Advance Edited Version

Distr.: General
21 August 2017

Original: English

Human Rights Council
Thirty-sixth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

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

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the thematic report of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, Pablo de Greiff, pursuant to Council resolution 27/3.

In the present report, the Special Rapporteur lists the main activities that he conducted between October 2016 and July 2017. He also addresses the issue of transitional justice in weakly institutionalized post-conflict settings, which vary significantly from the post-authoritarian context in which the model of transitional justice originally took shape. Noting the urgency of improving the effectiveness of transitional justice in these new contexts of application, the Special Rapporteur argues that, in these cases, transitional justice must include a significant dimension of institution-building. Because building institutions is a long-term process, however, he also emphasizes the importance of steps to increase the responsiveness of transitional justice measures. He insists on the importance of responses that are suited to context and to well-defined ends. In the report, the Special Rapporteur refers to improvements in witness protection, prioritization strategies and measures to strengthen civil society as initiatives that would indicate responsiveness and yet offer the possibility of sustained action in the areas of truth, justice, reparation and non-recurrence.

* The present report was submitted after the deadline in order to include the most recent information.

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

Contents

I. Introduction

1. In the present report, submitted to the Human Rights Council pursuant to its resolution 27/3, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence lists his key activities undertaken from October 2016 to July 2017, then discusses the challenges of implementing transitional justice measures in weakly institutionalized post-conflict settings, which contrast deeply with the post-authoritarian settings existent when the model of transitional justice was originally designed. Like other justice- and human rights-related work, transitional justice has found the new context of application challenging.

2. The familiar model of transitional justice rested on presuppositions, inter alia, on institutional strength, that do not obtain in most post-conflict settings. In such contexts, the transitional justice project should include a significant dimension of institution-building. Given that this is a long-term process, however, the Special Rapporteur presents guidance regarding initiatives that can be undertaken in the meantime to increase the effectiveness of transitional justice in these challenging contexts.

II. Activities of the Special Rapporteur

A. Country visits

3. The Special Rapporteur thanks the Government of Sri Lanka for its invitation to visit the country, and is pleased to announce that the visit will be held from 10 to 23 October 2017. The Special Rapporteur regrets that his requests for visits to Brazil, Cambodia, the Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Japan, Kenya, Nepal and Rwanda are still pending.

4. In coordination with the United Nations Resident Coordinator and the West Africa Regional Office of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Special Rapporteur conducted a technical advisory visit to the Gambia from 8 to 12 May 2017. During the visit, he met with representatives of the Government, civil society, the diplomatic community and academics. The visit was aimed at allowing the Special Rapporteur to make a preliminary assessment of the situation and to provide advice on the transition processes under way in the country.

B. Communications and press releases

5. Between December 2016 and June 2017, the Special Rapporteur issued 11 communications, to the Governments of Argentina, Colombia, the Congo, France, Guatemala, the Islamic Republic of Iran, Nepal, Nigeria, Uruguay and Sri Lanka (see A/HRC/35/44). He also issued press releases concerning Argentina and Spain, and on thematic issues related to the mandate.

C. Other activities

6. On 18 October 2016, the Special Rapporteur delivered a keynote speech to celebrate the tenth anniversary of the Centre on Human Rights in Conflict at the University of East London.

7. On 5 December 2016, the Special Rapporteur participated in a seminar on transitional justice at the Foreign and Commonwealth Office in London.

8. On 7 December 2016, the Special Rapporteur participated in a meeting organized by Impunity Watch on “Victim participation; the way forward” in The Hague, the Netherlands, and gave a public talk on “The future of transitional justice” at the Ministry of Foreign Affairs of the Netherlands.

9. On 8 December 2016, the Special Rapporteur participated in a donors' meeting organized by the Ministry of Foreign Affairs of the Netherlands on "The future of transitional justice support".

10. On 14 February 2017, the Special Rapporteur participated in an international high-level conference on the theme "Mediation: possibilities and limits; recent experiences in the pursuit of peace", organized by the Ministry of Foreign Affairs of Belgium, in Brussels.

11. On 18 March 2017, the Special Rapporteur participated, via video link, in a workshop on the theme "North-South dialogue: bridging the gap in transitional justice", held at the School of Law of the University of California (Berkeley). He delivered a keynote speech entitled "Pursuing truth and accountability after mass violence: is it time to revisit the transitional justice paradigm?".

12. On 20 April 2017, the Special Rapporteur gave a keynote speech to launch the Institute for Genocide and Mass Atrocity Prevention of Binghamton University, in New York.

13. From 4 to 7 May 2017, the Special Rapporteur participated in the ninth BMW Foundation Global Table on "Responsibility, trust and reconciliation in post-conflict societies", held in Bogotá. The event was organized in partnership with the Auschwitz Institute for Peace and Reconciliation.

14. On 16 and 17 May 2017, the Special Rapporteur participated in the inter-agency retreat on the theme "United Nations support for transitional justice in Sri Lanka", held at United Nations Headquarters.

15. On 6 June 2017, the Special Rapporteur organized, in preparation for the present report, an expert meeting in Geneva on post-conflict transitional justice.

16. On 12 and 13 June 2017, the Special Rapporteur participated in a public forum on transitional justice in San Salvador, organized by the OHCHR Regional Office for Central America and the Embassy of Canada. While in El Salvador, the Special Rapporteur took the opportunity to call upon the Minister of Foreign Affairs and members of the legislative body to discuss issues pertinent to transitional justice in the country.

17. On 22 June 2017, the Special Rapporteur delivered a keynote speech on the theme "Rethinking transitional justice: what does it mean today?" on the occasion of the tenth anniversary of the Oxford Transitional Justice Network in Oxford, United Kingdom of Great Britain and Northern Ireland.

18. On 25 June 2017, the Special Rapporteur gave a keynote speech at the conference on the theme "Large-scale violence and its aftermaths" at Keane University, Union, New Jersey, United States of America.

19. On 28 and 29 June, the Special Rapporteur organized in New York City an expert meeting, attended by representatives of the United Nations and civil society actors, to discuss the main elements of the global study on transitional justice requested by the Human Rights Council in its resolution 18/7, paragraph 1 (*f*). On the sidelines of the meeting, the Special Rapporteur met with the United Nations representatives to discuss the role of the Organization and how to improve coordination among the United Nations agencies.

