2018-2021

CONTEMPORARY PERSPECTIVES ON TRANSITIONAL JUSTICE ISSUES

USER FRIENDLY VERSION

SPECIAL RAPPORTEUR ON THE PROMOTION OF TRUTH, JUSTICE, REPARATION AND GUARANTEES OF NON-RECURRENCE

JANUARY 2022

UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES
SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

List of acronyms

CBR	children born out of rape
DRP	Domestic reparation programmes
ECCC	Extraordinary Chambers in the Courts of Cambodia
GA	General Assembly
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	internally displaced persons
ICTR	International Criminal Tribunal for Rwanda
IHL	International humanitarian law
NRP	national reparation programmes
OHCHR	Office of the United Nations High Commissioner for Human Rights
SCSR	Special Court for Sierra Leone

FOREWORD

Transitional justice has undergone important transformations since truth-seeking and peace-making processes began in the 1980s and 1990s.

At the same time, no transitional justice process can be considered legitimate if it is not framed within the obligations and standards set by international human rights law.

Thus, the five pillars of transitional justice - truth, justice, reparations, guarantees of non-repetition, and memory - must be framed within the human rights standards in force for the international community as a whole.

Transitional justice processes require the full and effective participation of victims, with a privileged voice, from discussions about the design of each of the mechanisms to the supervision of the implementation of decisions. No legitimate transitional justice process can be carried out behind victims' backs.

Truth commissions must have the human and technical means to carry out their work with full autonomy and effectiveness; the teams must have the capacity to examine all dimensions of the human rights and humanitarian law violations that may have occurred; a gender approach is indispensable, as is the equal integration of women and men in the commissions.

Persons responsible for human rights violations, serious violations of humanitarian law and international crimes - such as genocide or crimes against humanity - must be tried and convicted with penalties commensurate with the gravity of the crimes committed. There should be no exemptions from responsibility, nor measures such as pardons or amnesties, which have no legal validity.

Reparations to the victims and their families must be comprehensive and include, in addition to financial compensation, measures of rehabilitation, satisfaction and measures to avoid the repetition of the acts.

Guarantees of non-recurrence imply the complete overhaul of all areas of the State so that it fulfils its function of respecting and fully guaranteeing human rights, without discrimination; special emphasis should be placed on the repeal of any norms incompatible with human rights standards. The vetting process must be effective so that persons involved in the violations committed do not remain in state structures.

Memorialisation processes must include dynamic measures in which the dignity of the victims is protected and mechanisms are established so that society is fully aware of the events that took place and of the commitment to safeguard the memory of the victims as a guarantee of a culture of peace.

Comprehensive transitional justice policies should be conceived as state policies, and subsequent governments should not delegitimise the work carried out by truth commissions, nor develop actions that re-victimise victims.

The paradigms of the 1980s and 1990s are no longer applicable to contemporary transitional justice processes. It will not be feasible to build peace without it being based on the full enjoyment of human rights.

The five pillars of transitional justice do not represent an "à la carte menu"; states must fully comply with the standards of each of them in order to truly advance towards the consolidation of a democratic society based on truth and justice.

In my reports to the United Nations Human Rights Council and to the United Nations General Assembly, I have reviewed and analysed some of the most pressing contemporary issues, concerns, and debates in the field of transitional justice integrating a comprehensive human rights based approach. The present publication reviews the essential contents of those reports. It aims at increasing public awareness and understanding of the findings and recommendations of those reports and at facilitating their wide national and international dissemination among policy makers, civil society, and other stakeholders.

Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

January 2022

INTRODUCTION to the Special Rapporteur's mandate

The mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence was established in September 2011 by the Human Rights Council through Resolution 18/7. The mandate has been extended in three occasions, namely, on 25 September 2014 (resolution 27/3), on 28 September 2017 (resolution 36/7) and on 6 October 2020 (resolution 45/10).

Mr. Fabian Salvioli took up his functions as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on 1 May 2018, succeeding Mr. Pablo de Greiff (2012-2018). Mr. Salvioli is a human rights lawyer and professor of International Law Human Rights Law. He was member of the United Nations Human Rights Committee between 2009 and 2016, and its President between 2015 and 2016.

Resolution 45/10 emphasizes the importance of adopting a comprehensive approach in transitional justice process which incorporates the full range of judicial and non-judicial measures (including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials), in order to, *inter alia*, ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State, and promote the rule of law in accordance with international human rights law. It also specifically requests to integrate a gender perspective and a victim-centred approach throughout the work of the mandate. Within the scope of this resolution, the Special Rapporteur has been mandated to "To identify, exchange and promote good practices and lessons learned, and to identify potential additional elements with a view to recommending ways and means to improve and strengthen the promotion of truth, justice, reparation and guarantees of non-recurrence." The Special Rapporteur was also mandated to "To make recommendations concerning, inter alia, judicial and non-judicial measures when designing and implementing strategies, policies and measures for addressing gross violations of human rights and serious violations of international humanitarian law".

In compliance with this mandate, the Special Rapporteur has submitted thematic reports to the Human Rights Council and General Assembly on a wide range of contemporary transitional justice issues and concerns. He has also conducted official visits to States to examine the transitional justice measures taken to address gross violations of human rights and serious violations of international humanitarian law, to identify gaps and challenges, and to make recommendations thereon. In addition, the Special Rapporteur sends on a regular basis communication to Governments and other stakeholders in connection to alleged human rights violations brought to his attention. Upon the request of Government officials or other actors, the Special Rapporteur has provided technical assistance and advisory services.

SCOPE OF THE SPECIAL RAPPORTEUR'S MANDATE

The Special Rapporteur is in charge of dealing with situations of transition from conflict or authoritarian rule in which there have been gross violations of human rights and serious violations of international humanitarian law. The Special Rapporteur focuses on the measures adopted by the relevant authorities to guarantee truth, justice, reparation, memory and guarantees of non-recurrence, with the aim to:

TRUTH	Promote truth and memory about past violations.
ACCOUNTABILITY	Ensure accountability and serve justice.
REPARATIONS	Provide remedies to victims.
GUARANTEES OF NON-RECURRENCE	Reform the national institutional and legal framework and promote the rule of law in accordance with international human rights law, and restore confidence in the institutions of the State
MEMORY	Ensure that current and future generations are informed about past human rights violations
PREVENTION	Prevent the recurrence of crises and future violations of human rights.
RECONCILIATION	Ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels; and promote healing and reconciliation.

THE SPECIAL RAPPORTEUR'S THEMATIC REPORTS (2018-2021)

In compliance with his mandate, the Special Rapporteur gathers information on national practices and experiences. He also studies trends, developments and challenges, and commits himself to promote good practices and lessons learned, as well as to integrate a victim-centred approach and a gender-perspective throughout his whole mandate.

Mr. Salvioli has submitted thematic reports to the Human Rights Council and General Assembly on a wide range of contemporary transitional justice issues and concerns, including these six latest reports on:

A. IMPLEMENTATION OF NATIONAL REPARATION PROGRAMMES (A/HRC/42/45)

B. APOLOGIES FOR HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW VIOLATIONS (A/74/147)

C. MEMORIALIZATION PROCESSES (A/HRC/45/45)

D. GENDER PERSPECTIVE TO TRANSITIONAL JUSTICE PROCESSES (A/75/174)

E. ACCOUNTABILITY: PROSECUTING AND PUNISHING GROSS VIOLATIONS OF HUMAN RIGHTS AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN THE CONTEXT OF TRANSITIONAL JUSTICE PROCESSES (A/HRC/48/60)

F. TRANSITIONAL JUSTICE MEASURES AND ADDRESSING THE LEGACY OF GROSS VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW COMMITTED IN COLONIAL CONTEXTS (A/76/180)

IMPLEMENTATION OF NATIONAL REPARATION PROGRAMMES

Under international human rights law, there is a solid legal framework establishing the right of victims to reparation for gross human rights violations. Despite the existence of a strong normative framework and international and domestic jurisprudence, and the recognition by States that victims have a right to reparation, victims do not see this right realized. Even in countries where domestic reparation programmes have been set up, many challenges remain to achieve adequate, prompt and full reparation for victims of gross human rights violations and serious violations of humanitarian law

During the forty-second session of the HRC, which took place from 9 to 27 September 2019, the Special Rapporteur submitted a thematic report on the:

"implementation of national reparation programmes".

What did the rapporteur assess in this report?

INTERNATIONAL STANDARDS AND JURISPRUDENCE UNDERPINNING DOMESTIC REPARATION PROGRAMMES

LESSONS LEARNED FOR EFFECTIVE DOMESTIC REPARATION PROGRAMMES

SELECTED CHALLENGES

What are national reparation programmes?

What are they?

- Reparation programmes are administrative processes set up by States aiming to deal with a large universe of victims, and they identify who can claim to be a victim and what violations are to be redressed, and establish reparation measures (such as, compensation, medical treatment, etc.) for the harm suffered.

What is their purpose?

- They are aimed at realizing the human rights of victims to an adequate and effective remedy.

Where have they been used?

NRP have been implemented on a wide array of countries such as Argentina, Chile, Iraq or Morocco, or during conflict, as in Bosnia Herzegovina, Colombia, Guatemala, Iraq or Sierra Leone.

Domestic reparation programmes are the most effective tool for victims of gross human rights violations and serious violations of humanitarian law to receive reparation.

Minimum requirements of National reparation programmes

Remedies must be adequate, prompt and effective

Bearing in mind that domestic reparation programms are set up to provide remedies to redress victims of mass atrocities, it is essential that the remedies are adequate, prompt and effective.

Victim participation is fundamental

Domestic reparation programmes should be designed, implemented and monitored through processes that include consultation with and the participation of victims.

Compensation is not enough

Victims are entitled to be provided with different forms of reparations, and not only with compensation (for instance: medical and/or psychological treatment, the building of a monument in honour of the victims, the establishment of a community center, etc.).

Interconnected

They must relate to other pillars of transitional justice, including justice, truth, and guarantees of non-recurrence

Reasonable and proportional

They must establish clear distribution criteria across victims and provide equitable redress for the violations suffered. Under that analysis, domestic programmes must be complete, comprehensive, complex and coherent.

VICTIM'S REGISTRIES

Registries allow State authorities to decide who is eligible for reparation. Individual and collective registries of victims are crucial in order to have realistic projections of the level of victimhood in States undergoing transitions, since they help in estimating the cost of redressing the potential beneficiaries of the programme and in planning resource allocation.

VICTIM'S REGISTRIES constitute a key measure of:

ACKNOWLEDGMENT

SATISFACTION

MEMORY

UNDER-REGISTRATION is a common challenge.

HOW TO DEAL WITH IT?

AIM: TO REACH ALL VICTIMS

INFORMATION	Information is fundamental. Therefore, States should implement measures so that all victims are **informed** about their right to reparation, available reparation programmes and registration processes.
FLEXIBILITY AND ACCESSIBILITY	They must also include **flexible time frames for registration.** Forms should be confined to **essential information**, such as basic personal information, a statement of facts and of violations suffered, confidentiality issues, harms suffered, and supporting documents. Additionally, States should not put a **heavy burden and standard of proof** on victims.
PROTECTION OF THE MOST VULNERABLE	Special registration measures should be adopted to ensure that those in a **situation of special vulnerability** come forward, such as victims of sexual violence, children, and persons with disabilities.
VICTIM PARTICIPATION	Domestic reparation programmes should include **adequate consultation with and participation of victims** in their design, implementation and monitoring processes. This is of particular importance in relation to satisfaction, symbolic reparation and collective reparation.
CIVIL SOCIETY	**Participation of civil society** is essential. Civil society organizations have relevant data about victimhood and violations that would be of utmost importance in any mapping exercise. They also have vital links to communities of victims that could help State authorities to build trust with victims and help them come forward.

Domestic reparation programmes are often weak, fragile and highly dependent on political will and on the context in which they are implemented. Institutional security is key to their implementation, continuance and durability.

Legal frameworks establishing and regulating domestic reparation programmes are **crucial**.

National laws on reparations should indicate the State commitment to reparation, including an **acknowledgement of responsibility** and, at the very least, the **violations eligible for reparation** and the applicable time frame in which they must have occurred, a **definition of victim**, the **forms of reparation**, the **timeline for reparation**, the **allocation of funds**, and the **time frame for the programme**. The law should also indicate the institutions responsible for providing reparation as well as for providing oversight.

Purpose of the legal framework

- Provide legal certainty.
- Guarantee sustainability, regardless of political fluctuations.
- Sign of the State's commitment to properly address mass atrocities, leaving behind all political opportunism.

Requirements

- COORDINATED — Reparation programme should, at least, be coordinated by an entity responsible for its implementation.
- POLITICAL AND ECONOMIC LEVERAGE — They should enjoy the necessary political and economic leverage, as well as authority, to coordinate and promote action across the different State institutions that are part of the reparation system.

GOOD PRACTICES

on institutional security of Domestic Reparation Programmes

Colombia

In Colombia, a reparations system was put in place with responsibilities assigned to various institutions, such as the Victims' Unit, the Centre for Historical Memory and the Land Restitution Unit.

The Philippines

In the Philippines, the Human Rights Victims Reparation and Recognition Act created the Human Rights Victims' Claims Board.

Chile

Chile set up the National Corporation for Reparations and Reconciliation tasked with implementing various pieces of legislation on reparation enacted over time.

Financial resources are key.

Domestic reparation programmes are seriously underfunded, which hampers their ability to redress victims. The availability of financial resources to fund the work of domestic reparation programmes, including the provision of benefits, is essential for the fulfilment of the right to reparation. States must make the necessary budgetary allocations to provide reparation to victims, on the basis of realistic projections of its cost as well as the universe of victims.

How can reparation programmes be funded?

Through a reparation fund

- In **Colombia**, a fund was created under the Justice and Peace Law, in 2005. The fund was to include assets given up by members of paramilitary groups, contributions from the Colombian budget and any national or international donations. The fund was established and maintained under the Victims and Land Restitution Law of 2011.
- The **German** compensation programme for forced labour also established a fund, with a fixed amount of approximately €5.2 billion, which received contributions in equal proportion from the Government of Germany and from various German corporations
- **Sierra Leone** set up a reparation fund a decade after this was envisaged in the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, of 1999.

Inclusion of the programme in the national budget

- In **Guatemala**, the National Compensation Programme was to receive 300 million quetzals on an annual basis (equivalent to about $40 million). However, the programme has never received the full allocation of funds and year after year its budget has decreased.

With Government bonds

- **Argentina** recognized the debt owed to victims of enforced disappearance, execution and arbitrary detention, and guaranteed the payment through government bonds. The bonds (of $224,000 per victim) could be exchanged at their market value at any time, or at full value on maturity (16 years later).

Private funding is also a suitable source.

GERMANY	PHILIPPINES	COLOMBIA
The German compensation programme for forced labour was half-financed by corporations.	The Human Rights Victims' Claims Board in the Philippines, established to provide reparation to victims of the regime of Ferdinand Marcos, was financed from funds from Marcos's wealth.	In Colombia, the Revolutionary Armed Forces of Colombia-People's Army (FARC) agreed to contribute to reparation in the peace agreement signed with the Government of Colombia in 2016.

IMMEDIATE AND PROVISIONAL ACTION IS FUNDAMENTAL

While domestic reparation programmes are being designed, States should adopt **emergency reparation programmes or services** to address the urgent needs of victims and avoid exposing them to further harm.

And what about the role of the international community?

The role of the international community in domestic reparation programmes must also be considered. If States acknowledge their responsibility for the violations, there is no reason for other States, international financial institutions or international organizations to abstain from helping to fund reparation programmes.

SELECTED CHALLENGES

1. REHABILITATION

2. REPARATION FOR VICTIMS IN VULNERABLE SITUATIONS

1. REHABILITATION

Rehabilitation is one of the reparation measures where States face serious implementation challenges, which are exacerbated when conflict situations are ongoing, and the required infrastructure and expertise are not available or are insufficient to provide such services. The lack of effective provision of rehabilitation measures for vulnerable victims constitutes inhuman treatment and generates new victimization.

What is rehabilitation?

Rehabilitation is a form of reparation that is aimed at providing victims with physical and mental health services as well as other legal and social services. It has the ability to address the mental and physical harm caused to victims, or community harm, as well as to enable victims to reconstruct their lives, get new life opportunities, fulfil their rights to justice and truth, and contribute to non-recurrence.

- The Special Rapporteur would like to note that rehabilitation goes beyond physical and medical care and includes other social services such as education.

- A problem with the provision of education as a form of reparation in countries devastated by conflict is that not even basic education infrastructure is likely to be in place. Therefore, States have to consider carefully how to combine – in a way that maximizes their potential – development measures such as the construction of schools in areas ravished by conflict, with victims' entitlement to education. For example:

✓ **Access to quality primary education**

✓ **A monthly stipend**

GOOD PRACTICES ON REHABILITATION: THE CASE OF **CHILE**

- Chile set up a **comprehensive rehabilitation system** for physical and mental health was established following the recommendations made by the *Rettig Commission*.
- The programme began its work in 1991 and continues to provide rehabilitation to victims today
- Law 19.123 included **education** for the children of victims who were disappeared or killed, providing them with full scholarships for primary and secondary schooling as well as for technical training until the age of 35. The scholarship included the payment of tuition fees and a monthly stipend. Equally, Law 19.992 included education for survivors of torture.
- It provides **medical** and **psychosocial services** to parents, children, partners and grandchildren of victims of enforced disappearance, execution and torture, people dismissed from their employment for political reasons, and persons who have provided support to victims of the dictatorship for at least 10 continuous years.
- The programme, administered by the Ministry of Health, provides medical and dental care, diagnostic tests, access to specialists, hospitalization, and emergency services, to approximately 750,000 registered persons. The personnel include physicians, social workers and psychologists, who are also involved in memory and justice initiatives.

