



General Assembly

Distr.: General
27 December 2016

Original: English

Human Rights Council

Thirty-fourth session

27 February-24 March 2017

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 report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, pursuant to Council resolution 27/3.

In the report, which should be read in conjunction with his report to the General Assembly (A/71/567), which focused on national consultations processes, the Special Rapporteur addresses the participation of victims in transitional justice measures.

GE.16-22946(E)



* 1 6 2 2 9 4 6 *

Please recycle



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

Contents

	<i>Page</i>
I. Introduction	3
II. Activities of the Special Rapporteur	3
A. Country visits and regional consultations	3
B. Communications and press releases.....	3
C. Other activities	4
III. Victim participation in transitional justice measures	5
A. Introduction	5
B. Legal framework: participation and consultations in international human rights law	7
C. Participation of victims in transitional justice measures	9
IV. Conditions of success	16
A. Structural and contextual conditions.....	16
B. A substantive or thematic condition: capacity	17
V. Conclusions and recommendations	20

I. Introduction

1. The present report should be read in conjunction with the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the General Assembly on national consultation processes (A/71/567). In the latter report the Special Rapporteur addressed one form of participation (national consultations) and covered a wider range of stakeholders, whereas in the present report he covers a wider spectrum of forms of participation but concentrates on one specific group, namely victims. The report also contains information on the activities of the Special Rapporteur during the reporting period.

2. Like the notion of consultation, the idea of victim participation has become a mantra in the field of transitional justice. However, the rhetorical commitment to these ideas is not matched consistently by actual practice, and even less by systematic analysis of relevant experiences or by sustained efforts to establish comprehensive means of making them effective.¹

II. Activities of the Special Rapporteur

A. Country visits and regional consultations

3. The Special Rapporteur undertook an official visit to the United Kingdom of Great Britain and Northern Ireland from 9 to 18 November 2015 and visited Belfast again from 16 to 18 May 2016.² He also carried out two advisory visits to Sri Lanka, from 26 January to 1 February,³ and from 6 to 10 June 2016.

4. On 9 and 10 November, the Special Rapporteur held regional consultations on transitional justice in the Asia-Pacific region in Colombo. The results of the consultations will be reflected in the study requested in paragraph 1 (f) of Human Rights Council resolution 18/7, to be submitted to the Council at its thirty-sixth session.

5. The Special Rapporteur sent a request for an official visit to Sri Lanka. Replies to his requests to visit Brazil, Cambodia, the Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Japan, Kenya, Nepal and Rwanda remain pending.

B. Communications and press releases

6. From July 2015 to November 2016, the Special Rapporteur sent 10 communications to the Governments of Bangladesh, Burundi, Guatemala, Japan, the Republic of Korea, Sri Lanka and Tunisia.⁴ He also issued press releases concerning Argentina, Burundi, El Salvador, Guatemala, Japan, Peru, the Republic of Korea, Sri Lanka and Turkey, as well as on thematic issues.

¹ Impunity Watch has just completed a two-year study of victim participation, soon to be available from www.impunitywatch.org. The Special Rapporteur is also grateful for the paper by M.P. Saffon and V. Tacha submitted by De Justicia, and to the United Nations Development Programme for hosting an expert meeting on this topic in preparation of the report.

² See A/HRC/34/62/Add.1.

³ See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17029&LangID=E.

⁴ See A/HRC/31/79, A/HRC/32/53, A/HRC/33/32 and Corr.1 and A/HRC/34/75.

C. Other activities

7. During the thirtieth session of the Human Rights Council, the Special Rapporteur participated in three side events, on transitional justice in Sri Lanka; impunity in Burundi; and accountability for the torture programme of the United States Central Intelligence Agency, including reparations for victims.
8. On 14 and 15 October 2015, the Special Rapporteur participated in a high-level policy dialogue, held in Stockholm, on the subject “Guarantees of non-recurrence — from aspiration to policy: challenges and lessons in preventing mass violations”, organized in cooperation with the Ministry for Foreign Affairs of Sweden in follow-up to his report to the Human Rights Council on that subject (A/HRC/30/42).
9. On 26 October, he presented his report to the General Assembly (A/70/438). In the report, he addressed the preventive potential of measures associated with reform of the security sector, including the vetting of security institutions, in the context of guarantees of non-recurrence.
10. On 19 November, the Special Rapporteur gave the first distinguished lecture on transitional justice at the University of Leuven, Belgium.
11. On 9 December, the Special Rapporteur participated via video link in a conference entitled “Understanding the age of transitional justice”, organized by the NIOD Institute for War, Holocaust and Genocide Studies. On the same day, he participated in the observance of the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime, at United Nations Headquarters.
12. On 17 December, the Special Rapporteur participated in the twenty-fourth special session of the Human Rights Council, on the human rights situation in Burundi. He was nominated as one of three experts charged with the independent investigation requested by the Council in resolution S-24/1 and visited Burundi in that capacity from 1 to 8 March and from 13 to 17 June 2016.
13. From 2 to 4 February 2016, the Special Rapporteur took part in the second international meeting organized by Global Action against Mass Atrocity Crimes, held in Manila.
14. On 25 and 26 April, the Special Rapporteur organized an expert meeting on participatory approaches to transitional justice, hosted by the United Nations Development Programme in New York.
15. On 10 May, the Special Rapporteur held meetings in Berlin with the Federal Foreign Office and parliamentarians. On 11 May, he gave a presentation at the German Institute for Human Rights.
16. On 19 May, the Special Rapporteur participated in the seminar titled “Breaking the cycle of violations: reforming judiciaries as prevention”, organized by the International Legal Assistance Consortium in Stockholm.
17. During the months of May and June, the Special Rapporteur participated in the online debate titled “Does collective remembrance of a troubled past impede reconciliation?”, organized by the International Center on Transitional Justice.
18. On 15 September, the Special Rapporteur facilitated a meeting for staff of a large number of departments of the Secretariat and United Nations agencies to reflect on how to improve joint analysis and coordination of transitional justice activities at the domestic level.

19. On 27 September, the Special Rapporteur participated via video link in a workshop titled “Pathways to just and sustainable peace: how can international actors support transitional justice processes?”, organized by the non-governmental organization (NGO) Working Group on Peace and Development and hosted by the Federal Foreign Office, in Berlin. On the same day, he presented the report of the independent investigation on Burundi to the Human Rights Council (A/HRC/33/37), together with the two other experts.

20. On 28 September, the Special Rapporteur participated in an expert round table, held in Brussels, on exploring opportunities for enhanced cooperation between the European Union and the African Union on transitional justice, organized by the Egmont-Royal Institute for International Relations, the Ministry of Foreign Affairs of Belgium, the Leuven Institute of Criminology and the Directorate-General for International Cooperation and Development of the European Commission. The next day, he gave a lecture titled “Current challenges for transitional justice: linkages with peace, security and development”, hosted by the Permanent Mission of Belgium to the European Union.

