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

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

*Summary*

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, presents his report on accountability with a view to the prosecution and punishment of gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes.

The report examines the scope of the legal obligation to prosecute and punish such violations, as well as the constraints, gaps and opportunities encountered in the implementation of this obligation in countries undergoing transitional justice processes. It concludes with recommendations.

# Contents

# I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence pursuant to Council resolution 45/10. In the report, the Special Rapporteur lists the main activities that he undertook between July 2020 and June 2021 and examines the scope of the legal obligation of States to prosecute and punish persons who bear responsibility for gross violations of human rights or serious violations of international humanitarian law, as well as the constraints, gaps and opportunities encountered in the fulfilment of this obligation in countries undergoing transitional justice processes.

2. In 2021, the Special Rapporteur convened an expert meeting with the support of the Instituto Internacional de Responsabilidad Social y Derechos Humanos and organized an open consultation with States, national human rights institutions and civil society which made valuable contributions to the present report.

# II. Activities undertaken by the Special Rapporteur

3. Owing to the coronavirus disease (COVID-19) pandemic, the Special Rapporteur had to postpone official visits to Bosnia and Herzegovina, Croatia, the Republic of Korea and Serbia and decided instead to assess the implementation status of the recommendations set out in the country visit reports of his predecessor concerning Burundi, Spain, Sri Lanka, Tunisia, the United Kingdom of Great Britain and Northern Ireland, and Uruguay. As some restrictions have been lifted, the postponed visits are now being rescheduled.

4. On 17 September, the Special Rapporteur participated in the forty-fifth session of the Human Rights Council, where he presented his report on memorialization processes in the context of serious violations of human rights and international humanitarian law as the fifth pillar of transitional justice[1] and his reports on his visits to El Salvador and the Gambia.[2]

5. On 27 October, he participated in the seventy-fifth session of the General Assembly, where he presented his report on the gender perspective in transitional justice processes.[3]

6. Between 27 November 2020 and 22 January 2021, he convened several open consultations in order to gather input for his follow-up reports on country visit recommendations to the above-mentioned countries.

7. From 25 November 2020 to 15 January 2021, he held an online consultation to collect input for the present report.

8. From 18 to 20 January 2021, he held an expert meeting to gather input for the present report.

9. On 10 February 2021, he participated in an intersessional meeting on the prevention of genocide pursuant to Human Rights Council resolution 43/29.

10. On 15 March 2021, he participated in a meeting on justice and security for women in peace reconciliation convened by the Council of Europe Committee on Equality and Non-Discrimination.

11. From 31 March to 7 May 2021, he held an open consultation to gather input for his next report to the General Assembly on transitional justice and the legacy of serious violations of human rights and humanitarian law committed in colonial contexts.

12. From 10 to 13 May, he held a meeting of experts to gather input for his next report to the General Assembly.

13. The Special Rapporteur participated in numerous events, including: an expert round table on transitional justice in the Democratic Republic of the Congo; a forum on global

[1] A/HRC/45/45.
[2] A/HRC/45/45/Add.2 and A/HRC/45/45/Add.3, respectively.
[3] A/75/174.

democracy in the post-pandemic period in the Republic of Korea; a round table on truth and reconciliation commissions in Chile; a webinar on COVID-19, the institutionalization of persons with disabilities and the right to truth; an international conference on transitional justice in Mali; a conference on the experience of women in post-conflict situations and the scope of radicalism in Indonesia; a dialogue on comprehensive transitional justice processes based on a preventive approach in Colombia; a discussion on reparatory pensions for victims of human rights violations in Uruguay; an exhibition of the work and contributions of the International Tribunal for the Former Yugoslavia; and a round table on mass incarceration and COVID-19.

# III. General considerations

14. Since the end of the Second World War, various models of accountability have been used for prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law: international and hybrid tribunals, special courts established at the national level and pre-existing ordinary national courts. Examples include the International Tribunal for the Former Yugoslavia, the Extraordinary Chambers in the Courts of Cambodia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. Hybrid or mixed courts have also been established in Bosnia and Herzegovina, Kosovo, Lebanon and Timor-Leste.

15. At the national level, examples include the Special Jurisdiction for Peace of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition in Colombia; the High-Risk Courts and the unit of the Office of the Prosecutor for Human Rights responsible for special cases related to the internal armed conflict in Guatemala; the International Crimes Division in Uganda; and the *gacaca* courts in Rwanda. Criminal proceedings have also been held in the ordinary national courts of Argentina, Peru and Uruguay, among others.

16. These examples are representative of the significant progress made in the fight against impunity. However, there are numerous obstacles hampering the search for justice, and their effects are concerning. It has been estimated that, from 1948 to 2008, between 85 million and 170 million people died as a result of national or international armed conflicts. In an overwhelming majority of these cases, the perpetrators of serious international crimes have gone unpunished.[4]

17. Political realities and the pressure to end armed conflicts or ensure democratic transitions have had a negative impact on many accountability processes. In Spain, the violations committed under the Franco regime remain unpunished. Despite condemnatory judgments by the Inter-American Court of Human Rights in cases involving El Salvador, attempts to investigate and punish persons responsible for those violations have either been flawed or have run aground as a result of political or legal obstacles. The change of government in Sri Lanka led to a setback in the investigation and prosecution of violations committed during the conflict there, and a convicted perpetrator was pardoned. In the Gambia, a global coalition is calling for the prosecution of former President Yahya Jammeh, who has taken refuge in another country.

# IV. The duty to investigate and punish

18. There is a need for a clear understanding of the obligations applicable to prosecutions, since trials are a way of according recognition to victims as rights holders and provide an opportunity for the legal system to establish its credibility. Moreover, when done properly, prosecutions strengthen the rule of law and contribute to social reconciliation.[5] As stated by a previous mandate holder of this rapporteurship, criminal justice alone is not sufficient to satisfy the justice claims of victims of massive or systematic human rights abuse but must instead be accompanied by other elements such as memory, truth and guarantees of non-

[4] See https://biblioteca.iidh-jurisprudencia.ac.cr/index.php/documentos-en-espanol/prevencion-de-la-tortura/1311-combate-a-la-impunidad-y-promocion-de-la-justicia-internacional/file, p. 3.

[5] A/HRC/27/56, para. 22.

recurrence. However, States need not choose between truth and justice.[6] Transitional justice mechanisms should not be seen as an alternative to the criminal responsibility of perpetrators of serious violations of human rights and international humanitarian law.[7]

19. The international human rights obligations of States are fully applicable to transitional processes. Political will cannot be invoked as an excuse for breaching such obligations. The duty of accountability is grounded in international law.