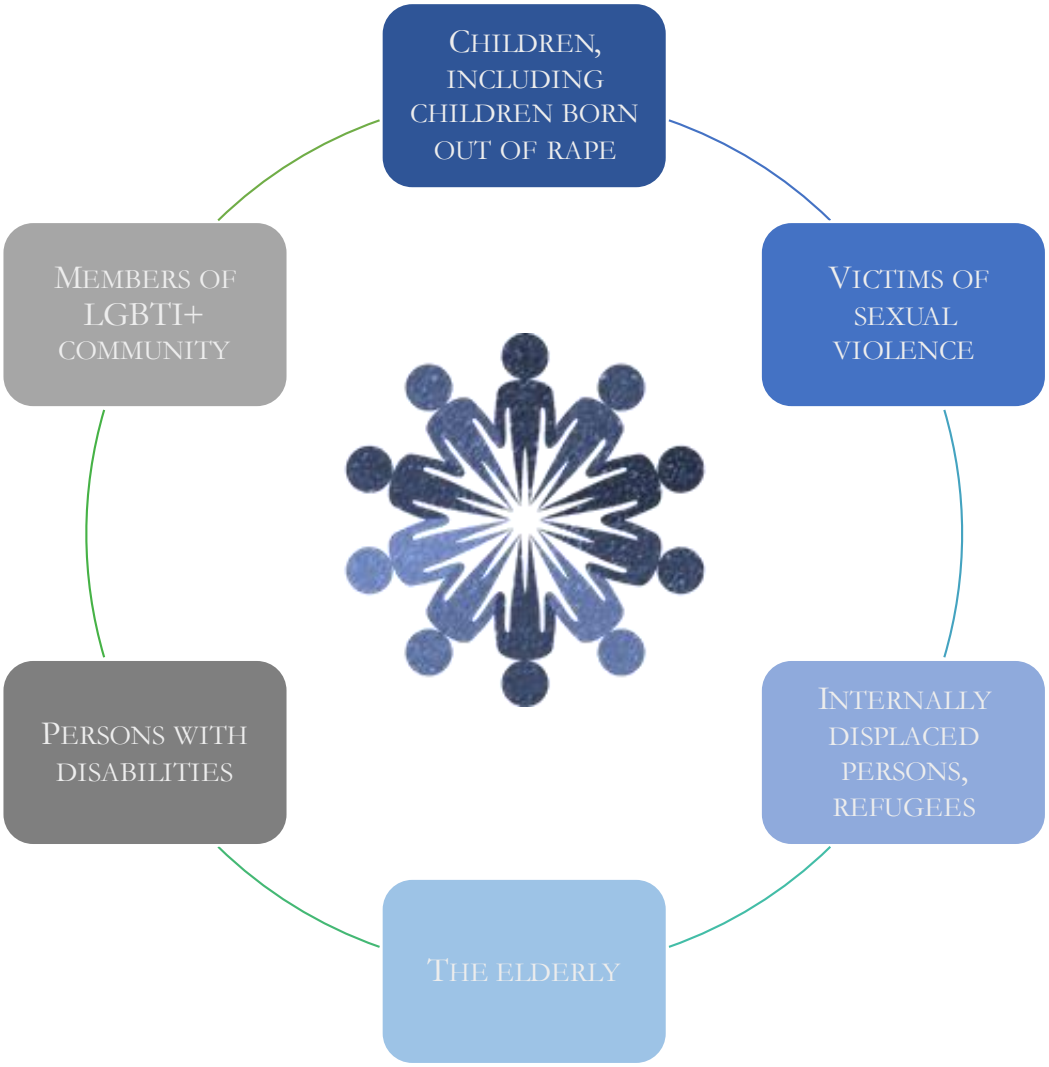
CURRENT CHALLENGE?

The programme falls short of providing medical and psychosocial support to victims in **exile** or who **live abroad** as a result of the harm suffered.

2. VICTIMS IN VULNERABLE SITUATIONS

Reparation programmes should acknowledge that not all victims are in the same situation. They do not experience the same harm and do not face the same consequences.

While domestic reparation programmes are unable to provide reparation according to the harm suffered by each victim, they can take measures to respond adequately to those most in need, such as:



REFUGEES, MIGRANTS AND INTERNALLY DISPLACED PERSONS

Refugees, **migrants** and **internally displaced persons** are often found in especially **vulnerable situations** after conflict or repression.

Notwithstanding, domestic reparation programmes have failed to include them as beneficiaries of reparation or to provide them with special measures to ensure that they are able to access reparation benefits.

GOOD PRACTICES

GERMANY	German compensation programme for forced labour represents a successful experience which provided compensation to forced labour victims, many of whom had been refugees.
CHILE	Chile put in place a series of incentives to get refugees to return to Chile (Law 19.074 of 28 August 1991 and Law 19.128 of 7 February 1992), yet they were not conceived of as reparation.
ARGENTINA	The Supreme Court of Justice of Argentina considered in the *Vaca Narvaja* case that reparation given under Law 24.043 to those illegally detained also applied to exiles, as their situation also constituted an infringement on their right to personal liberty. As a result of that judgment, government resolution 670/2016 expressly recognized the application of that law to those in exile.
COLOMBIA	Colombia has included the category of internally displaced persons in their reparation programmes (Law 1448/201).

VICTIMS OF SEXUAL VIOLENCE AND CHILDREN BORN OUT OF RAPE

Sexual violence remains a pervasive crime and its victims remain **invisible** or **ignored** in society.

As a consequence, they have often been **excluded** as beneficiaries in domestic reparation programmes. In other places, legislation on reparation for victims of sexual violence has arrived decades later.

Special measure in the design and implementation of domestic reparation programmes are necessary:

Holistic and **gender approach** are essential.

Victims should have **priority access** to some **benefits**.

Standard of evidence should be **lower**.

Safety and private spaces are key. This allows victims of sexual violence to come forward and protects them from social exposure, stigma and revictimization.

THE SPECIAL RAPPORTEUR RECOMMENDS THAT STATES:

(A) ADEQUATE, PROMPT AND EFFECTIVE	Design and implement **adequate, prompt and effective domestic reparation programmes** to remedy the harm suffered by victims of mass atrocities, which recognize the responsibility of the State.
(B) DIFFERENT FORMS OF REPARATION	Ensure that such programmes include **different forms of reparation** beyond compensation, such as measures of satisfaction, restitution and rehabilitation, and guarantees of non-recurrence;
(C) COMPENSATION	Ensure that **compensation**, including the distribution criteria across victims, the family unit, and those in the most vulnerable situations, is **reasonable and proportional**;
(D) DESIGN	Design reparation programmes which are **complete, comprehensive, complex, and coherent internally and externally**;
(E) REGISTRY	Develop **national registries of victims**, which are flexible and reach out widely, to adequately estimate the potential universe of victims and expected costs, prior to the design of reparation programmes;
(F) SOLID LEGAL FRAMEWORKS	Adopt **solid legal frameworks** to ensure legal certainty and sustainability of reparation programmes;
(G) SOLID INSTITUTIONAL FRAMEWORKS	Adopt **solid institutional frameworks** that bestow domestic reparation systems with the institutional security, political leverage, financial autonomy and territorial outreach needed to operationalize the reparation policy;
(H) BUDGETARY ALLOCATIONS	Make the necessary **budgetary allocations**, based on the universe of victims and realistic cost expectations, through the creation of special funds, inclusion in the national budget, or other financing by sustainable means;
(I) PARTICIPATION OF OTHER ACTORS	Where relevant, design **financing mechanisms by which other actors responsible for violations contribute** towards reparation expenses, through, for example, financial or in-kind contributions;

(J) INTERNATIONAL DONORS	**International donors** may also **play an important role** in financially supporting reparation programmes;
(K) EMERGENCY REPARATION PROGRAMMES	Adopt **emergency reparation programmes or services**, while domestic reparation programmes are being designed, to address the urgent needs of victims and avoid exposing them to further harm;
(L) VICTIMS' PARTICIPATION AN CONSULTATION	Ensure and facilitate **effective participation and consultation** and a meaningful role for victims in the design, implementation and monitoring of reparation programmes. Also ensure effective participation of and consultation with civil society and victims' organizations in these efforts;
(M) REHABILITATION	Establish **effective and timely rehabilitation services** to address the physical and mental health and educational needs of victims, as well as other services, and coordinate efforts between State institutions and specialized civil society organizations and victims' organizations in this regard. The international community may support the delivery of such services;
(N) VICTIMS OF SEXUAL VIOLENCE AND CBR	Adopt **special measures** in the design and implementation of domestic reparation programmes to address the reparation needs and the challenges faced by **victims of sexual violence**, and by **children born out of rape** when the woman has decided to continue her pregnancy, including safety and privacy measures to prevent their social exposure and to avoid inflicting further harm on them;
(O) REFUGEES AND IDP	Adopt **special measures** in the design and implementation of domestic reparation programmes to address the reparation needs of **refugees and internally displaced persons**.

APOLOGIES FOR HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW VIOLATIONS

(A/74/147)

On 12 July 2019, in the framework of the seventy-fourth session of the General Assembly, the Special Rapporteur submitted a thematic report on the:

"apologies for gross human rights violations and serious violations of international humanitarian law".

What type of apologies were under assessment?

The apologies under discussion were **PUBLIC APOLOGIES**, rather than private communications between individuals. However, such a focus is not to suggest that private apologies are unimportant and nothing in the report should be interpreted as discouraging private apologies.

What did the rapporteur assess in this report?

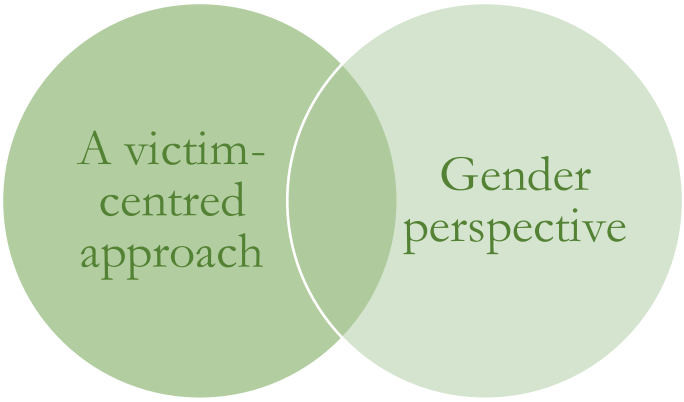
1. LEGAL AND CONCEPTUAL FRAMEWORK
2. EXISTING PRACTICES AND LESSONS LEARNED
3. RECOMMENDATIONS FOR THE DESIGN AND IMPLEMENTATION OF APOLOGIES

WHAT ARE THE REQUIREMENTS OF A PUBLIC APOLOGY?

Apologies may form an important part of a society's efforts to establish the truth about a violent or abusive past and can bring added value to other truth-seeking transitional justice mechanisms or processes.

ACKNOWLEDGEMENT	TRUTHFUL ADMISSION OF RESPONSIBILITY	STATEMENT OF REMORSE	GUARANTEE OF NON-RECURRENCE
An acknowledgement of a wrong deliberately or negligently inflicted that is named.	A truthful admission of individual, organizational or collective responsibility for that hurt.	A public statement of remorse or regret related to the wrongful act or acts, or omission, that is delivered with due respect, dignity and sensitivity to the victims.	Legal, institutional and cultural measures aimed at preventing the recurrence of past human rights violations.

IT IS **ESSENTIAL** THAT APOLOGIES ARE CARRIED OUT WITH:



INTERNATIONAL LEGAL FRAMEWORK

- 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

- Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant.

- The International Law Commission's has drafted articles on Responsibility of States for internationally wrongful acts (General Assembly resolution 56/83).

- Various other United Nations reports and commentaries have also considered apologies as a symbolic and collective reparation measure aimed at providing satisfaction to victims, by recognizing their victimhood and the societal norms transgressed (for example, A/69/518; A/HRC/14/22; A/HRC/21/46; and CCPR/C/158).

- Certain special procedures mandate holders have argued that official apologies and official recognition of State responsibility can be more effective than monetary compensation for victims of violent crimes, such as torture or sexual violence (see A/HRC/4/33 and A/HRC/14/22).

- Case-law of international courts
  - ICTY
  - ECCC
  - ICC
  - IACtHR

DID YOU KNOW….?

The most developed jurisprudence on apologies from regional human rights courts has come from the **INTER-AMERICAN COURT OF HUMAN RIGHTS.**

SOME EXAMPLES ARE:

▪ *Case of the Plan de Sánchez Massacre v. Guatemala (2004)*	Despite a previous State apology, made by the former Vice-President of Guatemala, public acknowledgment of State responsibility and commitment to repairing the harm done, the Court nevertheless held that: **"to be fully effective as reparation to the victims and serve as a guarantee of non-recurrence, … the State must organize a public act acknowledging its responsibility for the events that occurred"**. The Court also ordered that the memory of those executed should be honoured, that traditions and customs of the indigenous communities concerned should be respected and that the judgment should be translated in their language.
▪ *Case of the Massacres of El Mozote and nearby places v. El Salvador (2012)*	As in the *Case of the Plan de Sánchez Massacre*, the State had previously apologized for the abuses. On the twentieth anniversary of the peace agreement, then President of El Salvador, Mauricio Funes delivered a **speech** in El Mozote, in which he recognized the State responsibility in the massacre, presented a list of the victims and apologized to victims on behalf of the State. In its judgment, the Court determined the following necessary criteria for the apology: (a) it should be agreed upon with the victims; (b) it should take place in public; (c) it should take place where the crimes were perpetrated; (d) it should include an acknowledgment of responsibility for all human rights violations that were committed; (e) victims and survivors should be present during the ceremony or participate in it; (f) the highest senior officials should make the apology and take part in the ceremony; and (g) the ceremony should be recorded and disseminated throughout the country.

FIRST STEPS:

CONSULTATION

Apologies are closely associated with notions of honour, national or organizational self-image and reputation. Understanding the variables that may inhibit the offer of apologies or limit them are important for victims or campaigning organizations that are seeking apologies.

WITH WHOM?

With those to whom apology is addressed

Comprehensive and effective consultation with those affected by harms inflicted is key to the delivery of a victim-centred apology. It enables the apologizer to establish what victims want and need to hear and what they do not want to hear.

Within the apologizing constituency

Apologizers should consult widely within their own constituencies. If there are limits to what the apologizer can say, the apology should at least be communicated clearly to victims and their representatives as part of the consultation process, in order to manage the expectations of victims.

Victims should ideally be afforded the opportunity to read draft apologies and to offer feedback on the appropriateness of the language used and on the setting and context of the delivery of the apology

Those seeking apologies must understand the **motivation** of the apologizing States, non-State groups or other organizations and the **variables** working against fulsome public apologies. Such an understanding should inform any negotiations or discussions about the nature, content and delivery of apologies.

HOW SHOULD A PUBLIC APOLOGY COMMENCE AND WHAT SHOULD BE ITS CONTENT?

Motivation for issuing a public apology in a transitional justice context is often **crucial** to determining the **effectiveness** or **legitimacy** of the public apology. It can stem from several **reasons**:

TURN THE PAGE OF THE PAST	• The desire on the part of a State, armed group or organization to make a clean break with the past and herald a new era.
MORAL REASONS	• The need of an individual or the collective leadership to exercise moral authority and "do the right thing" in addressing past human rights violations.
VICTIMS' PRESSURE	• Pressure from direct victims or victims' representative bodies or the media.
LEGAL OR POLITICAL PRESSURE	• Legal or political pressure associated with either a criminal investigation or truth and recovery process.

Apologies should NOT serve:

- to evade blame and responsibility.
- to obfuscate, to minimize legal culpability.
- to close down a conversation that may lead to more fulsome truth recovery.

States, armed groups, corporations or organizations can sometimes use apologies as a TECHNIQUE OF DENIAL whereby past abuses and their responsibility for same are minimized, obscured or reinterpret.

GOOD PRACTICE: THE CASE OF CHILE

Following 17 years of rule by the military regime headed by General Augusto Pinochet, marked by brutalities, persecution, murder and repression, Mr. Aylwin authorized the Rettig Commission to **document abuses and provide recommendations of reparations** and **legislative measures to ensure non-recurrence**.

When the Commission had concluded its work, Mr. Aylwin delivered an emotional, televised address in which **he fully acknowledged the abuses that took place and apologized on behalf of the State to victims and their families**.

Commentators have argued that that represented a "turning point in **gaining respect for victims and advancing public understanding of the country's past**".

The transitional apology made by former President of Chile, Patricio Aylwin, is often cited as an **example of how an apology can aid in the reparative process**.

WHAT ARE THE REQUIREMENTS OF A PUBLIC APOLOGY?

1. NAMING AND ACKNOWLEDGING OF HARM DELIBERATELY OR NEGLIGENTLY INFLICTED

- **Acknowledgment of the truth** of past wrongdoing is a fundamental prerequisite for an effective apology, for they validate the experience of victims and restore their dignity:

  - ✓ **Clear acknowledgment of the nature, scale and duration of the harm inflicted**.
  - ✓ The **direct and indirect impacts** of the harm on different categories of victim should be acknowledged.
  - ✓ The **gender dimensions** of the harm should be clearly articulated.
  - ✓ It should specify clearly whether the harm was inflicted **deliberately, with intent, or negligently**.