III. Legal framework

20. Although the relevance of the distinction between post-authoritarian and post-conflict transitions has not often been explicitly thematized in literature on transitional justice (perhaps because of its origins in cases of post-authoritarianism), transitional justice is seen primarily as an effort to redress human rights violations. Both international human rights law and humanitarian law, however, impose obligations on States emerging from situations of conflict. These obligations, which lie at the core of the transitional justice project in the post-conflict cases, include a duty (a) to investigate, prosecute and punish those accused of serious rights violations; (b) to reveal to victims and society at large all known facts and circumstances of past abuses; (c) to provide victims with restitution, compensation and

rehabilitation; and (d) to ensure repetition of such violations is prevented. Numerous human rights treaties underpin these affirmative obligations, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination.[1]

21. The Geneva Conventions and the Additional Protocols thereto form the foundational basis of international humanitarian law articulating conflict-related rights and obligations. While they primarily pertain to international conflicts between States, common article 3 and Protocol II have implications for non-international armed conflicts.[2] Common article 3 establishes fundamental rules for all parties to a conflict, requiring them to treat all non-combatants humanely, with no exceptions. It explicitly prohibits murder, mutilation, torture and other forms of cruel, humiliating and degrading treatment, as well as the taking of hostages and extrajudicial executions. Article 6 of Protocol II supplements and develops these provisions, mandating prosecution and punishment of serious criminal offences related to conflict. Amnesty is permitted under humanitarian law (Protocol II (art. 6 (5)) with a view to facilitating peaceful transition and reconciliation, although States are prohibited from absolving themselves or others from liability for war crimes and other grave breaches of international human rights and humanitarian law.[3]

22. International human rights and humanitarian laws also underline the positive obligation of parties to the conflict to search for those who may be missing or dead during or after the conflict,[4] to facilitate the reunification of families,[5] and to inform individuals of "the fate of their relatives".[6] The International Convention for the Protection of All Persons from Enforced Disappearance references the right to truth, and related requirements of sustained investigation into acts of enforced disappearance (arts. 3, 12, 17 (3), 24 (3)), and the prosecution and punishment of such acts (arts. 4-6, 25). It also stipulates that States must inform victims of the "truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the date of the disappeared person", and provide reparation (art. 24 (2) and (5)).

23. Humanitarian law also provides for the protection of the civilian population and civilian objects, including cultural sites, schools, clinics and places of worship.[7] Article 28 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict extends mandatory prosecution provisions to cover breaches of the Convention, while article 8 (2) of the Rome Statute considers intentionally directing attacks at such objects or places a serious violation of the laws and customs of armed conflict. Furthermore, in its resolution 1325 (2000), the Security Council specifically called upon States to protect women and girls from gender-based violence during armed conflicts.

24. Article 118 of the Third Geneva Convention prohibits prolonged and indefinite detention, and requires prisoners of war to "be released and repatriated without delay upon the cessation of active hostilities". Unjustifiable delay constitutes a grave breach of article 85 (4) of Protocol I, warranting investigation and prosecution as a war crime. In the absence of safety or military imperatives, parties cannot forcibly displace civilians;[8] and in the event that

[1] See also A/HRC/21/46, paras. 13 and 14, A/HRC/24/42, paras. 18-20, A/HRC/27/56, paras. 27-32, and A/HRC/30/42, paras. 15-19.

[2] For a definition of non-international conflict, see Protocol II, art. 1 (1); Rome Statute, art. 8 (2) (f).

[3] See Geneva Convention IV, arts. 146-48; Geneva Conventions I-IV, common art. 3; Protocol II, art. 6; Rome Statute, art. 8 (2) (e). See also principle 24 of the updated set of principles for the protection and promotion of human rights through action to combat impunity (see E/CN.4/2005/102/Add.1).

[4] See Protocol II, arts. 7 and 8; and the International Convention for the Protection of All Persons from Enforced Disappearance, art. 3. See also General Assembly resolution 3220 (XXIX).

[5] See Protocol II, art. 4 (3) (b); and the Annual Report of the Inter-American Commission on Human Rights, 1985-86.

[6] Protocol I, art. 32.

[7] See Protocol II, art. 16t.

[8] Protocol II, art. 17; Geneva Convention, art. 49.

evacuation is necessary, article 49 of the Fourth Geneva Convention provides for civilians to be "transferred back to their homes as soon as possible". With the exception of prohibiting forced movement of civilians, however, these obligations are only binding in contexts of international conflict. While common article 3 recommends that parties to non-international conflicts bring all provisions of the Geneva Conventions to bear, this area still requires further elaboration.

25. Other international instruments and mechanisms – such as the updated set of principles for the protection and promotion of human rights through action to combat impunity, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, reports and statements of OHCHR, the treaty bodies and the special procedures of the Human Rights Council – provide procedural and substantive clarification, support and guidance to operationalize these requirements, in addition to a growing body of international and regional jurisprudence.[9]

26. In accordance with customary international law and practice, in addition to obligations deriving from humanitarian law, a State is responsible for the violations committed by private actors should it fail to exercise due diligence.

27. The increasingly complex nature of modern armed conflict presents challenges for the application of humanitarian law, in addition to uneven development between provisions governing international and non-international conflicts. Other challenges arise from the recent trend to conflate acts of terrorism and those of warfare by non-State groups. Indeed, the general question of the obligations and rights of armed non-State actors is far from settled.

28. Regardless of its shortfalls, this is architecture is impressive, reflecting ambitious protection and including calls for comprehensive redress when it is breached. The humanization of conflict is one of the noblest possible ideals (short of the idea of eliminating armed conflict altogether), and the effort to address the consequences of conflict by means of a comprehensive policy combining truth, justice, reparation and guarantees of non-recurrence is one that many countries have found compelling.

IV. The problem

29. The present report is animated by concerns about a scandalous gap in redress for violations of rights in post-conflict cases. The Special Rapporteur will query whether the same model of transitional justice forged in post-authoritarian transitions can be applied to post-conflict transitions without modification. Obligations in situations of conflict are no less serious than those pertaining to human rights in other contexts, and the rights that are violated in conflict deserve to be redressed. The Special Rapporteur calls for further study and reflection about appropriate means to satisfy the rights to truth, justice, reparation and guarantees of non-recurrence in the post-conflict cases.

30. With regard to the global state of transitional justice, the Special Rapporteur has shown that the field has some significant accomplishments to its credit, despite some persisting and new challenges (see A/HRC/36/50/Add.1).

31. Transitional justice has contributed to the entrenchment of rights to justice, truth and reparation, and to their operationalization. In doing so, it has provided recognition to victims as rights holders, promoted civic trust, strengthened the rule of law, furthered social integration and reconciliation, and promoted the adoption of measures to guarantee the non-recurrence of violations.