20. Numerous international instruments establish the obligation of States to investigate, prosecute and punish persons responsible for gross violations of human rights or serious violations of international humanitarian law with appropriate penalties. The Convention on the Prevention and Punishment of the Crime of Genocide establishes the obligation to punish the crime of genocide and those who bear responsibility for it with effective criminal penalties.[8] Similar provisions exist in the four Geneva Conventions of 12 August 1949 (arts. 49, 50, 129 and 146, respectively), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 6) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 4).

21. The Human Rights Committee has established that the duty to investigate and punish serious human rights violations is derived from the right to an effective remedy set out in article 2 of the International Covenant on Civil and Political Rights.[9] Failure to investigate and prosecute such violations in and of itself gives rise to a breach of human rights treaty provisions. Impunity for such violations may constitute a negative element that contributes to their recurrence.

22. Customary international law also establishes the obligation to investigate and punish genocide, war crimes and crimes against humanity. The International Court of Justice has established that the prohibition of genocide is a peremptory norm of jus cogens and that the Convention on the Prevention and Punishment of the Crime of Genocide establishes obligations erga omnes.[10] The Court has also stated that punishing persons who commit serious crimes is one of the most effective forms of prevention.[11] Moreover, the Inter-American Court of Human Rights has established that the prohibition of crimes against humanity is a norm of jus cogens and that the punishment of such crimes is mandatory under general international law.[12]

23. The Human Rights Committee has established the obligation of States to "ensure that all alleged perpetrators of gross human rights violations and war crimes are impartially prosecuted and, if found guilty, convicted and punished in accordance with the gravity of the acts committed, regardless of their status or any domestic legislation on immunities".[13]

24. International human rights law establishes that the penalties imposed for crimes against humanity must be commensurate with the gravity of the crimes committed. The Trial Chamber of the International Tribunal for the Former Yugoslavia has referred to a standard according to which crimes against humanity are of extreme gravity and demand the most severe penalties.[14] While there is no exhaustive list of the means of imposing penalties on persons responsible for such crimes, giving States a degree of discretion in the application, individualization and severity of such penalties, the main international treaties in this area

[6] A/HRC/36/50/Add.1, paras. 25 and 55.

[7] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25552&LangID=E.

[8] Convention on the Prevention and Punishment of the Crime of Genocide, arts. I, IV and V.

[9] General comment No. 31 (2004), para. 18.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, ICJ Reports 2015, p. 3, paras. 84–89.

[11] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43, para. 426.

[12] *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006, para. 99.

[13] CCPR/C/LBR/CO/1, para. 11 (a).

[14] Appeals Chamber, *Prosecutor v. Dražen Erdemović*, Judgment, Case No. IT-96-22-A, 7 October 1997, p. 7.

refer to "appropriate penalties which take into account [the] grave nature [of the offence]",[15] "effective penal sanctions",[16] and "effective"[17] or "appropriate penalties which take into account [the] extreme seriousness"[18] of the offence and the individual circumstances of the convicted person.[19] The seriousness of the criminal conduct, the degree of criminal involvement of the accused and his or her personal circumstances, as well as any other mitigating or aggravating circumstances, must be taken into account. These standards cannot be lowered by a State party. The Rome Statute of the International Criminal Court provides that the penalties applicable to the crime of genocide, crimes against humanity, war crimes and the crime of aggression are: (a) imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[20] Moreover, the Inter-American Court of Human Rights has stated that an inadequate legal characterization and a penalty disproportionate to the offence can be factors of impunity[21] and that, in order to comply with this obligation, States must take into account various aspects, such as the nature of the offence and the participation and culpability of the accused.[22] International law also establishes that admission of responsibility by a perpetrator cannot exempt him or her from criminal or other responsibility and may only provide grounds for a reduction of sentence.[23]

25. As a result of the foregoing, some special sanctions imposed in transitional contexts may not meet the standards governing the form and severity of the penalty. In this regard, there is concern that countries that impose sanctions of a "restorative" nature (usually in exchange for an acknowledgement of truth or responsibility) could incur international responsibility for a possible violation of the obligation to appropriately punish the crime of genocide, crimes against humanity and war crimes. The Special Rapporteur considers that, where sanctions are not proportional to the gravity of the crimes committed, de facto impunity may arise.

26. With regard to the interposition of legal obstacles to accountability, international law sets limits on the use of amnesties, immunity, statutory limitations and the notion of due obedience in connection with serious crimes, even when intended to establish conditions conducive to reaching a peace agreement or fostering national reconciliation.[24] Going beyond the standard established by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Human Rights Committee has stated that all impediments to the establishment of criminal liability must be removed and that States may not relieve perpetrators of serious human rights violations from legal responsibility through amnesties or prior legal immunities and indemnities.[25] Moreover, the Inter-American Court of Human Rights has established, on the basis of its judgment in the case of *Barrios Altos v. Peru*, that States must refrain from resorting to mechanisms such as amnesty, statutory limitations, the non-retroactivity of criminal law, res judicata, *ne bis in idem* or other

[15] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4 (2).

[16] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention (III) relative to the Treatment of Prisoners of War, art. 129; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 146.

[17] Convention on the Prevention and Punishment of the Crime of Genocide, art. V.

[18] International Convention for the Protection of All Persons from Enforced Disappearance, art. 7.

[19] Rome Statute of the International Criminal Court, art. 78.

[20] Ibid., art. 77.

[21] *García Ibarra et al. v. Ecuador*, Judgment of 21 November 2015, para. 167.

[22] *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, 7 September 2012, p. 22, para. 55.

[23] Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), principle 28.

[24] Ibid., principle 22–28.

