了过去三十年来该领域的演变情况，着重谈到不同的区域办法和有关辩论。在第二部分中，他介绍了这一领域的各种进展，其中主要是将正义概念分解为其各组成要素，将受害者置于讨论的中心并纳入性别视角。他着重谈到该领域为实现各项权利所做的创新，包括减轻大赦的影响、设计起诉战略来处理系统犯罪、采用真相委员会、能够为各种各样受害者提供复杂福利的全面赔偿方案，以及机构、安全部门和文化改革主动行动。第三部分描述了该领域面临的若干挑战。外部挑战包括执行措施方面的“双重标准”和普遍关闭公民空间问题。关于内部挑战，特别报告员着重指出，过渡时期司法任务的扩大没有充分敏感地考虑到成功所需的职能和体制要求，没有充分敏感地考虑到执行背景情况的基本特征。在第四部分中，他就如何应对这些挑战提出了建议。

* 本报告附件不译，原文照发。

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice**

Contents

** Circulated in the language of submission only.

I. Introduction

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in accordance with Human Rights Council resolution 18/7, in which the Council asked the Special Rapporteur to undertake a study, in cooperation with and reflecting the views of, inter alia, States and relevant United Nations bodies and mechanisms, international and regional organizations, national human rights institutions and non-governmental organizations, on the ways and means to implement the issues pertaining to the mandate.

2. The purpose of the present report is to describe the most important advances in transitional justice and to assess the current challenges facing its implementation.

3. In preparation for the present report, the Special Rapporteur organized five regional consultations, which gathered representatives of Member States, United Nations agencies, regional organizations and civil society organizations. The purpose was to understand the regional specificities of transitional justice and to create a space where actors from each region could share priorities, lessons learned and good practices. The consultations took place in: Cairo (7-9 November 2012); Buenos Aires (11-13 December 2012); Kampala (6-8 November 2013); Berlin (14-15 May 2014); and Colombo (9-10 November 2016). The Special Rapporteur thanks all of the participants, the Governments of the host countries for their collaboration with the meetings and the Office of the High Commissioner for Human Rights (OHCHR) for its support of this endeavour.

4. Subsequently, the Special Rapporteur requested written contributions from United Nations agencies, civil society organizations and Member States. He is grateful for the cooperation of the following Member States: Honduras, Mexico, the Netherlands, Sweden and the United States of America. He also thanks for their assistance OHCHR, the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), the Department of Peacekeeping Operations, the Department of Political Affairs, the Executive Office of the Secretary-General and the Special Adviser of the Secretary-General on the Responsibility to Protect. OHCHR, UNDP and UN-Women, which jointly funded an expert meeting where the contents of this report were discussed, deserve particular recognition. Finally, he acknowledges the contributions from the civil society organizations and individuals listed in the annex.

II. Regional approaches to transitional justice

A. Latin America

5. The measures which would come to be known as transitional justice emerged first in Latin American countries in their transitions away from authoritarian rule in the 1980s. Latin America has pioneered the model of transitional justice, developing a high degree of specialized expertise. Civil society, especially victims' groups, have played central roles in pushing States to recognize their obligations, relying on citizen activism, litigation in the Inter-American Court of Human Rights, cross-national networking and raising public awareness through cultural expression.

6. Argentina and Chile remain signal examples of the potential achievements of transitional justice. As Argentina transitioned away from authoritarian rule in 1983, it adopted initiatives to address the needs of victims and to strengthen its nascent democracy. These included a National Commission on the Disappearance of Persons that sought to establish the facts concerning enforced disappearances, leading to the establishment of State-run reparations programmes. The transition in Argentina included trials in 1985 of the military *juntas* on charges of systematic human rights violations, leading to sentences from four and a half years to life for six generals. However, in 1986/1987, prosecutorial efforts were halted, and in 1989 Presidential pardons were granted owing to military backlash and

fears of a coup. Since then, Argentina found ways to circumvent and eventually annul its amnesty law. "Truth trials" — judicial procedures attributing guilt or innocence, but with no actionable sentence attached to them — have been followed by regular trials leading to 176 decisions sentencing 695 members of the armed forces and the police, and absolving 74.[1] Even with no official vetting programme, citizens and the State have found other ways to indirectly vet security forces. Moreover, popular expression about the authoritarian past is common in the public sphere.

7. In Chile, the transition away from Augusto Pinochet's rule in 1990 was also facilitated by an amnesty, the effects of which have been circumvented despite the fact that it stays in the books. With prosecutions foreclosed by the 1978 Amnesty Decree Law, the Government focused initially on truth-seeking and administrative reparations programmes for victims. Indeed, Chilean reparations programmes have been particularly successful. The programmes are increasingly comprehensive, providing benefits for an increasing number of violations, not just those leading to death. They also combine material and symbolic benefits, including access to victim-sensitive health care, long-term pensions rather than "one-off" payments and many other benefits.[2] Chile has experienced a "war of attrition" against impunity, as judicial opinions on the 1978 Amnesty Decree Law have limited its effect.[3] Chilean civil society has been a catalyst for truth-seeking and accountability, through meticulous documentation of abuse, unrelenting activism and cultural expression about the past.

8. Many other Latin American countries have adopted transitional justice measures, including Brazil, Colombia, El Salvador, Guatemala, Honduras, Paraguay, Peru and Uruguay. Among these, a number of countries have created comprehensive strategies for truth, justice, reparation and guarantees of non-recurrence, rather than narrower, one-off approaches. Latin American approaches to transitional justice have been greatly helped by the existence of the Inter-American Court of Human Rights, whose decisions have shaped jurisprudence at the national level across Latin America. The Court's reiterated position on the inadmissibility of amnesties has also been an essential part of the region's transitional justice story. Additionally, Latin American countries have benefited from inter-State cooperation on archiving, forensics, and other issues, an example of which is the MERCOSUR (Southern Common Market) Acervo Documental Cóndor.[4]

B. Europe and North America

9. Europe and North America, particularly the former, have extensive experience with transitional justice measures, albeit not necessarily under this name. Experience with the Second World War, colonialism, military dictatorships and post-communist transitions led Europe to establish many approaches to dealing with the past. In North America, Canada and the United States have adopted some of these measures: reparations from the United States to Japanese-Americans interned during the Second World War, and the recent Truth and Reconciliation Commission of Canada addressing the horrific history of residential schools for Aboriginal children.

10. The long struggle in Germany to deal with its past is particularly worthy of attention. Following the Second World War, the first international tribunal was held in Nuremberg, Germany. Subsequently, the Allied Powers and the German Government took other steps, including institutional reforms (not limited to denazification), intended to prevent the recurrence of Nazism. Domestic trials were pursued against Nazi perpetrators, and massive reparations were paid to victims of the Nazi regime. The German experience is perhaps most far-reaching in unofficial truth and memory efforts as citizens have debated

[1] See www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad.