32. Despite this success, several caveats are in order. First, transitional justice is but a part of a broader and deeper transformative agenda that States that have suffered systemic failure

[9] On the duty to investigate and prosecute, see, for example, Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, 29 July 1988; and European Court of Human Rights, *Aksoy v. Turkey*, 18 December 1996. On the right to truth, see Human Rights Committee, *María del Carmen Almeida de Quinteros et al. V. Uruguay*, 15 October 1982; *and* European Court of Human Rights, *Cyprus v. Turkey*, 10 May 2001.

manifested in massive rights violations typically call for. Such States usually need reforms, including reforms of a socioeconomic, administrative and fiscal nature, that go beyond the remit of transitional justice, even though they should be coordinated with it (see A/68/345).

33. Second, transitional justice is not a "universal policy tool" that works equally well in all contexts. The rapid dissemination of transitional justice (and a generalized tendency to copy institutions regardless of contextual fit, what some economists and organizational sociologists call "isomorphic mimicry")[10] may have obscured this otherwise obvious fact. The early successes of transitional justice depended on the close fit between problem and remedy, between context and solution, something that is less apparent in some more recent transitional justice efforts.

V. Post-authoritarian origins of transitional justice

34. Even a cursory review of the development of the paradigm of transitional justice over the past 30 years suggests that it emerged from the experiences of a set of countries – in the Southern Cone of Latin America, to a lesser extent from those in Central and Eastern Europe, and then in South Africa – that shared many characteristics. Despite all their differences, these countries shared some important institutional features that made it possible – and sensible – for them to implement certain transitional justice policies. Just as significant, these measures were implemented as responses to particular types of human rights violations.

35. It is important to note that the paradigm of transitional justice emerged in States with a fairly high degree of institutionalization; the institutions of the State had broad coverage, being able to reach every corner of the territories under their respective jurisdiction.[11]

36. Such institutions had not only broad but also "deep" coverage; most of the important spheres of interaction between citizens and the State were already regulated by laws. In other words, there were no large legal vacuums in the States in question (which does not mean, however, that laws were equally "wise" or even equally well enforced).

37. Besides sharing a fairly high degree of institutionalization, the States in which the paradigm of transitional justice took shape also shared a type of "conflict" (term used in its broader sense).[12] The human rights violations committed in these States were the result of the brutal exercise of State power; only highly institutionalized States can perpetrate certain types of violations. These States were emerging from authoritarianism. Their conflicts were not civil wars, conventional or unconventional, although in a few of them (comparatively speaking, irrelevant), armed insurgent movements were operating.[13] The violations were the result of the abusive exercise of a tremendously asymmetric State power.

---

[10] Lant Pritchett, Michael Woolcock and Matt Andrews, "Capability Traps? The Mechanisms of Persistent Implementation Failure", Center for Global Development, Working Paper 234, December 2010.

[11] This does not mean that these institutions served all parts of the national territories equally or that all States provided comparable services. Disparities within countries were more the result of priority-setting than of lack of capacity.

[12] In the present report, and particularly in the current section, the term "conflict" is used to designate more the context in which violations may have been perpetrated (namely, an armed conflict) than a particular understanding of, for example, a threshold in the number of deaths that has to be crossed in order for something to qualify as an "armed conflict". On the definitions of "conflict", see for example "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?", International Committee of the Red Cross, Opinion Paper, March 2008. The use of the term in the present report is intended to help to establish a contrast with a different type of context of violations, namely authoritarian regimes. The term "post-conflict" is used to designate not a State in which there is no longer any violence, because it is well known now that most armed conflicts do not lead to the elimination of violence but rather to its transformation. See in this regard *World Development Report 2011: Conflict, Security and Development* (World Bank, Washington, D.C., 2011), chap. 1.

[13] Even where there was an armed opposition, the conflicts were only "bilateral" (although highly asymmetrical), in contrast to the multiplicity of parties active in, for example, Colombia, the Democratic Republic of the Congo, and Sierra Leone, and in other recent cases.

38. In addition to commonalities in institutionalization and the types of violations, the States whose experiences shaped transitional justice shared a type of transition that may be characterized as "regime failure", either outright collapse or terminal weakening.

39. Given these conditions, it is not surprising that the notion of transitional justice took the shape that it did. Most States concerned regarded themselves as recovering legal traditions temporarily disrupted by authoritarianism. While such a perspective might seem somewhat self-serving, the States had modern, functional institutions with the capacity to make reliable attributions of criminal responsibility, an institutional set-up and the economic capacity to establish large-scale reparations programmes, and institutions sufficiently strong and compliant to withstand reform processes. Transitional justice was also made feasible by the fact that the violations were predominantly and overwhelmingly perpetrated by just one actor, and that, in terms of type, the violations, while horrific, had a relatively narrow range.

A. Transitional justice in weakly institutionalized post-conflict settings

40. The sense of urgency that motivates the Special Rapporteur in the present report stems precisely from the observation that, once the transitional justice model took shape, it was transferred, with little modification, to contexts in which the background conditions that made it effective were absent. Transitional justice has often – and in the recent past, predominantly – been implemented in weakly institutionalized post-conflict contexts. These contexts are, however, significantly different to the post-authoritarian contexts for which the model was developed. Not surprisingly, the outcome of its implementation has been uneven. This is true of two early cases, namely, El Salvador and Guatemala, but also of Sierra Leone, Liberia and the Democratic Republic of the Congo. Currently, efforts to apply transitional justice measures in post-conflict situations are ongoing in Burundi, the Central African Republic, Côte d'Ivoire, Libya, Mali and South Sudan, among others.[14]

41. There are important contextual differences between post-conflict transitions and early post-authoritarian processes. In the first place, post-conflict transitions are conducted in a context of significantly greater scarcity of security and development.[15] Cycles of violence, to which many of these countries have been subjected, affect all dimensions of life. Conflict decimates infrastructure, diminishes foreign and local investment, distorts government expenditures, decreases revenues, disrupts education, and generally depletes social capital.[16]

[14] In all the cases mentioned, efforts have been made to implement transitional justice measures within nation States (even though some of the conflicts had regional and even international dimensions). The States of the former Yugoslavia have tried, and largely failed, to implement these measures across national borders. There is now ample experience regarding the implementation of justice initiatives in international forums; not only from the Nuremberg and Tokyo tribunals following the Second World War, but more recently and relevantly, from the ad hoc International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and from hybrid tribunals, universal jurisdiction cases in different parts of the world, and more recently cases at the International Criminal Court. Similarly, ample experience has been acquired from inter-State reparations with an even longer history, some of it distinguished (such as the reparations efforts by Germany following the Second World War); predominantly, however, it has been a matter of transfers between States. The United Nations Compensation Commission established after the Iraqi invasion of Kuwait combined some features of inter-State reparations and the massive reparations programmes familiar in intra-State contexts; once again, however, this is not exactly an example of an administrative reparations programme for violations working across national borders. There is much less experience with cross-border truth-seeking mechanisms, the Truth and Friendship Commission established by Indonesia and Timor-Leste being the only one of its kind. In the present report, the Special Rapporteur nonetheless concentrates on the implementation of transitional justice measures in the aftermath of intra-State conflicts.