[25] General comment No. 31 (2004), para. 18.

exemptions from responsibility that are intended to prevent the investigation and punishment of persons responsible for serious human rights violations.[26]

27. Nor is the early release of persons convicted of serious human rights violations consonant with international law. The international community recognizes the need to limit the use of certain legal norms, such as those providing for dispensations or sentence remissions, in order to prevent them from becoming an obstacle to justice. The Committee against Torture has noted that the early release of persons convicted of serious human rights violations is contrary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the Inter-American Court of Human Rights, the undue granting of such dispensations or remissions can eventually lead to a form of impunity for serious human rights violations. The Court has also emphasized that efforts must be made to harmonize the application of criminal norms based on the principle of lenity such that they do not have the effect of rendering criminal justice illusory.[27] The Rome Statute establishes a standard according to which a sentence may be reduced if the convicted person continuously cooperates with the investigation, provided that a certain proportion of the sentence has been served, which on average is two thirds of the sentence, or 25 years of imprisonment in the case of life imprisonment.[28]

# V. Challenges and obstacles

28. Usually, only a small fraction of those who bear responsibility for international crimes or crimes against humanity are subject to criminal investigations because of the large number of suspected perpetrators and the relative scarcity of human and financial resources, capacity and will.[29] This failure to pursue effective investigation and punishment also results from established objective limits on or obstacles to the prosecution and criminal punishment of perpetrators, such as prior immunities or exemptions from responsibility (including amnesties or the application of the notion of due obedience to superior orders), the discontinuance or time-barring of criminal prosecutions, dispensations accorded in the enforcement of punishments (including humanitarian and other types of pardons, commutation of sentences and alternatives to imprisonment), or policies or laws on repentance or reconciliation in exchange for immunity or the commutation of the sentence. Another common mechanism of impunity is the application of sentences that are not commensurate with the seriousness of the offence or the premature release of persons who have been convicted.

## A. De jure impunity

### Amnesties and immunities

29. Amnesties violate a number of human rights, such as the right of victims to be heard by a judge and the right to judicial protection by means of an effective remedy. They also pave the way for impunity by preventing the investigation, pursuit, capture, prosecution and punishment of persons responsible for human rights violations.[30]

30. Many countries, including Argentina, Brazil, Chile, the Democratic Republic of the Congo, El Salvador, Sierra Leone, Spain, South Africa and Uruguay, promulgated amnesty laws which barred criminal investigations and the punishment of responsible parties when they were embarking on transitional justice processes in order to facilitate political settlements or negotiations. Some have since repealed those laws (e.g. Argentina and, more

[26] *Barrios Altos v. Peru*, Judgment of 14 March 2001, para. 41; *Contreras et al. v. El Salvador*, Judgment of 31 August 2011, para. 185 (d); and *Rochac Hernández et al. v. El Salvador*, Judgment of 14 October 2014, para. 188 (d).

[27] *Manuel Cepeda Vargas v. Colombia*, Judgment of 26 May 2010, para. 152; *Rochela Massacre v. Colombia*, Judgment of 11 May 2007, para. 196.

[28] Rome Statute of the International Criminal Court, art. 110.

[29] A/HRC/27/56, para 24.

[30] Inter-American Court of Human Rights, *Barrios Altos vs. Peru*, para. 42.

recently, El Salvador), but others have maintained them on the books for decades, even after the political risks that supposedly justified them had dissipated.

31. Some countries introduced amnesties in exchange for revelations of the truth. The South African Truth and Reconciliation Commission provided for a conditioned amnesty-for-truth model that did not live up to expectations in terms of the information obtained as a result[31] and made the authorities reluctant to initiate criminal proceedings. Kenya, Liberia and Sierra Leone have used similar models.

32. There has been a proliferation of amnesties in Uganda, and Libya has a very broad normative framework for the granting of amnesties. In other cases, various types of immunities have been put in place to shield possible offenders from criminal responsibility. In India, the normative framework confers an array of immunities on civil servants, private citizens and members of the armed forces that prevent them from being brought to trial.[32] In Turkey, vaguely worded decrees grant immunity to officials who helped to suppress the failed coup.[33] In Libya, the Criminal Code provides immunity for persons who were acting on the orders of a superior.[34] In Myanmar, the Constitution states that legal proceedings cannot be brought against former or current members of the Government and, in the few cases in the past in which convictions were handed down, numerous amnesties were granted.

33. While, in some cases, amnesties and immunities are granted in an effort to put an end to the violence as soon as possible, it has been found that, in addition to running counter to international law, they further entrench a culture of impunity by placing some people above the law and fail to prevent the recurrence of new violations.[35]

### Application of statutory limitations

34. Other States use legal mechanisms such as statutory limitations or non-retroactivity provisions to prevent the investigation and punishment of serious violations of human rights and crimes against humanity despite the fact that these kinds of crimes are not subject to limitation and that an ample body of international jurisprudence establishes that these legal mechanisms are not applicable to serious human rights violations. The Supreme Court of El Salvador ruled that criminal legal action against the alleged instigators of the massacre of Jesuits that took place in November 1989 was time-barred. In Libya, few investigations have been conducted and, in some cases, defendants have been acquitted on the basis of the principle of extinctive prescription in proceedings that have been criticized as being incompatible with international standards.[36]

### Insufficient legal definition of offences

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

36. Genocide and crimes against humanity are not legally defined offences as such in India.[37] In the Gambia, the Constitution and the Criminal Code do not define enforced or involuntary disappearance as a specific offence. The crime of torture is prohibited by the Constitution but is not defined in the Criminal Code.[38] In Tunisia, the offences of enforced disappearance and torture have not been properly integrated into the criminal justice system, and the extraordinary gravity of crimes against humanity as stipulated and defined under international law is not recognized. The national laws of Libya do not cover all the offences

[31] A/HRC/36/50/Add.1, para. 14.
[32] Code of Criminal Procedure of India, No. 45 (1860), arts. 46 (2), 129 to 131, 132, 197, 300 and 311 (a).
[33] See www.reuters.com/article/us-turkey-security-idUSKBN1EJ0MW.
[34] Criminal Code of Libya, art. 69 (1) and (2).
[35] A/HRC/27/56, para. 31.
[36] See www.ohchr.org/Documents/Countries/LY/Trial37FormerMembersQadhafiRegime_EN.pdf, pp. 16 and 47, and www.hrw.org/news/2018/08/22/libya-45-sentenced-death-2011-killings.
[37] Civil society responses to the questionnaire.
[38] A/HRC/45/45/Add.3, para. 12.

defined under international law, but they do prohibit all serious and systematic human rights violations.[39]

**Pardons and dispensations or remissions**

37. In some countries, persons have been convicted but have then been acquitted or pardoned, transferred to house arrest, paroled or granted other temporary release arrangements. In Albania, some leaders of the communist regime were convicted of the crime of genocide in courts of first instance but their convictions were overturned by the Supreme Court. Most of the crimes and offences committed under that regime have not been investigated to this day. The Good Friday Agreement between Ireland and the United Kingdom of Great Britain and Northern Ireland provided for the release of persons convicted of the offences described in that agreement so long as they belonged to the organizations that signed onto the cease fire; all of them were released after two years. In Myanmar, a number of the convicts were granted early release.