21. On 4 October, the Special Rapporteur participated in an “expert convening on remedies”, held at New York University School of Law, to discuss reparations for Haitians.

22. On 26 October, he presented his report to the General Assembly (A/71/567). The next day, he participated in a side event titled “Time to end intentional destruction of cultural heritage: a human rights call to action”, organized by the Special Rapporteur in the field of cultural rights.

23. On 11 November, the Special Rapporteur participated in a round table with representatives of civil society in Colombo on the preventive role of civil society networks in transitioning countries.

III. Victim participation in transitional justice measures

A. Introduction

24. As he did in his latest report to the General Assembly, in the present report the Special Rapporteur makes a fundamental distinction between the “epistemic” and “legitimacy” arguments in favour of victim participation in transitional justice measures.

25. Epistemic arguments refer to the kind of information and insight that can come about through participation, and the positive consequences of such a gain in knowledge. Epistemic arguments for victim participation, accordingly, posit that asking victims to participate in transitional justice measures can:

- Increase the likelihood that transitional justice measures will capture the sense of justice of victims and their judgments of what would constitute effective redress
- Help ensure a close fit between the measures and the needs of victims, on the one hand, and important contextual factors such as cultural, historical and political realities, on the other
- Broaden the range of adequate alternatives as more ideas for effective redress are put on the table

26. According to legitimacy arguments, victim participation is important not just because of specific contributions in terms of information or insight that victims may make, but rather because:

- Participation in itself provides a measure of recognition to, and empowerment of, victims

- The call for victim participation and the consequent empowerment may contribute to making victims visible, helping them achieve a place in the public sphere that may have been denied to them before
- The equalizing effect of participation facilitates the identification of commonalities of experiences, values and principles among different types of victims as well as between victims and non-victims, which is important for the sake of coalition- and consensus-formation regarding transitional justice policies
- The participation of victims puts a human face on discussions about transitional justice, providing an important reminder that the discussions are not merely technical matters and in the process motivating stakeholders to reach an agreement that might otherwise prove elusive

27. In thinking about the important contributions that victims can make to transitional justice measures, it is crucial not to obscure the fact that participation also imposes burdens on them, in addition to those that they already carry by virtue of their past victimization. Participation in transitional justice measures can involve security risks, social risks, including stigmatization and isolation, economic costs and the risk of retraumatization, among others. While some of these risks can be mitigated, in most circumstances it is difficult to eliminate them totally. Ignoring these risks when designing participatory processes would be tantamount to the instrumentalization of victims.

28. A full analysis of victim participation in transitional justice measures calls for making some distinctions that can be introduced in the present report but not used to the extent that they merit. Participation can take place at any or all of the design, implementation and monitoring stages of a transitional justice process. As will be seen, participation can also take place through different modalities, ranging from qualitative and quantitative consultations, workshops, seminars, community meetings, debates, focus groups and in-depth interviews and quantitative tools such as surveys, to direct involvement in transitional justice institutions.

29. In talking about victim participation, it is easy to elide the deep differences that may exist between different victim groups. Even in post-authoritarian settings, in which the absolute majority of violations may have been the responsibility of a single agent, victims have been seen to differentiate themselves on the basis of many grounds: by types of violation, perceptions of salience (e.g., of having been particularly targeted), identity markers such as urban/rural, student/worker and indigenous/non-indigenous, as well as religious, ethnic, linguistic and political factors, to name a few. Failing to heed some of these distinctions may defeat the purpose of participation. At the same time, incorporating real and perceived distinctions between different types of victims in programme design and implementation increases the magnitude of the challenges to the equal, non-discriminatory treatment of all victims, risks entrenching distinctions that may not justify differential treatment and, most importantly, may undermine the message that transitional justice measures intend to send about the equality of rights of all.

30. Finally, it is crucial to keep in mind that “victimhood” is only one dimension of the complex identity of a victim and that while transitional justice measures are indeed meant to provide recognition to victims and acknowledge the harm and suffering that they endured, their main purpose is to provide recognition of their equal status as rights holders.

B. Legal framework: participation and consultations in international human rights law

31. That persons directly affected by a State's decision-making have the right to participate and to be consulted is recognized in several international human rights treaties. This includes the right to take part in the conduct of public affairs,⁵ to equal participation in cultural life⁶ and the right to education that shall enable all persons to participate effectively in a free society.⁷ Other treaties enshrine specific rights relating to the participation of women and girls,⁸ the participation of persons with disabilities⁹ and the participation of children and adolescents as part of their right to be heard and to have their views taken into account.¹⁰

32. Several United Nations human rights mechanisms have developed an authoritative interpretation of these provisions. The Human Rights Committee has established that the right to participation in the conduct of public affairs covers all aspects of public administration, including the formulation and implementation of policy at the international, national, regional and local levels.¹¹ The Committee on Economic, Social and Cultural Rights also reinforced the right of individuals and groups to participate in decision-making processes that may affect their development, stating that this must be an integral component of any policy, programme or strategy developed in relation to the right to health and the right to water.¹² Other treaty bodies have recalled the critical importance of participation and consultation with specific groups and individuals in legislative processes and the design of public policies, action plans and strategies at the national, regional or local level, including recommendations on the development of guidelines for public consultation and participation. The Committee on the Elimination of Discrimination against Women regularly recommends consultations with civil society for the revision of legislation relative to discriminatory provisions that affect women and policies that concern them.¹³ The Committee on the Rights of the Child has stressed that children's participation should not be only a momentary act but the starting point for an intense exchange between children and adults on the development of policies, indicating that this would require appropriate information, adequate support and procedures for complaints, remedies or redress.¹⁴ The Special Rapporteur on extreme poverty and human rights has developed a human rights-

⁵ Universal Declaration of Human Rights (art. 21); International Covenant on Civil and Political Rights (art. 25); International Convention on the Rights of All Migrant Workers and Members of Their Families (arts. 41 and 4 (2)); African Charter on Human and Peoples' Rights (art.13 (1)); American Convention on Human Rights (art. 23 (1) (a)); Inter-American Democratic Charter (art. 2); Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 3).

⁶ Universal Declaration of Human Rights (art. 27); International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e) (vi)).

⁷ International Covenant on Economic, Social and Cultural Rights (arts. 13 (1) and 15 (1)).

⁸ Convention on the Elimination of All Forms of Discrimination against Women (arts. 7, 8, 13 (c) and 14 (2)); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (art. 9).

⁹ Convention on the Rights of Persons with Disabilities (arts. 3 (c), 4 (3), 9, 29 and 30).

¹⁰ Convention on the Rights of the Child (arts. 12 and 31); see also Committee on the Rights of the Child, general comment No. 12 (2009) on the right of the child to be heard.

¹¹ General comment No. 25 (1996) on participation in public affairs and the right to vote.

¹² General comments No. 14 (2000) on the right to the highest attainable standard of health and No. 15 (2002) on the right to water.

¹³ See, e.g., concluding observations on Cameroon (CEDAW/C/CMR/CO/4-5) and Poland (CEDAW/C/POL/CO/6).