[15] By way of example, the annual government revenue per capita in Chile in 1990, the year of the transition, was $562; in Sierra Leone, in 2002, when the Lomé Peace Agreement was signed, it was $42; in Burundi, in 2000, when the Arusha Accords were signed, it was $24; in Liberia, in 2003, when the Comprehensive Peace Agreement was reached, it was $12 (figures calculated by the Special Rapporteur on the basis of various sources).

[16] See for example the *World Development Report 2011* (see footnote 12), chaps. 1-2.

42. The differences between post-authoritarian and post-conflict settings are clear with regard to the above-mentioned factors; most post-conflict States have institutions that are considerably weaker in terms not only of their extent of coverage but also of their depth. In such contexts, State institutions do not cover the entire territory, and significant legal vacuums exist, in addition to enforcement deficits.

43. The type of conflict may also be significantly different: while in post-authoritarian contexts the State is overwhelmingly responsible for violations, conflict scenarios have a more "horizontal" or symmetrical distribution of violence. Indeed, the typical conflict scenario is no longer binary but one in which multiple agents of violence operate. In the words of one author, "chaos has replaced tyranny as the new challenge to human rights in the twenty-first century".[17]

44. If there is a correlation between the nature of the authoritarian State, its capacities and the violations for which it is responsible, the same is true, *mutatis mutandi*, of the diverse agents in a conflict scenario. One of the most important implications of this, however, is that the violations and abuses that need to be redressed in a post-conflict situation are very likely to be of a different type, and not only of a different magnitude – which alone would be significant – to those in post-authoritarian transitions. Many conflicts feature a plethora of armed non-State actors; different agents, different aims, differing degrees of discipline, training, oversight and control, which all lead, predictably, to various forms of violence.[18]

45. Thus, some of the background conditions that gave plausibility to the model of transitional justice in post-authoritarian settings are simply absent in most countries in a post-conflict situation. In these contexts, drawing familiar lines between contending forces, between civilians and armed agents, and even between victims and perpetrators, becomes increasingly difficult. Similarly, participation in violence may be more widespread in weak States, making the attribution of responsibility more complicated. The larger universe of potential beneficiaries coupled with economic scarcity make comprehensive reparations much less feasible. The absence of a well established institutional setting also makes talk of reform much less convincing than that of "institution-building" in its most literal sense. Furthermore, the fact that, in open conflict, secrecy is not part of the modus operandi changes the specific need for the truth.

46. Not surprisingly, transitional justice, by some measures at least, is much more challenging in weakly institutionalized post-conflict contexts than in post-authoritarian settings. On the one hand, weakly institutionalized post-conflict settings are generally challenging not just for transitional justice but for a huge range of policy initiatives. In many ways, these are the hardest cases. The point is worth emphasizing; transitional justice does not necessarily complex fare worse in this respect than other rights or justice-related fields. Evaluations of the effectiveness, in post-conflict contexts, of rule of law reform programmes, security sector reform, disarmament, demobilization and reintegration and, at the highest level of generality, development assistance, are legion. On the other hand, proponents of transitional justice have been much less ready to heed rhetoric about context sensitivity than it should have been, as evidenced by the suspicious resemblance of institutional policies despite the very significant differences in the contexts in which they are applied.

47. It would be easy to illustrate how States in a weakly institutionalized post-conflict situation have encountered challenges when implementing transitional justice measures on the basis of its four constitutive pillars, by describing concrete cases. Owing to space limitations, however, it would be difficult to describe all the particularities of each case, and indeed unfair to lump together countries that through great effort have achieved some modest success, others that have genuinely tried but failed, and those that have failed for various other reasons, such as the self-interest of political leaders or calculation of political expedience, with no regard for legal obligations. In order to round off the magnitude of the

[17] Michael Ignatieff, "State failure and nation-building" in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, J. L. Holzgrefe and Robert O. Keohane, eds. (Cambridge, Cambridge University Press, 2003), p. 321.

[18] Eric Hobsbawm, "War and Peace in the 20th Century", *London Review of Books*, vol. 24, No. 4 (2002), p. 16.

challenge, it is worth returning to certain aspects of the existing legal framework in order to show how it presupposes precisely what cannot be taken for granted: effective institutions.

B. Capacity issues in existing legal frameworks

48. International humanitarian law and human rights instruments are based on the assumption that the State has the ability to support the rights that they enshrine. For example, according to article 2 of the International Covenant on Civil and Political Rights, States parties are to take the necessary steps "to adopt such laws or other measures as may be necessary to give effect" to the rights recognized in the Covenant. According to article 2 (3), States parties must undertake actions to ensure "effective remedies", including "the possibilities of judicial remedy" with respect to the rights recognized". Article 9 (3) recognizes a right, as part of the right to liberty and security of the person, to a meaningful criminal justice system with the prompt exercise of judicial power within a reasonable amount of time.

49. In delineating various economic, social, and cultural rights, the International Covenant on Economic, Social and Cultural Rights refers to States creating processes and measures of implementation. For instance, article 6 (2) relates to "programmes, policies and techniques to achieve steady economic, social and cultural development", including technical and vocational training and full and productive employment, while article 10 (2) and (3) refers to laws providing for the rights of working mothers and the protection of children from "economic and social exploitation".

50. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment repeatedly focuses on the necessity for effective institutional processes ("effective legislative, administrative, judicial or other measures") relating to the prompt investigation, punishment, and prevention of torture, and restitution for past violations. This includes ensuring that the prohibition of torture is conveyed in the training of security sector personnel.

51. Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance requires States to "take appropriate measures to investigate acts" committed by non-State actors under the convention; articles 4, 6, 7, 9 and 24 set forth measures that States should take to protect against violations of the convention.[19]

52. Articles 3 and 4 (3) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict requires States Parties to take steps to safeguard cultural property within their territory from theft, destruction or misappropriating resulting from the effects of armed conflict.

53. Article 19 of the Convention of the Rights of the Child provides for the protection of children in all circumstances, and that States "shall take all appropriate legislative, administrative, social and educational measure to protect the child from all forms of physical or mental violence" as well as "for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment."