[2] Elizabeth Lira, "The reparations policy for human rights violations in Chile", in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford University Press, 2008).

[3] Cath Collins and Boris Hau, "Chile: incremental truth, late justice", in *Transitional Justice in Latin America*, Elin Skaar, Jemima García-Godos and Cath Collins, eds. (Routledge, 2016), p. 134.

[4] See www.ippdh.mercosur.int/acervo-documental-condor-10/.

the past, academics have analysed the root causes of the regime and memorials are common fixtures in the landscape.

11. The end of communism in Eastern Europe spurred a distinct approach to transitional justice, focusing on accessing secret surveillance archives that predecessor regimes had created and vetting State officials. In East Germany, as the Berlin Wall fell and staff at the archives of the Ministry for State Security (Stasi) burned and shredded files, citizens occupied Stasi buildings to preserve the documentation. Subsequently, the German Government created a Commission to maintain the archives and to open them to the public. Additionally, in the former Czechoslovakia, East Germany, Hungary and Poland, successor regimes developed laws and policies to exclude people linked to the communist regime from government or civil service through policies known as "lustration".[5]

12. The collapse of communism in Europe led to devastating conflicts in Yugoslavia as the country broke apart. In 1993, the United Nations Security Council reacted by creating the International Tribunal for the Former Yugoslavia.[6] Bosnia and Herzegovina, Croatia and Serbia have forged their own, often difficult paths in adopting transitional justice approaches. The region has, however, been the site of many positive developments, including the use of cutting-edge forensic approaches to identify the remains of 70 per cent of the estimated 40,000 people missing because of the conflict.[7] Civil society groups developed an innovative campaign (which has not yet born fruit) for a truth commission that was regional, rather than national, in scope. Regrettably, a comprehensive approach to reparation for victims of the conflict has lagged behind.

13. The European Court of Human Rights has played a role in pushing States to uphold their obligations to victims. As one example, the Court has established jurisprudence on the procedural obligation of States to investigate serious crimes based on cases from Northern Ireland.[8]

C. Africa

14. The South African Truth and Reconciliation Commission was established through the negotiated end to apartheid in South Africa in 1994. While the Commission benefited from the experiences of Argentina and Chile, it innovated beyond those models. It is the only truth commission to include an amnesty-for-truth model (a highly conditioned amnesty by design). It integrated a promise of reparations (alas, not completely satisfied), and, importantly, provided a public platform for victims, not the least through highly successful public hearings. Ultimately, the expectation that the amnesty process would generate significant information was not met. Similarly, the idea that those whose amnesty applications had been denied would be liable for prosecution (7,112 applications filed but only 849 amnesties granted) has been emptied of force because of the reluctance to initiate prosecutions.[9] Nonetheless, the model has been extraordinarily influential. Kenya, Liberia and Sierra Leone have adopted elements of this approach.

15. Another regional innovation concerns the integration of local and traditional justice in countries like Rwanda and Uganda. Rwanda developed the Gacaca courts, a system of more than 12,000 community-level tribunals that functioned from 2005 to 2012 to deal with all but the most serious crimes committed during the country's 1994 genocide. Gacaca filled a gap left by the decimation of the legal system during the genocide, combining traditional conflict resolution measures with elements of modern judicial procedure.[10]

[5] Alexander Mayer-Rieckh and Pablo de Greiff, *Justice as Prevention* (New York, Social Science Research Council, 2007).

[6] See www.icty.org/en/cases/key-figures-cases.

[7] International Commission on Missing Persons, "Annual report 2015", p. 7.

[8] *McKerr v. the United Kingdom* (Application No. 28883/95).

[9] See www.justice.gov.za/trc/amntrans/index.htm.

[10] Rwanda, "Gacaca Courts in Rwanda" (June 2012).

16. North Africa has also adopted transitional justice approaches. In Morocco, pressure from victim organizations and the political opening created by the ascension of a new King in 1999 led to the creation of an Equity and Reconciliation Commission to document the abuses that took place during the repressive "Years of Lead" in Morocco. More recently, during the Arab Spring, protesters linked current economic injustice with past repression; subsequently, a number of countries have implemented transitional justice. Tunisia, in addition to the adoption of a new Constitution, enacted a comprehensive transitional justice law establishing a Truth Commission to investigate human rights violations and also to settle cases of corruption.[11]

17. International criminal justice has played a more significant role in transitional justice in Africa than in other regions. The Security Council established the International Tribunal for Rwanda in 1994.[12] More recently, African countries have been the primary sites for investigations of the International Criminal Court, a fact that has spurred debate and critique.[13] Since the International Criminal Court acts as a court of last resort, attention has turned to the issue of "complementarity", referring to building the capacity of national courts to prosecute international crimes.

18. By the time many African countries adopted transitional justice, a formal, "template" approach already existed, filtering into negotiated peace agreements. The result is that African experiences provide important lessons about the challenges of implementation in the wake of peace settlements, and insights for global debates on the relationship between peace and justice. While debates on how justice should be approached in conflict-affected countries have been complex,[14] it would be a mistake to assume an intemperate opposition to criminal justice entirely: Africans have pursued justice in national courts in Eritrea, Rwanda, Tunisia and Uganda, and in hybrid courts in Chad and Sierra Leone.

19. The relevance of transitional justice is clear from recent initiatives of the African Union and the African Commission on Human and Peoples' Rights. The African Union is developing a Transitional Justice Policy Framework and considering establishing a related mechanism.[15]

D. Asia

20. Although Asian experiences with transitional justice may not be as well known, the region has a long history, extending back to the trials in the International Military Tribunal for the Far East after the Second World War.[16] More recently, countries like Bangladesh and Cambodia have sought to come to terms with large-scale human rights abuses that took place decades ago, while countries like Nepal and Sri Lanka are confronting more recent political conflict. Australia has used the tools to deal with the legacies of colonialism.

21. The initiatives of East Timor were innovative in many respects. After 1999, when the United Nations assumed administration of East Timor following massive violence around the referendum on self-determination, a Serious Crimes Process and a Commission for Reception, Truth and Reconciliation were established. The former was comprised of two hybrid criminal justice mechanisms that focused on perpetrators of the most serious abuses. The Commission complemented this approach by dealing with the aftermath of

[11] A/HRC/24/42/Add.1.

[12] See http://unictr.unmict.org/en/tribunal.

[13] See Elise Keppler, "AU's 'ICC withdrawal strategy' less than meets the eye", 1 February 2017, www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye.

[14] African Union Panel of the Wise, "Peace, justice, and reconciliation in Africa: opportunities and challenges in the fight against impunity", *The African Union Series* (International Peace Institute, February 2013).

[15] African Commission on Human and Peoples' Rights, Resolution No. 235.