¹⁴ General comment No. 12 (1999) on the right to adequate food and concluding observations on Italy (CRC/C/ITA/CO/3-4) and India (CRC/C/IND/CO/3-4).

based framework for meaningful, empowering and effective participation of people living in poverty in the design, implementation and evaluation of policies and programmes that affect them.¹⁵ The Special Rapporteur on the human right to safe drinking water and sanitation has also provided guidance on the elements and requirements for active, free and meaningful participation relating to all stages of decision-making processes on water and sanitation.¹⁶

33. The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization enshrines the binding duty to consult with indigenous peoples through special procedures in matters affecting their lives and territories, with the objective of obtaining their free, prior and informed consent. The United Nations Declaration on the Rights of Indigenous Peoples also develops core elements of indigenous peoples' participation.¹⁷ The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people provided an authoritative analysis and recommendations on these matters.¹⁸

34. International human rights instruments and mechanisms also refer specifically to participation by victims and civil society in transitional justice processes. The Human Rights Committee, for example, urged Canada to implement, in consultation with indigenous people, the recommendations of the Truth and Reconciliation Commission with regard to the Indian residential schools.¹⁹ The Committee on the Elimination of Racial Discrimination expressed concern and presented recommendations to Peru relative to the delays in the implementation of the comprehensive collective reparations plan, particularly with regard to indigenous peoples who were victims of the armed conflict between 1990 and 2000, and the lack of proper participation by such persons in developing and implementing reparation programmes.²⁰ Several special procedure mandate holders have also addressed recommendations to States relative to the participation of and consultations with victims, victim associations and civil society in relation to transitional justice processes.²¹ The updated set of principles for the protection and promotion of human rights through action to combat impunity emphasize the meaningful role of victims and other sectors of civil society in transitional justice processes and the importance of broad public consultations in decisions related to the establishment and composition of truth commissions, the design, implementation and assessment of reparation programmes, as well as in the establishment of institutional reforms aimed at preventing a recurrence of violations. Special efforts should be made to ensure that men and women, and minority groups, participate on an equal basis.²²

35. Concerning the participation of and consultation with women in the context of peace negotiations and transitional justice processes and related decision-making, the Committee

¹⁵ See A/HRC/23/36.

¹⁶ See A/69/213.

¹⁷ See A/HRC/18/42.

¹⁸ See A/HRC/12/34.

¹⁹ See CCPR/C/CAN/CO/6.

²⁰ See CERD/C/PER/CO/18-21.

²¹ See, e.g., the reports of the Special Rapporteur on his missions to Spain (A/HRC/27/56/Add.1), Uruguay (A/HRC/27/56/Add.2), Burundi (A/HRC/30/42/Add.1) and Tunisia (A/HRC/24/42/Add.1); the report of the Working Group on Enforced or Involuntary Disappearances on its mission to Timor-Leste (A/HRC/19/58/Add.1); the report of the Representative of the Secretary-General on the human rights of internally displaced persons on his mission to Côte d'Ivoire (A/HRC/4/38/Add.2); the report of the Special Rapporteur on the situation of human rights in the Sudan (E/CN.4/2006/111); and the report of the Special Rapporteur on the situation of human rights in Myanmar (A/HRC/22/58).

²² See E/CN.4/2005/102/Add.1, principles 6, 32 and 35.

on the Elimination of Discrimination against Women is particularly emphatic.²³ It has formulated specific recommendations in relation to the planning and management of resettlement, reintegration, rehabilitation and reparation programmes;²⁴ recommended the adoption of temporary special measures for participation, such as quotas for women²⁵ and capacity-building programmes for women.²⁶ The importance of women's equal participation and full involvement in transitional justice efforts is also enshrined in landmark resolution 1325 (2000) of the Security Council on women, peace and security.

C. Participation of victims in transitional justice measures

1. Truth commissions

36. It is easy to illustrate the important role of victim participation in transitional justice measures by reference to truth commissions. All truth commissions depend on the participation of victims primarily in statement-taking exercises, be they private (the majority) or public (in hearings). While civil society organizations provide commissions with information that is essential for the accounting of events and experts contribute essential analysis, what makes truth commissions distinctive is their reliance on testimony from the victims themselves.

37. While far from perfect, efforts by truth commissions to collect testimonies from victims have been impressive, particularly if one takes into account the effort to connect with a constituency that is generally geographically dispersed and, for good reasons, not immediately inclined to trust official mandates (even if truth commissions are independent). To illustrate the magnitude of the undertaking in terms of numbers, in the mid-1980s, the National Commission on the Disappeared in Argentina gathered 7,000 statements, 1,500 from survivors.²⁷ In the 1990s, the South African Truth and Reconciliation Commission took the testimonies of approximately 21,000 victims, of whom 2,000 appeared at public hearings. The Dialogue, Truth and Reconciliation Commission of Cote d'Ivoire, which submitted its report in December 2014 to the President, reportedly collected about 72,000 statements from victims, of whom some 28,000 were women and 750 children; 80 public hearings were held.

38. This does not mean, however, that the role of victims in truth commissions is limited to giving testimony. Victim participation has also proven to be important for commissions in the following circumstances:

(a) *Advocating for the adoption of transitional justice measures, including truth commissions.* The road to justice in the aftermath of authoritarian repression, and especially of conflict, is rarely straight. Most transitional regimes can be expected at some point to waver in their commitments to justice, overestimating the risks of pursuing transitional justice policies or the threats they pose to the continuity of the transition. Again and again, victim groups and other civil society organizations have carried the burden of keeping the issue on the agenda, sometimes at great risk. Even before the transition in Argentina, the Madres and the Abuelas de la Plaza de Mayo fulfilled this advocacy role, a paradigm for other groups. In less visible ways, in virtually all contexts in which mass violations of human rights have taken place, thousands of individual victims or their family members

²³ See, e.g., concluding observations on the Central African Republic (CEDAW/C/CAF/CO/1-5) and Cyprus (CEDAW/C/CYP/CO/6-7).

²⁴ In India (CEDAW/C/IND/CO/SP.1).

²⁵ In the Syrian Arab Republic (CEDAW/C/SYR/CO/2).

²⁶ In Afghanistan (CEDAW/C/AFG/CO/1-2).