2. TRUTHFUL ADMISSION OF INDIVIDUAL, ORGANIZATIONAL OR COLLECTIVE RESPONSIBILITY

- Truthful apologies are necessary in order to validate the experience of victims and to restore their dignity. In the light of the truth, the apology should **clearly admit responsibility** – individual, organizational and/or collective – and **blame should be accepted** for the infliction of the harm.

3. STATEMENT OF REMORSE AND REGRET RELATED TO THE WRONGFUL ACTS OR OMISSIONS

- The apology should include a **clear statement of regret for the named harms**. The **language** used should be **carefully chosen** to communicate sincere remorse. It must be **unqualified** and **unreserved**.

The truth-telling function of public apology is required in order to:

✓ ESTABLISH AN ACCURATE PUBLIC RECORD OF THE PAST

✓ EDUCATING THE WIDER COMMUNITY ON THE NATURE AND EXTENT OF PAST INJUSTICES

✓ CONTRIBUTING TOWARDS RECONCILIATION

Truthful apologies are a fundamental part of humanizing – or "rehumanizing" – those who have suffered past abuses and re-establishing their human worth, dignity and self-respect.

There should be no attempt to justify, explain, rationalize or contextualize the harm done.

Two key truth-telling parts of an effective apology:

- "reckoning"
- "naming"

Reckoning involves the unequivocal acknowledgement of events, without justification or explanation, in order to demonstrate awareness of each injustice committed.

Naming specifies who the victims of injustices were and to whom the apology is addressed.

1. Credible promise of non-recurrence

Apologies on their own are unlikely to be effective, unless they are underpinned by a **credible promise of non-recurrence**. The apology should clearly indicate the practical steps that have been taken to ensure that the apologizing individual, organization or institution **will not inflict the same harms again**. There must be no sense of entitlement to or expectation of forgiveness, acceptance or reconciliation on the part of the apologizer.

2. Appropriate compensation or reparations

Apologies should be accompanied, as appropriate, by **reparative measures designed to assist those who have been affected by past harms**. They may include:

- ✓ accepting legal liability.
- ✓ commitment to provide monetary compensation.
- ✓ restoration of the rights and dignity of victims and appropriate commemorations or acts of memorialization.
- ✓ commitment to fulsomely and effectively pursue justice, truth and information recovery.

The HOW matters.

Properly crafted and delivered public apologies may contribute to reconciliation processes, when accompanied by a comprehensive transitional justice strategy. Reconciliation and apologies adopted in that context should not be used as a substitute for criminal justice or other transitional justice measures.

Reconciliation is understood as the restoration of victims' trust in the State and its institutions and conditions under which individuals can trust one another as equal rights holders

Public apologies should be delivered in a context designed to maximize the potential of the apology, its impact and effectiveness.

TIMING OF AN APOLOGY IS KEY.

Timing of an apology can have a significant bearing on its reception. Victims will often want evidence that the apology has been given appropriate, careful and sincere consideration by the apologizing State or organization.

CONSULTATION WITH THE VICTIMS IS KEY.

The timing and context for the delivery of the apology should be carefully considered, ideally in consultation with the victims and, when appropriate, arranged with other events.

HOW SHOULD APOLOGIES TAKE PLACE?

Delivered by those with the **credibility to speak** for the organization or institution	The individual chosen should have the authority to speak on behalf of the State, institution or organization responsible for the harm with the necessary leadership and credibility to effectively represent those who inflicted the harms. It is important that both the victims and the apologizing organization or institution recognize the authority of the apologizer – an essential element for avoiding the subsequent diminution, rejection or undermining of an apology.
Delivered with due **respect, dignity and sensitivity** to the victimized	The apologizer should speak clearly, using terms that are clear and unambiguous. Insensitive terminology and language should be avoided at all costs. Honesty, sincerity and humility are essential components of their effective delivery.
Non-regression	Apologies should be part of a State policy, which is sustained and reaffirmed over time, under which regressions or actions that counter the effect of the original apology are not permitted.

AND WHEN?

- In some cases, it may be appropriate for the apology to coincide with an anniversary or other date deemed significant by the victims.
- In others, it would be most appropriate for an apology to be issued at the conclusion of an investigation designed to establish the truth of what occurred, such as internal organizational review, a criminal trial, a truth recovery process or a public inquiry.
- It may also be symbolically important for apologies to be offered in such a way that they coincide with the anniversary or other important dates set aside to commemorate the memory of victims of past abuses.

GOOD PRACTICES ON TIMING

NORWAY

- In January 2012, which marked 70 years since the largest deportation of Norwegian Jews from Oslo, the Prime Minister of Norway, Jens Stoltenberg, apologized for the participation of the Norwegian police force in the deportation and for the fact that the event had occurred on Norwegian soil. In 1997, the King of Norway used the opening of the Sami Parliament as an opportunity to apologize for the Government's "Norwegianization" policy towards the Sami people.

UNITED KINGDOM

- In a similar vein, in 2002, marking thirty years since a series of bomb explosions throughout Belfast, in which nine people were killed (5 of whom were civilians) and 130 people were injured, the Irish Republican Army issued a statement in which they offered its "sincere apologies and condolences" to the families of those killed.

SIERRA LEONE

- Following repeated calls from the Human Rights Commission and women's groups for a State apology for the sexual violence during the conflict, the Government chose to issue an apology to the women of Sierra Leone on International Women's Day, in front of a diverse group of women, civil society actors, representatives of the international community and the media.

THE SPECIAL RAPPORTEUR CONCLUDES:

(A) CONSULTATION WITH THOSE TO WHOM APOLOGY IS ADDRESSED

Comprehensive and effective **consultation** with those affected by harms inflicted is key to the delivery of a victim-centred apology. It enables the apologizer to establish what victims want and need to hear and what they do not want to hear. Victims should ideally be afforded the **opportunity to read draft apologies and to offer feedback** on the appropriateness of the language used and on the setting and context of the delivery of the apology, which helps to avoid unnecessary pitfalls and the possibility of an apology causing more harm than good. In situations in which collective apologies are being issued, it is important that victims groups consult internally and agree, insofar as possible, upon the parameters of what they would like the apology to include.

(B) CONSULTATION WITHIN THE APOLOGIZING CONSTITUENCY

In order to deliver a meaningful apology that is not subsequently qualified, rescinded or undermined, apologizers should **consult widely within their own constituencies**. If there are limits to what the apologizer can say, the apology should at least be communicated clearly to victims and their representatives as part of the consultation process, in order to manage the expectations of victims.

(C) NAMING AND ACKNOWLEDGING OF HARM DELIBERATELY OR NEGLIGENTLY INFLICTED

A public apology should commence with a **clear acknowledgment** of the **nature, scale and duration** of the **harm** inflicted. It should specify clearly whether the harm was inflicted deliberately, with intent, or negligently. The direct and indirect impacts of the harm on different categories of victim should be acknowledged. The gender dimensions of the harm should be clearly articulated. **Under no circumstances should the apology be used as a platform to minimize or obfuscate culpability**.

(D) TRUTHFUL ADMISSION OF INDIVIDUAL, ORGANIZATIONAL OR COLLECTIVE RESPONSIBILITY

Truthful apologies are necessary in order to validate the experience of victims and to restore their dignity. Establishing the truth of what occurred is almost always a prerequisite, but in some instances, an apology can effectively provoke a truth recovery process. In the light of the truth, the **apology should clearly admit responsibility** – individual, organizational and/or collective – and blame should be accepted for the infliction of the harm. There should be **no attempt to justify, explain, rationalize or contextualize the harm**. In circumstances in which the apologizer believes that some elements of

	past harms or human rights violations were justifiable, the public apology is not the time or place to restate that belief.
(E) STATEMENT OF REMORSE AND REGRET RELATED TO THE WRONGFUL ACTS OR OMISSIONS	The apology should include a **clear statement of regret** for the named harms. The language used should be carefully chosen to communicate sincere remorse. It must be **unqualified** and **unreserved**.
(F) DELIVERED IN A CONTEXT DESIGNED TO MAXIMIZE THE POTENTIAL OF THE APOLOGY	The **timing** and **context** for the delivery of the apology should be carefully considered, ideally in consultation with the victims and, when appropriate, arranged with other events. In some cases, it may be appropriate for the apology to coincide with an anniversary or other date deemed significant by the victims. In others, it would be most appropriate for an apology to be issued at the conclusion of an investigation designed to establish the truth of what occurred, such as internal organizational review, a criminal trial, a truth recovery process or a public inquiry. The **setting** for the apology should also be designed to maximize its impact and effectiveness.
(G) DELIVERED BY THOSE WITH THE CREDIBILITY TO SPEAK FOR THE ORGANIZATION OR INSTITUTION	The person or persons selected to deliver the apology must have the necessary **leadership** and **credibility** to effectively represent those who inflicted the harms. The individual chosen should have the **authority to speak on behalf of the State**, institution or organization responsible for the harm. It is important that both the victims and the apologizing organization or institution recognize the authority of the apologizer – an essential element for avoiding the subsequent diminution, rejection or undermining of an apology.
(H) DELIVERED WITH DUE RESPECT, DIGNITY AND SENSITIVITY TO THE VICTIMIZED	The **manner** in which an apology is delivered is centrally important. The apologizer should speak clearly, using terms that are clear and unambiguous. Insensitive terminology and language should be avoided at all costs. Victims are highly alert to overly staged or hollow apologies. **Honesty**, **sincerity** and **humility** are essential components of their effective delivery. In some instances, it may be appropriate for the public apology to be linked to broader political, societal, religious or communal events or rituals, to maximize the symbolic power of the public apology.
(I) CREDIBLE PROMISE OF NON-RECURRENCE	Apologies on their own are unlikely to be effective, unless they are underpinned by a **credible promise of non-recurrence**. The apology should clearly indicate the practical steps that have been taken to ensure that the apologizing individual, organization or institution will not inflict the same harms again. There must be no sense of entitlement to or expectation of forgiveness, acceptance or reconciliation on the part of the apologizer.

(J) APPROPRIATE COMPENSATION OR REPARATIONS	Apologies should be accompanied, as **appropriate**, by reparative measures designed to assist those who have been affected by past harms. They may include accepting legal liability, commitment to provide monetary compensation, restoration of the rights of victims and/or appropriate commemorations or acts of memorialization. Reparative measures may also include a commitment to fulsomely and effectively pursue justice, truth and information recovery.
(K) NON-REGRESSION	Apologies should be part of a **State policy**, which is sustained and reaffirmed over time, under which regressions or actions that counter the effect of the original apology are not permitted.
(L) APOLOGIES AND RECONCILIATION	Properly crafted and delivered public apologies may contribute to **reconciliation processes**, when **accompanied** by a comprehensive **transitional justice strategy**. Reconciliation, understood as the restoration of victims' trust in the State and its institutions and conditions under which individuals can trust one another as equal rights holders, and apologies adopted in that context should not be used as a substitute for criminal justice or other transitional justice measures.

MEMORIALIZATION PROCESSES: the fifth pillar of transitional justice

(A/HRC/45/45)

Memorialization processes in the context of transitional justice, are fully recognized by the rules and standards of contemporary international law. The role of memory is understood as a tool for combating injustice and promoting peace. Positive work in the area of memory not only helps to build democratic cultures in which human rights are respected but also fulfils the legal obligation of States to guarantee human rights.

During the forty-fifth session of the HRC, which took place from 14 September to 2 October 2020, the Special Rapporteur submitted a thematic report on the:

"Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice".

The report is based on the assumption that memory work, like history, cannot be dissociated from the political influences and debates of the present, although it has clear **limits**:

Memory processes should **never** result in the **revictimization** of victims of human rights and/or humanitarian law violations by **failing to recognize or attach sufficient importance** to the **harm** that such victims have suffered.

What did the rapporteur assess in this report?

1. OBJECTIVES AND REGULATORY FRAMEWORK OF MEMORIALIZATION PROCESSES

2. MEMORY AS A BATTLEFIELD

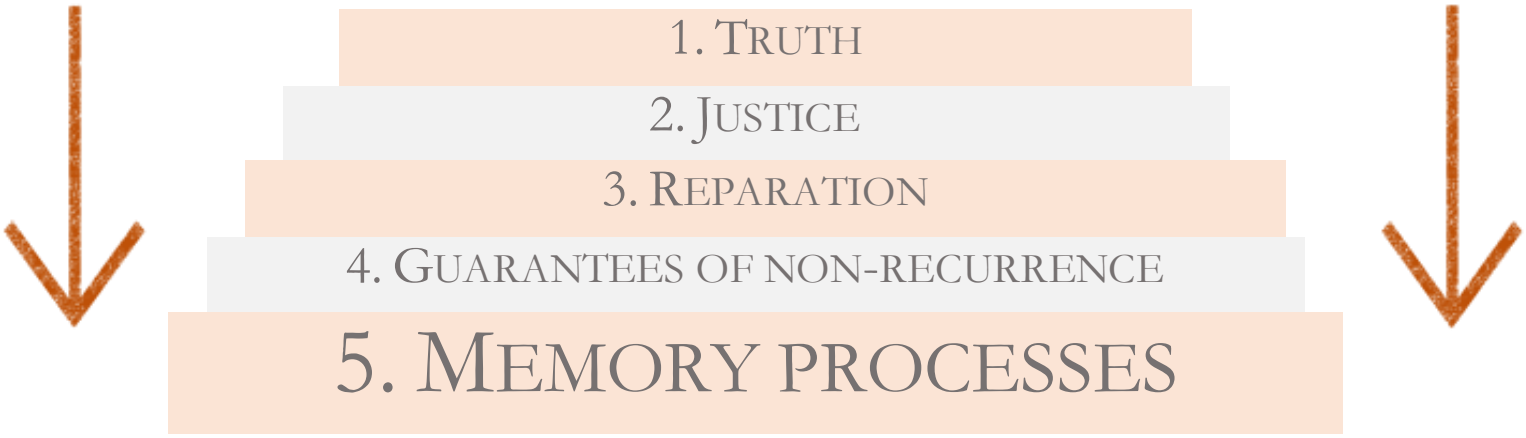
3. MEMORY WORK IN SITUATIONS OF TRANSITION

4. WEAPONIZATION OF MEMORY THROUGH SOCIAL NETWORKS

5. PROGRESSIVE DEVELOPMENT OF MEMORY AND NON-REGRESSION

Without the **memory of the past**, there can be no right to truth, justice, reparation, or guarantees of non-recurrence.

The five PILLARS of transitional justice:



Memory processes contribute to the implementation of the other four pillars and is a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps towards building a **CULTURE OF PEACE**.

INTERNATIONAL LEGAL FRAMEWORK

The duty to carry out memory processes derives from primary (covenants and conventions) and secondary (principles and guidelines) sources of international human rights law.

INTERNATIONAL TREATIES	▪ Convention on the Prevention and Punishment of the Crime of Genocide. ▪ International Covenant on Civil and Political Rights. ▪ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ▪ International Convention for the Protection of All Persons from Enforced Disappearance.
SOFT LAW INSTRUMENTS	▪ Note prepared by the former Special Rapporteur of the Subcommission Mr. Theo van Boven (E/CN.4/1997/104). ▪ Final report submitted by the Special Rapporteur of the Commission on Human Rights, Cherif Bassiouni (E/CN.4/2000/62). ▪ Updated set of principles for the protection and promotion of human rights through action to combat impunity, report by Diane Orentlicher, building on work previously carried out by Louis Joinet (E/CN.4/2005/102/Add.1). ▪ 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.

Memory as a **battlefield.**

The purpose of the proper use of memory is to establish "a dialogic truth", that is, to create the conditions for a debate within society on the causes and consequences of past crimes and violence and on the attribution of direct and indirect responsibility. The aim is to enable victimized populations to explain a brutal past without justifying it, thereby easing existing tensions and allowing society to live more peacefully with the legacy of past divisions.

In specific cases involving armed conflict between different groups, including tribal or ethnic groups, the process of memory must not give rise to competition between victims. Memory processes related to armed conflict can lead to the manipulation of history and the cult of martyrdom, which tends to reopen past wounds, intensify hatred and incite new acts of violence.

Memorialization takes many forms and should be a tool for fostering recognition of otherness, the consideration of all persons as rights holders and the promotion of peace, justice and social coexistence. But it is also part of a broader cultural framework in which different visions, values and narratives come together.

As a part of transitional justice, memory must take and be consistent with a human rights approach.

Three particular scenarios where memorialization my face challenges:

1 Memorialization in times of conflict.

2 Memorialization in post-conflict situations (situations of transition).

3 Weaponization of memory in connection with the politicization of social networks.

Memorialization in times of conflict

Memory processes related to armed conflict can lead to the manipulation of history and the cult of martyrdom, which tends to reopen past wounds, intensify hatred and incite new acts of violence.

CHALLENGES

- Experience shows that **immediate action is hardly ever taken** to approach crimes through the prism of education and to identify them as examples of conduct to be repudiated.
- Truth commissions and special criminal courts are sometimes set up **while the conflict is ongoing**, international crimes continue to be committed, and warring groups continue to disseminate their warmongering propaganda. In such conditions, memorialization is extremely difficult
- Investigation and documentation processes that take place **during conflicts**, while extremely important, are **complex** and **dangerous**. In different parts of the world, human rights defenders, journalists and other persons who document violations have been attacked and killed.