[16] Leigh A. Payne and Kathryn Sikkink, "Transitional justice in the Asia-Pacific: comparative and theoretical perspectives", in *Transitional Justice in the Asia-Pacific*, Renée Jeffery and Hun Joon Kim, eds. (Cambridge University Press, 2014).

violence in communities, focusing on mid- or lower-level perpetrators of crimes, through a programme to encourage the "reception" of former militias back home. Another novelty was the joint truth-seeking effort with Indonesia, the Commission on Truth and Friendship. Initially criticized by observers who expected nothing short of a whitewash, that Commission's final report supported many of the politically sensitive findings of the Commission for Reception, Truth and Reconciliation in East Timor regarding crimes against humanity committed by Indonesian forces.[17]

22. Also notable are long-term efforts to persist on the path of transitional justice, in spite of delays and political challenges. In Cambodia, the Extraordinary Chambers in the Courts of Cambodia were established in 2006 to prosecute Khmer Rouge crimes from the 1970s. In Nepal, there have been successive attempts to develop the truth commission mandated in its 2006 Comprehensive Peace Accord, including a much-criticized 2014 law to create two commissions. With support from an important Supreme Court decision, which struck down amnesty provisions that ran counter to victims' right to a remedy, there is hope that the commissions will yet make a meaningful contribution.[18]

23. Unlike in other regions, there is no specific model of success for transitional justice in Asia that is emulated by others. This is not necessarily a drawback, as it prevents a contextual mimicry. In addition, Asia does not have a regional human rights law system and, owing to the cultural diversity of the region, there has (so far) been less cross-country sharing than observed in other regions. Nevertheless, the wide range of experiences provide a clear basis for learning and continuation.

III. Advances in transitional justice

24. The purpose of this section is to highlight (non-exhaustively) some key achievements and lessons learned in the field of transitional justice in the last three decades or so. The items were chosen with a practical intent, to be of use to countries undergoing transitions or that may undergo these processes in the future.

A. Cross-cutting advances

25. The most important contribution of transitional justice has been, quite simply, its unpacking of the concept of justice into constituent and mutually reinforcing elements: truth, justice, reparation and guarantees of non-recurrence, in recognition of the fact that criminal justice alone would not be enough to satisfy the justice claims of victims of massive or systematic human rights abuse.

26. As part of this unpacking, a multifaceted normative framework has developed, which has been amply described in the Human Rights Council resolution in which the Council created the Special Rapporteur's mandate as well as the Special Rapporteur's reports.[19] The framework, which did not exist 30 years ago, defines State obligations to redress gross violations of human rights and serious violations of international humanitarian law.

1. Making victims "visible" and acknowledging their voice

27. The first, and most important, advance in transitional justice that cuts across the four elements of the mandate has been the "visibilization" of victims, who are typically among the most marginal and vulnerable people in a society. Through different means, transitional justice helps victims occupy a space in the public sphere that they lacked before. Functionally, that space becomes for society the grounds of solidarity, a basis of justice and

[17] Lia Kent, "Beyond 'pragmatism' versus 'principle': ongoing justice debates in East Timor", in ibid.

[18] International Center for Transitional Justice, "'We cannot forget': truth and memory in post-conflict Nepal", May 2017.

[19] A/HRC/21/46, especially.

ultimately of social integration. For victims, it becomes an arena for claims-raising, the core of the idea of rights-holding.[20]

28. Transitional justice has sought to put victims at the centre of its efforts, with the aims of providing recognition, fostering trust and strengthening the democratic rule of law. It is not just that victims have been central to pushing the government — often in highly visible, public ways — to adopt transitional justice, nor that on account of this and the very fact of victimization they, normatively, deserve to be included in the design and implementation of transitional justice measures, although all of this is true. The point is that, as a practical matter, the possibility of achieving the aims of transitional justice depends upon finding successful ways of giving victims a space in the public sphere.

29. One significant innovation has been the development of consultation or dialogue processes that precede and inform the development of transitional justice measures. National consultations, such as those that have taken place in Burundi, Colombia, Sri Lanka and Tunisia, send victims and society at large a powerful message of inclusion and ultimately empower them.[21]

2. Gender sensitivity and inclusion

30. Another cross-cutting advance concerns the creation of specific strategies to address the rights and participation of women and to integrate a gender perspective into transitional justice measures. These innovations are critical given the facts that women are less likely than men to come forward concerning abuses they have experienced, and that the kinds and consequences of human rights abuses suffered by men and women are often different.[22]

31. At the core of this contribution is the idea of ensuring that gender-based crimes are included in, for example, the mandates of truth commissions and in reparations policies as prosecutable offences. This includes the pivotal recognition of rape as a crime against humanity and a war crime through the work of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. The Rome Statute of the International Criminal Court has gone further, including not only rape, but other gender-based crimes, such as sexual slavery, forced pregnancy, enforced prostitution and enforced sterilization.

32. Transitional justice measures have taken steps over the years to enhance inclusion. Many institutions, following the lead of the Peruvian Truth and Reconciliation Commission, the first one to establish a gender unit, have adopted an explicit institutional approach to gender, either the establishment of a central gender unit or a cross-cutting approach to gender, dedicated staff with experience with gender-based violence and an outreach strategy for women victims. Reparations programmes have become more sensitive to gender — including expanding the list of harms eligible for benefits and making the benefits themselves responsive to differences in men's and women's needs.

33. Practitioners have pushed for creative ways to link transitional justice to structural transformation, by aligning it with positive legal and social changes to enhance the status of women in relation to property ownership, inheritance, marital rights and more.

34. Although progress at the level of design is not necessarily equivalent to progress at the level of implementation, nowadays it would be impossible to engage seriously in transitional justice work without heeding gender considerations.

3. Fact-finding and documentation

35. A final advance that also contributes across the four elements of the mandate concerns improvements in fact-finding and documentation, which are often conducted by civil society organizations and which provide critical information for a wide variety of

[20] Ibid.

[21] A/HRC/34/62 and A/71/567.

[22] UN-Women, "A window of opportunity: making transitional justice work for women", October 2012 2nd ed., pp. 11-12.

measures, including prosecutions, truth commissions and historical and cultural works. One example of this advance concerns the strengthening of professional competence in forensics since the early 1980s, when the Abuelas de la Plaza de Mayo first engaged United States-based scientists to help them trace their missing children and grandchildren.[23] Emerging out of the Argentine experience, a small but dedicated group of scientists pioneered new methods of DNA testing, which was put into practice also in Chile, Guatemala and Peru. These groups were again called on for their expertise by the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. In 1996, the International Commission on Missing Persons was created to investigate the roughly 40,000 people missing as a result of the conflict in the former Yugoslavia. The field of forensic investigation of human rights crimes has proliferated, with centres of expertise now set up in many countries.