²⁷ See www.usip.org/publications/truth-commission-argentina.

have persisted in their efforts to not only keep the memory of their loved ones alive, but to obtain truth, justice and reparation;

(b) *Contributing to consultations on the design of transitional justice policies, including truth commissions.* While the early truth commissions benefited from only very limited and informal exchanges with victims, a trend towards broad, inclusive and transparent national consultations prior to the establishment of transitional justice mechanisms is clearly emerging. National consultations in Burundi, Liberia, Nepal, Sierra Leone, Timor-Leste and Tunisia exemplify this trend;²⁸

(c) *Selection of commissioners and composition of commissions.* Given that the credibility of truth commissions depends to large extent not only on methodological questions but on the trustworthiness of commissioners, some truth commissions adopted consultative procedures for the selection of commissioners, apportioning seats to representatives of different stakeholders, including victim groups. This was the case in Kenya, Liberia, Sierra Leone, South Africa and Timor-Leste. In some cases, commission members were themselves victims,²⁹ their relatives,³⁰ part of the wider victim community,³¹ members of victim groups or victim representatives;³²

(d) *Proposals for recommendations.* In some cases, victims have articulated proposals to be considered by truth commissions as part of their recommendations, including recommendations on reparations made to the commissions in Peru and, recently, in Côte d'Ivoire. In a different setting, the consultation process around the peace agreement in Colombia established a mechanism for civil society organizations, including victim groups, to submit suggestions in writing for the negotiating table;

(e) *Follow-up mechanisms and initiatives.* In his report on truth commissions (A/HRC/24/42), the Special Rapporteur highlighted the worrisome lack of uptake by national authorities of commission recommendations. The reasons for this are various and complicated. However, even recommendations emanating from commissions with a mandate that concords with their nature and capacities often go unheeded. No institutional "fix" has fully resolved this problem.

39. Thus, as victim organizations, among other civil society organizations, have played a critical role in placing transitional justice on the public agenda, they have also played a critical role in guaranteeing a certain degree of follow-through. This role includes not only general advocacy, but also specific monitoring of the implementation of the recommendations made by truth commissions. For example, in Sierra Leone, an interactive recommendation matrix was prepared by the Human Rights Commission of Sierra Leone with the collaboration of the United Nations, which included contributions from various ministries and civil society groups.³³ Also in Sierra Leone, a project titled Witness was created which, in turn, helped establish a follow-up project in which several NGOs, including victim organizations, were involved.

²⁸ See A/71/567.

²⁹ The Equity and Reconciliation Commission in Morocco had a large number of members who had been victims, including its president.

³⁰ In Ecuador, one of the four members of the Truth Commission was the parent of two children who were disappeared in 1988; another was the brother of an executed member of the left-wing group Alfaro Vive Carajo and a third was a former member of that group.

³¹ In Canada, one of the three members of the Truth and Reconciliation Commission, which was mandated to investigate charges of abuse and other ill effects for First Nations children that resulted from the Indian residential school legacy, passed through a residential school.

³² Truth and Dignity Commission of Tunisia.

³³ See www.sierraleoneontrc.org/index.php/resources/recommendations-matrix.

2. Criminal justice

40. Victim participation in criminal justice procedures is a recent but not entirely new practice. Additional work is called for in streamlining and integrating lessons learned from criminal procedure at both the international and national levels. That it is important to integrate victims into criminal procedures both as a matter of protecting their rights and by virtue of the contributions they can make to the process is an idea that is taking hold. This is, of course, progress compared to the traditional notion, according to which victims have restricted roles in criminal processes, basically as witnesses and sources of testimony.

International Criminal Court

41. Article 68 (3) of the Rome Statute of the International Criminal Court contains a relatively vague provision, putting the concrete forms of victim participation at the discretion of the respective judges.³⁴ Given the breadth of the provision, different chambers have adopted different approaches to victim participation in Court proceedings. As a consequence, a clear and coherent approach to victim participation has thus far been lacking.³⁵

42. Differences in approaches relate to the application process and the appointment of legal representatives, as well as to the scope of victim participation during proceedings and the modalities employed to give effect to these victims' rights.³⁶ At the International Criminal Court victims can participate in a trial in the following ways: making opening and closing statements; consulting the record of proceedings; receiving notification of all public filings and those confidential filings that affect their personal interest; and tendering and examining evidence if the chamber feels it will assist in determining the truth. Moreover, legal representatives of victims can attend and participate in proceedings, as well as question witnesses, experts and the accused, subject to certain controls.³⁷ Thus, while participation does not reach the level of victims becoming a party to the proceedings at the Court, this is far better than locking victims into the role of witnesses and sources of testimony.

43. To manage the significant increase in the number of victims intending to participate in proceedings, some measures have been employed that allow for a more collective approach.³⁸ The move towards collective victim participation has raised questions as to whether treating victims as undifferentiated groups will further their interests. The collective approach assumes not only homogeneity of victimization, but also of the interests of victims seeking participation. Grouping victims into general categories, for example

³⁴ See also rules 91, 102 and 104 of the Court's rules of procedures and evidence.

³⁵ David Taylor, "Victim participation in transitional justice mechanisms: real power or empty ritual?", Impunity Watch Discussion Paper, April 2014, p. 11.

³⁶ Victims' Rights Working Group, "Making victim participation effective and meaningful", June 2014, p. 2.

³⁷ For an overview, see Luke Moffett, "Meaningful and effective? Considering victims' interests through participation at the International Criminal Court", *Criminal Law Forum*, vol. 26, No. 2 (June 2015), pp. 255-289

³⁸ By way of example, 129 victims were authorized to participate in the first trial at the International Criminal Court (the *Lubanga* case in the Democratic Republic of the Congo), represented by two teams of lawyers and the Office of the Public Counsel for Victims. In the subsequent *Bemba* trial, for crimes committed in the Central African Republic, over 5,000 victims participated, also in two groups. Another approach was taken in the Kenya cases, where a distinction was made between direct, individual participation and indirect participation through a common legal representative, with only the former requiring the participants to pass through the formal application process.

direct or indirect victims, can have harmful effects, incentivizing their own struggles for differentiation and also posing risks for them upon return to their communities.

Extraordinary Chambers in the Courts of Cambodia

44. The scope and form of victim participation as practised within the Extraordinary Chambers of the Courts of Cambodia have been enhanced by the unprecedented characterization of victims as full parties to the proceedings, rather than mere participants.³⁹ The contours of this expanded role emerged only with the adoption of the internal rules of the Extraordinary Chambers.⁴⁰ This led to early legal and procedural challenges, producing frequent revisions of the internal rules governing civil party participation in an attempt to preserve substantial space for victim participation while ensuring fairness and efficiency in the proceedings.

45. Early in proceedings before the Extraordinary Chambers, a victim is required to choose whether s/he wants to participate as a witness, as a victim-complainant or as a civil party. As civil parties, victims have the right to full access to the case file, to make limited pretrial and trial appeals, to make procedural and factual submissions, to attend hearings, to request witnesses, to question witnesses, to question the accused, to make closing arguments, to rebut the closing arguments of the accused and to request reparations.⁴¹

46. To illustrate the increase in the complexity of the proceedings, in case 001, 93 direct and indirect victims participated as civil parties and were represented by four civil party legal teams of both national and international lawyers. Case 002 involved some 4,000 civil parties.