MANAGING VICTIMS' EXPECTATIONS

- In times of conflict, transitional justice mechanisms must deal as best they can with the fact that they are unable, at least temporarily, to **meet** the unsatisfied **expectations** of the victims and communities on whose behalf they were created.

GOOD PRACTICES:

An example of innovation managing victims' expectations is the **International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic. Since March 2011:**

- ✓ It has taken a number of measures to **respond adequately** to victims' needs.
- ✓ Has **cooperated** with **national jurisdictions** prosecuting the perpetrators of international crimes
- ✓ Has established procedures for regularly **informing** victims' representatives about investigations.
- ✓ Has conducted studies on **expectations** and how **best to meet them**.
- ✓ Has ensured that **victims who testify** have given their **prior consent** and agreement and that **precautions** are taken to guarantee their **safety**.

Memorialization in post-conflict situations (or situations of transition)

When peace and/or democracy are finally restored, the ***educational goal*** *of memorialization is not always achieved through transitional justice mechanisms. For instance, although the act of prosecuting the perpetrators has enormous value for memory processes, the judgments handed down by an international or hybrid criminal court are not in themselves sufficient to change perceptions within societies*

JUSTICE IS NOT ENOUGH: THE CASE OF THE ICTY.

Despite the undeniable legal successes of the **International Tribunal for the Former Yugoslavia**, which were supplemented by the punitive measures taken by the War Crimes Chamber in Bosnia and Herzegovina and other national courts, it has not been possible to **change the narrative** established by the **propaganda machines** set up during the war in the societies of the former Yugoslavia or to curb denialism and hate speech, all of which are being vigorously echoed today.

One of the main lessons learned from the functioning of the Tribunal was that "the idea that simply flooding the public with technical information on the transitional justice mechanism's mandate, procedures and activities is sufficient to … create reservoirs of popular support is sheer fantasy."

…Nonetheless, Justice is Fundamental: The Case of South Africa

The **Truth and Reconciliation Commission in South Africa** was established when the democratization process was already under way in that country. Its immense merit lay in its ability to project and imagine a different future, making the act of addressing the crimes of apartheid an indispensable step in transforming race relations within South African society.

The Commission's approach was not technical but political, which enabled it to rally a sufficiently broad range of supporters around it, including victims' groups, the media, politicians, academics, trade unionists and others, to the point where this positive dynamic attracted and held everyone's attention.

However, the Commission did **not** tackle the issue of structural violence linked to the policy of apartheid, and its work was not accompanied by the prosecution and conviction of the perpetrators of atrocity crimes, leaving the victims without justice.

Justice alone, like the absence of justice, is not sufficient for the requirements of memory: **memorialization must be part of a comprehensive transitional justice process** in which the participants effectively address **all components** without losing sight of the goal of establishing democracy and a culture of peace.

GOOD PRACTICES

- The Truth and Reconciliation Commission of CANADA, after establishing the facts about persons who were directly or indirectly affected by the legacy of the Indian Residential Schools, devoted much of its work to the promotion of reflection on this past within society.

- In **SIERRA LEONE**, the Truth and Reconciliation Commission launched a national cross-disciplinary project that triggered a broad reflection on the country's vision for the future.

- In different countries, works that portray the history of victims and the circumstances surrounding their disappearance or death have served to remind the public of the lives lost to political violence. Books such as The **NORTHERN IRELAND** Book of the Dead have had a broad impact, including on the Catholic and Protestant Churches of Ireland, and have made it possible for both communities to share their suffering.

- In addressing **INTER-STATE CONFLICTS**, historians from opposing countries have in some cases managed to produce a single narrative, while in other cases they have set out a range of mutually irreconcilable views. Examples: a
  - ✓ A textbook on Franco-German history by authors from both States was published under the title Histoire/Geschichte at the start of the 2006/07 school year.
  - ✓ The Israeli-Palestinian work *Histoire de l'autre*, produced by the Peace Research Institute in the Middle East.
  - ✓ A textbook that describes the wars that took place in the former Yugoslavia during the 1990s, placing them in the context of regional events and providing access to documents on highly controversial historical episodes.

- Civil society plays an important role in public memorialization activities. In 2019, voices in **LEBANON** were raised to express the need for dialogue, debate and the reappropriation of memory in the public arena in relation to the conflict that tore the country apart between 1975 and 1990. Walking tours along the route of the "green line" that once separated the communities, photo exhibitions on the civil war, film screenings and countless debates were organized.

- In **LIBERIA**, one of the recommendations of the Truth and Reconciliation Commission was to launch a "memoryscape" that would examine forms of reparation and work on neo-traditional dispute settlement mechanisms.

- In **ARGENTINA**, the work of the National Commission on Enforced Disappearance of Persons and criminal prosecutions have helped to forge a common understanding of State terrorism under the military dictatorship.

The importance of culture

CULTURE in all its forms plays a key role in memory work, as it often allows mechanisms of oppression, confrontation and violence to be **deconstructed**. The aim is to **replace toxic and negative political cultures** whose legacies of violence and discrimination persist for decades.

Key factors of memoralization:

IMPLEMENTATION AND DISSEMINATION OF RECOMMENDATIONS	All too often, the recommendations contained in the final reports of truth commissions are **not implemented or disclosed by States**. This prevents society from effectively taking ownership of them and leaves gaps in the narratives of the past that can be exploited by political actors who are oblivious to the suffering of victims and the requirements of a peaceful society.
ACCESS TO ARCHIVES	Memorialization is linked to the ability to obtain access to archives. The most obvious risk is that some warring groups might deliberately seek to destroy documents that may be compromising or be used as evidence of serious violations of human rights and international humanitarian law. **The Special Rapporteur considers the protection of archives to be essential for enabling societies to learn the truth and regain ownership of their history**.

And what about the role of the United Nations?

Since its establishment, its agencies and organs have built up extensive and valuable archives in the countries where they have operated. These documents can provide a unique insight into violations of human rights and international humanitarian law and contribute to the historiography of different countries.

Within the institution itself, other actors, including the special procedure mandate holders of the Human Rights Council, do not always have access to these archives because of technical and budgetary reasons and because the resources required to process and digitize them are lacking.

Given the importance of issues related to memory for societies seeking to recover from serious conflicts or periods of repression in which human rights and/or international humanitarian law were violated, the United Nations must uphold these societies' right to the truth by establishing a useful methodology for granting access to its archives.

Weaponization of memory in connection with the politicization of social networks.

How to find a balance between the **right to information** and the **prohibition of incitement to hatred**?

Historically, information and memory have been critical political issues. The media play a vital role in documenting crucial events and reporting on them in real time. The Special Rapporteur is deeply concerned about the possible dangerous manipulation of information and memory to the detriment of human rights, the stigmatization of certain communities and hate speech that encourages the commission of violent acts and even mass violence.

The dissemination of **hate speech** and **fake news** is part of a broader trend marked by attacks on multilateralism and human rights and the rise of exclusionary and xenophobic ideologies based on nationalistic self-interest.

Specific State actions are needed to respond to these challenges.

The Special Rapporteur stresses that the right to information or any other human right may **not** be used as a **pretext to justify acceptance of the advocacy of hatred**.

The Rabat Plan of Action.

The *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* identifies six criteria for defining acts that constitute incitement to hatred and are therefore offences that must be prohibited.

1.	The context, which has a direct bearing on causation or intent.
2.	The speaker's position.
3.	The object or intent, which requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
4.	The content of the speech act.
5.	The extent of the speech act, such as its public or non-public nature and the media used to disseminate it.
6.	The likelihood, including the imminence, of a direct causal link between the hate speech and specific acts of violence.

The Rabat Plan of Action provides guidance on how to ensure the right to freedom of expression and States' duty to prohibit any expression that constitutes hate speech or incitement to discrimination, hostility or violence.

Balance between the right to information and the prohibition of incitement to hatred.

CRIMINAL RESPONSIBILITY OF IDEOLOGUES AND PROPAGANDISTS	The impunity of ideologues and spreaders of hateful and discriminatory speech facilitates the construction of a false memory that is morally repugnant and that contributes to and encourages violence.
RESPONSIBILITY OF THE MEDIA AND THE NEED TO ADAPT LAWS	Even when technology companies do not intend to engage in criminal acts, they cannot be absolved of responsibility for providing tools for the transmission of messages that may cause acts of violence to be inflicted on tens or even hundreds of thousands of people. There can be no justification for allowing social media companies to escape responsibility when they are found to have acted negligently and to have facilitated and/or permitted the dissemination of hate speech on their networks, inciting acts of violence that constitute international crimes.

FAKE NEWS: How memory and information can easily be weaponized.

The mass dissemination of fake news can create an atmosphere in which people are at risk of becoming dangerously radicalized, making coexistence difficult. The dissemination of hate speech and fake news is part of a broader trend marked by attacks on multilateralism and human rights and the rise of exclusionary and xenophobic ideologies based on nationalistic self-interest.

FAKE NEWS CONSTITUTE AN ATTACK ON DEMOCRACY

False information reveals and exacerbates the collapse of values and the dissolution of societies.

FAKE NEWS CAN EXACERBATE VIOLENCE

False information must be treated with concern because, as history shows, it has previously been a harbinger of tragedies, bloodshed and pogroms.

The situation is particularly serious in fragile States, where institutions are often weak and politicians use sectarian discourse – based on affiliation with an ethnic group, religion, community or clan – and fake news to manipulate identities with the aim of stirring up emotions and setting the stage for violent conflict.

Media and information education in schools is essential to counteract the harm caused by fake news.

PROGRESSIVITY IS KEY.

Pro Persona Principle

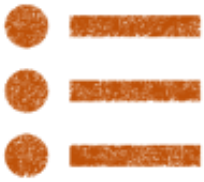
Progressivity is a principle that informs international human rights law from a *pro personae perspective (or Pro Homine),* a core element of international human rights law, which prohibits the interpretation of a provision as permitting the suppression or restriction of the enjoyment or exercise of any right or freedom.

Principle of Non-Regression

The principle of non-regression in relation to memory processes places a limit on denialist or revisionist theories that seek to deny the extent of past violations and the harm caused to victims. In this regard, any memorialization policy that is designed and implemented must be bound by the obligation not to distort or diminish the conclusions of legitimate mechanisms established to shed light on the events – truth commissions – and/or of any tribunals that have tried and convicted those responsible for them.

Memorialization processes must also be progressively developed so as to:

- ✓ move forward in the search for truth and in effectively establishing **memory policies concerning past violations**,
- ✓ considering **different groups of victims**, and
- ✓ duly reflecting a **gender perspective**.



THE SPECIAL RAPPORTEUR CONCLUDES:

(A) OBLIGATIONS STEM FROM LAW	The obligation to adopt memorialization processes in societies that have suffered gross violations of human rights and serious violations of international humanitarian law derives from **both primary and secondary sources of international human rights law** and therefore cannot be circumvented by Governments on the basis of budgetary, political or structural arguments or claims that efforts should be focused on other areas of transitional justice.
(B) HUMAN RIGHTS APPROACH	Transitional justice systems require vigorous and active memory policies based on **human rights approaches** in order to adequately address past crimes committed by dictatorial or authoritarian regimes or crimes perpetrated in the context of an armed conflict. Without memory, the rights to truth, justice and full reparation cannot be fully realized and there can be no guarantees of non-recurrence.
(C) FIFTH PILLAR	Memory processes related to gross violations of human rights and serious violations of international humanitarian law constitute the **fifth pillar of transitional justice**.
(D) FUNCTION	Memory processes **complement** but do not replace mechanisms for truth, justice, reparation and guarantees of non-recurrence. Memory mechanisms should never serve as a pretext for granting *de jure* or *de facto* impunity to the perpetrators of gross violations of human rights or serious violations of international humanitarian law.
(E) PROGRESSIVITY	**Progressivity** is a principle that informs international human rights law from a ***pro personae* perspective**. Memorialization processes must also be progressively developed so as to move forward in the search for truth and in effectively establishing memory policies concerning past violations, while considering different groups of victims and duly reflecting a gender perspective. The **principle of non-regression** in relation to memory processes places a limit on denialist or revisionist theories that seek to deny the extent of past violations and the harm caused to victims.
(F) STATE'S ROLE	Memorialization is a long-term process in which the **State must play an active and decisive role**. The authorities that adopt and implement memory policies should ensure that such policies properly represent the views of the victims and are established in collaboration with civil society, especially human rights organizations.

(G) PUBLIC POLICY	**Public policy** on memory should be **multidimensional** and include measures related to public spaces (memorials, parks, squares, etc.), artistic expressions (museums, plays, concerts, pictorial exhibits, etc.), media initiatives, and State-sponsored public events and activities held on significant dates. In the area of **education**, programmes under such policies should be established at all levels of formal and informal education and steps should be taken to build a culture of peace.
(H) TRANSVERALITY	Memory processes cut across **all aspects of full reparation** – especially the dimensions of satisfaction and guarantees of non-recurrence – as a new obligation for States arising from the violations committed.
(I) REFLECTION	The memorialization of past times defined by violations of human rights and international humanitarian law provides an opportunity to **reflect on the present** and **identify contemporary problems** related to exclusion, discrimination, marginalization and abuses of power, which are often linked to toxic political cultures. Memorialization promotes the development of a **culture of democracy** and **respect for human rights**.
(J) DIALOGIC TRUTH	The purpose of the proper use of memory is to establish a **"dialogic truth"**, that is, to create the conditions for a debate within society on the causes and consequences of past crimes and violence and on the attribution of direct and indirect responsibility. **Memory processes cannot, under any circumstances, deny or attempt to detract from violations and crimes that have been verified by truth commissions and/or legal proceedings**. Such a deceptive exploitation of memory is unacceptable and contrary to international human rights obligations.
(K) VICTIMS' VOICES	The **voices of victims** of human rights violations must play a **key role** in the construction of memory. This will also help to counteract attempts at denialism, revisionism and manipulation by the perpetrators of violations and by political groups or interests that seek to rekindle violence. The **public authorities** must **refrain** from making **denialist statements** that whitewash violations and revictimize victims.
(L) AIMS	The purpose of memory processes in post-conflict situations is to allow victimized populations to **make sense of a brutal past**, **avoid vengefulness**, **come to terms with past divisions**, **repudiate** the crimes committed, **support justice** mechanisms and, through the lessons learned, **alleviate existing tensions**, allowing society to live **peacefully** going forward.
(M) VICTIM'S TREATMENT	Although memorialization and, in particular, the documentation of crimes and human rights violations in times of conflict are essential, they require that **victims** be **treated appropriately**. Victims should

	play a leading role in the process, be kept regularly informed and have their expectations met as far as possible for as long as the violence continues.
(N) DEMOCRACY AND CULTURE OF PEACE	In transitional contexts, memorialization processes can be effective only if they pursue the political goal of **establishing democracy** and a **culture of peace**. Advocates of transitional justice mechanisms should form alliances with different civil society actors and help to change a toxic culture of political violence, confrontation and marginalization.
(R) ARCHIVES	In order for memorialization processes to be effective, it is essential to **protect the archives** of State agencies and civil society organizations, especially those that work in the area of human rights. Archives should be **accessible** in accordance with established standards, and Governments should **remove obstacles** to such access.
(S) UNITED NATION'S ROLE	The **United Nations** should establish procedures for **sharing** its own archives, which are important for shedding light on the past for many societies, thereby helping to uphold the right to the truth. Specifically, it should set up an **efficient access methodology**, with priorities defined in accordance with the purpose of investigations, in order to allow societies to learn more about their own history.
(T) FREEDOM OF EXPRESSION VS. HATE SPEECH	National legislation should be adapted to reflect technological developments. **Hate speech** that leads to violence **cannot be accepted** on the pretext that social networks are the entities that spread such statements. While freedom of expression must be guaranteed, criminal acts that constitute incitement to hatred must be banned and persons responsible for acts of discrimination, hostility or violence must be punished in accordance with international standards. Formal **education** in schools, colleges and universities should incorporate media and information literacy content that enables students to analyse information, sharpen their critical faculties and develop informed opinions, while ensuring full respect for human rights.

GENDER PERSPECTIVE IN TRANSITIONAL JUSTICE PROCESSES

(A/75/174)

Systemic and structural discrimination against women, fostered by patriarchy and the allocation of roles based on gender stereotypes, has impacts on all areas of life and affects all women, particularly women living in poverty in rural areas, women from ethnic minorities, women with disabilities and lesbian, gay, bisexual and transgender persons, among others.

The Special Rapporteur has been tasked with integrating a gender perspective and a victim-centred approach throughout the work of his mandate. Therefore, on 17 July 2020, in the framework of the seventy-fifth session of the General Assembly, the Special Rapporteur submitted a thematic report on:

"The gender perspective in transitional justice processes".

What did the rapporteur assess in this report?

1. TRUTH COMMISSIONS

2. REPARATIONS

3. CRIMINAL PROSECUTION

4. GUARANTEES OF NON-RECURRENCE

5. MEMORIALIZATION

6. PARTICIPATION IN TRANSITIONAL JUSTICE PROCESSES

1. TRUTH COMMISSIONS

Truth commissions are a tool to give visibility to and facilitate the participation of victims, and places emphasis on the individuals, communities or populations historically subject to discrimination, including women.