36. Documentation has also improved, aided by technological advances and international cooperation. Professional standards and methodologies for taking witness testimony and collecting official and unofficial documents have been strengthened, and are all critical to ongoing or later transitional justice efforts. Technological innovations have helped create tools for the documentation and analysis of large sets of data. Archiving, including preservation but also classification and access, has benefited immensely from new technologies.[24]

B. Advances in prosecutions

37. Prosecutions provide recognition to victims as rights holders; they provide an opportunity for the legal system to establish its trustworthiness; they strengthen the rule of law; and finally, in doing all of the above, they can contribute to social reconciliation. The aftermath, however, of gross violations of human rights and serious violations of international humanitarian law pose particular challenges for prosecutions. Usually only a fraction of those who bear responsibility for violations are ever investigated, because of the high number of suspected perpetrators, the relative scarcity of financial and human resources, capacity and will, and the fact that in many transitions the predecessor regime or forces maintain a certain power.

1. Right to justice: coping with amnesties

38. Some courts have nullified amnesties outright, articulating the limits of legislative power to grant amnesties in two main ways. First on constitutional grounds, as the Peruvian Constitutional Tribunal did, by declaring two successive amnesty laws unconstitutional and arguing that they were part of a plan to guarantee impunity at odds with article 1 of the Peruvian Constitution which establishes that "the defense of the human person and respect for [his or her] dignity are the supreme purpose of society and the State".[25]

39. Second, some courts have appealed to international law or jurisprudence to nullify amnesty laws. The Supreme Court of Argentina, for instance, in the *Simón* case, declared the Final Stop and Due Obedience Laws unconstitutional. The Supreme Court argued in that case that article 75 (22) of the Constitution, which establishes that "treaties and concordats have a higher hierarchy than laws", makes various instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, constitutional, and that those instruments limit the power of the legislature to grant such amnesties.[26]

40. Even countries that have not nullified amnesties have found ways of mitigating their worst consequences. One method has been to argue that the very concept of amnesty calls

[23] Adam Rosenblatt, *Digging for the Disappeared* (Stanford University Press, 2015).

[24] A/HRC/30/42.

[25] *Santiago Enrique Martín Rivas*, Exp. No. 679-2005-PA/TC, 2 March 2007, Constitutional Tribunal of Peru, especially paras. 56 ff.

[26] *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, etc., S.1767.XXXVIII, 14 June 2004, Supreme Court of Argentina, para. 16.

for a full investigation of the facts and a reliable identification of those presumed responsible. Thus, at least judicial investigations can be completed.[27]

41. A stronger way of mitigating the effects of amnesties has been to argue that some categories of violations cannot fall under their purview, independently of how particular amnesty laws define their subject matter. This applies most clearly in the case of "continuous crimes" which are not simply those in which an instantaneous action has an effect extended in time but those in which the perpetrator sustains the criminal state either through action or wilful failure to correct it. Kidnappings and disappearances are the prototypical examples of continuous crimes. Courts committed to the fight against impunity have fixed on the ongoing nature of the crimes to block the application in these cases of temporally limited amnesty laws.

42. The notion of a continuous crime has also been important in coping with statutes of limitation. To the extent that a crime has not ceased (for example, the disappeared person has not returned, and his or her body has not been found), no statute of limitation is applicable to it.[28] Resources to deal with issues of prescription and non-retroactivity have also been found by courts committed to human rights in the customary international law prohibition of applying statutory limitations to crimes against humanity,[29] even when those crimes had not been domestically codified at the time of commission, provided that the relevant domestic common crimes can be argued to also constitute crimes against humanity.[30]

2. Prosecutorial strategies

43. Transitional justice has contributed to the realization of the right to justice through the articulation of prosecutorial strategies, something that prosecutors confronting common crimes in ordinary jurisdictions never develop, as they typically stand under the obligation to consider cases as they come. By contrast, in the typical transitional situation the number and types of violations vastly outstrip the State's capacity to take in all cases that might be presented at any one time and even over time. A strategy is then necessary in order to rationalize the deployment of scarce resources and to maximize the impact of those efforts.

44. The Special Rapporteur devoted an entire report to this topic,[31] which examines the benefits and drawbacks of prioritizing cases that satisfy various criteria, including easy cases ("low-hanging fruit"), high impact cases, most serious crimes, the most responsible and cases that have the potential to dismantle criminal networks, and argues that in transitional situations the latter is particularly important. The point to emphasize is that this expertise has been developed, and that prioritization strategies are now available as tools to enhance the effectiveness of transitional justice prosecutions.

3. Diversification of venues

45. National courts have been (and remain) the primary sites for prosecutions. Yet innovation has been needed as many national courts were unwilling or unable to undertake them.

46. The ad hoc international courts (the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda) were created to respond to specific instances of massive violations of human rights and international humanitarian law. The International Criminal Court emerged later on as an expression of the aspiration for a permanent international court to address the most serious international crimes.

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[27] *Poblete Córdova*, Rol No. 469-98, 9 September 1998, Supreme Court of Chile, Second Chamber, especially paras. 6 ff.

[28] *Vásquez Martínez y Superby Jeldres*, Rol No. 559-04, 13 December 2006, Supreme Court of Chile, Second Chamber.

[29] *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, A.533.XXXVIII, Supreme Court of Argentina, especially paras. 28-33.

[30] Pablo Parenti, "Argentina", in *Jurisprudencia Latinoamericana Sobre Derecho Penal Internacional*, Kai Ambos and Ezequiel Malarino, eds. (Berlin, Konrad-Adenauer-Stiftung, 2008), p. 26.

[31] A/HRC/27/56.

47. "Hybrid" courts, which are comprised of national and international staff, and combine national and international law and standards, emerged in the wake of reflection on some of the drawbacks of the ad hoc international courts. Critiques concerned, inter alia, their distance, impressions of partiality and the fact that they were not well positioned to build national capacity to try such cases. As a result, hybrid courts were put to work in Bosnia and Herzegovina, Cambodia, Lebanon, Sierra Leone and Timor-Leste,[32] as well as in Kosovo.[33] They were designed to leave a legacy of jurisprudential, practical and even physical (in the form of court buildings) contributions at the national level.

48. More recently, attention has turned towards the principle of complementarity — investing directly in national judicial systems in order to prepare them for the prosecution of complex international crimes.

49. Experiments with different venues for the realization of the right to justice have contributed to the development of jurisprudence that manifests progress in international criminal law regarding novel topics, including sexually based violations, command responsibility and, incipiently, the destruction of cultural property. Equally, the various venues instigated the development of expertise regarding international criminal law which, if appropriately harnessed, can translate into trials in national jurisdictions of increased sophistication and effectiveness.

C. Advances in truth-seeking

50. Knowing the truth (and official recognition of it) is important for victims, their families and the public. Ultimately, it is difficult to think about the realization of rights if their violation is not even acknowledged, difficult to think about dignity in circumstances in which people do not have any control about what is said about them and their fate. Transitional justice has made indispensable contributions not only to the explicit articulation of a right to truth but to the operationalization of that right.