Domestic level: private prosecutions and victim statements

47. In countries with a civil law tradition, victims have long been granted an active role in criminal procedures. One interesting example in this respect is the institution of the private prosecution that exists, for example, in some countries in Latin America. Under this arrangement, victims or their relatives and, in some countries, domestic human rights organizations as well are allowed to bring criminal complaints and to participate in the investigation and prosecution of a crime. Private prosecution can be auxiliary (the private party adheres to the indictment of the State) or autonomous (the private party can press for different or additional charges than those brought by the public prosecutor).⁴² The most important rights in human rights cases are the right to bring habeas corpus cases and the right to appeal in court the decision of the public prosecutor not to investigate or not to present an indictment. Private prosecution not only empowers victims and their families; it also provides for a check on prosecutorial discretion. In Chile and Argentina, for example, families and vocal human rights organizations brought cases to the authorities during the

³⁹ Rudina Jasini, "Victim participation and transitional justice in Cambodia: the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC)", Impunity Watch Research Report, April 2016, p. 23.

⁴⁰ Article 36 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea makes a cursory reference to civil party participation, granting victims a right of appeal to the Supreme Court Chamber.

⁴¹ From the victims' perspective, however, the remedial responses available are too restrictive, with reparations being limited to moral and collective reparations.

⁴² Veronica Michels, "The role of prosecutorial independence and prosecutorial accountability in domestic human rights trials", *Journal of Human Rights*, 2 December 2015.

dictatorships, even though prosecutors were not ready to move on them; however, this action facilitated the prosecutions of the cases later on.⁴³

48. In common law countries, victims or affected persons can participate in proceedings by providing victim (personal or impact) statements. Although this represents a lower level of participation than being a party, as in civil law countries, it does provide victims with, inter alia, an opportunity to describe how the crime affected them; the chance to express their concerns regarding fear of intimidation; an opportunity to request information about the progress of the case; and, in some countries, the opportunity to claim compensation or request assistance.

49. In his report to the Human Rights Council in 2014 (A/HRC/27/56), the Special Rapporteur argued in favour of expanding the participation of victims to an area that has received comparatively little attention: the development of prosecutorial strategies. The main reasons for doing so are given in the following paragraphs.

50. Since many major decisions crucially affecting the interests and the rights of victims are taken long before a trial starts, promoting the rights of victims calls for allowing them to participate in the very formulation of prosecutorial strategies.

51. A very concrete contribution of victims to the articulation of a prosecutorial strategy relates to the identification of the range of possible violations, allowing prosecutors to determine the range of possible charges. Ensuring the input of victims at the outset can later help prosecutors to take cases forward and to investigate and frame charges in accordance with the evidence obtained. If done at an early stage, it can serve as an additional incentive for victims to come forward with testimonies and present evidence. It may also obviate the need to amend the strategy or the indictments at a later stage. A strategic decision to engage victims at an early stage can potentially lead to the prosecution services bringing cumulative charges, where appropriate, and can help to reflect the multidimensional nature of international crimes. Cases at the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have demonstrated that victims have a decisive role to play in the identification of the charges.⁴⁴ It can be expected that victims would play a similar role in helping to identify relevant charges in domestic jurisdictions.

52. The contributions of victims can be important in determining the “most responsible” party and the “most serious crimes”, as victims are not bound by formal concepts of hierarchy but are familiar with the dynamics of local contexts and, in particular, with the impact of the various forms of criminality from which they have suffered.

53. To conclude, while victim participation in criminal proceedings undoubtedly raises challenges to efficiency and the perception of a fair trial for the accused, the participation of those who suffered the actual violations as a result of the criminal actions under scrutiny is important for the following reasons:

- (a) Victim participation implies the recognition of victims as rights holders, which is tremendously empowering for them and others as they are afforded the respect of formal State institutions and gain a space in the public sphere;
- (b) Such participation both manifests and strengthens the right to truth;

⁴³ Ibid.

⁴⁴ See, e.g., International Tribunal for Rwanda, case No. ICTR-96-4-T, *Prosecutor v. Akayesu*. Jean-Paul Akayesu was convicted for, inter alia, rape as a crime against humanity and rape as an act of genocide. However, the failure to include charges at the outset prevented future prosecutions for sexual violence crimes at the Tribunal. See also REDRESS and African Rights, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes*, 2008, pp. 95-98.

(c) Formalizing methods of victim participation acknowledges the crucial role of victims not only in initiating procedures but in collecting, sharing and preserving evidence;

(d) Victim participation increases the likelihood that the needs of victims will be taken seriously in processes that have traditionally relegated them to being mere sources of information;

(e) Victim participation in criminal procedures increases the likelihood that those procedures can be better integrated into other transitional justice processes;

(f) The sense of empowerment that victims derive from participating in criminal procedures can catalyse demands for justice which, in turn, may have beneficial non-recurrence effects.

3. Reparations

54. In view of the fact that that of all transitional justice measures reparations are the one that, by design, is intended to benefit victims tangibly and directly,⁴⁵ there are especially compelling reasons to involve victims in the design stage of such programmes.

55. Reparations in the context of mass violations take the form of the distribution of material and symbolic benefits, either to individuals or groups. Given that large-scale administrative reparation programmes, even when providing benefits to individuals, have never come close to achieving full compensation for the harms suffered, it is necessary to have criteria to distinguish between those programmes developed for awarding serious and sincere reparations from those developed primarily to present the appearance of being reparative.

56. The Special Rapporteur has argued that this is possible, starting on the basis of the aims that are characteristically pursued through the implementation of transitional justice measures in general, namely providing recognition to victims not only as victims but as rights holders, increasing trust among citizens and between them and State institutions, strengthening the rule of law and promoting social integration or reconciliation.⁴⁶

57. Victim participation can help increase the fit between the benefits on offer and the expectations of victims. Given that large-scale programmes fall short of full compensation, the adequacy of the benefits they offer depends on complicated judgments concerning the appropriateness of the whole complex of benefits, the process of distribution and the relationship between the reparation benefits and other redress measures, including criminal justice, truth and guarantees of non-recurrence, judgments that are also for the victims to make.

58. Collective reparation measures are usually designed with the involvement of victims. Both Peru and Morocco established community reparation programmes that worked on the basis of projects submitted by communities to a selection body that also provided some degree of technical follow-up advice. While questions arise concerning competition for the funds, given the varying capacities of different victim groups, and about the sustainable impact of the investments, this method is one way to give victim communities a voice in reparations decisions.

59. One of the fundamental questions that must be resolved in implementing any programme is what types of violations will permit access to benefits. This is a question that has led to frequent and obvious exclusions, foremost among them the exclusion of

⁴⁵ See A/HRC/21/46 and A/69/518.

⁴⁶ Pablo de Greiff, "Justice in reparations" in *The Handbook of Reparations*, P. de Greiff, ed. (Oxford University Press, 2006).

violations that typically affect women the most. Requiring those responsible for making this decision not only to articulate the principles on the basis of which they decide but to do so with the participation of victims is a useful way to prevent the most egregious exclusions.

60. Finally, it bears repeating that there is a scandalous lack of reparation programmes implemented for victims. Most Governments that face calls for reparations argue that reparations are unaffordable. The fact that they make this claim absent any serious effort to quantify the costs should raise suspicions about the underlying rationale. The fact is that the relationship between socioeconomic development and reparations seems to be mediated by political factors: the likelihood that a country will establish a reparation programme for victims depends not only on economic factors, but on the presence of strong political coalitions in favour of such programmes. Civil society, victim groups included, are therefore a crucial factor in the adoption and implementation of reparation programmes.

