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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights, including  
the right to development****Role and responsibilities of non-State actors in 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 the role and responsibilities of non-State actors in transitional justice processes.

In the report, he examines the normative and conceptual framework underpinning the participation of non-State actors (notably non-State armed groups, but also corporations) in transitional justice processes aimed at redressing the serious human rights violations and abuses in which they were directly or indirectly involved. He further reviews good practices, lessons learned and emerging opportunities regarding their engagement, or lack thereof, in the implementation of measures in the fields of truth, justice, reparation, memorialization and guarantees of non-recurrence to address those violations. He concludes the report with recommendations.



## **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 key activities he undertook between July 2021 and June 2022 and examines the practices and lessons learned in relation to the role and responsibilities of non-State actors in transitional justice processes aimed at addressing gross human rights violations and serious violations of international humanitarian law in transitional settings.

2. The Special Rapporteur held an open consultation with States, international organizations, national human rights institutions and non-governmental organizations to inform the report and convened an expert meeting on the topic, with support from the Instituto Internacional de Responsabilidad Social y Derechos Humanos (International Institute for Social Accountability and Human Rights). He thanks respondents to the questionnaire for their submissions and the participants in the expert meeting for their contributions.<sup>1</sup>

## **II. Activities undertaken by the Special Rapporteur**

3. On 19 July 2021, the Special Rapporteur participated of a special session of the Commission on Human Rights and Indigenous Peoples of the Chamber of Deputies of the National Congress of Chile on the right to reparation and guarantees of non-repetition in Chile.

4. On 17 and 18 August, he participated remotely in a seminar on transitional justice capacity-building for State actors in Kinshasa.

5. On 15 and 16 September, he participated in the forty-eighth session of the Human Rights Council and met with representatives from some permanent missions and with other special procedure mandate holders.

6. On 26 October, he participated in the seventy-sixth session of the General Assembly and held a meeting with the Special Adviser to the Secretary-General on the Prevention of Genocide.

7. On 27 October, he met in New York with representatives of the Peacebuilding Support Office and participated in side events on the experience in Kenya of transitional justice and the legacy of serious human rights violations in colonial contexts, and on racial violence and colonial accountabilities.

8. On 4 November, he participated by video link in a panel discussion at the Northern Ireland Assembly on the Northern Ireland legacy proposals of the Government of the United Kingdom of Great Britain and Northern Ireland and the rule of law.

9. From 15 November to 14 January 2022, he held an online consultation to gather information for the preparation of the present report.

10. On 23 and 24 November, he participated remotely in a series of training seminars on transitional justice for magistrates, held in Kinshasa and Goma, Democratic Republic of the Congo.

11. On 25 November, he participated by video link in the third international conference on Action with Women and Peace, organized in Seoul by the Ministry of Foreign Affairs of the Republic of Korea.

12. From 26 November to 3 December, he conducted an official country visit to Croatia.

13. From 3 to 10 December, he conducted an official country visit to Bosnia and Herzegovina.

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<sup>1</sup> The Special Rapporteur also thanks Professor Kieran McEvoy and Daniela Suárez Vargas of Queen's University Belfast for their research on and analysis of the topic.

14. From 12 to 14 December, he participated in a seminar held in Vatican City on the rights of alleged victims of sexual abuse as minors in canonical penal procedures, organized by the Pontifical Commission for the Protection of Minors.
15. On 3 March 2022, he participated remotely in the Minnesota Journal of International Law Symposium entitled “Reflecting on the 60th Anniversary of the Eichmann Trial: Contemporary Impacts”.
16. On 7 March, he participated remotely in a session held in Brussels of the special parliamentary commission on the colonial past of Belgium on the Congo.
17. On 10 March, he convened an expert meeting to gather information for the present report.
18. On 14 March, he participated by video link in the first national meeting of victims of serious human rights violations in the Plurinational State of Bolivia.
19. From 24 March to 25 April, he held an online consultation on the impact of people- and victim-centred transitional justice measures on progress towards reaching the Sustainable Development Goals in post-authoritarian and post-conflict settings.
20. On 24 March, he participated by video link in a consultation on transitional justice in Ethiopia, organized by the Ethiopian Human Rights Commission and the Office of the United Nations High Commissioner for Human Rights (OHCHR).
21. On 29 April, he participated remotely in a workshop for civil society organizations on victims’ and stakeholder’s consultations on accountability in the Democratic People’s Republic of Korea, organized by OHCHR.
22. On 24 May, he convened an expert meeting on the topic of advancing the Sustainable Development Goals through people- and victim-centred transitional justice processes.
23. From 8 to 15 June, he conducted an official country visit to the Republic of Korea.
24. On 23 and 24 June, he participated in the international expert working meeting on disappeared persons and dealing with past processes, organized by the Government of Switzerland, the Swiss Peace Foundation and OHCHR.

### III. General considerations

25. There are different types of non-State actors that have been responsible for serious violations of human rights and humanitarian law and that can legitimately be considered within the purview of transitional justice. They may include corporations and private sector organizations, non-State armed groups and other civil society organizations, including religious institutions and non-governmental organizations, or indeed criminal gangs.<sup>2</sup> While each is worthy of its own specific analysis, the present report focuses initially on corporations and the private sector, followed by the main analysis of non-State armed groups.
26. The Special Rapporteur is aware that distinctions between State and non-State actors can become blurred and that States sometimes use non-State actors or indeed mercenaries as proxy agents to carry out human rights violations.<sup>3</sup> He is also mindful that different types of collusive relations are sometimes formed between State and non-State actors during periods of conflict or authoritarianism, including State officials turning a blind eye to such violations when they have a legal responsibility to prevent them. The international responsibility of the State arises for acts committed by non-State actors with State acquiescence, or when the State fails to act with due diligence. In focusing on non-State actors, justice or truth-seeking

<sup>2</sup> See, e.g., Philip Alston, ed., *Non-State Actors and Human Rights* (Oxford University Press, 2005); and James Gallen, “The European Court of Human Rights, transitional justice and historical abuse in consolidated democracies” *Human Rights Law Review*, vol. 19, No. 4 (2019).

<sup>3</sup> Ruth Jamieson and Kieran McEvoy, “State crime by proxy and juridical othering”, *British Journal of Criminology*, vol. 45, No. 4 (2005).

processes in particular should always investigate lines of accountability between State and non-State actors.

27. Across all of the areas of transitional justice work discussed below, the approach advocated is both victim-centred and gender-sensitive.

#### **A. Victim-centred approach to transitional justice and non-State actors**

28. As the Special Rapporteur has noted previously, a victim-centred approach to transitional justice places primary emphasis on the rights, agency and perspectives of victims.<sup>4</sup> What this means in practice is that any transitional justice process must ensure that the rights of victims are central in the design and delivery of all aspects of transitional justice. In addition, victims cannot be pressurized into engaging in transitional justice processes in the name of reconciliation or other larger social goals.

#### **B. Gendered perspective on transitional justice and non-State actors**

29. The Special Rapporteur has previously dedicated a thematic report on how to adopt a gendered perspective across all aspects of transitional justice.<sup>5</sup> It requires that gender be considered at all stages of transitional justice, recognizing the gendered nature of past harms and ensuring that gender inequalities are not perpetuated, but rather that they be rooted out, through transitional justice.<sup>6</sup>

### **IV. Corporations, private sector organizations and transitional justice**

30. It is essential for States and international actors to pursue accountability for corporations and businesses for gross abuses committed during periods of armed conflict or authoritarian rule. As the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises argued in 2011, “the most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence”.<sup>7</sup>

31. Other United Nations human rights mechanisms have addressed issues relating to the role of corporations and transitional justice. The Working Group on the issue of human rights and transnational corporations and other business enterprises has linked the right to an effective remedy under international human rights law to corporate violations and set out benchmarks by which corporate accountability should be measured. In a 2020 report on conflict-affected regions, it noted that businesses should engage with relevant transitional justice processes and contribute to truth, justice, reparation and guarantees of non-recurrence where appropriate.<sup>8</sup>

32. In one of its 2022 reports, the Working Group stressed that transitional justice should engage with the full range of forms of complicity by businesses in human rights abuses and duly consider “corporate governance failures that led to, facilitated or failed to stop their involvement in human rights abuse”. It recalled that, while international law normally places the burden for providing remedies on States, the Guiding Principles on Business and Human Rights clarify that when a business has caused or contributed to a harm, it too has a responsibility to secure remedies for victims. In relation to such efforts, all four components of transitional justice need to be recognized as an integral part of the implementation of the

<sup>4</sup> [A/74/147](#).