1. Right to truth

51. While there is no specific international convention on the right to truth, national courts and international judicial bodies have developed a set of decisions that provide a framework for satisfying the right of victims and their families to the truth, as part of victims' broader right to a remedy.[34] At the international level, key references include the International Convention for the Protection of All Persons from Enforced Disappearance and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. At the regional level, the Inter-American Court of Human Rights,[35] the African Commission on Human and Peoples' Rights[36] and the European Court of Human Rights[37] have all acknowledged aspects of the right to truth. At the national level, court cases in Argentina, Colombia, Peru and South Africa, among others, have affirmed a legal basis for the right to truth.[38]

52. The right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged

[32] A hybrid tribunal to try the former leader of Chad was also created in Senegal.

[33] All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

[34] Eduardo González and Howard Varney, eds., "Truth seeking: elements of creating and effective truth commission", 2013.

[35] Inter-American Commission on Human Rights, Annual Report, 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986), p. 193.

[36] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight that the right to an effective remedy includes "access to the factual information concerning the violations" (principle C (b) 3).

[37] *El-Masri v. the former Yugoslav Republic of Macedonia* (Application No. 39630/09), para. 191.

[38] González and Varney, "Truth seeking", p. 5.

violation,[39] the fate and whereabouts of the victim[40] and, where appropriate, the process by which the alleged violation was officially authorized.[41] The right to truth should be understood to require States to establish institutions, mechanisms and procedures authorized to seek information about disputed events.

2. Truth commissions

53. One of the institutions that has risen to prominence in transitional justice processes is the truth commission. Successful truth commissions can give voice to victims, foster general social integration, help to set reform priorities and provide important information for other transitional justice measures.

54. There are contextual factors that make truth commissions an apt choice in post-authoritarian transitions: truth is a proper foil to the mantle of secrecy and denial under which authoritarian regimes exercise their power; the task of finding the truth is made feasible by the highly asymmetric use of violence, with the State being responsible for the majority of violations; and truth is also a reachable goal, a feasible first step towards a more comprehensive remedy, even in circumstances in which predecessor regimes maintain some capacity to destabilize the transition process.

55. In other contexts, including the post-conflict ones, truth commissions may still make important contributions to accountability, but their adequacy should be carefully assessed. The Special Rapporteur has devoted a report to truth commissions.[42] One point worth reiterating is that despite misconceptions since the South African Truth and Reconciliation Commission, there is no intrinsic connection between truth commissions and amnesties. In Argentina, the National Commission on the Disappearance of Persons was required to hand its information to prosecutors; in Chile, President Aylwin forwarded the report of the Truth and Reconciliation Commission to prosecuting authorities; and in South Africa, those denied amnesty by the Truth and Reconciliation Commission could be prosecuted. The Peruvian Truth and Reconciliation Commission was required to prepare cases for prosecution. The truth commissions in East Timor and Sierra Leone did not short circuit the possibility of moving cases to the criminal justice system, at least not by design. Countries need not choose between truth or justice.

56. Unofficial, civil society-led truth commissions have also made contributions to truth-seeking, with a notable example being the Catholic Church-led Recovery of Historical Memory Project in Guatemala (1998), which positively influenced the later, United Nations-sponsored Commission for Historical Clarification.

3. Other truth-seeking tools

57. As important as truth commissions have been, it would be a mistake to see them as the only tool for truth-seeking. In the case of the post-communist transitions, opening of the intelligence services' archives was a critical means of exposing the truth. In Germany, the 1991 Stasi Records Act allowed controlled access to the Stasi archives. Archives remain highly relevant in other contexts as well, and their preservation in the face of intentional destruction or neglect is critical to a full accounting of the past. In Guatemala, police archives relating to its armed conflict were found decaying in an abandoned warehouse in 2005 in Guatemala City; since then, the documents have been digitized and have contributed to the prosecution of human rights cases.

58. International commissions of inquiry and fact-finding missions are another method for truth-seeking. There have been more than fifty such efforts supported or undertaken by different organs of the United Nations in every region of the world. Their purpose is to

[39] See E/CN.4/2006/91, para. 38.

[40] A/HRC/16/48, pp. 12-17.

[41] General Assembly resolution 60/147, annex, para. 24; and *Myrna Mack Chang v. Guatemala*, 25 November 2013, Inter-American Court of Human Rights, para. 274.

[42] A/HRC/24/42.

gather and verify information, create a historical record of events and provide the basis for further investigation.[43]

59. Finally, in many countries, historical research has played an important role in demystifying the past, with many countries developing resources for historical inquiry. Germany has been a leader through its investigations of the workings of the repressive and genocidal Nazi state. In Morocco, the National Human Rights Council has supported the development of contemporary historical research in Moroccan universities.[44]

D. Advances in reparations

60. Reparations are material and symbolic benefits distributed either to individuals or to groups, intended to recognize and redress the violation of human rights, which can be shattering for victims and have long-lasting effects with ripples felt by many persons and even across generations. They are typically the only measure designed to benefit victims directly.

1. Right to reparation

61. There has been significant progress at the normative level in establishing the rights of victims to reparations. The legal basis for a right to a remedy and reparation has been enshrined in a variety of international human rights, international humanitarian law and international criminal law instruments. Treaty bodies and national, regional and international courts have considered a large number of both individual cases and group claims arising from periods of mass violations, and have developed a rich jurisprudence that confirms that the State obligation to provide reparation extends far beyond monetary compensation to encompass such additional requirements as: public investigation and prosecution; legal reform; restitution of liberty, employment or property; medical care; and expressions of public apology and official recognition of the State's responsibility for violations.

62. The adoption by the General Assembly of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by consensus in 2005 was a milestone. These Principles have helped catalyse a better understanding of the right to reparation and guide action in this domain.

2. Massive administrative programmes

63. An important advancement has been the development and diffusion of the model of massive administrative programmes. Countries in every region of the world have opted for such programmes, including ones already mentioned, such as Argentina, Chile, Germany, Morocco, Nepal and the United States, as well as many others, including Canada, Guatemala, the Philippines, Sierra Leone, Spain and Uruguay.

64. Large-scale administrative programmes respond to a large universe of cases rather than the judicial resolution of individual, isolated cases. Instead of trying to tailor remedies to individual losses or harms suffered, administrative programmes distribute the same benefit to all individuals within particular classes, determined by the type of violations, allowing only for some variations along predetermined axes such as the intensity, duration or effect of the violation. The whole point is to make the programme expeditious, accessible and effective as a redress mechanism for large universes of victims. So, while these programmes do not deliver "perfect justice", some of them have successfully provided significant benefits to thousands and in some cases tens of thousands of victims

[43] OHCHR, "Commissions of inquiry and fact-finding missions on international human rights law and humanitarian law: guidance and practice" (2015), p. v and 2-3.