4. Guarantees of non-recurrence

61. “Guarantees of non-recurrence” refers to a preventive function rather than a particular measure. That function can be satisfied by a broad array of measures, of which two recent reports of the Special Rapporteur give an overview.⁴⁷ For reasons of brevity, in the present report he will specifically address victim participation in security sector reform.⁴⁸

62. Security sector reform, as a development concept, is seen mainly as a technical, forward-looking reform, generally unconcerned with allegedly retrospective questions of justice. Hence, the participation of victims in this context is rarely a topic for discussion.

63. To involve victims in security sector reform processes will not only be critical to ensure trust in the process, but will help to move from a regime-centred to a people-centred understanding of security.⁴⁹ The participation of victims in a security sector reform process is likely to have the following advantages:

(a) Victims know best the deficiencies of the security sector, as they have experienced those deficiencies themselves. Victims should therefore be consulted on requirements for reform. This could be undertaken either through broad-based consultations on transitional justice measures,⁵⁰ or in the context of truth-seeking efforts. The Equity and Reconciliation Commission in Morocco, having examined more than 22,000 applications and having held public hearings with victims, recommended, *inter alia*, strengthening governance and oversight of the domestic security sector;⁵¹

(b) On the basis of their specific experience, victims can make recommendations concerning, for example, the establishment of gender units in either police or prosecutorial services, or of specialized units to combat violations experienced by minorities, indigenous people or other vulnerable groups. In Sierra Leone, a gender unit was established upon the recommendation of victims;

⁴⁷ See A/HRC/30/42 and A/70/438.

⁴⁸ For the area of constitution making, see, e.g., Jason Gluck and Michele Brant, *Participatory and Inclusive Constitution Making: Giving Voices to the Demands of Citizens in the Wake of the Arab Spring*. Available from www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf.

⁴⁹ Alexander Mayer-Rieckh, *Dealing with the Past in Security Sector Reform*, Geneva Centre for the Democratic Control of Armed Forces, SSR Paper 10 (Geneva, 2013), p. 23.

⁵⁰ See A/71/567.

⁵¹ Kingdom of Morocco Equity and Reconciliation Commission, *Final Report*, vol. 4 (Rabat, Advisory Council on Human Rights, 2009), p. 84.

(c) The inclusion of representatives of victims and other marginalized groups, as well as women, in security personnel will not only diversify the respective force so as to better understand the security concerns of all groups, but also lend it more legitimacy and effectiveness. Such representation would also contribute to indirectly empowering the victim community and marginalized groups. Following the 1998 Belfast Agreement, the reformed Police Service of Northern Ireland increased the representation of Roman Catholics, through affirmative action recruitment schemes, from 8 per cent during the “Troubles” to up to 31 per cent as at 2015.⁵² This effort, together with focused community involvement, has resulted in high rates of popular trust in the police;

(d) In Argentina, where no formal vetting processes were established after the dictatorship, civil society organizations made use of legislation adopted to both increase parliamentary transparency and the level of participation of civil society to intervene in debates concerning promotions in the security sector; NGOs could make submissions concerning candidates with murky pasts. The system therefore created powerful incentives for members of the security forces to retire, thereby becoming an indirect and yet effective means of cleansing the security forces.⁵³

IV. Conditions of success

64. Whether victims can successfully participate in transitional justice processes depends on many conditions, including the accessibility of the forums, geographically, linguistically and otherwise, where participation is to take place. Conditions of participation cannot be too onerous in any respect, and in any case should be designed with the well-being and dignity of the victims and other stakeholders in mind. The Special Rapporteur cannot review all such conditions in the present report. He will briefly mention three because of their importance and because they have not received sufficient attention in the past.

A. Structural and contextual conditions

1. Security as a basic (and general) precondition of successful participation

65. The likelihood of significant victim participation in transitional justice processes is — and should be — at least in part a function of security conditions. No victim participation measures can operate properly if participants are or feel coerced in any way. Indeed, the seriousness of a Government’s commitment to a transitional justice process can be measured at least in part by the seriousness of its efforts to guarantee the security of participants. Those who have already been victimized deserve special consideration.

66. Because the report to the General Assembly already touched upon the issue of security, the present report will be brief on this topic. With the exception of some judicial processes, transitional justice measures are not particularly well known for carrying out thorough and independent security assessments. This should change. Such assessments should include an evaluation of the risks to participating victims as well as to other stakeholders, including staff, as well as recommendations on how to mitigate some of the risks. Transparency concerning risks should govern communication with all stakeholders, including participating victims. Different means of enabling participation while minimizing

⁵² See A/HRC/34/62/Add.1.

⁵³ Valeria Barbuto, “Strengthening democracy: *impugnación* procedures in Argentina”, in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, A. Mayer-Rieckh and P. de Greiff, eds. (Social Science Research Council, 2007), pp. 40-79.

risks, including the use of different electronic media that preserve anonymity, should be considered, as long as they are compatible with due process and the demands of fairness. Protection systems commensurate with the levels of risk should be established before victims are asked to participate. At the least, initiatives akin to witness protection measures should be established.⁵⁴

2. Need for psychosocial support

67. After it became apparent, during the operation of the South African Truth and Reconciliation Commission, that, contrary to the belief held by many, truth (in the sense of providing testimony to a commission) does not necessarily heal, efforts have been made to offer at least modest forms of support to participating victims. This topic, however, currently receives more verbal and written expressions of support than systematic study or implementation.

68. The willingness and capacity of individual victims to even consider participating, as well as the nature of that participation, could be significantly enhanced by the provision of effective and much more sustained and long-term psychosocial support. Such support would be in addition to immediate support to victims participating in transitional justice mechanisms and alongside other, more specific, forms of support such as physically accompanying victims to criminal trials and prior briefings on what to expect when providing testimony in private or public hearings.

69. There are types of trauma — an expected and intended consequence of policies of terror — that have a deep effect on the agency of people to come forward. Just as it is irresponsible to ignore potential security risks that participating victims may incur, it is cruelly naive to think that the experience of victimization has no impact on people's readiness to put themselves at the forefront of claims-raising exercises without a great deal of support.

B. A substantive or thematic condition: capacity

70. The ability to embark on participatory processes depends in part on a shared understanding by all relevant stakeholders of the underlying principles and procedures. In the case of transitional justice, there are many contexts in which victims — in fact precisely those who, because of numerous circumstances, have the weakest understanding of their rights — are called upon to participate in processes meant to restore those rights. This has been referred to as the paradox of participation.⁵⁵ Consequently, from the very outset, special attention needs to be paid to sharing knowledge with victims and their representatives, including about their rights.