38. In Argentina, the top military leaders convicted in the 1980s were pardoned. After two laws and pardons that had blocked criminal investigations were declared invalid, hundreds of members of the military and civilians were tried and convicted, some of whom were sentenced to house arrest because of their advanced age. The Supreme Court of Argentina also applied Act No. 24.390, which counts each day spent in detention before a final judgment is issued as equivalent to two days in prison. This led to the early release of one person who had been convicted of crimes against humanity. The application of that provision to crimes of that type was later prohibited by law.[40]

39. In Chile, an effort has been made to secure passage of a law under which prison sentences would be replaced by other arrangements for humanitarian reasons having to do with prisoners' health, including prisoners convicted of crimes against humanity.[41] In Senegal, the former President of Chad, Hissène Habré, was temporarily freed because of the health hazards posed by prison conditions during the COVID-19 pandemic despite the fact that he was being held in private quarters.[42] In the Sudan, former President Omar Hassan Ahmad Al-Bashir requested his release on similar grounds.[43]

40. The Special Rapporteur has observed that, in health emergencies, once general measures for avoiding prison overcrowding have been taken, if the possibility of overcrowding still exists for persons convicted of serious human rights violations, crimes against humanity, genocide or war crimes, it is recommended that they be relocated or, failing that, be temporarily placed under house arrest, but under no circumstances should they be granted dispensations or remissions such as amnesties, pardons or sentence reductions.[44]

41. In Peru, Alberto Fujimori was pardoned because of his advanced age, but the pardon was later overturned. At the time, the Special Rapporteur said that: "There are concrete requirements for the granting of pardons for humanitarian reasons which must be carefully observed in order to avoid arbitrariness. Imminent terminal illnesses can give rise to pardons; however, such benefits cannot be granted owing to the mere passing of time, the age of the person, or the general physical or mental state resulting from age. In such cases, States must guarantee the right to health through medical services provided in prisons or transfers to specialized medical centres."[45]

[39] Act No. 29 of 2013, arts. 2 and 3.

[40] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23173.

[41] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25204.

[42] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25401.

[43] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25370.

[44] See www.ohchr.org/SP/Issues/TruthJusticeReparation/Pages/infonotecovid.aspx.

[45] See www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23700&LangID=S.

**Alternative sanctions**

42. In the context of transitional justice processes, some countries have used non-custodial alternatives to prison sentences for perpetrators of serious human rights violations; these essentially restorative or reparative sanctions are focused on redressing the harm caused. In some but not all cases, these types of alternatives have been offered in exchange for an acknowledgement of responsibility and a recognition of the truth.

43. In Liberia, the Strategic Road Map for National Healing, Peacebuilding and Reconciliation has been designed to support the implementation of recommendations of the Truth and Reconciliation Commission focusing on restorative justice mechanisms rather than on criminal accountability. The establishment of the Extraordinary Criminal Court for Liberia has accordingly been delayed owing to a lack of political will, despite the demands of vast sectors of Liberian society.[46]

44. In Colombia, the Justice and Peace Act on the demobilization of paramilitary forces establishes prison sentences of from five to eight years for serious offences. The Comprehensive System for Truth, Justice, Reparation and Non-Repetition establishes:

(a) Sanctions are determined on the basis of the conditionality regime for persons who do their part to help reveal the full truth and provide redress to victims and who thus may avail themselves of the legal benefits afforded under that regime;

(b) Special sentences of from five to eight years (or from two to five years in the case of persons deemed to have played a subsidiary role in the commission of such offences) consisting of restrictions on freedom of movement in non-custodial establishments for persons who provide detailed information and acknowledge their responsibility. This sanction is considered to be restorative in nature and reparative of the harm done;

(c) Alternative sentences of from five to eight years for persons who acknowledge their responsibility before sentence is passed but who do so belatedly;

(d) Ordinary sentences of up to 20 years for persons who do not provide detailed information and do not acknowledge their responsibility but who have been found guilty by the Trial Chamber in Cases of Absence of Acknowledgement.

## B. De facto impunity

45. Shortages of human and financial resources and of technical and institutional capacity, along with the lack of mechanisms for ensuring the safety of victims and witnesses who participate in the proceedings, constitute de facto obstacles to the investigation of serious human rights violations and the criminal prosecution of suspected perpetrators. The pressure, intimidation and threats faced by judges and prosecutors and the existence of structural prejudice against members of minority groups also give rise to de facto impunity.

46. In Guatemala, setbacks in legal proceedings involving serious human rights violations have been coupled with threats directed at judges and prosecutors dealing in such cases.[47] In India, police have reportedly harassed and threatened victims in order to interrupt legal proceedings, and the justice system, which is prone to structural prejudice against certain minorities and suffers from excessive bureaucracy, has not brought legal proceedings against the suspected perpetrators of the events that occurred in Manipur, Jammu and Kashmir or punished them accordingly.

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

48. In Myanmar, the establishment of investigative commissions has been improvised and perfunctory and, as a result, these bodies do not have the resources they need, nor have they

[46] See www.amnesty.org/download/Documents/AFR3487352018ENGLISH.PDF.

[47] Civil society responses to the questionnaire.

succeeded in consolidating suitable procedures for investigating mass violations of human rights and international crimes. In addition, the justice system is corrupt.[48] In Albania, the judicial branch of government is still lacking in impartiality and legitimacy.[49]

49. In Uganda, the International Crimes Division suffers from procedural difficulties, especially with respect to victim participation, as it lacks witness protection arrangements and victim referral and social support mechanisms. Because it is not sufficiently resourced, it holds sessions only three or four times every two to three weeks. In Gambia, judicial and forensic capacity is very limited, and stigmatization, underreporting of incidents of gender violence and insufficient psychosocial support services are all problems. In the Maldives, issues include obstacles that interfere with efforts to gather evidence, very limited judicial and forensic capacity, and problems with the witness protection system.

50. In Colombia, the sheer number of victims is making it difficult to ensure their participation in the legal proceedings, and a "macro-case" investigation system has been devised in order to address this problem. In addition, the special sanctions regime that is now being developed is a quite complex system.

51. International courts are also faced with operational challenges. The International Criminal Tribunal for Rwanda had difficulties in securing the staff it needed to do its work towards the end of its mandate, and the Secretariat did not find the persons who stood in for other staff members to be satisfactory.[50] The Special Tribunal for Lebanon is at imminent risk of closure owing to a lack of funding. The Extraordinary Chambers in the Courts of Cambodia rely on external financing and therefore do not have proper budgetary autonomy.[51] The Special Rapporteur is encouraged by the consolidation of the International Residual Mechanism for Criminal Tribunals, which, thanks to the continuity of its work, is able to retain highly qualified staff and offer them stable working conditions.