54. Article 4 of the Declaration on the Elimination of Violence against Women[20] focuses on various preventative and remedial measures that States should take to prevent, investigate, punish and redress violence against women. This includes exercising "due diligence", "developing appropriate measures" and implementing policies to train law enforcement officers.

55. References to institutions and institutional processes for the provision of rights in international law imply recognition that, in the absence of effective State institutions, the

[19] See also article 6 of the Convention, which states that "each State party shall take the necessary measures to hold criminally responsible at least […] any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance […]".

[20] General Assembly resolution 48/104.

ability of the State to ensure that rights under international law are protected would be severely compromised.

56. Neither development nor human rights regimes have focused sufficient attention on how post-conflict societies should be assisted by international organizations, other States or civil society groups to effectively bridge institutional gaps that may hinder the realization of rights afforded under international law.

57. The conclusion to be drawn from these observations is not that the legal framework should be modified in order to weaken the universality of certain rights and obligations. This would imply that justice is a luxury that only the affluent (or at least well institutionalized) countries can afford.

58. Mere reiteration of an existing legal obligation, without considering how, under particular circumstances, the obligation could ever be satisfied, will not, however, undo very real constraints. The solution involves rather the adoption of a problem-solving attitude and considering what kind of processes can be established to secure in the short term maximum satisfaction for victims, and, eventually, the full realization of those rights.

VI. Increasing the effectiveness of transitional justice

59. The Special Rapporteur does not wish to provide a blueprint for achieving justice in the absence of institutions, simply because no such blueprint exists. He rather aspires to offer some guidance moving forward by examining initiatives that can be implemented in the short, medium and long terms, and that can improve the quality of transitional justice responses in weakly institutionalized post-conflict settings.

60. Generally speaking, in weakly institutionalized post-conflict settings, it is imperative to find ways of integrating the transitional justice agenda closely with institution-building and institution-strengthening processes. Ensuring redress and prevention requires improving the capacity of institutions.

61. In his reports on guarantees of non-recurrence (A/HRC/30/42 and A/70/438), the Special Rapporteur presented a broad framework approach that includes elements of a comprehensive prevention strategy that coincides largely with an institution-building agenda particularly relevant to post-conflict settings. In the present report, the Special Rapporteur will highlight some elements of the agenda relevant to the specific challenges and needs of weakly institutionalized post-conflict settings.

62. Initiatives need to be devised for the short, medium and long terms. In the short term, initiatives aimed at establishing (or re-establishing) legal identity are critical, because legal identity is a gateway right that is crucial to the exercise of other rights. Conflict undermines legal identity in many ways, including through migration and displacement, and the deliberate destruction of registries, as was witnessed during conflict in Guatemala, Peru, Bosnia and Herzegovina, Timor-Leste and Cambodia, among others. Addressing this deficit is not particularly onerous, and it would help to lay the foundation for other forms of rights-claiming, shoring up the protection of rights generally.

63. Given that no legal document is self-executing, the ratification of international human rights treaties may not have an immediate effect, but it lays the ground on which subsequent guarantees of rights will rest. It helps to address one of the problems identified above, namely, the lack of depth in institutionalization.

64. Other legal reforms, including changes to emergency, security and counter-terrorism legislation, are another step that does not necessarily involve large costs, exorbitant risks or complexities that would overburden weak institutions. Such legislation has often been used to justify gross human rights violations, including prolonged periods of “preventive” detention and limited access to defence lawyers, and, in many cases, has either directly or indirectly instigated the violation of rights by, for example, weakening the ban on the use of evidence that may have been obtained by coercion, in effect becoming an invitation to torture detainees.

65. Judicial reforms involving the screening of existing judicial personnel, strengthening judicial independence and increasing the capacities of judiciaries to deal with human rights violations can all help to remedy institutional weaknesses common in the post-conflict contexts. Reforms of this type are indispensable for both redressing past violations and abuses and preventing their reoccurrence. The establishment of specialized investigatory offices, courts or tribunals to deal with mass criminality can also contribute to – rather than distract from – fighting current criminality, as some of the capacities necessary for targeting system criminality can address organized crime. It must be recognized, however, that such reforms are precisely of the type that are not easily borne by weak institutions, so may have to be phased in over time or introduced in a stepwise fashion.

66. Even more ambitious are constitutional reforms of various sorts, ranging from repealing discriminatory provisions and adopting mechanisms of inclusion; and defining the role of the police, the military, and the intelligence services in the Constitution; to strengthening the separation of powers and even redistributing power among separate branches. Incorporating a bill of rights would also help to fill in legal vacuums (but again, not an easy or uncontentious project). One ambitious project is the establishment of a constitutional court (although its establishment and the appointment of new judges is in many ways an alternative to vetting the judiciary, which may be even more difficult). Of course, the most ambitious constitutional project of all would be the adoption of a new constitution. While such an initiative would be a powerful way of drawing a line between the present and the past, and of filling in legal lacunae, recovering institutions might need instead to concentrate on the provision of urgent services in the immediate aftermath of a conflict (and also be deterred by the technical burdens involved). A period when it would be difficult to guarantee adequate levels of participation and consultation might not be the best time to embark on such a process. A gradual approach might be adopted, including by, for instance, engaging in the more discrete constitutional reforms listed above, or even adopting an interim constitution.

67. Considering the role that security forces may have played in the violations, there is a series of reforms that could contribute to the prevention of future abuses and provide forms of redress to victims. These reforms include vetting members of security services; rationalizing forces; narrowing the jurisdiction of military courts; defining constitutionally the role of the police, the military and the intelligence services; and eliminating "military prerogatives", such as guaranteed seats in parliament and other privileges that forces often accumulate during times of conflict (see A/70/438).

VII. More immediate responses

68. Given that the realization of the rights to justice, truth, reparation and non-recurrence requires institutional frameworks that post-conflict States may (at least partially) lack, transitional justice is in no way conceivable in these States without a strong component of institutional-building. As is well known, however, the processes of institutional transformation take a long time, measured mostly in terms of decades.[21] While institutions gain sufficient strength to be able to adopt international "best practices", it is crucial to respond in some way to the immediate needs and rights of victims.

69. Without claiming to provide a full and adequate response to the challenges that transitional justice faces in weakly institutionalized post-conflict States, the Special Rapporteur makes a number of suggestions that could nonetheless increase the effectiveness of transitional justice in them.

70. Before describing specific measures, a few general, procedural recommendations might be in order. First, it would be advisable that those responsible for the design and implementation of transitional justice measures concentrate on the relevant transitional justice ends rather than on the replication of institutional forms which, as discussed above, took shape in entirely different contexts. This step will likely involve making more use of local measures, procedures and resources, and lead to less uniformity in the tools deployed.