Early truth commissions were **gender-blind** and **ignored gross violations based on gender, sexual orientation and gender identity**.

Until relatively recently:

- Women were **forgotten** among the overall victims, and the gender issue was ignored or touched upon in only a superficial way by truth commissions.
- Women, men and LGBT persons who were victims of sexual and gender based violence, were also **forgotten** and rendered invisible.
- There has been also a general lack of focus on sexual orientation and gender identity in the vast majority of truth-seeking processes.

Intersectional perspective is key.

Truth commissions should comprehensively address the impact of gender, including sexual and other gender-based violence suffered by all persons, and consider the dimension of sexual orientation and gender identity.

Need to implement a cross-cutting and systemic approach in all stages of a commission's work, including through the adoption of a combined organic strategy that includes a special gender unit (with consultants and experts of different sexual orientations and gender identities specialized in gender analysis) and specialized members in other teams.

GOOD PRACTICES ON INTERSECTIONAL PERSPECTIVE:

COLOMBIA

The mandate of the Truth Commission of Colombia explicitly includes lesbian, gay, bisexual and transgender persons among the categories to be addressed in order to clarify the impact of the conflict.

PERU AND ECUADOR

The Truth and Reconciliation Commission of Peru and the Truth Commission of Ecuador established a special unit in their organizational structure dedicated exclusively to gender issues, which allowed for a specific operational focus on gender based patterns of human rights violations.

Which criteria should truth commissions meet?

KNOWLEDGE

All commission staff should have sufficient knowledge of gender issues and receive ongoing training to raise awareness about gender, sexual violence (including against men, boys and lesbian, gay, bisexual and transgender persons) and overcoming biases.

Gender parity or balance among commission members is fundamental since:

a) brings greater visibility to the political decision to include a gender perspective in commission work,

b) ensures the presence of women at the highest decision-making levels of commissions; and

c) brings commissions closer to women victims.

TRAININGS

Interviewers should be trained in techniques to safely, confidentially and sensitively identify and record the experience of both male and female victims or survivors of sexual violence, or those who have been subjected to violence because of their actual or perceived sexual orientation or gender identity

It is important to avoid classifying women's experience exclusively as victims of sexual violence and reducing them to sexual beings.

- Duly interpreting the scope of the violations studied, from an individual person's perspective, is key to homogenizing the joint work of the teams that comprise truth commissions.

- It is necessary to adopt a broad definitions of human rights violations covering gender behaviours such as forced nudity, inappropriate touching, genital mutilation and beating, forced prostitution, sexual slavery, rape, forced abortion, forced pregnancy intentionally or unintentionally resulting from rape, forced fertilization, forced sterilization, forced incest, malicious or unintentional transmission of a sexual disease resulting from rape, loss of reproductive capacity intentionally or unintentionally resulting from torture or sexual violence, labour in captivity, baby theft, among other violations.

- The format for taking statements and the design of the database should allow for the recording of primary and secondary violations and their impacts on primary and secondary victims, while the narrative and the recommendations should appropriately cover the gender impact.

The importance of conducting proceedings with a victim centered approached.

HEARINGS	The risks of revictimization are high and must be taken into account when designing hearings. The informed consent of those who testify is essential. Psychosocial support must be guaranteed before, during and after the hearing. Those who testify must be in a decent and safe environment, have support to prepare their testimonies and anticipate questions, and have protection and security measures in place to prevent the social exposure of victims and avoid inflicting further damage on them once they return to their communities.
VICTIMS' SILENCE	Many women do not perceive the crimes committed against them as violations of their human rights or they diminish them by prioritizing the telling of the experiences of others, which entails making their own suffering invisible. In particular, in the case of sexual violence, silence prevails, not only because of feelings of guilt, shame or fear of being stigmatized or ostracized by the community, but also because of the conviction that any complaint would be futile owing to the lack of institutional protection, which highlights the extent of sexist cultural patterns. The silence can be even greater when the victims of sexual violence are men, boys and lesbian, gay, bisexual and transgender persons, especially if they have been attacked because of their actual or perceived sexual orientation or gender identity

KEY:

- A proactive strategy of support and confidence-building is required to motivate women, lesbian, gay, bisexual and transgender persons and victims of sexual violence in general to provide statements.

- The dissemination and communication campaigns developed by truth commissions are crucial: the development of dissemination materials should take special care to make non-sexist use of language and image, convey a message of gender equity and sensitivity, and expressly include gender-based violence in the list of violations to be investigated.

Final reports of truth commissions.

Final reports have gradually moved from scant mention of women to attention to rape or sexual and gender-based violence, and to a more comprehensive analysis of such issues as the role of women in the history of conflict, the conditions that facilitated the abuse of women and the situation of women victims.

DISSEMINATION AND FEEDBACK.

In order to achieve gender mainstreaming in final reports and ensure that recommendations respond adequately to the causes and consequences of violence, it is key to circulate the findings of the work teams and their feedback, both internally and horizontally.

GOOD PRACTICES

Morocco
In Morocco, the Equity and Reconciliation Commission devoted a section of its final report to lessons learned on gender and to serious human rights violations

Peru
In Peru, the final report contains a chapter on sexual violence against women and another on the differentiated impact of human rights violations on men and women.

Brazil
The final report of the National Truth Commission of Brazil goes further. In addition to a special chapter on sexual violence, gender violence and violence against children and adolescents, the report includes a section on the dictatorship and homosexuality that seeks to examine the ways in which the dictatorship's systematic and widespread violence affected the lesbian, gay, bisexual and transgender population

2. REPARATIONS

The first reparations programmes for victims of gross human rights violations did **not** address the specific forms of victimization that **women experience**. Currently, the explicit incorporation of a gender perspective in reparations programmes is aimed at providing reparations for sexual crimes committed and identifying any reparation decisions that may have a differential impact between the sexes. Similar perspectives should be adopted in relation to lesbian, gay, bisexual and transgender persons

A. DEFINITION OF THE UNIVERSE OF VICTIMS

Reparation programmes should not reproduce patterns of gender discrimination. Currently, in order to define the notion of a victim eligible for reparations and the list of violations to be remedied through a gender sensitive lens, the programmes usually:

a) Use a progressive typology with a gender focus to analyse the different violations of human rights, specifically including sexual violence and violations of sexual and reproductive rights, as well as the gender impact of forced displacement and violations of economic and social rights.

(b) Classify the relatives of deceased or disappeared persons as victims and provide them with full reparation as successors and direct victims.

(c) Include the relatives of surviving victims in that classification; allow children born of rape to be recognized as autonomous victims of a sexual violations; and recognize as autonomous violations, for example, the interruption of the life plan of persons who sought the release of a relative, or of persons caring for a relative with disabilities due to torture, which are experiences often faced by women.

(d) Use a definition of the family that does not restrict the meaning to a rigid or legalistic concept or to dominant cultural views, and that includes people who are emotionally attached to or in a dependent relationship with the primary victims.

(e) Include complex victims, that is victims who were themselves perpetrators since, in the context of their imprisonment or within their own non-State armed group, they may have been victims of sexual and gender-based violence.

B. DEFINITION OF REPARATION MEASURES

STIGMATIZING EFFECT OF RAPE

Beyond the physical and moral harm suffered, certain crimes have secondary effects on the social and economic status of the victim. Steps should be taken to ensure that the standards and parameters used in identifying and quantifying such factors as actual damage, lost profits, lost opportunities and disruption to the life plan are not based on sexist preconceptions, and that the secondary effects are duly assessed in the reparation measures.

STIGMATIZING EFFECT OF REPARATION

Careful assessment must be made of which reparation measures are most appropriate, particularly in cultural and social contexts where the community usually takes precedence. Individual reparation in principle forces the victim to become visible, which may make him or her vulnerable to revictimization.

TRANSFORMATIVE EFFECT OF REPARATION

The traditional restitutive approach to reparations is insufficient for women, who traditionally find themselves in conditions of exclusion, inequality and discrimination.

A return to the situation before the violation is insufficient as it does not imply the effective enjoyment of their rights. Reparations should aspire to subvert the pre-existing structural inequality that may have engendered the violence suffered by women.

EXAMPLES

(a) Measures which can have a transformative impact on women's lives in practical term and in terms of their self-esteem;

(b)Measures which facilitate a real narrowing of existing gender gaps;

(c) Measures which promote a new positioning of women as individuals, in relation to the community and within the family;

(d) Measures which encourage their incorporation in other spaces or some level of economic or other autonomy, and allow the new positions assumed by women **during crises and conflicts to be reflected.**

Implementation of domestic reparation programmes

Maintaining a gender focus at the time of implementation requires a review of gender inequalities and discrimination and also a comprehensive understanding of the gender structure of society and how that affects the socioeconomic and political status of women in everyday life and their access to social programmes.

EVIDENTIARY STANDARD	The evidentiary standard in reparation programmes should not create exclusion or resemble a court case. The challenge is to accelerate and facilitate the procedures for these sectors and to place the burden of proof on the rating agency.	
ACCESS	There are several barriers to women's effective access to reparation (a higher rate of illiteracy, lack of legal and economic autonomy, for example.), as well as for lesbian, gay, bisexual and transgender persons (criminalization of sexual or gender diversity or limits to the legal recognition of gender identity, for example). These barriers must be taken into account when designing implementation processes that are appropriate, understandable and accessible to victims.	
PRIORITIZATION	The implementation of reparation programmes should:	(a) identify which groups of victims will be addressed first and prioritized according to their situations of vulnerability, including vulnerability due to victimization, whose analysis should cover secondary harm inflicted by the community. (b) avoid gender bias and avoid reproducing patterns of discrimination.

GOOD PRACTICES:

RATING:	One identification and rating strategy that can overcome both the obstacle of proof and the challenge of getting women to talk is **to have recourse to reconstructing patterns of behaviour in the commission of certain violations**, in order to establish an appropriate system of presumptions and positive discrimination.
PRIORITIZATION:	The experience of **Timor-Leste** shows instructive elements in how to prioritize implementation in a gender-sensitive way that includes victims of torture, persons with physical or mental disabilities, victims of sexual violence, children, widows and single mothers.

3. Criminal prosecution

The establishment of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court contributed significantly to the visibility of sexual and gender-based violence. These advances have raised the standards for the prosecution of sexual and gender-based crimes in national courts, positively guiding representatives of the civil party, the prosecution and/or the judiciary.

However, impunity for sexual and gender-based crimes continues to prevail and there are barriers to women and lesbian, gay, bisexual and transgender persons accessing justice, mainly owing to negligent and prejudiced attitudes of justice officials.

Training of justice officials

It is necessary to provide justice officials with sufficient tools to be able to identify prejudices and carry out comprehensive gender analysis of the cases they are addressing through the implementation of special protocols for the investigation and prosecution of sexual and gender-based crimes, which can draw on the best practice manuals of the special international tribunals.

Specialization and prioritization for proper assessment

Strengthening national capacity to prosecute crimes of sexual and gender-based violence also involves promoting specialization, and thus the prioritization of such cases.

Safeguards and protection

It is essential to design special programmes based on an appropriate gender-sensitive assessment of the specific threat situations that victims of sexual and gender-based violence may face in the investigation phase, during the court proceedings and after sentencing. It is also essential to adopt regulatory provisions and specific measures that provide safe and private environments and protect the identity of victims.

GOOD PRACTICES:

TRAINING OF JUSTICE OFFICIALS

- ✓ In MEXICO, the Supreme Court of Justice of the Nation has a protocol for judging with a gender perspective, and the Attorney General's Office has a national protocol of action for personnel of the country's judicial bodies in cases involving sexual orientation or gender identity.

- ✓ In ARGENTINA, the Public Prosecutor's unit for coordination and follow-up in cases involving human rights violations during the period of State terrorism prepared a document entitled "Considerations on the prosecution of sexual abuse committed as part of State terrorism and a provincial court prepared a protocol for taking statements from persons who have been victims of sexual crimes in the context of crimes against humanity.

SPECIALIZATION AND PRIORITIZATION FOR PROPER ASSESSMENT

- ✓ The adoption of a special inter-agency model for investigation and prosecution with simplified procedures, a mobile design and legal staff who speak local languages – such as the mobile courts in the DEMOCRATIC REPUBLIC OF THE CONGO – makes it possible to overcome difficulties of geographical access.

- ✓ In COLOMBIA, the investigation and prosecution unit of the Special Jurisdiction for Peace has a specialized group investigating cases of sexual violence. Colombia also created the Gender Commission and included gender identity and sexual orientation in its criteria for prioritizing cases.

4. Guarantees of non-recurrence

In fulfilling a preventive function, guarantees of non-recurrence must be rooted in a gender-responsive analysis of the structural causes of violations and the factors that encourage them, in order to design legal and institutional changes with transformative potential.

GENDER-RESPONSIVE POLICY REFORMS AND INSTITUTIONAL REFORMS	A comprehensive review of all regulatory provisions (constitutional, civil and criminal or administrative in nature, and the provisions of traditional regulatory systems) should be undertaken in order to identify and amend provisions that are discriminatory against women and lesbian, gay, bisexual and transgender persons; to ensure the effective exercise of their rights; and to review the ways in which issues of sexual and gender-based violence and violence based on sexual orientation and gender identity are addressed
EDUCATION	An education system that is deficient in its interaction with wider social, cultural, political and economic processes can become an underlying element in the political momentum that leads a country to embark on the path of armed conflict, to undermine peace and/or to fuel violence. It is important to comprehensively review existing standards and policies in the education system to identify the role played by education in fueling or sustaining discrimination and conflict; and to correct the system by guiding it towards education for peace, based on respect for and guarantee of human rights without discrimination.

5. Memorialization

Memorialization processes complement truth, justice, reparations and non-recurrence mechanisms and can play a key role in duly addressing the gender dimension of violations of human rights and international humanitarian law.

The very culmination of the work of a truth commission, with its final report, is the development of a new story about the recent past, with a critical approach and recognition of the rights of victims.

Education is **crucial**

- A process of reviewing school textbooks and curricula must be undertaken in order to have a common memory and rebuild healthy and equitable relations between individuals and groups as well as trust in the State.

- Through school textbooks and curricula, truth commission reports can be made more accessible and disseminated to children, teachers and their families.

- A wide range of educational tools and resources can be designed using paper, audiovisual media and other means to directly represent memory, such as artefacts, celebrations, testimonies and newspapers

GOOD PRACTICES ON EDUCATION

In SOUTH AFRICA, the former prison of Johannesburg, Old Fort Prison, now converted into Constitution Hill complex which houses four museums and the Constitutional Court, is a good example of these synergies. One of the museums is the Women's Prison, which provides an insight into the gender-based violations suffered by common and political prisoners and the stories of prominent anti-apartheid women activists

The Peace School in Monte Sole, ITALY, an area razed to the ground by Nazi troops, is another example of a site of awareness that serves as a basis for educational programmes in which young people from affected societies are invited to reflect together on the past, with a focus on gender, stereotypes and prejudices

With the cooperation of a non-governmental organization, the Government of CAMBODIA opened a museum to the public in a pagoda complex in Battambbang to disseminate information on gender-based violence, and the Ministry of Religion supported the construction of memorials throughout the country to remember gender-based violence and as a lesson for the future

6. Participation in transitional justice processes

Consultative processes with these individuals should encompass the entire transitional justice process, from design to implementation. Without the participation of women, girls and boys, lesbian, gay, bisexual and transgender persons and victims of sexual and gender-based violence in consultative processes, transitional justice mechanisms are likely to reflect biased concerns, priorities, interests and experiences, and ignore sexual and gender-based violence.

Elements for gender - sensitive consultative processes

1. Inclusion

The determination in advance of the persons who will be consulted must be inclusive and overcome gender bias, whether conscious or unconscious, formal or informal, so as to avoid undermining the credibility of the consultative process.

The identification of the categories should take into account intersectional criteria and include:	✓ women, ✓ children and youth; ✓ lesbian, gay, bisexual and transgender persons; ✓ members of indigenous communities; ✓ people of African descent; ✓ persons in situations of poverty and displacement; ✓ religious, linguistic and ethnic minorities; and people from rural and urban areas

2. Security and protection

Participation in consultative processes implies a certain degree of visibility that entails security, social and revictimization risks. Security conditions must be safeguarded to allow their participation free of coercion, with separate consultations in neutral locations by peers qualified to deal with victims of sexual and gender-based violence.

3. Accessibility

There are several objective practical obstacles that make participation difficult – if not impossible – especially for women and girls (even more so if they are indigenous, of African descent, belong to an ethnic minority, are peasants farmers or in situations of illiteracy and/or poverty).

Consultations should be conducted in the local dialect or vernacular language of the place where they are being held, and should be organized in a decentralized manner in proximity to the places of residence or displacement of the marginalized persons and groups identified.

4. Training, communication and awareness-raising, and time frame

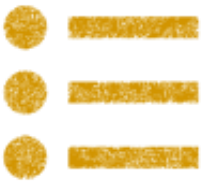
The capacity of women, girls and boys, lesbian, gay, bisexual and transgender persons and victims of sexual and gender-based violence who participate in the consultations should be strengthened through prior training to ensure that the purposes, principles, procedures and actual scope of the processes are understood. Communication strategies, risk awareness and transparency initiatives, risk mitigation measures and time limits are among the essential requirements. The flow of information must be constant and appropriate means used to reach these participants, taking into account local, cultural, religious, ethnic and other particularities, as well as vernacular languages and dialects.