## C. Lack of political will

52. Some States put up resistance when the time comes for them to bring one of their nationals to trial for serious violations of human rights or of international humanitarian law or to allow an international body to do so. While the Rome Statute has been ratified by 133 States, it has not been ratified by major military Powers such as China, the Russian Federation or the United States of America. In the context of an investigation into the possible commission of crimes in the territory of Afghanistan, government authorities of the United States have stated that the jurisdiction of the International Criminal Court over United States nationals is an unacceptable threat to American sovereignty and to its national security interests.[52] Proceedings before the International Criminal Court have given rise to discontent in some States, and South Africa, the Gambia when under the Jammeh regime[53] and Burundi have denounced the Statute as a "tool of pressure".

53. In the appearances of Myanmar before the International Court of Justice in the case concerning the possible commission of violations in Rakhine State,[54] the authorities avoided using the term Rohingya (as part of the institutionalized discrimination against that minority), referring instead only to "inter-community violence" or "a necessary operation for national security".[55]

54. The Special Rapporteur has encountered numerous troubling examples of legal or judicial obstacles to accountability, such as:

[48] Civil society responses to the questionnaire.

[49] Response of the Office of the Ombudsperson of Albania.

[50] S/2015/340.

[51] Response of the Extraordinary Chambers in the Courts of Cambodia to the questionnaire.

[52] See www.aljazeera.com/news/2018/9/10/full-text-of-john-boltons-speech-to-the-federalist-society.

[53] In 2017, the Gambia reversed its decision to withdraw from the Court.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, decision of 23 January 2020, *I.C.J. Reports 2020*, p. 3.

[55] Civil society responses to the questionnaire.

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

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

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

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

(e) The legal mischaracterization of these violations;

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

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

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

55. In the realm of public policy, the Special Rapporteur has observed the following:

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

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

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

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

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

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

# VI. Good practices and lessons learned

## A. Legal framework

56. Although some countries have not yet legally defined certain crimes such as torture, enforced disappearance, genocide and crimes against humanity in terms that meet the relevant international standards, such crimes are covered in the criminal code or in special legislation in most States.

57. The Criminal Code of Ukraine provides for the punishment of the most serious crimes, such as torture, cruel treatment, forced labour, looting and the use of internationally prohibited methods of warfare, with sentences of 8 to 12 years' imprisonment, or 10 to 15 years' imprisonment if the crime results in death. In Uganda, the crimes referred to in article 5 of the Rome Statute of the International Criminal Court have been defined as offences in the law but are yet to form the basis of any convictions. Guatemala has defined the crimes of genocide, which is punishable by 30 to 50 years' imprisonment; instigation of genocide, punishable by 5 to 15 years' imprisonment; and crimes "against the duties of humanity"

(*contra los deberes de la humanidad*), punishable by 20 to 30 years' imprisonment.[56] The definition of such crimes has been interpreted by the Guatemalan judicial authorities as covering war crimes and crimes against humanity.

58. In Ireland, the crimes referred to in the Rome Statute have been incorporated into the national legal framework by means of a law[57] which provides that such crimes may be investigated regardless of whether the conduct constituting the crime occurred within or outside Irish territory;[58] that law also gives the courts the power to confiscate property obtained in connection with the crime and to use it to make reparations to victims.[59] Breaches of human rights are punishable by imprisonment for life or up to 30 years, with the length of the sentence being determined in accordance with article 78 of the Rome Statute of the International Criminal Court.[60] Albania ratified the Rome Statute and has since incorporated its core criminal offences into national legislation, established universal jurisdiction in respect of those crimes[61] and withdrawn its reservation to the Convention on the Prevention and Punishment of the Crime of Genocide.

59. Some States that have not yet brought their criminal legislation into line with international standards apply the legal definitions of the most serious degree of the ordinary offences that most closely correspond to the prosecutable conduct, or have recourse to a concurrence of offences.

60. The international tribunals have brought visibility to crimes and offences that are often not properly investigated. The Rome Statute of the International Criminal Court not only defines the crime of rape but also defines gender-based crimes such as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and all other forms of sexual violence of comparable gravity.[62] In addition, in the case law of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, rape is recognized as a crime against humanity and a war crime.[63]

## B. Revocation of amnesties

61. Some national courts have revoked amnesties or declared them unconstitutional, thus preventing the legislature from obstructing proper accountability processes. In Peru, the Constitutional Court declared two amnesty laws unconstitutional.[64] A decision of the Supreme Court of Nepal struck down amnesty provisions on the grounds that they ran counter to victims' right to a remedy.[65] In Argentina, by virtue of Act No. 23040, it has been established that the Self-Amnesty Act is irrevocably void; the latter has thus been deprived of legal effect, opening the way for the prosecution of serious human rights violations that occurred during the dictatorship. Subsequently, the Full Stop Act, the Due Obedience Act and all pardons that had been granted were declared null and void,[66] resulting in numerous prosecutions and the criminal punishment of 1,013 members of the military and police forces.[67] The Constitutional Division of the Supreme Court of El Salvador has declared the General Amnesty (Consolidation of the Peace) Act unconstitutional, emphasizing that statutory limitations cannot be applied to crimes against humanity or war crimes. However, in blatant violation of that decision, in a judgment on a point of law of 8 September 2020, the

[56] Criminal Code of Guatemala, art. 378.
[57] International Criminal Court Act, 2006.
[58] Ibid., art. 12.
[59] Response from Ireland to the questionnaire.
[60] International Criminal Court Act, 2008, art. 10.
[61] Criminal Code of Albania, arts. 73, 74, 74 (a) and 75.
[62] Rome Statute of the International Criminal Court, art. 7 (1) (g).
[63] A/HRC/36/50/Add.1, para. 31.
[64] Constitutional Court of Peru, *Santiago Enrique Martín Rivas*, Case No. 679-2005-PA/TC, Judgment of 2 March 2007.
[65] A/HRC/36/50/Add.1, para. 22.
[66] Supreme Court of Justice, *Simón, Julio Héctor et al., regarding unlawful deprivation of liberty, etc. (Poblete)*, Case No. S.1767.XXXVIII, Judgment of 14 June 2004.
[67] See www.fiscales.gob.ar/lesa-humanidad/en-14-anos-de-juicios-se-dictaron-250-sentencias-con-1013-personas-condenadas-y-164-absueltas/.