71. Most efforts to introduce transitional justice measures at the local or national level are initially marked by steady technical and operational capacity development of the stakeholders involved, including victims, civil society and government actors. Knowledge-sharing, however, often does not take place on a level playing field. Social, cultural, material, professional and linguistic differences and geographic distance may exist between victims, on the one hand, and human rights and other professionals involved in justice

⁵⁴ See, e.g., Chris Mahony, "Witness sensitive practices in international fact-finding outside criminal justice: lessons for Nepal", in *Quality Control in Fact-Finding*, Morten Bergsmo, ed. (Florence, Torkel Opsahl Academic EPublisher, 2013), pp. 225-274.

⁵⁵ See, e.g., Frances Cleaver, "Paradoxes of participation: questioning participatory approaches to development", *Journal of International Development*, vol. 11, No. 4 (June 1999), pp. 597-612.

measures, on the other hand.⁵⁶ For example, victims may, at least initially, find legalistic language and procedures alien to their understanding of justice or struggle to identify relevance in examples of lessons learned from international practice, which will negatively affect their ability to participate.

72. Two main strategies have been used to mitigate the challenges of knowledge disparity between victims and other stakeholders with professional backgrounds: representation of victims by civil society experts and organizations, and capacity-building specifically designed to impart expertise and empower the victims themselves.

73. The strategy centred on building the capacity of victims themselves should be calibrated to reflect the specific circumstances faced by victims. Some modalities of South-South and triangular cooperation could be helpful in eliciting relevant knowledge and experience for victims' direct involvement. Victims from similar countries or cultural contexts with a long-standing record in defending their rights and who passed through a similar learning trajectory in their own communities could act as role models, mentors and on-the-job trainers. This can promote solidarity and the creation of networks for transnational transfer of knowledge between victim communities. In most victim communities there are also individuals who tie their professional careers to advocacy for victims' rights. Such life choices should be encouraged and incentivized and proper accompaniment provided for prospective leaders.

74. The strategy centred on building the capacity of victims often faces inflexible timelines, offering insufficient opportunity to grow the capacity necessary for victims to be able to participate as experts.⁵⁷ The planning of participatory processes requiring expert knowledge should take this into account and, consequently, should incorporate flexible and interim arrangements that provide for the gradual phase-in of victim representatives as their technical capacity improves. However, there may be time constraints that cannot allow such extended processes.

75. Where limitations to victims' capacity have proven to be insurmountable in the short run, civil society organizations have played a major role in bridging the gap. In some contexts, victims themselves insist that their participation is contingent on assistance with both understanding their rights and seeking redress for violations of those rights.⁵⁸ Because of the need to understand local conditions, in addition to the issue of trust, civil society organizations with strong grass-roots engagement are best suited to be intermediaries between victim communities and processes of Government-induced participation.

76. Transitional justice mechanisms need a constant flow of information from and to victim groups; sporadic encounters or updates are inadequate. Civil society organizations can contribute to providing updates and securing feedback from victim groups on policy development.⁵⁹ In sum, civil society organizations that act as victim representatives are required to have different capacities in place: capacity for technical expertise on the subject

⁵⁶ David Kennedy, "The international human rights movement: part of the problem?", *Harvard Human Rights Journal*, vol. 15 (2002), pp. 101-125; Séverine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (Cambridge University Press, 2014), pp. 68-96.

⁵⁷ See, e.g., Ghazala Mansuri and Vijayendra Rao, *Localizing Development: Does Participation Work?* (Washington, D.C., World Bank, 2013), p. 2.

⁵⁸ Simon Robbins and Ram Kumar Bhandari, *From Victims to Actors: Mobilising Victims to Drive Transitional Justice Process* (Kathmandu, National Network of Families of Disappeared and Missing Nepal, 2012), p. 41.

⁵⁹ Cristián Correa, Julie Guillerot and Lisa Magarrell, "Reparations and victim participation: a look at the truth commission experience", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Carla Ferstman, Mariana Goetz and Alan Stephens, eds. (Brill, 2009), p. 8.

matter; capacity for grass-roots engagement, including a thorough understanding of victims' lives and immediate environment and, preferably, an active presence in the communities; and capacity to create regular and effective channels of communication between expert bodies and victim constituencies.

77. Human rights organizations and other NGOs have played a critical role as advocates for victim rights, but they may face challenges in ensuring effective communication with victim groups⁶⁰ and, more seriously, there are cases in which NGOs advocate positions that do not exactly reflect those of victims.⁶¹ Finally, some argue that this form of representation may create dependency, or at the very least delay the empowerment of the victim communities to speak for themselves.

78. In order to mitigate some of these risks, civil society organizations should ideally establish mechanisms of accountability to the relevant victim constituencies. Victim groups should be treated as primary stakeholders, with monitoring and oversight roles. Civil society organizations should also play a role in the capacity development of representatives and communities and have sustainability plans for the gradual transfer of responsibilities to victim groups.

79. There is no more urgent task in the domain of consultation and participation than the design of effective capacity-building for all stakeholders in such processes, victims included. If justification for consultation and participation is an epistemic argument grounded in the gains in information and insight that are achieved through the participation of victims, any potential contribution will be maximized by providing victims the wherewithal to participate fully and without mediation at all stages of the design, implementation and monitoring of transitional justice programmes.

80. In his last report to the General Assembly, the Special Rapporteur argued that given known constraints on short-term capacity-building, it is important to adopt a dynamic conception of consultation and, consequently, to design consultation processes that allow for ongoing participation rather than seeing it as a single event. This is the best way to guarantee that knowledge and expertise will accrete over time. Similarly, mechanisms for victim participation must be dynamic and allow for ongoing participation.

81. It is crucial to keep in mind, however, that victims are not merely resources for transitional justice processes. The legitimacy argument in favour of victim participation rests on the premise that participation in itself is a positive experience for victims, which in turn has the potential to support the sustainability of transitional justice measures. Participation provides a measure of recognition to victims not only as victims but as rights holders; this is one of the aims of transitional justice policies in general.⁶² In addition, participation opens up space for victims in the public sphere, a space that has often been denied to them.

82. On the basis of these are two equalizing contributions that the process of participation can make to victims, it is easier to find commonalities of experiences, values and principles among the different stakeholders, victims included, commonalities that are important for the type of coalition- and consensus-formation on which sustainable transitional justice policies depend.

⁶⁰ Ibid.

⁶¹ See, e.g., Robbins and Bhandari, *From Victims to Actors*, p. 47; and Kieran McEvoy and Kirsten McConnachie, "Victims and transitional justice: voice, agency and blame", *Social and Legal Studies*, vol. 22, No. 4 (November 2013), pp. 498-499.

⁶² See A/HRC/21/46.

83. The participation of victims in transitional justice measures always provides a poignant reminder of the fact that the choices necessary for the adoption of an effective and sustainable transitional justice policy are not merely technical in nature, but are intended to both manifest and sustain the dignity and worth of all concerned. In this respect, transitional justice is not merely an exercise in institutional design. Given the increased professionalization and standardization of the field, it is always good to be reminded of this. The presence of victims, their narratives of pain and loss but also of endurance, offers this indispensable reminder, and is an important source of motivation to adopt redress and prevention measures, as has been shown again and again in all cases where transitional justice has been adopted.