[21] See *World Development Report 2011* (see footnote 12), chaps. 3 (in particular box 3.6) and 5.

Provided that the responses are more effective and satisfy basic criteria such as inclusivity, non-discrimination, and where appropriate, procedural guarantees, familiar tools should not be thought of as universal or indispensable.

71. The international community has responded in a lukewarm fashion to certain such efforts, for example, the recourse to *gacaca* courts in Rwanda. While the present report is not the place to attempt a conclusive assessment of that experience, the Special Rapporteur encourages that sort of attempt it represented; indeed, more constructive approach by the international community to efforts of this type could maximize both their effectiveness and their consistency with formal and substantive requirements.

72. If formal institutional mechanisms at least temporarily are not able to deliver results at the scale that cases call for, other forms of intervention can provide recognition to victims and promote social integration. Initiatives that enable the involvement of victims and give them a safe space in the public sphere should be welcomed. Developing mechanisms of victim participation and of consultations with a broad range of stakeholders should be adopted in all transitional justice processes, particularly in weakly institutionalized post-conflict settings (see A/HRC/34/62 and A/71/567). Similarly, much more could be learned from processes usually conducted at the local level, involving the participation of religious and other civil society leaders, which can cultivate social solidarity.[22]

73. In the section below, the Special Rapporteur provides a partial list of topics that, if properly addressed, could improve the effectiveness of transitional justice measures in post-conflict contexts.

74. To the extent that transitional justice measures depend on the participation of victims and other stakeholders, and that most weakly institutionalized post-conflict settings suffer from serious security deficits, witness protection programmes require more attention than they have received in the past. The challenges are daunting; typically, protection is expected from security forces, whose members are part of the forces against which witnesses under their care are offering testimony. In contexts in which there is little clarity about who is a member of the security forces and who is not, the creation of, for example, a special force for protection only is not so easy to realize.

75. Rwanda faced a severe challenge in providing witnesses with protection both in the *gacaca* processes and in procedures before the International Criminal Tribunal for Rwanda. According to a report issued by the Government of Rwanda in 2008, 156 genocide survivors and witnesses were killed between January 1995 and August 2008 because of their participation in genocide trials.[23] In countries where armed non-State actors remain strong even after a peace agreement has been reached, transitional justice measures, including truth commissions, will face significant challenges in offering protection to witnesses.

76. In post-conflict settings, certain models of protection merit systematic study; these include various forms of community involvement in protection, including with the participation of ex-combatants. The witness protection programmes need not be located, institutionally and operationally, under existing security forces. Other possible institutional locations include prosecutorial services, human rights institutions, and even supreme courts. They can also be established as autonomous entities that report to the ministry of justice, be part of peacekeeping operations, or include an international component under bilateral or multilateral agreements.[24]

[22] For example, see "CAR's archbishop and imam in peace drive", BBC news, 9 April 2014, the Tanenbaum Peacemakers in Action network (https://tanenbaum.org/peacemakers-in-action-network), the Nansen Dialogue Network (http://nansen-dialogue.net), and national dialogues described in the *National Dialogue Handbook: A Guide for Practitioners* (Berghof Foundation Operations GmbH, Berlin, May 2017).

[23] REDRESS, *Testifying to Genocide: Victim and Witness Protection in Rwanda*, October 2012, p. 17.

[24] Chris Mahony, "The justice sector afterthought: witness protection in Africa", Institute for Security Studies, Tshwane (Pretoria), South Africa, 2010.

VIII. Prioritization strategies

77. In previous reports, the Special Rapporteur expressed his concern at the overstretching of the mandates of most transitional justice measures, an expansion of functions without due attention being paid to the capacities of the transitional justice institutions. In the most difficult of contexts, it seems reasonable to ensure that scarce resources are deployed in the most prudent manner, guided by long-term objectives and the need to manage expectations.

78. With regard to criminal justice, the Special Rapporteur has argued in favour of adopting prioritization strategies in the deployment of (scarce) investigatory and prosecutorial resources, in particular when selecting strategies aimed at the dismantlement of networks of violence (see A/HRC/27/56). In weakly institutionalized post-conflict settings where securing justice for the massive number of violations is not feasible, especially in the short term, a strategy of this sort is urgent – but difficult to implement. This will likely require international support of various sorts, and the creation of specialized bodies within the judiciary, because it is unlikely that existing judicial bodies will have the required capacities or trustworthiness.

79. With regard to truth-telling, the Special Rapporteur has highlighted with concern the expansionist trends in the design of the mandates of ad hoc truth commissions, without any regard for their capacity (A/HRC/24/42). In the most difficult of settings, it would not be improper to emphasize in the early stages of a truth-seeking process work on a type of case that is important also in the post-conflict settings in terms of both prevalence and its consequences – namely, those missing in general and, in particular, those who have been forcibly disappeared.

80. As is well known, the uncertainty about the fate of disappeared persons constitutes a source of deep anxiety for loved ones and raises all types of obstacles (such as legal impediments to property transfers, remarriage or succession) to the possibility of rebuilding anything resembling a normal life. Victim-tracing was one of the essential functions of early truth commissions. Since then, although the technical means for identifying burial sites and remains have improved enormously, truth commissions have been attributed other functions that have displaced this one. While it would not be advisable to create single-issue truth commissions (no truth commission is likely to be able on its own to solve the huge caseload of disappearances resulting from conflict), ensuring that truth commissions do a proper job on the issue of the missing and that they lay the foundation for continued work on it, including sound recommendations on the establishment of an effective national mechanism to resolve outstanding cases, would constitute a significant accomplishment.

81. Dealing properly with the missing is not simply a matter of excavating mass graves and identifying remains; for instance, forensic work carried out in Latin America also encompassed tracing abducted children and studying clandestine detention centres, and indeed, the logic underlying repression. This process also involves attending to the needs of those who are present. Although various forms of psychosocial support have been successfully provided by civil society organizations in different post-conflict settings, they have rarely been scaled up. Short of more ambitious reparations benefits (see below), basic forms of psychosocial support before, during and after either the return of remains or the clarification of the fate of victims would be an achievement.

82. In highlighting work on the missing and the disappeared as a truth-telling issue, the Special Rapporteur in no way suggests that no judicial consequences should follow. As he has emphasized in all his reports, transitional justice is a holistic policy; therefore, there are relations of complementarity between its different components. It is essential that efforts are made to satisfy both humanitarian and judicial aims with regard to missing and disappeared persons. Once again, such an ambition is not feasible in the short run; but virtually all decisions create path-dependence. It is therefore important to be clear about the diversity of the ends to be reconciled.