<sup>5</sup> [A/75/174](#).

<sup>6</sup> Yasmine Ahmed and others, “Developing gender principles for dealing with the legacy of the past”, *International Journal of Transitional Justice*, vol. 10, No. 3 (2016).

<sup>7</sup> [A/HRC/17/32](#), p. 1.

<sup>8</sup> [A/75/212](#), para. 85.

third pillar of the United Nations “Protect, Respect and Remedy” Framework on access to effective remedies. Guidelines in that regard are contained in the annex to that report.<sup>9</sup>

33. Several States have used transitional justice mechanisms to address the direct and indirect responsibility of businesses for human rights abuses committed in conflict and authoritarian settings. A relevant study reviewed the work of 39 truth commissions and noted that 59 per cent of them have addressed issues of corporate responsibility in serious rights violations, with 223 commissions naming over 329 companies.<sup>10</sup> Substantive findings from some of these commissions have helped to provide a comprehensive narrative of the violations committed, the structures (including corporate) that facilitated the abuses and the actors that directly or indirectly enabled and benefited from them, as well as offering recommendations regarding reparations (including from corporations) owed to victims.

34. For example, the South African Truth and Reconciliation Commission concluded that certain businesses, particularly the mining industry, were involved in helping design and implement policies of apartheid and that the apartheid regime would not have survived without the business support of certain multinational companies, such as IBM and Ford.<sup>11</sup> The Truth and Reconciliation Commission of Liberia found that warring factions gained de facto control over timber and mining sectors, illegally transferring authority to corporations to exploit resources, and that corporations engaged in joint ventures with perpetrators of gross human rights violations.<sup>12</sup> The Project for the Recovery of Historical Memory in Guatemala, initiated by the Guatemalan Archbishop’s Human Rights Office, documented how large-scale agricultural entrepreneurs seized communal lands during the conflict there.<sup>13</sup>

35. There are both positive and negative lessons to be drawn from these and related truth-seeking efforts. On the positive side, a truth commission examining the role of corporations facilitates a more holistic narrative of conflict and repression.<sup>14</sup> In addition, the power to “name names” with regard to particular companies may provide the basis for future legal redress. Furthermore, greater awareness of past corporate roles in abuses can help transitional States avoid repeating mistakes concerning the regulation of corporations.

36. However, a number of challenges have undermined corporation-facing truth recovery. A key difficulty for truth commissions is how to incentivize corporations to take part. In many instances, businesses simply refuse to participate.<sup>15</sup> Shell and British Petroleum, the largest apartheid-era foreign investors in South Africa, did not even respond to the Commission’s invitation to participate.<sup>16</sup>

37. Several truth commissions recommended that businesses contribute to reparations programmes. The South African Truth and Reconciliation Commission recommended the introduction of a wealth tax and business contributions to a reparations fund, but did not include recommendations on how individual businesses should provide reparation. The Liberian Truth and Reconciliation Commission recommended the creation of a reparation trust fund to compensate victims of economic crimes funded through tax arrears from businesses, legal proceedings and asset freezing and recovery.<sup>17</sup>

38. However, the commissions have often failed to ensure delivery of reparations for victims. For example, the South African Truth and Reconciliation Commission did not have

<sup>9</sup> A/HRC/50/40/Add.4, paras. 8, 11–12 and 22, and annex, paras. 11–12.

<sup>10</sup> Leigh A. Payne, Gabriel Pereira and Laura Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below: Deploying Archimedes’ Lever* (Cambridge University Press, 2020).

<sup>11</sup> Truth and Reconciliation Commission of South Africa Report (1998), vol. 4, chap. 2. Available at <https://www.justice.gov.za/TRC/report/finalreport/Volume%204.pdf>.

<sup>12</sup> Truth and Reconciliation Commission of Liberia (2005) “Volume Three: Appendices – Title III: Economic crimes and the conflict, exploitation and abuse”, paras. 3–4 and 135–136. Available at [https://www.trcofliberia.org/resources/reports/final/volume-three-3\\_layout-1.pdf](https://www.trcofliberia.org/resources/reports/final/volume-three-3_layout-1.pdf).

<sup>13</sup> Arzobispado de Guatemala, Oficina de Derechos Humanos, *Guatemala: Nunca Más*, Proyecto Interdiocesano de Recuperación de la Memoria Histórica, 1998, p. 207. Available at <http://www.odhag.org.gt/publicaciones/remhi-guatemala-nunca-mas/>.

<sup>14</sup> Irene Pietropaoli, *Business, Human Rights and Transitional Justice* (Routledge, 2020).

<sup>15</sup> Truth and Reconciliation Commission of South Africa Report, vol. 4, chap. 2, pp. 18–19.

<sup>16</sup> *Ibid.*, p. 18.

<sup>17</sup> A/HRC/50/40/Add.4, paras. 38–39.

the power to compel corporations to provide reparations, and corporate tax recommendations were never enacted.<sup>18</sup> The Commissions in Liberia and Timor-Leste had similar experiences.

39. In several cases, business participation in reparation processes has included conditions, such as immunity from criminal or civil litigation, failed to acknowledge corporate responsibility or has been wrongly conflated with development or construction assistance. The Working Group noted that reparations relate to the obligation to redress harm caused to victims by businesses and should be clearly distinguished from other forms of remedies, such as voluntary contributions to reconstruction or corporate social responsibility, as the latter do not entail admission of responsibility. Reparations imposed on or established by business must include all reparative measures (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition), must be accompanied by the acknowledgment of wrongdoing and must not be conditional on immunity from legal liability.<sup>19</sup>

40. With regard to the justice component of transitional justice, there have been efforts to use criminal prosecutions to hold corporations accountable for past violations. At the international level, while Article 25 of the Rome Statute of the International Criminal Court limits the jurisdiction of the Court to “natural persons”, two former International Criminal Court prosecutors have indicated a willingness to undertake prosecutions for environmental destruction, illegal exploitation of natural resources and land confiscation. In application of universal jurisdiction, criminal trials have been held in France, the Netherlands and Sweden against corporations’ executives for their complicity in war crimes in Liberia, the Sudan and the Syrian Arab Republic.<sup>20</sup>

41. In some instances, “home States” of businesses involved in abuses have supported transitional justice processes in transitioning States by conducting domestic criminal prosecutions, providing mutual legal assistance to the States where business abuse was committed and removing barriers to transnational civil litigation for those abuses. Home states should consider engaging in these practices, while respecting the processes and policy choices of the transitioning State.<sup>21</sup>

42. In the domestic context, there has been more progress. Corporations were initially included within the Special Jurisdiction for Peace in Colombia. However, this was ultimately declared to be unconstitutional by the Colombian Constitutional Court. While that decision limited the capacity of the Special Jurisdiction to investigate corporations as perpetrators, it has demonstrated imagination in its consideration of who can be considered a victim. In what some commentators have referred to as the “greening of transitional justice”,<sup>22</sup> since 2019 it has passed five resolutions recognizing the territories of indigenous peoples and black communities as victims of the conflict in Colombia – a judicial acknowledgement of the fact that conflicts inflict harm on the natural world as well as individuals and communities.<sup>23</sup>

43. An academic study has established a database of domestic criminal prosecutions for corporate violations of human rights. It found that the largest number of cases were before the Argentinian and Colombian domestic courts.<sup>24</sup> They have included successful prosecutions of senior officials in the Ford company over corporate participation in crimes against humanity in Argentina.<sup>25</sup> In Colombia, there have also been emblematic prosecutions against a United States mining company, a livestock firm and a palm oil company for

<sup>18</sup> Christopher Colvin, “Overview of the reparations program in South Africa”, in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford University Press, 2006).