[44] www.cndh.ma/fr/actualites/table-thematique-sur-lhistoire-des-propositions-pour-developper-et-diffuser-les.

on a time frame, at a cost and in a much more victim-friendly manner than any court procedure.

3. The importance of "complexity"

65. Normative guidance recognizes that, strictly speaking, it is impossible to fully repair the harms of gross and serious violations. Programmes that have, however, taken a complex approach to their mix of benefits have been more successful in achieving basic transitional justice goals such as recognizing victims and fostering a sense of citizenship — for example, by providing a mix of both material reparations such as payments and social benefits, and symbolic actions like memorials and apologies. Material reparations may take the form of compensation (payments in cash) or of service packages, which may in turn include provisions for education, health and housing. Symbolic reparations may include official apologies, the establishment of days of commemoration, the creation of museums or rehabilitation measures such as restoring the good name of victims.[45]

E. Advances in guarantees of non-recurrence

66. Because the notion of "guarantees of non-recurrence" is seldom used outside United Nations circles (and in fact, even within the Organization, there are only a handful of documents that use the term), it may appear that this is a category around which there is not a lot of activity or progress. This would be a mistake. The Special Rapporteur has presented two reports on guarantees of non-recurrence and will therefore only highlight a few relevant points, the first one being that the most sensible interpretation of the concept is that it refers to a preventive function,[46] and the problem with prevention is not that we do not know how to achieve it, but that our knowledge and our preventive programmes have traditionally been compartmentalized.

67. The concept of guarantees of non-recurrence made its first appearance in a United Nations document in 1993.[47] Since then it has received sporadic and uneven attention. There are two main strands of interpretation of the concept, one which takes it to be part of a proper interpretation of remedies, and the other as an entailment of the commitment to rights.

68. The General Assembly, in its resolution 60/147 adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparations for the Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, espoused the first position, that guarantees of non-recurrence are one of the forms of reparation (remedy) to which victims are entitled.

69. The second position has been defended by the Human Rights Committee in arguing that the purposes of the International Covenant on Civil and Political Rights "would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee … to include … the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question".[48] This same line has been taken by regional and national courts, which have expanded the scope of the guarantees significantly. Whereas the "foundational" documents gave content to the concept largely by reference to what we would now call aspects of security sector reform, national and regional courts have used the concept to require States to take steps including measures intended to preserve the victims' memory, to reform legislation and the constitution, and to adopt educational initiatives.[49] In its landmark *Velásquez-Rodríguez* decision, the Inter-American Court of Human Rights argues that States are obliged "to organize the

[45] A/69/518.

[46] A/HRC/30/42 and A/70/438.

[47] See E/CN.4/Sub.2/1993/8, paras. 47-48 and 55, and chapter IX, general principle 11.

[48] See CCPR/C/21/Rev.1/Add.13, para. 17.

[49] A/HRC/30/42 and María Carmelina Londoño Lázaro, *Las Garantías de no Repetición en la Jurisprudencia Interamericana* (Tirant Lo Blanch, 2014).

governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".[50]

70. Significant knowledge has been accumulated about preventing both conflict and human rights violations. This encompasses initiatives from establishing "gateway" rights such as legal identity, to complex institutions such as constitutional courts. In between there are effective preventive initiatives involving changes in policing strategies, anti-torture mechanisms, limiting the jurisdiction of military courts, strengthening civilian oversight over security and intelligence services, and vetting personnel in the security sector and sometimes the judiciary.

71. In all these areas important lessons have been learned. Transitional justice has not been especially good at integrating these lessons, hence the impression that guarantees of non-recurrence is the least developed pillar. To be fair, no policy field has developed a systematic prevention framework successfully. The Special Rapporteur has argued in favour of such an approach in his two reports on the topic, advocating for a framework that would give space not only for the reform of official State institutions, but also, on account of their preventive potential, for measures that strengthen civil society, and for those that can lead to changes in culture and in personal dispositions.

IV. Challenges

72. In a short period of time — at least by the standards of international normative change — transitional justice has become part of the repertoire of measures that countries undergoing different types of transitions are expected to implement. It has made important contributions in the countries where it has been implemented earnestly, including to the lives of victims and their families, to the quality of institutions, and, especially, to the way in which citizens and institutions relate to one another. Having said this, the field faces challenges which can be organized in two broad categories.

A. External challenges

73. This report cannot offer a full diagnosis of the state of human rights globally, but it would be remiss to assess the state of transitional justice without mentioning three tendencies that make achievements in the field more difficult. The first is the persistent selectivity in the way in which universal legal obligations are implemented, and in the consequences that follow from breaching them. The idea of an international community in which all parties are equally bound by shared obligations is more distant today than it was even twenty years ago. Transitional justice as a means of redressing and preventing serious violations is not applied everywhere it should be applied, and it would be naive to fail to observe that this pattern correlates with markers of power. Some powerful countries have legacies of violations of the very type that they expect other countries to redress through the implementation of transitional justice measures, but they do not. These countries have a lot to learn from those that have found the courage and clarity to implement such measures. They should also be clear about the fact that their "double standards" make it increasingly difficult for countries to take the necessary leap.

74. The second tendency is aptly captured by the term "securitization", the decision to understand certain risks in terms of an existential threat that justifies exceptional responses. From the standpoint of transitional justice, this poses a double threat, providing a cover for violations and abuses both ex post and ex ante. Many issues that may have been approached in different ways are now "securitized", with the consequent sidestepping of human rights and other justice-related considerations.

[50] *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988, Inter-American Court of Human Rights, para. 166.

75. Finally, the third external trend is the closing of civil spaces, the widespread tendency of governments all over the world to establish mistrustful or even antagonistic relations with civil society, particularly with the adoption of laws that limit and exercise control over civil society organizations. In virtually every report heretofore, the Special Rapporteur has pointed out the ways in which successful transitional justice experiences have depended upon the contributions of a thriving civil society.

B. Internal challenges

76. In addition to the external difficulties just mentioned (as well as others), the field faces some challenges that are more properly thought of as the outcome of its self-understanding and dynamics.

77. Perhaps it is worth remembering that the field was born out of practice, as the improvised result of the effort to find a practical solution to very real problems in the heavily constrained democratic transitions of the Latin American Southern Cone, and not as the result of the mere unfurling of a theory. While some of the strengths of the field can be traced to these pragmatic origins, the fact is that the field remains undertheorized and that this comes at a cost.

1. Expansion of mandates

78. There is no consensus on the aims that are properly pursued through the implementation of the measures. This is neither unique to transitional justice nor fatal, but nor is it inconsequential. The absence of theoretically-worked-out models of transitional justice is expressed in the plethora of (mutually incompatible) extraordinary effects attributed to the measures.

79. When the lack of theory is accompanied by scant efforts to monitor and evaluate the actual results of the implementation of the measures, not to mention any serious functional analysis of what the familiar transitional justice tools are good for, of what they are capable of delivering, this is sufficient for an enormous lack of discipline.