Criminal Division of the Supreme Court applied statutory limitations and acquitted the accused. In Albania, there are no immunities or exemptions from liability that would prevent the prosecution of perpetrators, nor are there statutory limitations on serious violations of human rights or international humanitarian law.

## C. Improved institutional capacities, civil society participation and the centrality of victims

62. Technological advances and greater international cooperation have contributed to improvements in the documentation of international crimes. There has been a proliferation of forensic investigations, centres of expertise are functioning in several countries, and standards and methodologies relating to the gathering of testimony and documentation have been strengthened. In addition, technological tools have been developed for use in big data documentation and analytics. In Latin America, the achievement of a high level of expertise has been driven by the central role of civil society and victims' organizations. The Southern Common Market (MERCOSUR) Condor Document Archives project is a notable example of inter-State cooperation intended to build forensic and documentation capacities. Globally, more than 50 initiatives on data identification and collection have been carried out by United Nations institutions.[68]

63. In Albania, a judicial reform process has led to the establishment of a special prosecutor's office, a court competent to try crimes against humanity[69] and the creation of offices that are exclusively devoted to documenting cases and opening case files relating to acts committed by the communist regime, identifying the persons responsible for those acts and keeping the general public informed.[70]

64. In Liberia, civil society has been instrumental in publicizing the establishment of specialized courts for the prosecution of serious crimes committed during the civil wars in that country.[71]

65. In the case of the Rwandan genocide, international efforts were complemented by the *gacaca* courts that operated between 2005 and 2012; more than 12,000 community courts prosecuted persons accused of less serious crimes and tried more than 1.2 million cases in all.[72] While these trials helped to cement participatory justice, reduce the prison population and identify the bodies of many victims, the system had limited due process guarantees, combined "modern criminal law with more traditional informal community procedures" and was marked by "misuse of [the system] to settle personal scores".[73]

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

67. Some countries have adopted case prioritization strategies or established specialized prosecution bodies with the technical capacities required to prosecute cases effectively and efficiently. Institutions have been established in Germany and Poland, and specialized units have been set up in prosecutors' offices in Argentina, Chile, Colombia and Côte d'Ivoire.[74] In Colombia, the Peace Agreements require the application of a case prioritization system that has so far resulted in seven "macro" cases which address a number of different incidents simultaneously. In Tunisia, special chambers have been established to try cases referred to the courts by the Truth and Dignity Commission. In Maldives, the Commission on Murders

[68] A/HRC/36/50/Add.1, paras. 5, 8, 35, 36, 58.

[69] Response of the Office of the Ombudsperson of Albania to the questionnaire.

[70] Ibid.

[71] Report submitted by Advocates for Human Rights and other organizations for the universal periodic review of Liberia. Available at www.ohchr.org/EN/HRBodies/UPR/Pages/UPRLRStakeholdersInfoS36.aspx.

[72] See https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts.

[73] Ibid.

[74] A/HRC/27/56, paras. 88–90.

and Disappearances – although not a judicial body – can refer cases to the Attorney General's Office, which has set up a special department to investigate international crimes, for prosecution.

68. Steps have also been taken to strengthen national justice mechanisms or set up hybrid mechanisms to pool technical capacities and resources. In the Gambia, discussions are under way on the establishment of a hybrid ad hoc mechanism to address the absence of specific legal characterizations of crimes against humanity and torture in the domestic legal system and the insufficiency of the technical and institutional capacities of the judicial system.

69. The Special Rapporteur has identified laudable examples of good practices. At the legislative level, some countries have adopted criminal and procedural laws and rules that set out appropriate legal definitions of serious human rights violations and gross violations of international humanitarian law; transitional justice frameworks have been established to complement ordinary criminal law systems; criminal prosecution strategies have been designed; and legal obstacles to criminal investigation and punishment, such as amnesty laws and the application of ordinary statutory limitations to crimes against humanity, have been removed.

70. At the level of public policy, some countries have established specialized bodies for the criminal prosecution of these violations and, have declassified and disseminated military and police records to facilitate accountability processes, have developed effective processes of consultation with victims and civil society in the context of transitional justice processes and have adopted framework agreements on ending armed conflicts that incorporate, albeit partially, the requirements set out in international transitional justice standards with regard to the right to truth and accountability.

## D. Symbiosis between the international system and national systems

71. The relationship between national and international jurisdictions has received increased attention in recent years, leading to greater investment in national judicial systems with a view to the prosecution of complex international crimes.

72. The principle of universal jurisdiction has been incorporated into many national normative frameworks, and noteworthy progress has been made in winning convictions in foreign courts. The application of article 23 (4) of Organic Act No. 6/1985 on the Judicial System of Spain allowed the arrest of former President Augusto Pinochet on foreign soil at the request of the National High Court. In a recent landmark judgment in Germany, a former agent of the Syrian Government was convicted of complicity in crimes against humanity.[75] Also noteworthy is the conviction of the son of former Liberian President Charles Taylor in the United States of America for torture, and the conviction of a Liberian rebel commander in a Swiss court for rape, murder and cannibalism. Legal cases against alleged perpetrators have also been initiated in other national courts in application of the principle of universal jurisdiction.

73. Various positive examples of symbiosis between national and international jurisdictions can be found. Positive attitudes towards international criminal tribunals and national awareness of their standards and practices contribute to the modernization of justice systems and to fairness, effectiveness, efficiency and transparency.[76] In Bosnia and Herzegovina and in Serbia, the decisions of the International Tribunal for the Former Yugoslavia have been determined to have had a positive effect on the maintenance of the rule of law and the conduct of national judicial processes that respect international standards.[77] In Guatemala, prosecutors apply international law in the prosecution of crimes against humanity,[78] and the High-Risk Courts have applied international law in the prosecution of

[75] See https://www.dw.com/en/german-court-hands-down-historic-syrian-torture-verdict/a-56670243.
[76] Response from civil society to the questionnaire.
[77] Response from civil society to the questionnaire.
[78] Response from civil society to the questionnaire.

several emblematic cases, including the Dos Erres massacre, Ríos Montt and Molina Theissen cases.

74. Liberian and French authorities have cooperated closely in the investigation of acts committed during the First Liberian Civil War, undertaking crime scene reconstructions in the presence of judges, lawyers and civil parties.[79]

75. Uganda took the requisite legal steps and became the first State to refer a case concerning an internal situation to the International Criminal Court, which then issued international arrest warrants for Joseph Kony and other senior commanders of the Lord's Resistance Army. The Court sentenced Dominic Ongwen in 2020.[80]

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

77. In Colombia, the settled jurisprudence of the corpus of constitutional law permits the direct application of international standards.