<sup>19</sup> A/HRC/50/40/Add.4, para. 73, and annex, paras. 6–8 and 15.

<sup>20</sup> A/HRC/50/40/Add.4, para. 34.

<sup>21</sup> *Ibid.*, paras. 75–77.

<sup>22</sup> Rachel Killean and Lauren Dempster, “‘Greening’ transitional justice?”, in *Beyond Transitional Justice*, Matthew Evans, ed. (Routledge, 2022).

<sup>23</sup> Rachel Killean, “Environmental restorative justice in transitional settings”, in *The Palgrave Handbook of Environmental Restorative Justice*, Brunilda Pali, Miranda Forsyth and Felicity Tepper, eds. (forthcoming).

<sup>24</sup> Payne, Pereira and Bernal-Bermúdez, *Transitional Justice and Corporate Accountability from Below*.

<sup>25</sup> See <https://www.argentina.gob.ar/noticias/dos-anos-del-veredicto-en-la-causa-ford>; and Nelson Camilo Sánchez, *Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America* (Global Initiative for Justice, Truth and Reconciliation, 2021).

involvement with right wing paramilitaries in murders, disappearances and kidnapping of trade union activists and workers, as well as the forced displacement of Afro-Colombian families from their lands.<sup>26</sup> As criminal responsibility applies to individual perpetrators, attention must be placed on ensuring that criminal proceedings adequately capture the structures that facilitated corporate abuses.

44. The personnel of corporations or the companies themselves may also be held accountable through civil proceedings. In some cases, civil litigation or related out-of-court settlements have led to compensation provided to victims or the adoption of reparation programmes. However, several challenges were identified, including the application of short statutes of limitations to civil claims, the incorporation of confidentiality agreements and the failure to acknowledge corporate wrongdoing as part of such settlements. For example, as noted by the Working Group, the settlement between the victims and Volkswagen Brazil was criticized for failing to include acknowledgement of wrongdoing, measures of satisfaction or memorialization activities.<sup>27</sup>

45. Concerning guarantees of non-recurrence, the Working Group has noted that measures to prevent corporate abuse must be given due consideration as they relate to the prevention and mitigation focus of the Guiding Principles on Business and Human Rights. They could entail reforming corporate governance regulations and policies, conducting human rights education programmes with a business focus, assessing the linkages between corruption and human rights abuses, introducing corporate criminal liability in States where it does not exist, or even the dissolution, sale or exclusion of a business or businesses from public procurement processes.<sup>28</sup>

46. The Special Rapporteur stresses that transitional justice processes must address corporate responsibility for serious human rights abuses and must be provided with legal powers and resources to undertake this task and ensure that businesses engage in the processes. Truth commissions should assess businesses' direct and indirect responsibilities for violations, identify the structures and actors that enabled and benefited from them and provide recommendations for the businesses' engagement in remedying the harm inflicted. Reparations provided by businesses should include full reparative measures and acknowledgement of wrongdoing and must not be conditional upon immunity from legal liability. Voluntarism and corporate social responsibility frameworks, while also needed, are not a substitute for corporate legal obligations to provide remedy for past harms. Corporations must be held accountable for the abuses committed, through criminal prosecutions against alleged individual perpetrators and through civil litigation against those individuals and the companies.

## V. Transitional justice and non-State armed groups

47. In 2021, the International Committee of the Red Cross estimated that there are over 600 armed groups around the world with the capacity to cause violence, at least 100 of which can be considered parties to a non-international armed conflict under international humanitarian law.<sup>29</sup> At any given moment, dozens of other groups are engaging with transitional justice processes in societies at different stages of a transition from conflict or authoritarianism. The present report is designed to assist such processes.

### A. Relevant international legal frameworks

48. As noted, the legal frameworks which normally govern the conduct of non-State armed groups are international humanitarian law, international human rights standards and

<sup>26</sup> Sánchez, *Roles and Responsibilities of the Private Sector in Transitional Justice Processes in Latin America*.

<sup>27</sup> [A/HRC/50/40/Add.4](#), paras. 28–29 and 36.

<sup>28</sup> *Ibid.*, paras. 43–45, and annex, paras. 45–48.

<sup>29</sup> Bruno Demeyere, “Editorial, non-State armed groups”, *International Review of the Red Cross*, No. 915 (2022).

international criminal law. In addition, it is possible to argue that there are a number of specific gender-related legal developments that are also of direct relevance for non-State armed groups.

### 1. International humanitarian law

49. International humanitarian law has long been the primary regulatory framework for addressing the conduct of non-State armed groups in conflict. In broad terms, its basic premise is that, in situations of armed conflict, non-State armed groups have direct obligations under common article 3 of the Geneva Conventions of 1949 and Protocol II Additional thereto which are analogous to those of a State involved in such conflicts.<sup>30</sup> According to article 1 (1) of Protocol II Additional to the Geneva Conventions of 1949, non-State armed groups are considered to be a party to a non-international armed conflict when they have the military and organizational capability to implement the Protocol. In broad terms, international humanitarian law prohibits a range of actions in conflict, including the deliberate killing of civilians, torture, collective punishment, the taking of hostages, rape or enforced prostitution, slavery, pillage, the recruitment of children, the mistreatment of prisoners, captured or wounded combatants and other offences.<sup>31</sup> International humanitarian law therefore provides a well-established legal framework for the design of transitional justice processes to address such harms.

### 2. International human rights standards

50. The application of human rights standards to the actions of non-State armed groups is more complex.<sup>32</sup> Historically, human rights law has been regarded as applying only to States. However, from the late 1980s onwards, a norm has gradually evolved that where non-State armed groups control a territory and fulfil State-like functions, they can be held to a minimum of accountability under international human rights law.<sup>33</sup> OHCHR has stated clearly that its policy is to hold armed groups accountable in circumstances where they exercise “some degree of control over a given territory and population”.<sup>34</sup> In situations as diverse as those in Afghanistan, the Democratic Republic of the Congo, El Salvador, Sri Lanka, the Sudan, and the situation in the Gaza Strip, international bodies have recognized that non-State armed groups must observe human rights standards in the territories under their control, including in terms of health, education and complaints of human rights violations from civilians.<sup>35</sup> International human rights standards may therefore provide transitional justice with a broader accountability framework for addressing non-State armed groups’ violations than the narrower focus of international humanitarian law.

### 3. International criminal law

51. A central tenet in the evolution of international criminal law is that individual non-State armed group members can be held individually responsible for the commission of international crimes including war crimes, crimes against humanity and genocide, as well as breaches of domestic criminal codes.<sup>36</sup> Furthermore, Article 75 (2) of the Rome Statute

<sup>30</sup> See Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman: Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, Case No. SCSL-2004-14-AR72(E), 31 May 2004, para. 22.

<sup>31</sup> Geneva Conventions of 12 August 1949, art. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. 4–5 and 7.

<sup>32</sup> Nigel Rodley, “Can armed opposition groups violate human rights?”, in *Human Rights in the Twenty-first Century*, Kathleen Mahoney and Paul Mahoney, eds. (Martinus Nijhoff, 1993); and David Petrasek, *Ends and means: human rights approaches to armed groups* (International Council on Human Rights Policy, 2000).

<sup>33</sup> Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017).

<sup>34</sup> OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (HR/PUB/11/01), p. 25.

<sup>35</sup> Fortin, *The Accountability of Armed Groups Under Human Rights Law*.