80. It should then not come as a surprise that the literature (fortunately, thus far, not so much the practice) of transitional justice is dominated by "aspirational" thinking. One way in which this is beginning to manifest itself in practice, however, is in the expansion of mandates of transitional justice measures, particularly truth commissions. In his report to the Human Rights Council in 2013, the Special Rapporteur documented the trends towards the expansion of the temporal, thematic and functional dimensions of truth commission mandates, without any corresponding increase in their powers. So while the first few truth commissions concentrated on fact-finding and victim-tracing (and mainly succeeded at those jobs), these functions have been replaced by a significantly broader set of functions, without any obvious regard for whether such commissions are "fit to purpose". Under these conditions it should come as no surprise that these trends are accompanied by a decline in the take-up of truth commission recommendations.[51]

2. The elision of differences between post-authoritarian and post-conflict contexts

81. Transitional justice emerged as a response to massive human rights violations largely in the Southern Cone countries of Latin America, to some extent in Central and Eastern Europe, and later on in South Africa. Despite the significant differences between these countries, they share two characteristics: a relatively high degree of institutionalization and the need to redress violations that came about as a result of the abusive exercise of State power. More recently, transitional justice has been implemented in countries with a different degree of State institutionalization; in these contexts, there is a wider range of violations, which are the result more of conflict and social upheaval than of authoritarian rule.

[51] A/HRC/24/42.

82. These differences call into question the appropriateness and relevance of transposing, without modification, measures that were initially developed as a response to authoritarianism and (overly) strong States into fragile, post-conflict contexts. These measures presupposed the feasibility of relatively easy attributions of responsibility, strong institutions, high degrees of capacity and a manageable set of potential beneficiaries of the different transitional justice measures (relative to institutional capacities and resources). In post-conflict or fragile contexts, however, none of those presuppositions prevail. In addition to deep resource scarcities and capacity deficits in general, institutions relating to criminal justice may be weak or non-existent. The capacity and resources needed to implement a country-wide, large-scale administrative reparations programme may be absent. And whereas truth-seeking (and the corresponding truth commission model) made sense in post-authoritarian contexts as a foil to violations under the mantle of silence or secrecy, in contexts in which open conflict occurred, truth-seeking may need further specification and perhaps call for a different model.

83. Far from this being an argument in favour of giving up on transitional justice, it is a call to ensure that the proper preconditions for the implementation of the measures chosen are established, to choose the best institutional models relative to the context in order to satisfy the relevant rights, and to devote the necessary time and resources to build the required capacities.

3. "Mimicry"

84. A related challenge facing the field can be captured in terms of what some economists and organizational sociologists call "isomorphic mimicry", the tendency to replicate institutional forms regardless of context and even of the specificities of the ends sought. There has been much discussion in the field about the "templatization" of transitional justice, as if it were a model that could or should be adopted in the same way in every place. So rather than starting with the question, "What are the most effective ways of realizing under particular circumstances the rights to truth, justice, reparation, and non-recurrence?", this question is sidestepped and efforts to implement a familiar set of initiatives and institutions are undertaken as if there were no choices to be made. The Special Rapporteur takes this opportunity to call once again for putting front and centre of transitional justice work the ends sought, the realization of a specific set of rights, rather than the reproduction of particular institutional forms.

4. Overemphasis on technocratic responses, institutional measures at the expense of cultural and individual interventions

85. The tendency to concentrate on institutions overshadows other dimensions of transitional justice work on which the sustainability of the institutional responses will also depend. In previous reports, the Special Rapporteur has warned against reducing transitional justice to a technocratic exercise as if it were simply a matter of clever institutional design. The success of transitional justice ultimately is reflected in (and also rests upon) changes at the level of culture and of individual convictions and dispositions. Achieving a high degree of social integration in the wake of massive and systematic violations calls for many different types of contributions including those designed to explore the many-layered legacies of those violations in the lives of individuals and communities, those designed to awaken empathy and solidarity, to gain new levels of tolerance and respect, aside from those that give meaning to the legal notion of rights. Education, various forms of cultural products and interventions and an open and accessible public sphere, among others, are dimensions of transitional justice work that have not received as much attention as they deserve.

5. Coordination with development and security policies

86. In all transitional contexts, but particularly in the weakly institutionalized post-conflict countries, it would be a mistake to think that the agenda of transitional justice exhausts the agenda of transformations that these countries call for. Truth, justice, reparation and guarantees of non-recurrence are important tools, but only one part of a broader justice, security and development agenda that most post-conflict countries certainly

need. Transitional justice is a corrective and preventive justice tool that stands in a complex set of relations with other kinds of justice measures, including distributive justice initiatives, but that cannot replace them. Similarly, transitional justice measures can make a contribution to development and security policies but cannot substitute for them. Given that, in most contexts in which transitional justice is applied, security and development policies are also applied, much greater coordination of transitional justice with security and development initiatives (preserving the integrity of each) than what is typically experienced is desirable.[52]

V. Conclusions and recommendations

A. Conclusions

87. **Transitional justice has become part of the packet of measures that countries undergoing transitional processes are expected to adopt. In the last thirty years, the field has consolidated itself, producing a model of redress and preventive measures that include truth, justice, reparations and guarantees of non-recurrence, not as random elements, but as mutually supportive parts of a holistic policy.**[53]

88. **Transitional justice has contributed to, and at the same time is a manifestation of, the entrenchment of corresponding rights, now expressed in various national and international legal instruments that ground rights to truth, justice, reparations and guarantees of non-recurrence. Regarding each of these rights, transitional justice at its best has provided practical means for their achievement, including truth commissions as an important tool of truth-seeking and truth-telling, the design of prosecutorial strategies to address system crimes, the mitigation of the effects of amnesties, comprehensive reparations programmes capable of providing complex benefits to large universes of victims, and institutional reform initiatives including but not limited to the reform of security services.**

89. **These achievements have benefited countless victims in transitional processes in all regions of the world. When implemented earnestly, the measures have made a contribution by providing recognition to victims, not only as victims but as rights holders, they have fostered civic trust, trust between individuals and between them and State institutions, strengthened the rule of law and promoted social integration or reconciliation. The field has learned to do this in ways that are gender sensitive, although much work remains to be done in this regard, particularly at the level of implementation.**

90. **For these reasons, among others, transitional justice deserves the continued, and indeed, increased support of the international community in ways that will be mentioned in the recommendations that follow.**

91. **Current circumstances, alas, are challenging for all human rights and justice-related fields. Transitional justice has a harder time achieving its aims in the face of the continued selectivity in the implementation of measures meant to satisfy universally binding obligations, the tendency to "securitize" responses to an ever-larger set of risks, and the trend towards the closing of civic spaces around the world.**

92. **Additionally, transitional justice faces internal challenges, from the tendency to expand the mandates of institutions without sufficient functional or contextual analysis, from insufficient sensitivity to context, particularly to the differences between the needs and constraints characteristic of the post-conflict and often weakly institutionalized contexts in which it now frequently operates (very different from the**

[52] A/68/345 and Pablo de Greiff, "Articulating the links between transitional justice and development", in *Transitional Justice and Development: Making Connections*, Pablo de Greiff and Roger Duthie, eds. (Social Science Research Council, 2009).