78. The Inter-American Court of Human Rights, the United Nations Human Rights Committee and the United Nations Committee against Torture have established an extensive corpus of jurisprudence regarding the obligation to ensure accountability for serious violations of human rights and international humanitarian law, particularly with respect to the inadmissibility of de jure or de facto obstacles to compliance with that obligation, such as amnesties, immunities, statutory limitations, due obedience, the non-retroactivity of criminal law, res judicata and dispensations or remissions in the enforcement of sentences.

79. These decisions have had an important impact and have helped to standardize accountability criteria at the domestic level. In the case of *Barrios Altos v. Peru*, which was tried before the Inter-American Court of Human Rights, the State acknowledged the facts relating to the extrajudicial executions committed by State agents under the Fujimori Government and recognized that it faced the obstacle of the amnesty laws, which "directly entailed a violation of the right of all victims to obtain not only justice but also truth".[81] Subsequently, the Constitutional Court annulled Acts No. 26479 and No. 26492, which provided for the amnesties in question. In El Salvador, the Amnesty Act was declared unconstitutional following several rulings of the Inter-American Court of Human Rights urging the State to do so. In its ruling in the Simón case, the Supreme Court of Argentina interpreted international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights as having a higher status than national legislation.[82] In several States in the Americas, the doctrine of oversight of treaty compatibility developed and promoted by the Inter-American Court of Human Rights in its case law allows national courts to follow good practice in applying international human rights standards.

80. Good relations between national and international jurisdictions help to combat impunity. One example of this is the coordination between States, international tribunals and the International Criminal Police Organization (INTERPOL) in intensifying their efforts to catch and prosecute fugitives from justice. In addition, the International Criminal Tribunal for Rwanda[83] has issued best practice manuals on: (a) the investigation and prosecution of sexual and gender-based violence; and (b) the referral of international criminal cases to national jurisdictions. The Tribunal has also worked with the press, organized genocide

[79] See https://civitas-maxima.org/2019/06/12/the-french-judicial-authorities-have-investigated-in-liberia/.

[80] *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Judgment of 6 May 2021.

[81] *Barrios Altos v. Peru*, para. 35.

[82] *Simón, Julio Héctor et al, regarding unlawful deprivation of liberty*, paras. 56 et seq.

[83] S/2015/340, para. 80.

memorial days and published books for children on the causes and dynamics of genocide and on guarantees of non-recurrence.[84]

81. However, some States remain reluctant to apply international standards. While the events involving the targeting of the Rohingya minority are known to the International Court of Justice[85] and have been condemned by the United Nations High Commissioner for Human Rights[86] and the independent international fact-finding mission on Myanmar established by the Human Rights Council, there has been no serious progress at the national level in Myanmar towards prosecuting the perpetrators of those crimes. In the face of national inaction, international initiatives by the International Court of Justice, the International Criminal Court, the independent international fact-finding mission on Myanmar, the Permanent Peoples' Tribunal, the Government of the Gambia and an Argentine court have sought to address the events that led to thousands of deaths and the displacement of more than 700,000 persons in Myanmar.

82. The good practices that have been identified open up opportunities to combat impunity through the use of new capacities and the application of legal criteria that are better aligned with international standards. Expertise built up over time in international criminal law and international human rights law can translate into trials in national jurisdictions of increased sophistication and effectiveness.[87]

83. For example, when a serious human rights violation is not defined as a criminal offence in national law at the time of the events, interpretations of international human rights law can be applied to counter impunity. For example, the notion of the continuous nature of violations, as applied in cases of enforced disappearance, provides an exception to the rule prohibiting the retroactive application of law and to the application of statutory limitations, thus allowing for the prosecution of perpetrators of these crimes even after some time has passed.

# VII. Conclusions

84. **The rendering of accounts is a legal obligation of States that is grounded in international human rights law, and neither political will nor reasons of State can therefore be invoked as justification for failing to fulfil that obligation. A number of international instruments establish the duty to investigate and punish serious violations of human rights and international humanitarian law. Customary international law also establishes the obligation to investigate and punish heinous crimes such as genocide, crimes against humanity and war crimes.**

85. **Above and beyond the legal imperatives, the demands of life in society make the necessity of this clear. It would be unthinkable for societies to punish common offences in order to uphold the rule of law while allowing the most aberrant and heinous crimes to go unpunished.**

86. **The chief expression of the duty of accountability for States in transitional justice processes is the legal obligation to prosecute and punish serious violations while identifying and removing any obstacles or limitations that would prevent it from doing so.**

87. **Accountability is a tool for combating impunity. It entails the imposition of a given penalty pursuant to a final judgment handed down under criminal law; that penalty must be commensurate with the nature of the crime in question and must actually be executed and served. Non-custodial sentences, usually applied in relation to restorative justice proceedings, are useful but cannot take the place of criminal sanctions, which are an end in and of themselves.**

[84] Ibid., para. 54.

[85] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020.

[86] See https://news.un.org/en/audio/2017/09/632872.

[87] A/HRC/36/50/Add.1, para. 49.

88. **The present report documents examples of good practices in the formulation of regulatory frameworks, criminal legislation and institutional mechanisms aligned with international standards that provide a way forward in the pursuit of accountability; national criminal proceedings conducted under universal jurisdiction against former dictators, their collaborators and other perpetrators; and the establishment of permanent, ad hoc or hybrid international criminal tribunals.**

89. **Nevertheless, the approach taken by States to crimes committed in the past has not been uniform. This report has identified instances in which the insufficiency of the action taken or the omission of such action has resulted in situations of total or partial impunity that do not rise to international human rights standards.**

90. **On occasion, the persons responsible for acts of genocide, torture, rape, crimes against humanity, war crimes, enforced disappearances and other aberrant violations of human rights have not been penalized or have been given sentences that are not commensurate with the gravity of their acts. In other cases, convicted perpetrators have later been pardoned or have had their sentences reduced. In many cases, criminal proceedings have not even been instituted.**

91. **In some cases, the insufficiency of the domestic institutional framework has prompted the creation of special bodies or courts of a transitional nature which have nonetheless displayed shortcomings in terms of the length of the sentences that they have issued or the fulfilment and execution thereof.**

92. **Some countries have used a double standard: whereas their courts have exercised universal jurisdiction in properly and successfully prosecuting foreign nationals, offences committed by nationals have gone unpunished, thereby resulting in an unacceptable degree of impunity in the latter instances.**