<sup>36</sup> The International Criminal Court has opened 30 cases, 15 of them against individual non-State armed group members for crimes committed in conflict, with five individuals convicted to date. Individual



provides that the International Criminal Court may order non-State armed group members convicted of crimes within its jurisdiction to provide reparations to the victims of those crimes.<sup>37</sup>

#### 4. Women and peace and security agenda

52. A final route to the framing of non-State armed groups' engagement within transitional justice may be found in the women and peace and security agenda. Since Security Council resolution 1325 was adopted in 2000 (and updated in a series of subsequent resolutions), conflicting parties to a conflict have had specific obligations to prevent violations of women's rights, to support the participation of women in peace processes and to protect women and girls from sexual violence.<sup>38</sup> These obligations fall on both State and non-State actors involved in conflict. While the agenda has been justifiably criticized for being patriarchal and casting women as passive victims, it does provide a framework for encouraging gender-sensitive approaches to transitional justice.

### B. Definition of non-State armed groups

53. Within the international humanitarian law framework, emphasis is placed upon armed groups which, under responsible command, exercise such control over a part of a territory as to enable them to carry out sustained and concerted military operations and to implement Protocol II Additional to the Geneva Conventions of 1949.<sup>39</sup> The International Criminal Court has questioned whether the control of territory is actually required and instead suggested a focus on a non-exhaustive range of factors required in order for international humanitarian law obligations to be triggered. They include the group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, is available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness and intensity of any military involvement.<sup>40</sup> Relevant case law from international human rights law also includes a focus on the extent to which an armed group is unified enough for it to be bound by human rights law, its level of organization, whether it has a law enforcement or dispute resolution system and whether it has bureaucratic structures for civilians (e.g. health care, education, a system for officiating over weddings, etc.).<sup>41</sup>

54. Based on the review of a broad range of legal and academic sources, a "non-State armed group" is defined for the purposes of the present report as an illegal entity under domestic law that is currently or has previously been engaged in armed violence, has some degree of de facto command structure and the capacity to control the actions of its individual members and that, where it is exercising a governance function over civilian populations, is capable of administering such functions in compliance with international human rights standards.

### C. Truth seeking

55. Over recent decades, the main mechanism for upholding the right to truth in transitional justice processes has been truth commissions. Truth commissions are officially sanctioned, temporary investigative bodies which are usually established to examine the

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non-State armed group members have also been prosecuted before the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

<sup>37</sup> Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press, 2018).

<sup>38</sup> Laura Shepherd, *Narrating the Women, Peace and Security Agenda* (Oxford University Press, 2021).

<sup>39</sup> E.g., Protocol II Additional to the Geneva Conventions of 1949, art. 1.

<sup>40</sup> International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 537.

<sup>41</sup> Fortin, *The Accountability of Armed Groups Under International Human Rights Law*, pp. 159–160.

causes, context and consequences of past human rights violations.<sup>42</sup> Although different truth commissions have had different operating procedures, their work usually involves conducting research and investigations into past human rights violations, taking statements from victims or others, holding hearings, either in public or in private, and producing a report on their findings.<sup>43</sup> Although they are frequently described as non-judicial bodies, they are in fact creatures of law, often established by national statutes and, of course, requiring lawful, fair and effective practices in how they conduct their work to ensure that the rights of all of those with whom they engage are properly respected. Given that they are supposed to be explicitly victim-centred transitional mechanisms, a central challenge is how truth commissions maximize the capacity for effective truth recovery from non-State armed groups and their former members.

56. To ensure the fairness of the working practices of truth commissions, they should be guided by the principles of independence, impartiality, accountability, competence, transparency, proportionality, dignity, accessibility and good faith.<sup>44</sup> The Special Rapporteur believes that these principles offer a good general basis for the engagement of any truth commission in considering how to manage relations with non-State armed groups, former non-State armed groups and their individual members.

57. An obvious issue for any truth commission seeking the cooperation of non-State armed groups or their members or former members is whether any information provided can be used for prosecutorial purposes. In some instances, as was the case in Haiti, Peru, Timor-Leste and Uganda, the mandate of the truth commissions required that files concerning certain criminal acts be transferred to the relevant police or prosecutorial authorities with a view to future prosecutions.<sup>45</sup>

58. The Special Rapporteur notes that in circumstances where those providing information to a truth commission may be vulnerable to subsequent prosecution, due process requires that they are aware of the risks and that they make an informed choice as to whether to volunteer such information, having taken appropriate legal advice. Apart from possible prosecutions, all of those who provide information to a truth commission should give explicit consent to all possible future uses of their statement, including whether their name or extracts from the statement can appear in the final report.

59. More generally, truth commissions are also required to consider whether they will name individual perpetrators. Different commissions have different practices in this regard. The South African Truth and Reconciliation Commission was mandated to name individual perpetrators, as did the commissions in Chad and El Salvador, while the Guatemalan Historical Clarification Commission (Comisión de Esclarecimiento Histórico) and the Moroccan Equity and Reconciliation Commission (Instance Équité et Réconciliation) did not.<sup>46</sup> There may be arguments for a sliding scale concerning the naming of names, taking into account the seriousness of the offences under consideration, the level of responsibility of those involved (e.g. foot soldiers versus those in command and control positions) and the risks of death or serious injury for both perpetrators and victims in the community.

60. Apart from the significant legal arguments concerning the naming of individual ex-combatants or State actors, there are other arguments which are of direct relevance to the focus of the present report. There is a strong argument that if a truth commission focuses disproportionately upon the attribution of individual culpability, it may risk obscuring broader organizational, political or institutional responsibility for past atrocities. Truth commissions are the obvious vehicle for investigating the extent to which non-State armed groups have planned and utilized strategies that deliberately break international humanitarian

<sup>42</sup> OHCHR, “Rule-of-law tools for post-conflict States: truth commissions”, New York and Geneva, 2006; and Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (Routledge, 2011).

<sup>43</sup> Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press, 2016).

<sup>44</sup> Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), p. 132, and [A/HRC/24/42](#).

<sup>45</sup> Freeman, *Truth Commissions and Procedural Fairness*, pp. 172–173.

<sup>46</sup> Hayner, *Unspeakable Truths*.

or human rights law, such as ethnic or sectarian cleansing of particular territories, the targeting of civilians, the use of sexual violence or kidnapping as a weapon of war, the recruitment and utilization of child soldiers and so forth.

61. If properly constituted, truth commissions usually focus on themes, patterns and levels of organization and authorization when investigating human rights violations by State agencies in order to challenge the “few bad apples” denial strategies that are so often deployed by such human rights abusing States.<sup>47</sup> The position is exactly the same for non-State armed groups or indeed non-State entities, including corporations. Truth commissions can obviously ascertain whether such violations were indeed part of a broader organizational strategy rather than the aberrational behaviour of a few organizational members. They can also examine the nature of any collusive relations between State agencies and such organizations and can again ascertain such collusive relations. Once organizational responsibility has been allocated appropriately, they can in turn, in conjunction with other institutions such as reparations programmes, recommend how both non-State and State responsibilities should be addressed.

62. By definition, in addressing past human rights and humanitarian law violations, truth commissions tend to divide people into two distinct categories – victims and perpetrators. In some instances, that distinction has been maintained rather rigidly. For example, the Peruvian truth commission focused almost entirely on testimony from victims and civil society groups and refused to hear testimony from former non-State armed group members.<sup>48</sup> It also explicitly excluded the possibility of recognizing ex-combatants as victims of the conflict, making them ineligible for reparations. Similarly, some former non-State armed group members in South Africa felt that the Truth and Reconciliation Commission focused on civilian victims and refused to take on board the fact that ex-combatants themselves, including those who applied for amnesty, were also victims of the systemic racism of the apartheid regime.<sup>49</sup>

63. The reality, of course, is that many ex-combatants, non-State armed group members and former members may be both victims and perpetrators. Ex-combatants have often suffered torture, discrimination or other human rights violations at the hands of the State, rival non-State armed groups or indeed the non-State armed groups to which they belong, and truth commissions must be capable of capturing that reality. Some have done so quite successfully. For example, the truth and reconciliation commissions of Liberia and Sierra Leone both placed strong emphasis on the experiences of children who had been forcibly recruited by non-State armed groups.<sup>50</sup> In Timor-Leste, the Commission for Reception, Truth and Reconciliation (Commission vérité, accueil et réconciliation) set up the innovative Community Reconciliation Process to hold truth and reconciliation hearings, and many of the participants were ex-combatants who had been forcibly recruited by the pro-Indonesian militias.<sup>51</sup>

64. In Colombia, under the peace agreement between the Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (Revolutionary Armed Forces of Colombia – People’s Army) (FARC-EP) and the State, a Truth and Reconciliation Commission was established.<sup>52</sup> Between 2019 and 2020, the Commission held approximately

<sup>47</sup> Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity Press, 2001).