ELEMENTS FOR GENDER- SENSITIVE CONSULTATIVE PROCESSES: GOOD PRACTICES

In CHILE, the regional intercultural dialogues held with society civil organizations served as a basis for the elaboration of the first national human rights plan, in which consultations with and the participation of women and lesbian, gay, bisexual and transgender persons were encouraged.

The use of techniques for the comprehensive mapping of groups and organizations, and the use of sampling (as in BURUNDI), quotas (as in BOSNIA), or parity, are powerful tools for equalizing the possibilities of participation and ensuring the implementation of such criteria.

In SWITZERLAND, the Federal Department of Justice and Police established a round table of equal composition to carry out an in-depth memorialization work and establish recommendations for victims regarding coercive measures for assistance and extra-family placements.



THE SPECIAL RAPPORTEUR RECOMMENDS THAT STATES:

(A) TRUTH COMMISSIONS

Ensure that truth-seeking initiatives contain an explicit reference to examining the causes and consequences of sexual and gender-based violence, and to the comprehensive implementation of their work from a gender perspective; and that the selection and appointment of commissioners is gender balanced and include the participation of the communities and populations concerned;

Establish a combined organizational structure that allows for mainstreaming and specialization, and adopt a process of continuous training for the commission's staff in order to ensure awareness-raising and overcome biases, with special attention given to the teams responsible for collecting statements and in charge of analysis and investigation.

Ensure that the typology of serious human rights violations includes gender behaviours; broad definitions that are not limited to physical injuries; a differentiated impact of violations; and a record of primary and secondary violations and their effects on the primary and secondary victims.

Include thematic public hearings on women, gender, homosexuality or the lesbian, gay, bisexual and transgender population with safe, dignified and informed procedures and spaces that avoid revictimization.

Adopt a proactive dissemination and communication strategy to motivate women, lesbian, gay, bisexual and transgender persons and victims of sexual violence in general to provide their statements; and encourage strategic partnerships with specialized civil society to strengthen the gender perspective, and build a coalition of social actors who advocate for the process.

Ensure that final reports address the gender perspective in relation to the causes, consequences and contextualization of past violence, building on the findings of the gender and research teams and their feedback, circulated both internally and horizontally.

(B) REPARATIONS

Ensure that reparation programmes incorporate a gender perspective by identifying measures with differential impact between the sexes and in relation to lesbian, gay, bisexual and transgender persons.

Ensure that the list of violations and categories of victims eligible for reparations do not reproduce patterns of gender discrimination; and include the relatives of victims and surviving primary victims, without restricting the meaning to a rigid or legalistic concept of the term or to dominant cultural views on the notion of the family.

Ensure that reparation measures consider gender and its intersectionality; the complexity of the damage suffered and its consequences on the daily lives of women and lesbian, gay, bisexual and transgender persons; the potential stigmatizing effect of crimes and reparations; and the potential transformative effect of certain measures on the structure of gender exclusion.

Adopt a presumption of related gender-specific violations or a lowered or differentiated evidentiary test in which the burden of proof is placed on the rating agency or in which there is recourse to reconstructing patterns of conduct in the commission of certain violations, in order to establish an adequate system of presumptions and positive discrimination.

Ensure that reparation programmes are creative and flexible to overcome sociocultural and administrative barriers; take into account the de jure and de facto ownership of property and the right to identity of women and lesbian, gay, bisexual and transgender persons, as well as measures of satisfaction and apologies; and ensure that they are understandable and accessible to victims.

(C) PROSECUTIONS

Promote the capacity-building of justice officials and administrative, medical and social workers to overcome negligent and prejudiced attitudes; and adopt special protocols for the investigation and criminal prosecution of sexual and gender-based crimes, as well as protocols for gender-sensitive medical care in the law enforcement, judicial and forensic fields.

Assess the creation of specialized chambers or courts, and prosecutors' offices and investigation teams specifically dedicated to the issue of sexual and gender-based violence; and adopt a special inter-institutional model of investigation and prosecution with simplified procedures, a mobile design and legal staff who speak the regional languages to facilitate access for victims.

Adopt victim and witness protection programmes that ensure security, discretion and confidentiality, with a gender-sensitive assessment of the specific risk situations faced by victims of sexual and gender-based violence in the investigative, procedural and post-conviction phases.

(D) GUARANTEES OF NON-RECURRENCE

Conduct a comprehensive review of all legal provisions to identify and modify provisions that are discriminatory towards women and lesbian, gay, bisexual and transgender persons and pay inadequate attention to sexual and gender-based violence and violence based on sexual orientation and gender identity.

Reform the justice, security and armed forces sectors by adopting fair and transparent vetting processes, where appropriate; improving gender representation, especially in positions of authority; developing training programmes with and on the gender perspective; and establishing specialized sexual and gender-based violence units.

Review textbooks and programmes at all educational levels in order to include critical accounts of the violent past provided by truth-seeking and move away from educational cultural structures that are despotic and/or violent and/or reproduce patterns of patriarchal and male domination; and reform education systems that perpetuate marginalization and discrimination based on ethnicity, religion, culture, gender and actual or perceived sexual orientation or gender identity.

(E) MEMORIALIZATION

Ensure that critical analysis is adopted in past violence memorialization processes of hegemonic patriarchal cultures and that the design of these processes fully incorporates a gender perspective in relation to the rights of women and lesbian, gay, bisexual and transgender populations and that it applies intersectionality.

Memorialization policies should avoid resulting in a stereotypical view of historical memory.

(F) PARTICIPATION

Organize consultative processes with women, girls and boys, lesbian, gay, bisexual and transgender communities and victims of sexual and gender-based violence on transitional justice policy formulation, including: the design and implementation of mechanisms, the composition and selection of members of truth commissions and other relevant bodies, and the formulation and implementation of recommendations, particularly in relation to reparations.

The identification of the categories of persons and actors to be consulted should take into account intersectional gender criteria.

Ensure that the consultation processes are held in safe and secure conditions for these persons; that linguistic, geographical and compensatory measures are made accessible to them; and that there are training, communication and awareness-raising strategies on the topics to be consulted and on the actual procedures and scope of the consultations.

ACCOUNTABILITY: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes

During the forty-eight session of the HRC, which took place from 13 to 1 October 2021, the Special Rapporteur submitted a thematic report focusing on the duty to ***investigate, prosecute and sanction gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes***.

What did the rapporteur assess in this report?

A) the **scope** of the legal obligation to **prosecute** and **punish** such violations.

B) the **constraints**, **gaps** and **opportunities** encountered in the **implementation** of this obligation in countries **undergoing transitional justice processes**.

Models of accountability

It has been estimated that, from 1948 to 2008, between **85 million and 170 million** people died as a result of national or international armed conflicts. In an overwhelming majority of these cases, the perpetrators of serious international crimes have gone **UNPUNISHED**.

What are the models of accountability?

Tribunals in charge of prosecuting and punishing gross violations of human rights and serious violations of IHL.

Which kind of models of accountability exist?

- **INTERNATIONAL AND HYBRID TRIBUNALS** (such as the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone).
- **SPECIAL COURTS ESTABLISHED AT THE NATIONAL LEVEL** (such as in Bosnia and Herzegovina, Kosovo, Lebanon and Timor-Leste).
- **PRE-EXISTING ORDINARY NATIONAL COURTS** (such as the domestic Special Jurisdiction for Peace of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition in **Colombia** of the High-Risk Courts and the unit of the Office of the Prosecutor for Human Rights responsible for special cases related to the internal armed conflict in **Guatemala**).

THE DUTY TO INVESTIGATE AND PUNISH

Trials are a way of according recognition to victims as rights holders and provide an opportunity for the legal system to establish its credibility. When done properly, prosecutions strengthen the rule of law and contribute to social reconciliation. States' obligation to prosecute serious violations of human rights and international humanitarian law are fully applicable to transitional processes. This obligation stems from numerous sources of international law:

The Convention on the Prevention and Punishment of the Crime of **Genocide** (arts. I, IV and V)	The four **Geneva Conventions** of 12 August 1949 (arts. 49, 50, 129 and 146, respectively)
The International Convention for the Protection of All Persons from **Enforced Disappearance** (art. 6)	The Convention against **Torture** and Other Cruel, Inhuman or Degrading **Treatment** or **Punishment** (art. 4)

Customary international law also establishes the obligation to investigate and punish genocide, war crimes and crimes against humanity

The **INTERNATIONAL COURT OF JUSTICE** has established that punishing persons who commit serious crimes is **one of the most effective forms of prevention**.

The **INTER-AMERICAN COURT OF HUMAN RIGHTS (IACtHR)** has established that the prohibition of crimes against humanity is a norm of ***JUS COGENS*** and that the punishment of such crimes is **mandatory** under general international law.

The **HUMAN RIGHTS COMMITTEE** has established the obligation of States to ensure that **all alleged perpetrators of gross human rights violations and war crimes** are impartially **prosecuted** and, if found guilty, **convicted** and **punished in accordance with the gravity of the acts committed**, regardless of their status or any domestic legislation on immunities.

Penalties imposed for crimes against humanity must be **commensurate** with the **gravity of the crimes** committed.

Despite de fact that States enjoy a certain degree of discretion in the application, individualization and severity of penalties imposed on perpetrators of crimes against humanity, according to international law, such penalties must:

1. Be **appropriate** and take into account the **grave nature** of the offence and the **individual circumstances** of the convicted person.

2. Impose **effective penal sanctions**.

The Special Rapporteur considers that, **where sanctions are not proportional to the gravity of the crimes committed**, *de facto* **IMPUNITY** may arise.

Challenges and obstacles

to the prosecution and criminal punishment of perpetrators.

Usually, only a small fraction of those who bear responsibility for international crimes or crimes against humanity are subject to criminal investigations.

*What are the **main obstacles** to the prosecution and criminal punishment of these perpetrators?*

A. *De jure* impunity.

B. *De facto* impunity.

C. Lack of political will.

A. De *jure* impunity

Amnesties and immunities

Amnesties can pave the way for impunity by preventing the investigation, pursuit, capture, prosecution and punishment of persons responsible for human rights violations. While, in some cases, amnesties and immunities are granted in an effort to put an end to the violence as soon as possible, it has been found that, in addition to running counter to international law, they further entrench a culture of impunity by placing some people above the law and fail to prevent the recurrence of new violations.

Pardons and dispensations or remissions

In some countries, perpetrators have been convicted but have then been acquitted or pardoned, transferred to house arrest, paroled or granted other temporary release arrangements.

Application of statutory limits

Other States use legal mechanisms such as statutory limitations or non-retroactivity provisions to prevent the investigation and punishment of serious violations of human rights and crimes against humanity despite the fact that these kinds of crimes are not subject to limitation and that an ample body of international jurisprudence establishes that these legal mechanisms are not applicable to serious human rights violations.

Alternative sanctions

In the context of transitional justice processes, some countries have used non-custodial alternatives to prison sentences for perpetrators of serious human rights violations. In some but not all cases, these types of alternatives have been offered in exchange for an acknowledgement of responsibility and a recognition of the truth.

Insufficient legal definition of offences

In other countries, crimes against humanity and serious human rights violations are not defined in the Criminal Code, making it difficult to apply appropriate penalties to perpetrators of those crimes.

Additionally, there are several factors that can lead to…

B. ***DE FACTO*** *IMPUNITY*, such as:

Shortages of **human** and **financial resources in the justice system**.

Lack of **mechanisms** for ensuring the **safety of victims and witnesses** who participate in the proceedings.

Lack of **technical** and **institutional capacity**.

Pressure, intimidation and **threats** faced by **judges** and **prosecutors**.

The existence of **structural prejudice** against **members of minority groups**.

EXAMPLES OF *DE FACTO* IMPUNITY

1. In **ALBANIA**, the judicial branch of government is still lacking in impartiality and legitimacy.

2. In **COLOMBIA**, the sheer number of victims is making it difficult to ensure their participation in the legal proceedings, and a "macro-case" investigation system has been devised in order to address this problem.

3. In **GAMBIA**, judicial and forensic capacity is very limited, and stigmatization, underreporting of incidents of gender violence and insufficient psychosocial support services are all problems.

4. In **GUATEMALA**, setbacks in legal proceedings involving serious human rights violations have been coupled with threats directed at judges and prosecutors dealing in such cases.

5. In **INDIA**, police have reportedly harassed and threatened victims in order to interrupt legal proceedings, and the justice system, which is prone to structural prejudice against certain minorities and suffers from excessive bureaucracy, has not brought legal proceedings against the suspected perpetrators of the events that occurred in Manipur, Jammu and Kashmir or punished them accordingly.

6. **LIBERIA** lacks specialized judicial bodies, while members of the judicial branch are the target of pressure tactics, and perpetrators named in the report of the Truth and Reconciliation Commission, some of whom hold important posts in the Government, have not been brought to justice.

7. In the **MALDIVES**, issues include obstacles that interfere with efforts to gather evidence, very limited judicial and forensic capacity, and problems with the witness protection system.

8. In **MYANMAR**, the establishment of investigative commissions has been improvised and perfunctory and, as a result, these bodies do not have the resources they need, nor have they succeeded in consolidating suitable procedures for investigating mass violations of human rights and international crimes. In addition, the justice system is corrupt.

9. In **UGANDA**, the International Crimes Division suffers from procedural difficulties, especially with respect to victim participation, as it lacks witness protection arrangements, victim referral, and social support mechanisms.

C. LACK OF POLITICAL WILL

Some States put up resistance when the time comes for them to bring one of their nationals to trial or to allow an international body to do so.

EXAMPLES OF LEGAL or JUDICIAL obstacles to accountability

(a) The **failure** to formulate **criminal law provisions** that define crimes against humanity and serious violations of human rights and of international humanitarian law.

(b) The adoption of laws on **amnesties, immunity, pardons** and **commutations**.

(c) The application of **statutes of limitations** and provisions under which criminal laws cannot be applied **retroactively** to these types of violations.

(d) The imposition of **sentences** that are **not commensurate** with the **gravity** of the acts in question.

(e) The **legal mischaracterization** of these violations.

(f) The granting of certain **dispensations** or **remissions** in the application of a penalty, a **reduction of the sentence, early release** or **house arrest**.

(g) The initiation of **attenuated or simulated legal proceedings** in order to evade proceedings before international criminal courts.

(h) A **failure to cooperate with international courts** or legal proceedings instituted in other countries on the basis of the principle of universal jurisdiction, in particular by **refusing to extradite** the perpetrators or **impeding witnesses from testifying**.

EXAMPLES of obstacles to accountability in the realm of PUBLIC POLICY

(a) The adoption of **framework agreements** that **contravene international standards**.

(b) A **failure** to provide continuing **psychosocial and legal support** to victims before, during and after trials.

(c) The existence of **official narratives** that **justify** the passage of **amnesty laws** – euphemistically called laws of "national reconciliation" or some similar term – or that force victims to **decline their right to justice** in exchange for the perpetrators' provision of information (such as the whereabouts of disappeared family members) that will clarify the truth.

(d) The destruction or obstruction of **access to information held in military, police** or **administrative records** that would be useful in documenting the responsibility and culpability of perpetrators.

(e) The absence or concealment of avenues for gaining **access to differentiated justice** for the most seriously affected **vulnerable persons** or groups, particularly women, children and adolescents.

(f) A failure to **consult with victims** and to keep them apprised of developments with respect to the accountability process.

GOOD PRACTICES AND LESSONS LEARNED

LEGAL FRAMEWORK

ALBANIA ratified the Rome Statute and has since incorporated its core criminal offences into national legislation, established universal jurisdiction in respect of those crimes and withdrawn its reservation to the Convention on the Prevention and Punishment of the Crime of Genocide.

GUATEMALA has defined the crimes of genocide, which is punishable by 30 to 50 years' imprisonment; instigation of genocide, which is punishable by 5 to 15 years' imprisonment; and crimes "against the duties of humanity", which is punishable by 20 to 30 years' imprisonment. The definition of such crimes has been interpreted by the Guatemalan judicial authorities as covering war crimes and crimes against humanity.

In **IRELAND**, the crimes referred to in the Rome Statute have been incorporated into the national legal framework by means of a law which provides that such crimes may be investigated regardless of whether the conduct constituting the crime occurred within or outside Irish territory. Breaches of human rights are punishable by imprisonment for life or up to 30 years, with the length of the sentence being determined in accordance with article 78 of the Rome Statute.

In **UGANDA**, the crimes referred to in article 5 of the Rome Statute of the International Criminal Court have been defined as offences in the law but are yet to form the basis of any convictions.

The Criminal Code of **UKRAINE** provides for the punishment of the most serious crimes, such as torture, cruel treatment, forced labour, looting and the use of internationally prohibited methods of warfare, with sentences of 8 to 12 years' imprisonment, or 10 to 15 years' imprisonment if the crime results in death.

GOOD PRACTICES AND LESSONS LEARNED

REVOCATION OF AMNESTIES

In **ALBANIA**, there are no immunities or exemptions from liability that would prevent the prosecution of perpetrators, nor are there statutory limitations on serious violations of human rights or international humanitarian law.

In **ARGENTINA**, by virtue of Act No. 23040, it has been established that the Self-Amnesty Act is irrevocably void; the latter has thus been deprived of legal effect, opening the way for the prosecution of serious human rights violations that occurred during the dictatorship. Subsequently, the Full Stop Act, the Due Obedience Act and all pardons that had been granted were declared null and void, resulting in numerous prosecutions and the criminal punishment of 1,013 members of the military and police forces.