83. With regard to reparations, given that, on the one hand, the various forms of scarcity affecting official institutions, and on the other, the extent of the needs of certain victims, the Special Rapporteur encourages, first of all, greater international support for reparation programmes. The international community has traditionally been reluctant to fund such

programmes, unlike the disarmament, demobilization and reintegration programmes that benefit ex-combatants. While the rationale for the latter is to control those who might undermine the peace process, the ultimate success of disarmament, demobilization and reintegration programmes depends on the willingness of communities to reintegrate returning combatants, which would be undermined by the message that only those who bear arms receive any attention from the State (and the international community) (see A/69/518).[25]

84. Second, although massive reparation programmes have not usually had the aim of achieving full restitution (*restitutio ad integrum)*, in weakly institutionalized post-conflict settings with a large number of potential beneficiaries on the one hand, and deep scarcity on the other, any reparation programme claiming to be "complete" will, in the short term, dilute benefits to such an extent as to be totally inconsequential.[26] Once again, it may be advisable to adopt a prioritization strategy so that benefits are distributed first to the most vulnerable, for example, the severely handicapped, the elderly, and young children.

85. Third, and in these contexts in particular, experimentation and local remedies should be encouraged, and efforts should be made to maximize the impact of even small benefits, either through collective distribution of benefits or by distributing benefits that have a multiplier effect.[27]

86. Finally, it may be that, for reasons that include scarcity of resources, nothing that merits the name "reparations" can be provided in the short term; however, as this is an issue of rights and of deep and unpostponable needs, ways to establish victims' assistance programmes on the model of humanitarian efforts should be sought. While none of these initiatives will do away with a debt that society would have incurred with rights-holders, they will at least pay some attention to the rights of victims, may make a difference in terms of satisfying needs, and may be the first step in a process leading to a more complete realization of rights.

IX. Strengthening civil society

87. In all transitional contexts, civil society, including victims' organizations, non-governmental organizations, youth and women groups but also religious organizations, labour unions, and lately, social movements, have been a determining factor in the fight against impunity, the struggle for recognition and campaigns for non-recurrence.

88. In contexts in which official institutions are burdened with various kinds of difficulties and where for the reasons cited by the Special Rapporteur throughout the present report, it is fundamental to think in terms of dynamics of change; finding ways to strengthen the historical engine of the struggle for justice – civil society organizations – becomes imperative.

89. In each of his reports, the Special Rapporteur has included both observations about the sine qua non role of civil society in the pursuit of justice and reconciliation, and recommendations on how to bolster that role. He emphatically reiterates that point. In weakly institutionalized post-conflict settings, the promise of justice will, in the long run, depend to a large extent on the unfettered operation of civil society. States that recognizably struggle to fulfil their obligations are in a particularly poor position to alienate civil society as freely organized in self-chosen forms.

90. Strengthening civil society means at the very least repealing legislation that limits the operation of civil society organizations and criminalizes protest. It involves engaging in serious consultations not seen as one-off events, but rather as ongoing processes of

[25] See Pablo de Greiff, "Establishing Links between DDR and Reparations", in *Disarming the Past: Transitional Justice and Ex-Combatants*, Ana Cutter Patel, Pablo de Greiff and Lars Waldorf, eds., Social Science Research Council, 2010.

[26] Pablo de Greiff, "Justice and Reparations", in *The Handbook of Reparations* (Oxford University Press, New York, 2006).

[27] Hans Dieter Seibel with Andrea Armstrong, "Reparations and Microfinance Schemes," in *The Handbook of Reparations*, ibid.

communication. It also involves supporting modes of legal empowerment that facilitate the raising of claims, perhaps the most fundamental aspect of being a rights-holder.

X. Conclusions and recommendations

A. Conclusions

91. **Over the past three decades, transitional justice has made a significant contribution to the fight against impunity, the struggle for justice and the aim of non-recurrence. Its first contribution has been to disaggregate the various components of redress, going well beyond the notion of criminal justice, while at the same time to articulate those "pillars" in a comprehensive redress and prevention policy. It has been fundamental in the entrenchment of the rights to truth, justice, reparation and guarantees of non-recurrence. In addition to its contribution to the formal, legal entrenchment of those rights, it has made a crucial contribution to their operationalization through, among other means, the formulation of prosecutorial strategies for mass violations, the establishment of truth commissions, the design of mass reparations programmes and the implementation of various institutional reforms (see A/HRC/36/50/Add.1).**

92. **The paradigm of transitional justice that afforded these achievements took shape in post-authoritarian transitions, in countries that, prior to their descent into authoritarianism, and even during it, were highly institutionalized, in terms of both breadth and depth. The institutions had the capacity to reach all corners of the State, and mediated through laws, the most essential forms of interaction between citizens and the State.**

93. **In such contexts, States were faced with the need to redress and prevent the recurrence of violations of a particular kind: those perpetrated through the abusive exercise of State power.**

94. **There were many other important shared characteristics in States where transitional justice took shape. Generally speaking, they were not afflicted by deep economic scarcity; their "conflicts" were not predominantly ethnic or religious; and the transitions came about through something that looked much more like regime collapse (or at the very least exhaustion).**

95. **The emergent model of transitional justice travelled rapidly and, at least in part by dint of its success in its context of origin, to an entirely different type of situation, namely, weakly institutionalized post-conflict settings, where the conditions that made the model feasible and sensible were absent; the institutional setting was completely different. State institutions did not have broad coverage; they did not have the capacity to provide services in large swathes of their territories. They were also institutions with a large legal vacuum, not just enforcement deficits. The conflicts that generated the violation of rights were completely different; far from tackling a highly asymmetrical, vertical violence, by one agent, namely, the State, being responsible for the overwhelming majority of the violations, transitional justice was now supposed to redress a much wider range of violations, caused by a multiplicity of agents, a good number of them non-State actors.**

96. **To top it all, these were contexts marked by deep economic scarcity, low social capital and significant deficits in a variety of competencies, and whose conflicts had come to an end through negotiations between undefeated parties, calling for compromises of various sorts. Not surprisingly, the implementation of the model has proven to be much more difficult in these contexts, and the results more ambiguous.**

97. **The model of transitional justice rests on legal obligations, which the field helped to entrench. The proper conclusion to be drawn from the present report is not that the existing legal regime should be changed, or that the obligations that stem from violations of international humanitarian law are less serious than those from violations of international human rights law. Justice cannot be conceived as a luxury that only the affluent deserve. It is precisely because the universality of the obligations cannot be**

questioned that the difficulties of implementing transitional justice measures in weakly institutionalized post-conflict settings cannot be ignored. It is the effectiveness in the design and implementation of the measures that, rather, must be increased.