V. Conclusions and recommendations

84. The present report and the report to the General Assembly focusing on national consultation processes emphasize the importance of broad participation in transitional justice measures, including by victims. They are intended as contributions to clarifying the rhetoric of transitional justice and matching it in practice.

85. Although, as both reports have demonstrated, there are significant experiences of both national consultations and of victim participation, one of the things that is missing is greater efforts to analyse those experiences from a comparative perspective, with an eye to greater clarity regarding challenges and conditions for success.

86. The Special Rapporteur will not attempt to summarize the contents of the report in this section. In brief, however, he provides evidence of solid legal backing for the participation of victims in all stages of the design, implementation and monitoring of each of the transitional justice measures — truth commissions, criminal justice processes and reparation programmes — and security sector reform, one dimension of guarantees of non-recurrence.

87. He provides examples of the indispensable contributions by victims to the operation of truth commissions, which, after all, depend almost entirely on the willingness of victims to provide testimony; he refers to the strides made by the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia, and to the contributions of victims in other national jurisdictions, through mechanisms such as private prosecutions, to the achievement of justice; he cites the great importance of making sure that reparation programmes provide benefits that fit the victims' understanding of adequate redress and, perhaps most surprisingly, he describes the contributions that the participation of victims can make to processes of security sector reform, which have not been particularly victim-friendly heretofore.

88. The Special Rapporteur distinguishes between two broadly different types of arguments that can be used to justify victim participation. The first type is epistemic, and concentrates on the contributions that victims can make to the quality of information on the basis of which transitional justice measures can be designed, operated and monitored. Victims not only have a privileged perspective on the ways in which systems and institutions that were meant to guarantee their rights failed to do so, but also on what constitutes effective redress in terms of truth, criminal justice, reparation and guarantees of non-recurrence.

89. Having said this, the Special Rapporteur has no interest in treating victim participation as if it were a silver bullet, or an uncomplicated endeavour. Hence, he warns first that participation in transitional justice measures can involve security risks for victims, social risks, economic costs and risks of retraumatization, among others.

90. Furthermore, he offers reminders that victims do not constitute a monolithic constituency characterized by internal consensus, but rather that they are frequently divided not just because of the pre-existing social cleavages that may have contributed to the violations and to conflict in the first place but additional ones, some of them resulting from the violations and the conflict themselves.

91. He focuses on three conditions for success of victim participation that are frequently not met. Security conditions frequently do not allow for coercion-free participation by former victims, who have especially compelling reasons to be wary of the risks involved and mistrustful of institutions that have often failed abjectly in protecting them.

92. While there has been some progress in offering some psychosocial support to participants in transitional justice measures such as truth commissions and criminal justice processes, the support is, more often than not, quite basic and centred mostly on the participation entities. However, the combination of systematic violations and, not infrequently, years of neglect call for more robust forms of assistance if there is going to be any reasonable expectation that people who were the targets of either State repression or of gross abuses by third parties will be able to participate on an equal footing with others in the design and implementation of a policy that has frequently led to reprisals. The Special Rapporteur, recalling that, despite all this, victims have indeed contributed to transitional justice processes, takes the opportunity to acknowledge the sacrifices that victims have endured in the search for justice.⁶³

93. Finally, in the two reports he examines the paradox of participation that involves consulting on questions of rights those persons who have been offered weak reasons for having neither a solid understanding of themselves as rights holders, nor experience with effective redress mechanisms.

94. While finding most of the existing capacity-building efforts severely wanting, and therefore arguing that there are few more urgent needs than the design and implementation of proper capacity-development programmes for victims as well as other stakeholders if the promise of participation is going to be realized, the Special Rapporteur calls for the adoption of consultation and participatory methods that are not single events; for this reason, among others, consultation and participation must be ongoing processes.

95. The Special Rapporteur also recalls that in addition to epistemic reasons, there is also a legitimacy-based argument for victim participation that includes the following considerations: participation provides victims a measure of recognition not only as victims but also as rights holders; this in turns helps victims become visible and gain a place in the public sphere frequently denied to them. These equalizing tendencies enable the identification of common experiences, values and principles across different constituencies, a necessary condition for sustainable consensus- and coalition formation on controversial redress and prevention issues.

⁶³ See, e.g., www.elespectador.com/noticias/paz/van-70-asesinatos-de-defensores-de-derechos-humanos-201-articulo-666528. Seventy human rights defenders have been killed in Colombia in 2016, including 30 after the ceasefire agreement between the Government and the Fuerzas Armadas Revolucionarias de Colombia came into effect.

Recommendations

96. The Special Rapporteur encourages the United Nations system as well as other relevant stakeholders, including mediating agencies, international cooperation agencies and academic institutions and other relevant civil society organizations, to place sufficient emphasis on the comparative analysis of experiences with victim participation to close the gaping hole in the study of transitional justice processes.

97. Similarly, the Special Rapporteur urges those responsible for the design of transitional justice measures not to think of victim participation as marginal, but to incorporate it as an essential element of transitional justice policy-making. Doing so should have an impact on the calendar of transitional justice measures, their staffing, outreach, implementation and monitoring.

98. Regarding the three preconditions for success analysed in the present report, the Special Rapporteur cannot be more emphatic in his call to all Member States and all relevant parties to a conflict to guarantee the security of those who have not only already been victimized, but who are willing to make the extraordinary effort, almost invariably at high cost to themselves and their families, to contribute to the success of transitional justice measures. Post-conflict countries such as Colombia and Sri Lanka must be particularly attentive to this issue, as do countries like Argentina, where a witness who provided crucial testimony in a criminal trial disappeared in 2006, as well as countries that have never instituted transitional justice measures despite violations that would justify their doing so and where civil space for such discussions has been closed, including through the use of intimidation and threats.

99. The Special Rapporteur urges much more systematic attention (academic, practical, financial, etc.) to the issue of psychosocial support to victims. This needs to go far beyond the rather basic and immediate forms of support offered around instances of participation (such as in hearings, public or private, of truth commissions or in criminal justice processes). Victims are owed much more robust and long-term support; social integration ultimately cannot take place without it, and participation on an equal footing depends on it. Very few countries have established such programmes on a sufficiently large scale. This is a failure that is seldom noticed, but one that condemns victims to some degree of suffering from which they could be spared, communities to divisions that could be partly healed, and transitional justice measures to alienation from participants that could make them more effective and more legitimate.

100. The Special Rapporteur urges all relevant stakeholders to invest greater efforts in the design of capacity-building programmes for victims and other potential participants in transitional justice measures. The full potential of participatory methods will be realized only when victims in particular are empowered to participate at all levels in the design, implementation and monitoring of these measures, in an ongoing manner rather than in single events.

101. The Special Rapporteur also urges all relevant stakeholders to pay particular attention to the design of participatory methods that could elicit greater participation on the part of women, including female victims, and other frequently victimized and marginalized groups.