93. **In some cases, an effort has been made to lower certain standards in order to negotiate political accords. The urgent need to achieve a regime change or the cessation of a conflict has in some instances had a negative impact in terms of accountability and the way in which that principle has been implemented. Although achieving peace and democracy is imperative, impeding accountability runs counter to international law, often consolidates a culture of impunity and violence, and fails to prevent the recurrence of further violations.**

94. **The accountability of perpetrators of gross human rights violations and serious violations of international humanitarian law is an essential pillar of a peaceful, sustainable transition, and the centrality of victims' rights as its guiding principle should be beyond question. Mechanisms for seeking the truth are complements to justice and full redress, not substitutes for them. Impunity for acts committed in the past may open the way for their repetition and the attempted justification/advocacy of similar acts in the future.**

95. **Debates about the adoption of mechanisms that hinder investigation and the imposition of criminal penalties in the interests of other pillars of transitional justice place victims in an unbefitting dilemma in which they have to choose between realizing their right to justice or their right to the truth, thereby asking them to shoulder a very heavy historical burden and, in some cases, even to pardon their malefactors. This is illegitimate, ineffective and revictimizes the victims.**

96. **The Special Rapporteur recalls that reconciliation entails rebuilding trust among the members of society and, above all, their trust in the State. If they are to achieve effective, lasting reconciliation, States in transition need to embrace a holistic process for upholding the five pillars of transitional justice – truth, justice, reparation, guarantees of non-repetition and memorialization – in full consultation with the victims and with civil society.**

# VIII. Recommendations

97. **The Special Rapporteur shares the following recommendation:**

(a) **States should bring alleged perpetrators of gross human rights violations and serious violations of international humanitarian law to judgment and impose**

**appropriate, effective penalties that are proportional to the gravity of the acts in question while ensuring that no obstacles are placed in the way of access to justice or accountability;**

(b) **States should refrain from having recourse to legal, judicial or de facto obstacles to accountability, such as immunities, total or partial amnesties, pardons, the application of statutory limitations or of provisions of non-retroactivity in criminal law, ne bis in idem or res judicata, or dispensations or remissions that are at odds with the determination and execution of a quantum of the sentence, since they run counter to international law;**

(c) **States should refrain from having recourse to exemptions that shield perpetrators from criminal punishment such as: the rule of due obedience, which is not a legally valid defence; the doctrine of command responsibility, which would prevent the judgment of hierarchical superiors that should be held legally liable for violations committed by persons acting under their effective control; or the legal concept of repentance involving the telling of the truth or the recognition of responsibility;**

(d) **States should remove any barrier that could result in immunity or legal protection for Heads of State and other civil servants who are authors of, or linked to, serious violations of human rights and international humanitarian law, including State or diplomatic immunity or any other form of judicial protection;**

(e) **Dispensations or remissions of sentence (including sentence reductions, conditional release and early release) for persons convicted of crimes against humanity should never, under any circumstance, be greater than those granted to persons convicted of ordinary offences and should be in accordance with the criteria established in the Rome Statute for the reduction of sentences for the offences specified therein;**

(f) **Pardons on humanitarian grounds should be permitted only in cases of terminal illness of imminent resolution;**

(g) **The use of house arrest on humanitarian grounds or for health reasons should be granted only when no viable option within the designated place of incarceration exists and then only as a temporary measure until the emergency situation has been resolved;**

(h) **States should not invoke their national laws or any legal lacunae therein as a basis for failing to conduct or for impeding criminal investigations and a rendering of account. If the legal definitions of the relevant offences do not meet international standards, then the necessary and proper legislative amendments should be introduced without delay. In the interim, States should prosecute, investigate and sentence perpetrators on the basis of the legally defined offences that most closely correspond to the punishable acts in question, having recourse to the concurrence of offences where appropriate and applying the greater penalties permitted on the basis of aggravating circumstances;**

(i) **Alleged perpetrators may be brought to trial in national criminal courts, in ordinary, mixed or hybrid criminal courts, or in special transitional justice courts;**

(j) **Military courts should not be permitted to try cases in which the defendants are members of the military or police force, agents of intelligence services or members of paramilitary forces and are accused of committing or participating in serious violations of human rights or of humanitarian law;**

(k) **Judicial proceedings should observe international legal standards of due process for all parties to the proceedings in order to avoid any possibility of annulment that could interfere with justice being done;**

(l) **Such proceedings should not be mere formalities intended to simulate fulfilment of the requirements of the criminal justice system and avoid the invocation of universal jurisdiction or the initiation of proceedings in other international criminal courts with subsidiary competence;**

(m) **Judicial impartiality and independence should be cross-cutting guarantees at all stages of the investigation, proceedings and sentencing. Evidence should be duly processed, the chain of custody should be carefully documented, and**

**confidentiality should be maintained. This entails effective protection programmes for witnesses, victims and their families, which will require inter-agency and, in some cases, international cooperation. States should provide protection for legal counsel, officers of the court and judicial staff;**

(n) **States should provide their full cooperation at the international level in seeing to it that the national criminal court or, alternatively, the international criminal court fulfils its duty of accountability by standing ready to hand over or extradite accused or convicted persons who are in their territory, providing documentation for any and all types of evidence that may be required and furnishing visas and permits so that witnesses may appear in court;**

(o) **States should not provide asylum or protection to persons who have committed or who are accused of having committed serious violations of human rights or humanitarian law in order to shield them from criminal prosecution; if a State does not hand over such a person on the basis of the principle of non-refoulement, the State should put the person on trial in accordance with the international standards identified in this report;**

(p) **Victims should be allowed to participate fully in legal proceedings as complainants and petitioners for comprehensive reparation and in that respect should have untrammeled access to justice;**

(q) **Psychosocial and legal support appropriate to the circumstances in each case should be offered by States to victims and their families before, during and after the proceedings;**

(r) **If violations have been directed at certain persons because they belong to a specific vulnerable group, all the authorities involved in the case should apply a cross-cutting rights-based approach that embodies international standards of effective access to justice and the determination of justifiably differentiated reparations;**

(s) **In order for access to justice to lead to effective accountability, States should promote a wide-ranging, transparent process for the dissemination of information to the public about relevant criminal proceedings in order to ensure that the population is aware of these kinds of proceedings, their structure and their possible benefits for victims, their families, communities and society;**

(t) **The international community, including international organizations and donors, should ensure that countries undergoing transitional justice processes fully discharge their obligation to see to it that the persons responsible for serious violations are held fully accountable and should provide the necessary support to that end;**

(u) **States should consider establishing the principle of universal jurisdiction in their national legal frameworks and/or permitting the exercise of such jurisdiction in their national courts.**