A decision of the Supreme Court of **NEPAL** struck down amnesty provisions on the grounds that they ran counter to victims' right to a remedy.

In **PERU**, the Constitutional Court declared two amnesty laws unconstitutional in a judgment dated 2 March 2007.

The Constitutional Division of the Supreme Court of **EL SALVADOR** has declared the General Amnesty (Consolidation of the Peace) Act unconstitutional, emphasizing that statutory limitations cannot be applied to crimes against humanity or war crimes.

GOOD PRACTICES AND LESSONS LEARNED

IMPROVED INSTITUTIONAL CAPACITIES

Technological advances and greater international cooperation have contributed to improvements in the documentation of international crimes. Standards and methodologies for forensic investigations and for the gathering of testimony and documentation have been strengthened in many countries. Some countries have also adopted case prioritization strategies or established specialized prosecution bodies with the technical capacities required to prosecute cases effectively and efficiently.

The **SOUTHERN COMMON MARKET (MERCOSUR) CONDOR DOCUMENT ARCHIVES PROJECT** is a notable example of inter-State cooperation intended to build forensic and documentation capacities.

Institutions have been established in **GERMANY** and **POLAND**, and specialized units have been set up in prosecutors' offices in **ARGENTINA, CHILE, COLOMBIA** and **CÔTE D'IVOIRE**.

In **COLOMBIA**, the Peace Agreements require the application of a case prioritization system that has so far resulted in seven "macro" cases which address a number of different incidents simultaneously.

In **TUNISIA**, special chambers have been established to try cases referred to the courts by the Truth and Dignity Commission.

GOOD PRACTICES AND LESSONS LEARNED

CIVIL SOCIETY PARTICIPATION AND THE CENTRALITY OF VICTIMS

Some countries have developed effective processes of consultation with victims and civil society and have placed them at the centre of transitional justice processes.

In **COLOMBIA**, the Comprehensive System of Truth, Justice, Reparation and Non-Repetition has taken a victim-centred approach that incorporates restorative and reparative measures in order to realize the right to justice and the recognition of individual responsibility.

In **LIBERIA**, civil society has been instrumental in publicizing the establishment of specialized courts for the prosecution of serious crimes committed during the civil wars in that country.

In the case of the **RWANDAN** genocide, international efforts were complemented by the gacaca courts that operated between 2005 and 2012; more than 12,000 community courts prosecuted persons accused of less serious crimes and tried more than 1.2 million cases in all.

In **LATIN AMERICA**, the achievement of a high level of expertise has been driven by the central role of civil society and victims' organizations. The Southern Common Market (MERCOSUR) Condor Document Archives project is a notable example of inter-State cooperation intended to build forensic and documentation capacities.

GOOD PRACTICES AND LESSONS LEARNED

SYMBIOSIS BETWEEN THE INTERNATIONAL SYSTEM AND NATIONAL SYSTEMS

Symbiosis between national and international jurisdictions help to combat impunity. Good practices in this field open up opportunities to combat impunity through the use of new capacities and the application of legal criteria that are better aligned with international standards. Positive attitudes towards international criminal tribunals and national awareness of their standards and practices contribute to the modernization of justice systems and to fairness, effectiveness, efficiency and transparency Expertise built up over time in international criminal law and international human rights law can translate into trials in national jurisdictions of increased sophistication and effectiveness. In addition, the principle of universal

In **BOSNIA AND HERZEGOVINA** and in **SERBIA**, the decisions of the International Tribunal for the Former Yugoslavia have been determined to have had a positive effect on the maintenance of the rule of law and the conduct of national judicial processes that respect international standards

jurisdiction has been incorporated into many national normative frameworks, leading to convictions in foreign courts.

In **COLOMBIA**, the settled jurisprudence of the corpus of constitutional law permits the direct application of international standards

In **GUATEMALA**, prosecutors apply international law in the prosecution of crimes against humanity, and the High-Risk Courts have applied international law in the prosecution of several emblematic cases, including the Dos Erres massacre, Ríos Montt and Molina Theissen cases.

LIBERIAN and **FRENCH AUTHORITIES** have cooperated closely in the investigation of acts committed during the First Liberian Civil War, undertaking crime scene reconstructions in the presence of judges, lawyers and civil parties.

The application of article 23 (4) of Organic Act No. 6/1985 on the Judicial System of **SPAIN** allowed the arrest of former President Augusto Pinochet on foreign soil at the request of the National High Court. In a recent landmark judgment in Germany, a former agent of the Syrian Government was convicted of complicity in crimes against humanity. son of former Liberian President Charles Taylor was convicted in the United States of America for torture, while a Liberian rebel commander was convicted in a Swiss court for rape, murder and cannibalism.

UGANDA took the requisite legal steps and became the first State to refer a case concerning an internal situation to the International Criminal Court, which then issued international arrest warrants for Joseph Kony and other senior commanders of the Lord's Resistance Army. The Court sentenced Dominic Ongwen in 2020.

In **UKRAINE**, synergies have emerged at the national and international levels: The Office of the Prosecutor of the International Criminal Court completed its preliminary review of the events that occurred during the Maidan protests in Kyiv and in Crimea and eastern Ukraine and may request the initiation of an investigation into the situation. At the national level, the Public Prosecution Service established a special department to investigate international crimes; however, a comprehensive normative framework has not yet been established.

MYANMAR: In the face of national inaction, international initiatives by the International Court of Justice, the International Criminal Court, the independent international fact-finding mission on Myanmar, the Permanent Peoples' Tribunal, the Government of the Gambia and an Argentine court have sought to address the events that led to thousands of deaths and the displacement of more than 700,000 persons in Myanmar.

THE SPECIAL RAPPORTEUR RECOMMENDS THAT STATES:

(A) JUSTICE	Bring **alleged perpetrators of gross human rights violations** and **serious violations of international humanitarian law** to **judgment** and impose appropriate, effective **penalties** that are **proportional to the gravity of the acts** in question while ensuring that **no obstacles** are placed in the way of access to justice or accountability;
(B) REMOVE OBSTACLES TO PROSECUTION	**Refrain** from having recourse to **legal**, **judicial** or **de facto obstacles to accountability**, such as immunities, total or partial amnesties, pardons, the application of statutory limitations or of provisions of non-retroactivity in criminal law, *ne bis in idem* or *res judicata*, or dispensations or remissions that are at odds with the determination and execution of a quantum of the sentence, since they run counter to international law;
(C) REMOVE OBSTACLES TO CRIMINAL PUNISHMENT	**Refrain** from having recourse to **exemptions that shield perpetrators from criminal punishment** such as: the rule of due obedience, which is not a legally valid defence; the doctrine of command responsibility, which would prevent the judgment of hierarchical superiors that should be held legally liable for violations committed by persons acting under their effective control; or the legal concept of repentance involving the telling of the truth or the recognition of responsibility;
(D) HEAD OF STATE OR OTHER CIVIL SERVANTS IMMUNITY	**Remove any barrier** that could result in **immunity** or **legal protection for Heads of State** and **other civil servants** who are authors of, or linked to, serious violations of human rights and international humanitarian law, including State or diplomatic immunity or any other form of judicial protection;
(E) DISPENSATIONS OR REMISSIONS OF SENTENCE	**Dispensations or remissions of sentence** (including sentence reductions, conditional release and early release) for persons convicted of **crimes against humanity** should **never**, under any circumstance, be **greater than those granted to persons convicted of ordinary offences** and should be in accordance with the criteria established in the **Rome Statute** for the reduction of sentences for the offences specified therein;

(F) PARDONS ON HUMANITARIAN GROUNDS	**Pardons on humanitarian grounds** should be permitted only in cases of **terminal illness of imminent resolution**;
(G) HOUSE ARREST ON HUMANITARIAN GROUNDS OR FOR HEALTH REASONS	The use of **house arrest on humanitarian grounds** or for **health reasons** should be granted only **when no viable option within the designated place of incarceration exists** and then only as a **temporary measure** until the emergency situation has been resolved;
(H) REMOVE OBSTACLES TO CRIMINAL INVESTIGATIONS	States **should not invoke their national laws** or any *legal lacunae* therein as a basis for **failing to conduct** or for **impeding criminal investigations** and a rendering of account. If the legal definitions of the relevant offences do not meet international standards, then the **necessary and proper legislative amendments** should be introduced **without delay**. In the **interim**, States should **prosecute, investigate and sentence** perpetrators on the basis of the **legally defined offences that most closely correspond** to the punishable acts in question, having recourse to the concurrence of offences where appropriate and applying the greater penalties permitted on the basis of aggravating circumstances;
(I) COURT TYPES	Alleged perpetrators may be brought to trial in **national criminal courts, in ordinary, mixed or hybrid criminal courts**, or in **special transitional justice courts**;
(J) THE ROLE OF MILITARY COURTS	**Military courts** should **not** be permitted to try cases in which the **defendants are members of the military or police force, agents of intelligence services or members of paramilitary forces** and are accused of **committing or participating** in **serious violations of human rights or of humanitarian law**;
(K) DUE PROCESS	**Judicial proceedings** should **observe international legal standards of due process** for all parties to the proceedings in order to avoid any possibility of annulment that could interfere with justice being done;
(L) BARRIERS TO PROSECUTION	Such proceedings **should not** be mere **formalities** intended to **simulate fulfilment** of the requirements of the criminal justice system and avoid the invocation of universal jurisdiction or the initiation of proceedings in other international criminal courts with subsidiary competence;
(M) JUDICIAL IMPARTIALITY AND INDEPENDENCE	**Judicial impartiality** and **independence** should be cross-cutting guarantees at all stages of the investigation, proceedings and sentencing. **Evidence** should be **duly processed**, the **chain of custody** should be carefully documented, and **confidentiality** should be maintained. This entails **effective protection programmes for witnesses, victims and their families**, which

	will require inter-agency and, in some cases, international cooperation. States should provide **protection for legal counsel, officers of the court and judicial staff**;
(N) FULL COOPERATION WITH NATIONAL AND INTERNATIONAL COURTS	provide their **full cooperation at the international level** in seeing to it that the national criminal court or, alternatively, the international criminal court fulfils its duty of accountability by standing ready to **hand over or extradite accused or convicted** persons who are in their territory, **providing documentation** for any and all types of evidence that may be required and **furnishing visas and permits** so that witnesses may appear in court;
(O) AUT DEDERE AUT JUDICARE	**Not provide asylum or protection to persons who have committed or who are accused of having committed serious violations of human rights or humanitarian law** in order to shield them from criminal prosecution; **if** a State does **not hand** over such a person on the basis of the principle of *non-refoulement*, the State should **put the person on trial** in accordance with the international standards identified in this report;
(P) VICTIMS PARTICIPATION	**Victims** should be allowed to **participate** fully in **legal proceedings** as complainants and petitioners for comprehensive reparation and in that respect should have **untrammeled access to justice**;
(Q) PSYCHOSOCIAL AND LEGAL SUPPORT	**Psychosocial** and **legal support** appropriate to the circumstances in each case should be offered by States to victims and their families **before**, **during** and **after the proceedings**;
(R) VULNERABLE GROUPS	If violations have been directed at certain persons because they belong to a **specific vulnerable group**, all the authorities involved in the case should apply a **cross-cutting rights-based approach** that embodies **international standards of effective access to justice** and the determination of justifiably **differentiated reparations**;
(S) DISSEMINATION OF INFORMATION TO THE PUBLIC	In order for access to justice to lead to effective accountability, States should promote a **wide-ranging, transparent process for the dissemination of information to the public** about relevant criminal proceedings in order to ensure that the population is aware of these kinds of proceedings, their structure and their possible benefits for victims, their families, communities and society;
(T) THE ROLE OF THE INTERNATIONAL COMMUNITY	The **international community**, including international organizations and donors, should ensure that **countries undergoing transitional justice processes** fully discharge their obligation to see to it that the persons responsible for serious violations are **held fully accountable** and should provide the necessary **support** to that end;

(U) IMPLEMENTATION OF UNIVERSAL JURISDICTION AT A DOMESTIC LEVEL	States should consider **establishing** the **principle of universal jurisdiction** in their **national legal frameworks** and/or **permitting** the **exercise** of such jurisdiction in their **national courts**.

TRANSITIONAL JUSTICE MEASURES AND THE LEGACY OF GROSS VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW COMMITTED IN COLONIAL CONTEXTS

(A/76/180)

On 12 July 2021, in the framework of the seventy-sixth session of the General Assembly, the Special Rapporteur submitted a thematic report on the:

"Transitional justice measures and the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts".

What did the rapporteur assess in this report?

The design and application of measures in the area of truth, justice, reparation, memorialization and guarantees of non-recurrence to address gross violations of human rights and international humanitarian law committed in

COLONIAL CONTEXTS

For that purpose, the report examines the legacy of rights violations resulting from COLONIALISM in the following contexts:

A. Settler States and other contexts of dispossession and oppression of indigenous peoples and people of African descent.

B. Former colonies that are now independent States.

A. Settler States and other contexts of dispossession and oppression of indigenous peoples and people of African descent.

WHAT HAPPENED?

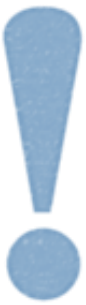
Settlers who arrived in new territories and settled in them:

- Appropriated the land and resources of the original peoples.
- Displaced and dispossessed them.
- In many cases, the indigenous populations were extraordinarily reduced as a result of disease – mostly caused by dispossession – and massacres, some of which amounted to genocide and where subjected to dispossession, incarceration in reservations or missions, and assimilation programmes that took on brutal and inhumane characteristics.

WHAT WERE THE CONSEQUENCES?

- Overrepresentation of indigenous people in detention.
- Distrust harboured by indigenous people for the police.
- General social disadvantages.
- Lack of any official and comprehensive commitment fully to redress the abuses suffered by them.

COLONIALISM resulted in a State that perpetuated it through a legal, institutional, and cultural apparatus that subjected colonized populations to discrimination, assimilation, criminalization and, in some cases, violence; and denied them basic rights such as ownership of ancestral lands and resources, and access to justice, health, education and economic opportunities.



When the transition processes adopted in these contexts do not seek to reverse the situation of domination still suffered by the colonized peoples, they are bound to fail.

However, components of transitional justice may contribute in these contexts by:

- Establishing the facts and conditions that made such rights violations possible.
- The acknowledgement of responsibility and public apology; individual and collective action.
- The memorialization and restoration of the dignity of the victims.
- The inclusion in various educational curricula of an accurate account of the rights violations committed.
- Guarantees of non-recurrence, insofar as they make it possible to identify and reform the oppressive standards and structures of the State, and also the material and ideological conditions that maintain the structural injustices suffered by indigenous peoples.

B. Former colonies that are now independent States.

The second category comprises contexts in which the colonial empire withdrew, but the power structures, the marginalization of certain ethnic groups or the expropriation of land remain in effect. Such is the case of some independent States on the African continent.

DIALOGUE IS CRUCIAL.

Transitional justice measures established in this context require a conversation between the former colonizing Power and the former colony; and their nature will depend on which of these entities initiates the processes and the reasons for doing so.

Duties of the former
COLONIZING POWER:

To provide effective remedies to victims, ensure accountability, contribute to truth and memory, facilitate unrestricted access to archives and grant reparations to victims.

Duties of the State that
HAS GAINED INDEPENDENCE:

Rehabilitation, socioeconomic reintegration and guaranteed access to justice*, education, health and essential services for the victims; as well as the quest for truth and memorialization.

* With regard to justice, in cases where perpetrators have remained in the jurisdiction of the newly independent State, that State also has a:

duty to ensure the **accountability** of these perpetrators.

When addressing the human rights violations arising from colonial and historical injustices…

…what are the

main components

of transitional

justice?

✓ **ACCOUNTABILITY.**

✓ **TRUTH.**

✓ **REPARATION.**

✓ **MEMORIALIZATION.**

✓ **GUARANTEES OF NON-RECURRENCE.**

✓ **PARTICIPATION OF VICTIMS.**

1. Accountability

Accountability for gross violations of human rights and international humanitarian law is an obligation under international human rights law.

What are the obstacles to accountability in former colonies?

- Some former colonizing Powers have invoked the principle of intertemporality, according to which only the rules of criminal law that were valid at the time of the alleged conduct may be applied, to exclude the possibility of prosecutions being brought for offences prior to the following events.

- A problem is also posed by acceptance of State responsibility for crimes committed after the initiation of the normative development of international human rights law, such as during the struggles for independence in Indochina, South-East Asia, and Africa, which were challenged by the colonial Powers through the bombing of civilian populations, forced displacement of sections of the population, mass imprisonment, torture and enforced disappearance.

There have never been serious efforts to investigate colonial crimes before national or international courts, nor to punish any of the surviving perpetrators, nor sanction the governments involved or to compensate the victims for the ongoing health problems triggered by the crimes.

Why are the arguments put forward by former colonizing Powers to refute accountability problematic?

Because they run counter to the prohibition on the application of the statute of limitations* to war crimes and crimes against humanity and grave breaches of human rights and international humanitarian law as set out in the following instruments:

(i) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;

(ii) Customary rules of international humanitarian law;

(iii) Updated set of principles for the protection and promotion of human rights through action to combat impunity;

(iv) 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.

Moreover, there are crimes that by their nature are continuous, such as enforced disappearances, where the statute of limitations and the principle of non-retroactivity are consequently not applicable. Enforced disappearances were committed in several colonial contexts.