B Recommendations

98. **Improvements in the background conditions, including economic circumstances, would certainly improve the prospects of successful implementation of transitional justice measures. Although the causes of violence or violations of rights cannot be reduced to inequality or poverty, singly or jointly, or to any straightforward combination of social indicators, it is well known that both inequality and poverty are profoundly correlated with violence. Most of the violent conflicts in the world take place in countries that are or have been deeply afflicted by great inequality or poverty, and often both. In addition, persistent and durable inequality, but also some forms of inequality associated with rapid but highly uneven economic growth, has been argued to be associated with civil conflict. In order to eliminate inequalities, and "horizontal" forms of inequality in particular, the Special Rapporteur recommends the implementation of robust reform programmes, which could make a positive contribution to the cause of justice, both *ex ante* and *ex post.***

99. **If one of the major constraints to the implementation of transitional justice measures is the weakness of State institutions, the Special Rapporteur believes that strengthening those institutions would undoubtedly make the prospects of transitional justice brighter. In his previous reports, the Special Rapporteur advocated for a framework approach to prevention that was aimed at avoiding the reduction of preventive action to crisis prevention and prevention plans to institutional reforms. He has instead sketched the elements of a broad prevention agenda that includes initiatives that can be implemented in the short, medium and long terms. These initiatives include legal, judicial and constitutional reforms, as well as reforms of the security sector, including vetting, the rationalization of forces and imposing limitations of the jurisdiction of military courts, among others. The framework approach also involves initiatives aimed at strengthening civil society and at achieving changes in the spheres of culture and of personal convictions and attitudes. States should be encouraged to make the necessary reforms, and assisted in the process of carrying them out. This involves the deep commitment of host countries, but also of partners in the international community, not the least because these are long-term processes.**

100. **Transitional justice in weakly institutionalized post-conflict settings should include a significant component of institution-building; however, given that these processes are measured mostly in decades rather than years, and the needs of victims, who have rights on their side, cannot be postponed for such a long period, context has to be taken more seriously in transitional justice. It is particularly important that those responsible for designing transitional justice measures avoid the prevalent tendency to mimic institutional responses. The Special Rapporteur encourages more reflection on identifying the most effective means in a particular context to satisfy the rights that transitional justice measures seek to promote, and more experimentation in terms of institutional responses.**

101. **In contexts in which formal institutions are weak and in which the adoption of "best standards" gleaned from experiences in different settings would not be feasible, it would seem that appealing to local responses and resources is sensible. The Special Rapporteur urges the international community, and partners generally, to engage constructively with transitional justice efforts that do this, making sure that they are rights-compliant, even if they do not take the form of the familiar institutions produced in post-authoritarian settings. Local solutions should involve victims, and religious and other civil society leaders committed to the ideas of redress and prevention.**

102. **The participation of victims and others in transitional justice measures presupposes a modicum of security that cannot be taken for granted in post-conflict**

settings. The Special Rapporteur urges that more attention be paid to witness protection programmes as an issue in virtually every recent transitional justice process.

103. **Given on the one hand the severity of the institutional and other deficits that afflict some of the States of concern mentioned in the present report, and on the other, the urgency of the needs of victims and the importance of showing that institutions are responsive to the violations of rights committed, the Special Rapporteur recommends articulating prioritization strategies across four areas of transitional justice.**

104. **Given the magnitude of violations but also of the weaknesses of investigatory, prosecutorial and judicial systems, it is important to gather and deploy those scarce resources in ways that are effective and sustainable, and that create further incentives for redress and prevention. With regard to criminal justice, the Special Rapporteur reiterates the call that he made in a previous report for the articulation of a prosecutorial strategy that aims at the dismantlement of criminal networks responsible for the most serious violations. This will likely also require the establishment of specialized units within the prosecutorial and judicial services in order to overcome deficits in both capacity and trustworthiness.**

105. **With regard to truth-telling, the Special Rapporteur has also expressed concerns in previous reports at the tendency to expand the mandates of truth-seeking mechanisms, especially truth commissions, without any regard for the actual capacities of those institutions. Taking into account the prevalent and recognized urgency to address the issue of missing and forcibly disappeared persons in situations of conflict, and the recent advances in forensics, the Special Rapporteur urges those responsible for the design of truth-seeking mechanisms to emphasize the importance of this topic. The present recommendation should not be construed as a call for a reduction in the mandate of truth-seeking mechanisms to this issue, or as a suggestion that missing or disappeared persons are of concern only from a truth-telling perspective. The Special Rapporteur takes the opportunity to reiterate his view that transitional justice is a comprehensive policy that includes truth, but also justice, reparation and guarantees of non-recurrence.**

106. **With regard to reparations in contexts that combine large numbers of potential beneficiaries burdened by deep economic scarcity and institutional weaknesses, the Special Rapporteur urges the international community to consider providing more support for reparations, reminding it of the contributions that it otherwise makes to demobilization and reintegration programmes for ex-combatants. The success of the said programmes is ultimately tied to the well-being of communities, which are not given great incentives to reintegrate ex-combatants if their needs and rights go completely unmet. Thus, in addition to a question of rights, there are reasons of expediency for providing support. The Special Rapporteur encourages greater experimentation in modes of distribution and types of benefits. Similarly, if broad coverage is unfeasible in the short run, he recommends articulating, in consultation with victims and other stakeholders, a prioritization strategy that favours the most vulnerable in the initial distribution of benefits. Lastly, the Special Rapporteur encourages States to consider establishing victims' assistance programmes in the short term (though not in lieu of reparation programmes that could follow).**

107. **The Special Rapporteur emphasizes that although the above recommendations are meant to demonstrate responsiveness to the rights and needs of victims, they are unlikely to provide full satisfaction. He nonetheless believes that they will not only provide relief but also catalyze conditions under which fuller forms of redress and prevention can be identified.**

108. **In contexts afflicted by serious institutional weaknesses, it is fundamentally important that civil society be seen as a resource and the main engine of change. The Special Rapporteur calls upon States and the international community to lend their support to initiatives that strengthen civil society. He urges States to open up space for civil society, to avoid adopting legislation that unduly constraints the free operation of civil society organizations, and to repeal such legislation wherever it exists, promoting**

instead the development of competencies that will contribute greatly to the general interest.

109. **The Special Rapporteur encourages further research and discourse aimed at clarifying the role of armed non-State actors in the international legal framework. The lacunae in this framework concerning their obligations, rights and responsibilities, especially in post-conflict settings, are an obstacle to the implementation of transitional justice measures. Different United Nations organs, in particular OHCHR, could take the lead in these discussions.**