[53] S/2004/616.

post-authoritarian contexts in which the model originally took shape), and from the consequent tendency to replicate institutional formulas. More can be done to respond creatively to these challenges, and to integrate better institutional responses with other types of initiatives, in the cultural domain, in civil society — unfailingly the fulcrum of transitional justice work — and in adjacent areas of policy intervention including security and development.

B. Recommendations

93. **The Special Rapporteur addresses the following recommendations to all actors engaged in transitional justice, especially implementing States and civil society:**

(a) **Learning between countries is valuable, but there is more mimicry, replication of institutional forms and less sensitivity to function and to context than there should be. Transitional justice would be significantly more effective if all actors would (i) devote more attention than they do at present to clarifying what they expect to accomplish through the adoption of these measures, (ii) engage in functional analysis to shed light on the institutional forms most fit to satisfying those ends in their particular circumstances, that is, after they (iii) engage in serious analysis of context, including an assessment of institutional capacities, the identification of gaps in expertise and resources, and similarly thorough political analysis;**

(b) **Attention to functional adequacy, to the load that particular institutional forms can bear and what they can realistically deliver, should manifest itself in the prudent framing of the mandates of transitional justice institutions. This is important for many reasons, a prominent one being not to awaken expectations of victims unless there are good reasons to believe that those expectations can be satisfied;**

(c) **Sensitivity to context should lead all actors to take more seriously the differences between post-authoritarian and post-conflict transitions and to adjust redress and preventive measures according to the specific constraints and the specific needs of each type of context;**

(d) **Increased attention to the ends sought through the adoption of transitional justice measures, to the particularities of the context in which the measures operate, and to the different institutional means through which obligations can be effectively satisfied, should lead to increased creativity and diversity in the design of redress and preventive measures — compatible with the universality of the underlying norms, which in all cases require complying with criteria of equality, impartiality, inclusivity and where applicable rule of law and due process guarantees;**[54]

(e) **For both normative and practical reasons, the sustainability of transitional justice measures depends upon placing the rights and needs of victims at the centre of design and implementation processes. There is no way of doing this without consulting victims. Inclusive consultations of an ongoing character, not mere one-off events, need to be established in order to give victims and other marginalized groups a voice in these processes;**

(f) **Transitional justice is not simply a technocratic process of clever institutional engineering. As important as institutional responses are, other dimensions — including cultural interventions, measures to strengthen civil society and initiatives that may produce changes in individual convictions and dispositions — deserve more attention than they have received as crucial elements of transitional justice.**

[54] As the Special Rapporteur has insisted in previous reports, nothing undermines the effectiveness and credibility of transitional justice measures more than the impression that they are instruments of "turntaking", tools to benefit supportive constituencies and to disfavour individuals, groups or communities that oppose those in power.

94. **The Special Rapporteur recommends that international supporters of transitional justice:**

(a) **As a matter of strategy, provide for balanced, long-term funding to transitional justice and eschew unrealistic and short-term, project-oriented timelines, and ensure that funding strategies pay proportionate attention to civil society (and victim) roles in successful transitional justice initiatives;**

(b) **Recognize the relevance of transitional justice to prevention of conflict, achieving sustainable peace, and Sustainable Development Goal 16, and integrate transitional justice into multilateral and bilateral frameworks touching on these issues.**

95. **The Special Rapporteur recommends that United Nations agencies:**

(a) **Consolidate or harmonize rosters in the various agencies that work on transitional justice, including OHCHR, the Department of Political Affairs, UNDP, UN-Women, the Department of Peacekeeping Operations, UNICEF and others. Such rosters can be drawn upon to activate essential expertise in tight windows of opportunity. United Nations agencies should also ensure that roster members are properly vetted for technical expertise and contextual knowledge;**

(b) **Take steps to strengthen organizational competence to deliver on transitional justice: United Nations agencies should develop joint strategies and strengthen both headquarter- and field-level mechanisms for coordination on transitional justice, for example, through the Global Focal Point for Police, Justice and Corrections; the Rule of Law Unit in the Executive Office of the Secretary-General; field-based strategy sessions linked to the Human Rights Up Front initiative; or other relevant means. Inclusion of both levels is critical as each performs different functions within the system. Additionally, United Nations agencies should improve information sharing and develop a specific platform, with a dedicated owner, to actively facilitate it; and, finally, develop accountability mechanism to track implementation, follow-through on commitments, and outcomes;**

(c) **In recognition of the relevance of transitional justice to prevention of conflict, achieving sustainable peace and Sustainable Development Goal 16, take the opportunity presented by initiatives relating to these issues to integrate transitional justice into the relevant policy frameworks.**

96. **The Special Rapporteur addresses the following recommendations to intergovernmental bodies:**

(a) **The universal periodic review processes in the Human Rights Council afford greater possibilities to encourage countries to adopt transitional justice and to mobilize the needed resources (technical and financial) from other countries for implementing it. Given the affinities between transitional justice and preventive strategies in general, this could be done as part of the proposal by the Secretary-General to include support for prevention strategies as part of universal periodic review discussions;**

(b) **Reference to transitional justice in Security Council mandates should be informed by contextual and political analysis and, in particular, the institutional preconditions for successful implementation of complex transitional justice engagements;**

(c) **Decisions to include transitional justice as part of Security Council mandates should be linked to clear and robust financing mechanisms;**

(d) **An informal experts group on transitional justice should be established to strengthen information flows to Security Council members from human rights mandates holders, human rights bodies, civil society and other relevant actors.**

Annex

Contributions from civil society organizations and individual experts

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Louis Bickford, Memria

Tine Destrooper, Wissenschaftskolleg zu Berlin

Carla Ferstman, REDRESS

Andrea Gittelman, United States Holocaust Memorial Museum

César Rodríguez-Garavito, Dejusticia

María José Guembe, Centro de Estudios Legales y Sociales

Kasande Sarah Kihika, International Center for Transitional Justice

Hanny Megally, Center on International Cooperation (NYU)

Hugo van der Merwe, Center for the Study of Violence and Reconciliation

Marcie Mersky, International Center for Transitional Justice

Betty Murungi, Joint Monitoring and Evaluation Commission

Stephen Oola, Joint Monitoring and Evaluation Commission

Naomi Roht-Arriaza, UC Hastings College of Law

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Harvey Weinstein, UC Berkeley Human Rights Center