Violations of international human rights law and international humanitarian law are the responsibility of the States that committed them, in this case, the colonial Powers, at the time of the violations.

Therefore, it cannot be argued that responsibility has passed to the independent States that emerged from them. The new State does, however, have a key role to play in respect of non-recurrence and certain other measures.

2. Truth

Truth-seeking initiatives shed light on and gather information about past violations of human rights and contribute to combating impunity, restoring the rule of law and facilitating reconciliation. In particular in colonial contexts, truth-telling must also be understood as forming part of reparations.

Of the more than 40 truth commissions established in transitional contexts over the past four decades, very few have addressed the colonial period or examined the economic and social injustices rooted in that period.

A truth commission to consider rights violations stemming from a colonial past or slavery must be set up to establish a proper factual account of the violations committed, the resulting patterns of conduct and the power structures involved, and also the way in which colonial practices, standards and processes still have repercussions, or even continue, today.

If the colonial legacy is to be satisfactorily addressed, truth commissions should prioritize facts that reveal connections between past violations with implications for present events.

TRUTH COMMISSIONS THAT STUDIED THE COLONIAL PAST:

- ✓ The **MAURITIUS** Truth and Justice Commission (2009–2011) examined the impact of the legacy of slavery from 1638 onwards, including the various colonial periods.
- ✓ The TUNISIAN Truth and Dignity Commission included the pre-independence period in its mandate.
- ✓ The Truth and Reconciliation Commission of the **REPUBLIC OF KOREA** examined the period 1905–2005.
- ✓ The Commission for the Clarification of the Truth, Coexistence and Non-Repetition in COLOMBIA seeks to clarify the origins of the conflict, including the experiences of indigenous communities.
- ✓ The mandate of the Truth and Reconciliation Commission in **BURUNDI** was extended to investigate colonial crimes committed since 1885.

TRUTH COMMISSIONS: EXPERIENCES FROM THE PAST

Some truth commissions have been established with the explicit aim of addressing the colonial legacy suffered by indigenous peoples in settler States and former colonizing Powers.

In AUSTRALIA, the Human Rights and Equal Opportunity Commission and the Yoo-rrook Justice Commission were established, the former to investigate the separation of Aboriginal and Torres Strait Islander children from their families (1995–1997), and the latter to examine the impact of European colonization on the Aboriginal communities of Victoria State (2021 to date).

In July 2020, the Federal Parliament of BELGIUM established a Special Commission to examine its colonial past, in response to the Black Lives Matter movement

CANADA saw the establishment of the Royal Commission on the Peoples of Canada (1991–1996), which investigated the period 1500–1996; the Truth and Reconciliation Commission of Canada (2009–2015), which examined human rights violations that occurred in indigenous residential schools over the period 1874–1996; and the National Inquiry into Missing and Murdered Indigenous Women and Girls (2016–2019).

In SCANDINAVIA, mechanisms were established to investigate the policies of dispossession and assimilation suffered by indigenous peoples, such as the Greenlandic Reconciliation Commission (2014–2017); the Commission to Investigate the Norwegianization Policy and Injustice against the Sámi and Kven/Norwegian Finnish Peoples (2018 to date); and the Truth and Reconciliation Commission for the Tornedalians, Kvens and Lantalaiset in Sweden (2020 to date).

Truth-seeking initiatives addressing the colonial legacy adopted by **nations that gained independence**:

In 2019, the KENYAN National Land Commission determined, for example, that the Kipsigis and Talai peoples had been victims of historical land injustices perpetrated during the colonial period and adopted recommendations addressed to the Government of the United Kingdom, the Government of Kenya and transnational corporations that maintain ownership of land expropriated from these victims.

Truth-seeking initiatives adopted in **former colonizing Powers**:

In July 2020, the Federal Parliament of BELGIUM established a Special Commission to examine its colonial past, in response to the Black Lives Matter movement

Recently, the President of FRANCE reported on the creation of a Commission of Memory and Truth to review the country's colonial history in Algeria, and the opening of classified archives related to that period.

TRUTH COMMISSIONS: REQUIREMENTS

If the colonial legacy is to be satisfactorily addressed, truth commissions should prioritize facts that reveal connections between past violations with implications for present events (such as current economic and social injustices and outstanding grievances or claims).

A thorough search for the truth may also require forensic investigation.

It is necessary to examine the reasons and ways in which policies of discrimination, oppression, dispossession and marginalization of indigenous populations and of people of African descent were instituted, along with the mechanisms facilitating their perpetuation.

The full participation of affected communities is essential to the success of truth commissions and the sustainability of transitional justice processes that address colonial legacies, from the design of these processes to the monitoring of their effective implementation.

In order to ensure access to information and facilitate fact-finding, settler States, former colonial Powers and nations that have gained independence should cooperate fully and in good faith with the work of truth commissions by providing unrestricted access to the necessary information and archives.

There is widespread denial of the heinous crimes committed during colonialism. The search for truth and its publication and dissemination constitute a vital tool in efforts to combat such denialism.

3. Reparation

Reparations are an essential component of transitional justice that, from its inception, seeks to benefit victims directly. For a measure to count as reparation, it must be accompanied by recognition of responsibility, be aimed at remedying the harm suffered by the victims and be linked specifically to truth, justice and guarantees of non-recurrence.

What are the challenges in the context of the rights violations arising from colonialism or slavery and other racial injustices?

1. Restitution	Restitution is difficult to achieve given the gravity, and therefore irrevocability, of the rights violations committed, and also the impossibility of fully restoring the status quo ante, namely the pre-occupation situation
2. Determination of victims in cases of mass violations of human rights	It is also difficult to determine which individual victims should be the beneficiaries of reparations when the violations have been suffered on a massive scale and have affected not only the direct victims but also their descendants
3. Former colonizing Powers' attitude	An additional obstacle is posed by the refusal of the former colonizing Powers to recognize that the compensation offered to victims constitutes reparation, since this would suggest an implicit recognition of their legal responsibility. Thus, instead of reparations for past rights violations, aid is provided through development cooperation, or other means that do not implicitly entail accountability.

Development aid is not genuine reparation because it perpetuates and reinforces an economic and political system that is based on colonial hierarchies of submission, rather than recognizing that the former colonizing Power has a debt to the former colony. Moreover, it does not target victims specifically.

Different types of reparation:

- ✓ **Restitution.**
- ✓ **Rehabilitation.**
- ✓ **Satisfaction.**
- ✓ **Compensation.**

RESTITUTION

Restitution of land expropriated from colonized populations is a central issue in the demands for reparations for the victims of colonialism, who have been dispossessed of their ancestral lands, natural resources, sources of livelihood and cultural heritage and have been plunged for generations into poverty and exclusion.

The restitution of the plundered tangible cultural heritage of indigenous peoples, such as artefacts, monuments and archaeological remains, represents another indispensable and still outstanding element of reparations in post-colonial settings and in settler States. Worrying manifestations of institutional and legal reticence and impediments to repatriation have been identified in several European countries.

Case studies:

- The Kenyan National Land Commission addressed the consequences of the land dispossession suffered by the Kipsigis and Talai peoples and issued recommendations addressed to the Governments of the UNITED KINGDOM and KENYA.
- A collection of Aboriginal remains discovered at the University of BIRMINGHAM and the Birmingham Museum and Art Gallery were returned to their traditional owners in Australia.
- GERMANY will start returning the Benin Bronzes to Nigeria from 2022, as announced by the ministries of culture and foreign affairs of the two countries in April 2021.
- Eight SWISS museums have joined forces in the "BENIN SWITZERLAND INITIATIVE", with a view to stepping up research into the provenance of their bronzes and engaging in dialogue with Nigeria.
- SWEDEN has concluded an agreement with the Yaqui Pueblo in Mexico to initiate a process of repatriation of the Maaso Kova and other items in the Yaqui Collection.

REHABILITATION

In many post-colonial contexts and in settler States, victims of gross human rights violations have received no medical and psychosocial rehabilitation to enable them to deal with the trauma that they have experienced. As a result, they have suffered for decades from the continued presence of physical injuries and physical and mental health problems associated with that trauma, including post-traumatic stress disorder, depression and addictions.

The colonizing Power or the Government of the settler States must provide reparation in the form of rehabilitation to the victims. For its part, in the case of the former independent colonies, the Government has a duty to respond to the urgent needs of these dispossessed populations, as the guarantor of economic and social rights in their country.

SATISFACTION

Public apologies are an essential element of reparation for the harm caused to colonized populations. It is important to analyse:

- the nature of the apology and the acknowledgement of the facts,
- the authority offering the apology,
- the responsibilities that have been accepted, and
- the participation and acceptance of the victims in the apology process.

Case studies:

- In 2008, 2017 and 2020, the Government of CANADA apologized to the indigenous peoples for the role played by Canada in the indigenous residential schools.
- The Government of BELGIUM apologized for the mistakes made by Belgium during the colonial period that had contributed to the genocide of the Tutsis in 1994, for the kidnapping of thousands of mixed-race children from the Congo between 1959 and 1962, and for the role played by Belgium in the assassination of Patrice Lumumba; these apologies were not accompanied by reparations, however, and were considered insufficient by some communities.
- The AUSTRALIAN Government apologized in 2008 for systemic oppression and racism practised against Aboriginal Australians, in particular those known as the "Stolen Generations".
- The King of the NETHERLANDS apologized to Indonesia in March 2020 for political violence administered during colonial rule.
- The UNITED KINGDOM offered an apology to Kenya as part of the settlement reached with a victims' group.
- The Government of MEXICO offered apologies to the Mayan people for abuses committed during colonial rule and after independence and requested the same from the Government of Spain and the Holy See, but the Mayan communities rejected the apologies for not having included reparations.
- GERMANY offered apologies in the context of the agreement reached with Namibia, although representatives of the Nama and Herero communities criticized the process.

COMPENSATION

Colonialism and slavery have been responsible for engendering the sovereign debt of the former colonies. Thus, serious consideration may be given to the possibility of debt cancellation for the former colonies as a form of reparation.

4. Memoralization

The processes of memorializing past violations, the context in which they occurred and the harm suffered by victims are a basic tool of transitional justice and an indispensable element of any mechanism that seeks to address a violent past and promote reconciliation. These processes are particularly relevant in the settings studied here, given the long-standing grievances that characterize colonial legacies.

It is essential that settler States, former colonizing Powers and former independent colonies conduct public processes of memorializing the rights violations that occurred, the conditions, patterns and responsibilities that led to them, their current impact and the harm suffered by the victims.

Beyond the adoption of measures to memorialize rights violations States must REVIEW the way in which colonialism is commemorated:

- In settler States, ceremonies offensive to indigenous peoples continue to be celebrated, such as Australia Day, commemorating Captain Cook's landing; or the "Day of the Race" or "Discovery of America Day" in several Latin American countries.
- Statues honouring colonial periods and figures are still displayed in many former colonial Powers and settler States, and also in independent countries. In the central square of the village May Jirgui in the Niger, graves are preserved of the French soldiers who led the Central African Mission, in which tens of thousands of people were massacred, but there are no memorials to the victims.

Victim participation is key…

In memorialization processes, the participation of victims is of critical importance: memory must be the expression of the feelings and suffering of the victims, otherwise it loses value.

5. Guarantees of non-recurrence

Legal, security, judicial, civil service and institutional reforms, as well as measures in the field of culture, education, arts and the media are relevant to address the legacy of colonialism.

What types of GNR are deemed necessary?

Reform of the SECURITY APPARATUS AND THE JUDICIARY. The need to reform these lies at the root of the demands of communities affected by colonialism, both indigenous and of African descent, in view of the treatment and violence that they receive at the hands of the former, and the criminalization that is inflicted on them by the latter.

LEGISLATIVE AND INSTITUTIONAL REFORMS that guarantee the effective enjoyment of the human rights of indigenous peoples and former colonized peoples, without discrimination, and favour their empowerment.

Reform all public procedures, practices and infrastructure to remove any REMNANTS OF COLONIALISM or of OPPRESSION and discrimination against indigenous or formerly colonized peoples.

Protect and ensure ACCESS to the CULTURAL HERITAGE of indigenous or formerly colonized peoples, including their narratives of violence suffered.

The inclusion of INFORMATION on the LEGACY OF COLONIALISM in CURRICULA and EDUCATIONAL MATERIAL at all levels.

6. Participation of victims

Effective participation of victims and communities is not "only" a political issue, but also a human rights issue.

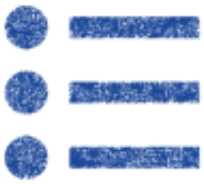
International human rights law recognizes the right of persons directly affected by decision-making to participate in and be consulted on the process, by virtue of the rights to take part in the conduct of public affairs and to equal participation in cultural life, and also the right to an education that enables effective participation in society.

The adoption of a top-down approach in decisions on measures to address colonial legacy falls short of the standards set by current international law.

On the contrary, that law requires States to:

SEEK THE **PARTICIPATION** OF VICTIMS	This means that States must actively seek the participation of representatives of affected communities and their free, prior and informed consent.
CONSULT THE VICTIMS	This entails the need to listen to and seriously analyse colonial grievances, in order to understand perceptions in the affected country.

The Special Rapporteur emphasizes that it is **not possible to remedy the violent past** in a truly restorative manner when the affected communities **do not feel included** and **are not part** of the negotiation process. Rendering them invisible is tantamount to a **new round of victimization**.



THE SPECIAL RAPPORTEUR RECOMMENDS THAT STATES:

(A) PARTICIPATION

The design, implementation and evaluation of transitional justice mechanisms adopted in these contexts must be carried out with the effective participation of the victims and affected communities and in permanent consultation with them.

(B) TRUTH

The former colonizing Powers, States in which the colonization of indigenous peoples and the oppression of people of African descent persist in various forms, and former colonies that have gained independence must establish mechanisms for investigation and truth-seeking within their areas of competence and jurisdiction in order to shed light on colonial violence and on the oppression, racism, discrimination and exclusion that affect those peoples today.

These processes should be accompanied by the institutional and legal reforms necessary to ensure unrestricted access to the official archives relating to the periods under study which are held in the three types of States mentioned above. Other institutions that may have documentation, such as religious bodies, should also make their archives available to the authorities or persons concerned.

Steps should be taken to ensure that, in addition to members of truth commission mechanisms, victims and affected communities, and society at large, have access to the archives.

The archives must be properly processed, classified and preserved according to the ethical standards established in this area, in order to ensure the safeguarding of the documentation for future generations.

(C) REPARATION

States that were colonizing Powers and States where the colonization of indigenous peoples and the oppression of people of African descent persists in various forms should consider mechanisms to redress the harm caused to victims and affected

communities. Such reparations, whether individual or collective, should aim to be comprehensive and include the following:

(a) Satisfaction, including restoration of the victims' dignity, recognition of the harm caused and the responsibilities involved, the dissemination of information in this regard, and the issuance of public apologies that meet the requirements set out in the Special Rapporteur's previous report to the General Assembly (A/74/147);

(b) Restitution of lands and natural resources, through mechanisms for the return of usurped lands, and/or the granting of other lands agreed upon with the affected persons and communities, including through land reform mechanisms that make it possible to overcome inequality in access to lands and natural resources; and the restitution of cultural heritage and archaeological remains;

(c) Compensation, including sums of financial compensation that are considered adequate and commensurate with the harm suffered by the victims, and to which they have agreed;

(d) Physical and psychosocial rehabilitation and access to essential rights, infrastructure and services that ensure a dignified life, including housing, health, education and access to water and sanitation.

Development aid projects that do not acknowledge accountability and do not aim to improve the specific conditions in which victims find themselves are not adequate substitutes for reparation programmes.

The independent States must, for their part, guarantee the urgent needs of the victims and affected populations under their jurisdiction, as guarantors of economic and social rights in their country.

(D) MEMORIALIZATION

All three types of States identified should adopt memorialization measures that comprehensively address the patterns, the causes and the consequences of rights violations committed during colonization and their impact today, in order to preserve the memory of these events and their dissemination to present and future generations.

(E) GUARANTEES OF NON-RECURRENCE

States in which the colonization of indigenous peoples and the oppression of people of African descent persist in various forms must identify and reform State standards, structures and processes that perpetuate the oppression, the violence, the exclusion and the racism that affect those peoples. They must also identify and reform the concomitant material, cultural and ideological conditions, including the revision of curricula.

Former colonizing Powers and the now-independent States must ensure that the legal and institutional frameworks and the material, ideological and cultural

conditions in their countries do not reproduce stereotypes or discriminatory practices from the colonial period, or any other persistent form of racism or exclusion.

(F) ACCOUNTABILITY

Former colonizing and settler States must ensure access to an effective remedy for victims of human rights violations related to colonialism and its continuing consequences, including racial oppression and violence, in their national courts so that legal complaints and claims for reparations for the harm suffered can be processed without legal or procedural obstacles.

In cases where persons suspected of having committed serious violations of human rights and international humanitarian law are still alive, former colonizing States, settler States and States that have gained independence should ensure accountability or, where appropriate, facilitate the extradition of the aforementioned persons under their jurisdiction.

Victims and witnesses who testify in such judicial proceedings should be provided with protection mechanisms and legal and psychosocial assistance adapted to the needs and characteristics of the rights violation that they suffered.

The international community must support national efforts to address the legacy of rights violations committed in colonial contexts, through mechanisms of truth, justice, reparation and memory and guarantees of non-recurrence.

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