<sup>48</sup> Ron Dudai, “Closing the gap: symbolic reparations and armed groups”, *International Review of the Red Cross*, vol. 93, No. 883 (2011).

<sup>49</sup> South African Truth and Reconciliation Commission, Amnesty Hearing, Application No. AM7033/97, 5 October 1999. Available at <https://sabctr.saha.org.za/hearing.php?id=53739&t=robert+mcbride&tab=hearings>; and Hugo van der Merwe and Guy Lamb, “Transitional justice and DDR: the case of South Africa”, Research Unit, International Center for Transitional Justice, June 2009.

<sup>50</sup> Philip Cook and Cheryl Heykoop, “Child participation in the Sierra Leonean Truth and Reconciliation Commission”, in *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, Sharanjeet Parmar and others (eds.) (Human Rights Program, Harvard Law School, 2010).

<sup>51</sup> Piers Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation* (UNDP Timor-Leste, 2004).

<sup>52</sup> Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace, ratified on 29 and 30 November 2016, sub-sect. 5.1.1.1.

15 collective interview sessions with former FARC-EP members.<sup>53</sup> The focus of the interviews included FARC-EP human rights and humanitarian law violations carried out within particular territorial blocks, and how participants could take responsibility for such violence and its impact on victims and communities.<sup>54</sup> Discussions also covered the impact of the conflict on the ex-combatants themselves and their families. In 2020, during an “act of recognition of the truth” promoted by the Truth and Reconciliation Commission, FARC-EP former Commander-in-Chief Rodrigo Londoño (known as Timochenko) accepted responsibility for the massacre in the village of Bojayá and offered public apologies to the Afro-Colombian communities who were its primary victims.<sup>55</sup> Similarly, in 2021, Mr. Londoño and Salvatore Mancuso – former commanders of the umbrella organization of paramilitary groups Autodefensas Unidas de Colombia (United Self-Defence Forces of Colombia), currently in prison in the United States of America – participated in an online meeting with victims organized by the Commission. Both former non-State armed group leaders addressed a range of issues, including their respective relationships with the political establishment and particular targeting strategies, including the use of landmines by FARC-EP, their targeting of local politicians and massacres by Autodefensas Unidas de Colombia of the populations of indigenous villages they deemed sympathetic to FARC-EP. Mr. Londoño said: “We are on this path for the victims. We are doing our best for non-repetition.” Mr. Mancuso stated that he wanted to spend the rest of his days restoring the dignity of the territories in which he had been and their communities and that “the best way to acknowledge and ask for forgiveness is by doing”.<sup>56</sup>

65. The final issue to address is the utility of internal truth-seeking processes facilitated by non-State armed groups themselves.

66. The best-known internal truth-seeking processes established by a non-State armed group were those established by the African National Congress to look into allegations of human rights abuses in camps run by its military wing (Umkhonto we Sizwe – MK) outside of South Africa during the anti-apartheid struggle. Three such Commissions were established: the Stuart Commission 1984, which never published its report, the Skweyiya Commission and the Motsuenyane Commission,<sup>57</sup> each with increased levels of independence from the African National Congress. Cumulatively, these commissions documented widespread human rights abuses in the camps by Umkhonto we Sizwe’s internal security units, including executions and torture. The African National Congress accepted the findings of the commission, took “collective responsibility” and issued a public apology.<sup>58</sup> The two published reports also became useful resources for the South African Truth and Reconciliation Commission when it too examined the issue of abuses in the camps, finding the African National Congress responsible for gross human rights violations.<sup>59</sup>

67. In conclusion, the Special Rapporteur notes that non-State armed groups and ex-combatants have a legal, political and moral duty to engage with truth-seeking initiatives concerning their involvement in past violations of humanitarian and human rights law. If those providing information may be vulnerable to subsequent prosecution, they should be made aware of the risks and make an informed choice to participate. Truth commissions need to be designed in such a way that they capture the experiences of ex-combatants as both

<sup>53</sup> See <https://comisiondelaverdad.co/actualidad/noticias/asi-avanza-el-proceso-de-escucha-al-colectivo-farc>.

<sup>54</sup> Ibid.

<sup>55</sup> See <https://www.aa.com.tr/es/mundo/-bojay%C3%A1-es-algo-que-vamos-a-cargar-toda-la-vida-l%C3%ADder-de-farc-en-acto-por-la-verdad-del-pueblo-negro-en-colombia/2074309> (in Spanish).

<sup>56</sup> See <https://comisiondelaverdad.co/actualidad/noticias/mancuso-y-londono-reconocieron-sus-responsabilidades-ante-las-victimas>; and <https://www.pares.com.co/post/pasos-hacia-la-verdad-encuentro-entre-mancuso-y-londo%C3%B1o-en-la-comisi%C3%B3n-de-la-verdad> (in Spanish).

<sup>57</sup> *Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees* (Skweyiya Commission) (1992); and “‘Justice for all?’ An independent assessment of the African National Congress (ANC) sponsored Motsuenyane Commission of Inquiry into ANC external detention centres” (1993).

<sup>58</sup> Dudai, “Closing the gap”.

<sup>59</sup> Alex Boraine, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission* (Oxford University Press, 2000), pp. 308–312.

perpetrators and victims. Where internal non-State armed groups investigations have previously been conducted, these may be useful for truth commissions in collecting information and holding non-State armed groups to account.

#### D. Accountability

68. Individual members of non-State armed groups have long been held accountable through domestic courts. However, in recent decades they have also been the subject of prosecutions by ad hoc international tribunals such as the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, hybrid tribunals such as the Special Court for Sierra Leone and, of course, the International Criminal Court.

69. Often a key prosecutorial strategy before international tribunals in particular is to punish those deemed most responsible for such abuses, to focus on leaders, planners and strategists rather than only the foot soldiers who carry out such atrocities. Under the doctrine of command responsibility (also called superior responsibility), the leaders of non-State armed groups can be held criminally responsible for the crimes of their subordinates.<sup>60</sup>

70. There are broadly two ways in which non-State armed group leaders can be prosecuted using command responsibility.<sup>61</sup> One is where a leader has directly ordered such violations. The other is essentially one of omission, where a commander has failed “to exercise due diligence in order to prevent a specific unlawful act or to repress unlawful conduct”.<sup>62</sup> Of course, non-State armed groups have varying levels of formal hierarchal ranks. In determining when command responsibility is triggered, the standard to be applied is actual authority rather than formal position.<sup>63</sup> In addition, for a commander of a non-State armed group to be held accountable, it is required that the commander “knew or that the totality of the circumstances may establish that the leader must have known that the subordinate was committing, was about to commit or had committed unlawful acts”.<sup>64</sup>

71. In addition to the accountability of individual non-State armed group leaders, in international or national trials, non-State armed groups can effectively be held organizationally responsible for serious breaches of humanitarian or human rights law. Such trials can determine that a non-State armed group has been involved in a particular pattern of abuses such as deliberate attacks on civilians, ethnic cleansing, the use of sexual violence, the recruitment of child soldiers or other violations, and indeed can order appropriate reparations.<sup>65</sup> By way of illustration, the Special Jurisdiction for Peace in Colombia has issued a number of judgments against FARC-EP leaders finding the organization guilty of kidnapping, recruitment of children, crimes in the Uraba region, and the assassination of a religious leader. Similarly, in 2021, the tribunal indicted eight FARC-EP leaders for war crimes and crimes against humanity in the kidnapping and hostage-taking case.<sup>66</sup>

72. In some cases, amnesties and immunities are granted to members of non-State armed groups in exchange for revelations of the truth or in an effort to put an end to violence.

<sup>60</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007).

<sup>61</sup> For example, the Rome Statute of the International Criminal Court (Art. 28 (a)) states that it is the responsibility of “a military commander or person effectively acting as a military commander” for omitting to prevent or punish the commission of offences by subordinates. See Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002), p. 117.

<sup>62</sup> Anna Marie Brennan, “Exploring the accountability of leaders of armed groups under international law”, in *Hague Yearbook of International Law, Vol. 23* (2010), p. 247.

<sup>63</sup> The International Tribunal for the Former Yugoslavia stated that “the decisive criterion in determining who is a superior according to customary international law is not only the accused’s formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control” and that “formal designation as a commander” should not be considered a necessary prerequisite for superior responsibility to attach. See *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment of 25 June 1999, para. 76.

<sup>64</sup> Zegveld, *The Accountability of Armed Opposition Groups in International Law*, p. 125.

<sup>65</sup> Drumbl, *Atrocity, Punishment and International Law*; and Marc Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press, 2009).

<sup>66</sup> Case 01. *Hostage-taking and serious deprivation of liberty committed by FARC-EP*, 2021.

However, as noted by the Special Rapporteur in his report on accountability, it has been found that, in addition to running counter to international law, these measures further entrench a culture of impunity by placing some people above the law and fail to prevent the recurrence of new violations.<sup>67</sup>

73. The Special Rapporteur recalls that there is a prohibition in international law on blanket amnesties for serious breaches of humanitarian or human rights law. Amnesties are impermissible if they prevent prosecutions of those responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, interfere with a victim's right to an effective remedy, including reparations, or restrict victims' or societies' right to know the truth about human rights or humanitarian law violations.<sup>68</sup> However, conditional amnesties or limited immunity that are linked to some form of accountability or truth recovery may be deemed lawful on a case-by-case basis, when they do not fall within the aforementioned categories of international crimes.

74. International law also sets limits on the use of other legal obstacles to accountability, such as the application of statutory limitations, the non-retroactivity of criminal law and the notion of due obedience in connection with international crimes and serious human rights violations committed by State and non-State actors.<sup>69</sup>

75. In some transitional justice settings, non-custodial alternatives to prison sentences have been granted to perpetrators of serious human rights violations or abuses, including members of non-State armed groups. In some but not all cases, these essentially restorative or reparative sanctions have been offered in exchange for an acknowledgement of responsibility and a recognition of the truth. 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. In this regard, there is concern that countries that impose sanctions of a restorative nature could incur international responsibility for a possible violation of the obligation to appropriately punish international crimes.<sup>70</sup>

76. In addition to these external drivers towards accountability, some non-State armed groups have themselves adopted measures to demonstrate their compliance with international standards.<sup>71</sup> For example, in 1989, the leaders of the Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front) in El Salvador declared that "the FML shall ensure that its combat methods comply with the provisions of Common Article 3 of the Geneva Conventions and Additional II".<sup>72</sup> In the Democratic Republic of the Congo, after engaging with the humanitarian non-governmental organization, Geneva Call, the Alliance des patriotes pour un Congo libre et souverain (Alliance of Patriots for a Free and Sovereign Congo) signed a "deed of commitment" to protect children in armed conflict and more than 40 children were released from non-State armed groups.<sup>73</sup> In addition, many non-State armed groups developed their own internal rules and regulations (e.g. the FARC-EP code of conduct or the Irish Republican Army's Green Book) spelling out what are deemed legitimate or illegitimate acts.<sup>74</sup>

77. Of course, the extent to which either international standards or indeed internal non-State armed groups' codes of conduct are honoured in practice during conflict varies hugely. Nonetheless, international humanitarian law and the internal rules of an organization,

<sup>67</sup> A/HRC/48/60, para. 33; and A/HRC/27/56, para. 31.

<sup>68</sup> OHCHR, "Rule-of-law tools for post-conflict States: amnesties", New York and Geneva, 2009.

<sup>69</sup> A/HRC/48/60, para. 26.

<sup>70</sup> Ibid., paras. 42 and 87. International crimes include genocide, war crimes, crimes against humanity and the crime of aggression.

<sup>71</sup> Ezequiel Heffes and Brian Frenkel, "The international responsibility of non-State armed groups: in search of the applicable rules", *Goettingen Journal of International Law*, vol. 8, No. 1 (2017).

<sup>72</sup> Anne Marie Brennan, "Exploring the accountability of leaders of armed groups under international law", p. 237.

<sup>73</sup> Geneva Call, "DR Congo: child soldiers leave armed groups following Geneva Call's awareness-raising efforts", 1 February 2017.

<sup>74</sup> Reglamento de Régimen Disciplinario de Las Fuerzas Armadas Revolucionarias de Colombia (FARC-EP), 2007; and Irish Republican Army, Green Book, 1 and 2. See René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (Oxford University Press, 2021), p. 43.

particularly if elements are consistent with international humanitarian law or international human rights law, do provide a framework to engage non-State armed groups during transitional justice processes.

78. In conclusion, the Special Rapporteur notes that non-State armed groups are responsible for the actions of their members. Ex-combatants who have been directly involved in serious violations of humanitarian law or human rights should be liable for prosecution. Non-State armed group leaders are responsible for the conduct of their subordinates when they are in a position of authority over those subordinates and when they have either ordered such violations or failed to prevent them or when they must have known that they would occur. Such trials can also serve to hold non-State armed groups organizationally responsible for systemic violations. Where domestic procedures grant a conditional amnesty or immunity to members of non-State armed groups in return for truth recovery, such processes cannot apply in respect to international crimes and serious human rights violations and must be applied on a case-by-case basis, not to categories of offenders. Non-State armed groups' internal codes of conduct, particularly when they comply with international humanitarian law or international human rights law, may also provide a useful framework to encourage non-State armed groups' engagement with transitional justice.

## E. Reparations

79. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law indicate that: "Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law." Reparations should include restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.<sup>75</sup> Reparations may be material, whereby something tangible (e.g. compensation, property restitution or social services) is offered to victims or affected communities, or they might be symbolic (e.g. an apology, commemorative days or sites, or measures to restore the honour of victims). Reparations often include a combination of different kinds of benefits.<sup>76</sup>

80. Reparations have traditionally been viewed primarily as a State-focused activity. While the Basic Principles and Guidelines provide a useful framework for understanding what reparations may entail, they refer repeatedly to States rather than non-State actors. As the Special Rapporteur on extrajudicial, summary or arbitrary executions concluded recently: "An important rationale for binding armed non-State actors to human rights obligations is that the current legal framework for holding them accountable has unacceptably large deficits with regard to access to justice, remedies and reparations."<sup>77</sup>

81. As the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has argued previously, non-State actors should contribute to reparations programmes.<sup>78</sup> In order to facilitate that contribution, there is a strong case for clarifying the international legal obligations of non-State actors to provide reparations for gross violations of human rights and humanitarian law.

82. A useful actor-specific approach to determining the legal obligations of non-State armed groups would include a case-specific evaluation of the level of the organization's capacity and resources. If a non-State armed group has the capacity to deliver material and/or symbolic reparations, it should. If it cannot, it should be required to contribute to, or at least facilitate, the provision of reparation by States or other actors. Where non-State armed groups lack capacity, the responsibility to ensure full reparation should fall on the State.<sup>79</sup>

<sup>75</sup> General Assembly resolution 60/147, annex, paras. 15 and 19–23.

<sup>76</sup> A/69/518, para. 30.

<sup>77</sup> A/HRC/38/44, para. 21.

<sup>78</sup> A/HRC/42/45, para. 95.

<sup>79</sup> Olivia Herman, "Beyond the state of play: establishing a duty of non-State armed groups to provide reparations", *International Review of the Red Cross*, No. 915 (2022).

83. Non-State armed groups may themselves agree to provide reparations as part of broader political negotiations. For example, the 2019 peace agreement between the Government of the Central African Republic and 14 non-State armed groups included obligations on the part of the groups to engage in reparations, including returning properties and other goods and contributing to a trust fund for victims.<sup>80</sup> In the Philippines, an agreement between the Government and the Moro Islamic Liberation Front specified that the latter would either return or compensate for destroyed properties and put in place a rehabilitation programme for victims.<sup>81</sup> Similarly, in the 2016 peace agreement in Colombia, FARC-EP agreed “to contribute to the material reparation of the victims and in general to their comprehensive reparation”.<sup>82</sup> As noted above, FARC-EP has subsequently acknowledged responsibility for a range of breaches of humanitarian law and offered a number of public apologies. Former members of FARC-EP and of the Ejército de Liberación Nacional (National Liberation Army) have also been involved in practical reparative work such as demining, in collaboration with their former enemies – the army – and local civil society and community organizations. While some victims may dismiss such efforts as self-serving, such symbolic and practical reparative efforts have been described as helping to improve relations between former guerrillas, victims, the military and local communities.<sup>83</sup>

84. Non-State armed groups may also engage in reparative measures to address specific harms for which they have been responsible.<sup>84</sup> For example, the Irish Republican Army and one other Irish republican grouping (the Irish National Liberation Army) have engaged privately with a commission established by the Governments of Ireland and of the United Kingdom to recover the remains of those disappeared by these non-State armed groups during the conflict.<sup>85</sup> To date, the bodies of 13 of the 17 disappeared persons have been returned to their families.

85. Non-State armed group reparations may be viewed as part of the process of “rehumanizing” victims. A common challenge in transitional justice is to break through the techniques of “neutralization” wherein those involved in past violence deny or obscure the human consequences of their actions (e.g. “I was following orders”, “the ‘cause’ required extreme measures”, “we only killed or injured ‘legitimate targets’”, etc.).<sup>86</sup> If done properly, non-State armed groups’ or ex-combatants’ direct engagement in reparations work can challenge such dehumanizing strategies and encourage ex-combatants towards a more honest acknowledgement of the harm done and their duty to address the needs of victims.<sup>87</sup>

86. In addition, non-State armed groups’ and ex-combatants’ visible engagement in reparations can also serve to rehumanize ex-combatants themselves. Victims and communities on the receiving end of non-State armed group violence may understandably harbour suspicions or hostile views towards non-State armed groups and ex-combatants. Good faith engagement in practical reparative work can give ex-combatants an opportunity to demonstrate their bona fides.

87. In sum, the Special Rapporteur underscores that non-State armed groups should contribute to post-conflict or post-authoritarian reparations. This will also help to rehumanize both victims and perpetrators. Specific commitments from non-State armed groups to engage in practical and symbolic reparations should be part of any negotiated peace agreement. If non-State armed groups do not have the capacity to provide complete reparations, their efforts should be supplemented by the State.

<sup>80</sup> Laura Íñigo Álvarez, “The obligation to provide reparations by armed groups: a norm under customary international law?”, *Netherlands International Law Review*, vol. 67, No. 3 (2020).

<sup>81</sup> *Ibid.*, p. 438.

<sup>82</sup> Final Agreement for Ending the Conflict and Building a Stable and Lasting Peace, sub-sect. 5.1.3.7.

<sup>83</sup> Kieran McEvoy, Cheryl Lawther and Luke Moffett, “Changing the script: non-State armed groups, restorative justice and reparations”, *Journal of Human Rights Practice*, vol. 14, No. 1 (2022).

<sup>84</sup> Luke Moffett, “Violence and repair: the practice and challenges of non-State armed groups engaging in reparations”, *International Review of the Red Cross*, No. 915 (2022).

<sup>85</sup> See <http://www.iclvr.ie/>.

<sup>86</sup> Cohen, *States of Denial*.

<sup>87</sup> Margaret Urban Walker, “Restorative justice and reparations”, *Journal of Social Philosophy*, vol. 37, No. 3 (2006).



## F. Memorialization, non-State armed groups and transitional justice

88. The relationship between non-State armed groups and memorialization is a complex one. Non-State armed groups and their supporters have often used different forms of artistic expression (e.g. graffiti, posters, murals, plays, commemorative ceremonies, marches, museums etc.) to commemorate past struggles. These variants of memorialization tend to be aimed at either internal constituencies or those with a historical interest in a non-State armed group's past.

89. By way of illustration, in El Salvador, the Museum of the Salvadoran Revolution (which is in an area previously controlled by the Frente Farabundo Martí para la Liberación Nacional) displays posters and paraphernalia linked to the Frente and its ex-combatants and guides.<sup>88</sup> Former Sandinista guerrillas have set up similar museums in Nicaragua. In Guatemala, ex-guerrilla members created Comunidad 29 de diciembre, a place of commemoration of ex-combatants who were injured, killed or disappeared by State forces.<sup>89</sup>

90. The Special Rapporteur notes that these practices are often not aimed at acknowledging the harm inflicted and restoring the dignity of all victims of violence, or at transmitting accurate and comprehensive accounts of past violence to present and future generations. Moreover, they run the risk of reproducing a biased view of the past which can hamper reconciliation efforts and guarantees of non-recurrence. As such, while valid for internal institutional purposes, these non-State armed group practices cannot be considered to constitute memorialization processes within a transitional strategy framework.

91. As the Special Rapporteur has argued previously, in transitional contexts, memorialization processes must aim at building a democratic, pluralistic, inclusive and peaceful society, restoring dignity to victims and enabling society to regain trust and foster reconciliation. Moreover, the purpose of memory work in transitional justice should be to establish a “dialogic truth”, encouraging societal debate on the causes and consequences of past violence. Memory processes cannot obfuscate or detract from violations and crimes that have been verified by truth commissions and/or legal proceedings.<sup>90</sup>

92. The Special Rapporteur notes that non-State armed groups, their political organizations, ex-combatants and their families have a right to remember their dead and injured. Non-State armed groups, their political affiliates, ex-combatants and their supporters should engage in dialogue with State and civil society organizations, and where possible with the representatives of victims' organizations, in conversations about how they can respectfully commemorate their own past while respecting the feelings of victims in ways which do not impede peace and coexistence. They should also participate in effective State or civil society-driven memorialization processes aimed at restoring the dignity of victims and at transmitting comprehensive and accurate accounts of past violence to present and future generations in order to foster peace, coexistence and non-recurrence.

## G. Guarantees of non-recurrence

93. Non-recurrence is arguably the least developed theme within the field of transitional justice.<sup>91</sup> Demobilization, disarmament and reintegration processes are often linked to non-recurrence.<sup>92</sup> Certainly, a failure to address the demobilization needs of ex-combatants, including retraining, education, employment, social stigma and untreated post-traumatic

<sup>88</sup> Rafael Quishpe, “Los ex-combatientes y la memoria: tensiones y retos de la memoria colectiva construida por las FARC en el posconflicto colombiano”, *Análisis Político*, vol. 31, No. 93 (2018) (in Spanish).

<sup>89</sup> Luke Moffett, “Reparations by non-State armed groups”, *Armed Groups and International Law*, 29 May 2019.

<sup>90</sup> [A/HRC/45/45](#).

<sup>91</sup> Alexander Mayer-Rieckh, “Guarantees of non-recurrence: an approximation”, *Human Rights Quarterly*, vol. 39, No. 2 (2017).

<sup>92</sup> Naomi Roht-Arriaza, “Measures of non-repetition in transitional justice: the missing link?”, in *From Transitional to Transformative Justice*, Paul Gready and Simon Robins, eds. (Cambridge University Press, 2019).

stress disorder, has been linked to ex-combatant involvement in crime, anti-social behaviour and drug- and alcohol-related problems in a range of settings, including Angola, Croatia, El Salvador, Mozambique, Nicaragua, Sierra Leone and South Africa.<sup>93</sup> Demobilization, disarmament and reintegration programmes have also been criticized for their failure to address the needs and rights of demobilized female ex-combatants and the realities for many such women returning to patriarchal social, economic and domestic settings.<sup>94</sup> The structural exclusion of ex-combatants, male or female, is manifestly not in the interests of any society seeking to move away from violence or authoritarianism.

94. There is also a need to focus on the potentially positive role of non-State armed groups or ex-combatants as a resource to deliver on the promise of non-recurrence. Former non-State armed groups that have transformed into democratic political parties and ex-combatants who are committed to peace are also a key civil society resource in ensuring non-recurrence. They are the key constituency in helping to secure and maintain ceasefires among non-State armed groups.<sup>95</sup> They can also challenge deeply embedded cultures of violence in societies which have undergone conflict for decades precisely because of their past engagement in such violence.

95. For example, in Northern Ireland, former Irish Republican Army and loyalist combatants have provided leadership in the establishment of community-based restorative justice schemes as a non-violent and human rights compliant alternative to non-State armed group vigilante violence and as a bridge to improved relations with the State police.<sup>96</sup> In addition, other ex-combatants there have engaged in an innovative educational programme where ex-combatants go to local schools to dissuade younger generations from violence by deglamourizing the reality of conflict and discussing the personal, familial and communal costs of such violence.<sup>97</sup>

96. The Special Rapporteur recommends that, in contexts where it is clear that non-State armed groups and ex-combatants have given up violence and have engaged in good faith with all relevant transitional justice processes, it is imperative that structural obstacles to their reintegration into society be removed. Moreover, in such circumstances, they should be recognized as rights holders in civil society with a particular role to play in the struggle to prevent the recurrence of violence.

## VI. Conclusions and recommendations

### Lines of accountability between State and non-State actors

**97. Given that the distinctions between State and non-State actors can sometimes be blurred, and that States may use non-State actors as proxy agents to carry out human rights or humanitarian law violations, collude with or otherwise turn a blind eye to such violations, any transitional justice process focusing on non-State actors must ensure that lines of accountability between State and non-State actors are always fully investigated. The international responsibility of the State arises for acts committed by non-State actors with State acquiescence, or when the State fails to act with due diligence.**

<sup>93</sup> Rosalind Shaw, "Linking justice with reintegration? Ex-combatants and the Sierra Leone experiment", in *Localizing Transitional Justice*, Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds. (Stanford University Press, 2010).

<sup>94</sup> K.C. Luna, "Everyday realities of reintegration: experiences of Maoist 'verified' women ex-combatants in the aftermath of war in Nepal", *Conflict, Security & Development*, vol. 19, No. 5, (2019).

<sup>95</sup> Kieran McEvoy and Peter Shirlow, "Re-imagining DDR: ex-combatants, leadership and moral agency in conflict transformation", *Theoretical Criminology*, vol. 13, No. 1 (2009).

<sup>96</sup> Anna Eriksson, *Justice in Transition: Community Restorative Justice in Northern Ireland* (Willan Publishing, 2009).

<sup>97</sup> Lesley Emerson, "Conflict, transition and education for 'political generosity': learning from the experience of ex-combatants in Northern Ireland", *Journal of Peace Education*, vol. 9, No. 3 (2012).

### Victim-centred

98. All transitional justice processes, including those with non-State armed groups' involvement or that impact upon them, must be victim-centred, ensuring that victims' right to justice, truth recovery and reparation are central to the design and delivery of the processes. Victims cannot be pressurized into engaging with transitional justice in the name of reconciliation or other larger social goals.

### Gender-sensitive

99. All transitional justice process, including those with non-State armed groups' involvement or that impact upon them, must adopt a gendered lens. Gender must be considered at all stages of transitional justice from inception to delivery and analysis. This includes recognizing the gendered nature of past harms, including of those committed by non-State armed groups, ensuring that gender inequalities are not perpetuated through transitional justice mechanisms, removing barriers to participation and addressing gender-specific needs appropriately.

### Corporations and businesses

100. Transitional justice processes must address corporate responsibility for serious human rights abuses and be provided with legal powers and resources to perform this task and ensure business engagement in the processes.

101. Truth commissions should assess businesses' direct and indirect responsibilities for those abuses and the structures and actors that enabled and benefited from them, as well as providing recommendations for business' engagement in remedying the harm inflicted.

102. Reparations imposed on businesses as a consequence of wrongdoing should include acknowledgement of wrongdoing and entail measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations provided must include acknowledgement of wrongdoing and refrain from establishing immunity from legal liability. Reparations should be distinguished from other forms of remedy such as social corporate responsibility and voluntary contributions to reconstruction.

103. Corporations must be held accountable for the abuses committed through criminal prosecutions against alleged individual perpetrators and civil litigation against those individuals and the company. Immunity from legal liability should not be embedded in reparation schemes provided by business.

### Non-State armed groups

#### *Truth seeking*

104. Non-State armed groups and ex-combatants have a legal, political and moral duty to engage with truth-seeking processes concerning their involvement in past violations of humanitarian and human rights law.

105. If those providing information to a truth commission may be vulnerable to subsequent prosecution, they should be aware of the risks and make an informed choice about whether to cooperate.

106. Truth commissions need to be designed in such a way as to capture the experiences of ex-combatants as both perpetrators and victims.

#### *Accountability*

107. Non-State armed groups are legally responsible for the actions of their members. Ex-combatants who have been directly involved in serious violations of humanitarian law or human rights should be liable for prosecution. Non-State armed group leaders are legally responsible and should be liable for the conduct of their subordinates and should also be liable for prosecution.

108. Where domestic procedures grant a conditional amnesty or immunity to members of non-State armed groups in return for truth recovery, such processes cannot apply in respect to international crimes and serious human rights violations and they must be applied on a case-by-case basis, not to categories of offenders. Similarly, other procedural obstacles to legal accountability, such as statutes of limitations, should not apply to those crimes.

109. Non-State armed groups' internal codes of conduct, particularly when they comply with international humanitarian law or international human rights law, may also provide a useful framework to encourage non-State armed groups to engage with transitional justice.

#### *Reparations*

110. Non-State armed groups should contribute to post-conflict or post-authoritarian reparations. This can help to rehumanize both victims and perpetrators. Non-State armed groups' commitments to engage in practical and symbolic reparations should be part of any negotiated peace agreement. If non-State armed groups do not have the capacity to provide complete reparations, their efforts should be supplemented by the State.

111. Non-State armed groups should offer apologies to victims that meet the requirements of international standards, as set out in the Special Rapporteur's report on the promotion of truth, justice, reparation and guarantees of non-recurrence.<sup>98</sup>

#### *Memorialization*

112. Non-State armed groups and their affiliates should be encouraged to engage in dialogue with State and civil society organizations, and where possible with victims' organizations, about how they can respectfully commemorate their own past while respecting the feelings of victims and in ways which do not impede peace and reconciliation. They should also participate in effective State or civil society-driven memorialization processes aimed at restoring the dignity of victims and at transmitting comprehensive and accurate accounts of past violence to present and future generations in order to foster peace, coexistence and non-recurrence.

#### *Non-recurrence*

113. Where it is clear that non-State armed groups and ex-combatants have given up violence and have engaged in good faith with relevant transitional justice processes, structural obstacles to their reintegration into society should be removed. Ex-combatants should be recognized as rights holders in civil society with a particular role to play in the struggle to prevent the recurrence of violence.

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<sup>98</sup> [A/74/147](#).