



General Assembly

Distr.: General
19 July 2021
English
Original: Spanish

Seventy-sixth session

Item 75 (b) of the provisional agenda*

Promotion and protection of human rights: human rights issues, including other means of enhancing the effective enjoyment of human rights and fundamental freedoms

Promotion of truth, justice, reparation and guarantees of non-recurrence

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, submitted in accordance with Human Rights Council resolution [45/10](#).

* [A/76/150](#).



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

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

Executive summary

The present report examines the design and application of measures in the area of truth, justice, reparation, memorialization and guarantees of non-recurrence to address gross violations of human rights and international humanitarian law committed in colonial contexts. Challenges, good practices and lessons learned are identified in the report and recommendations offered to the States in which forms of colonization persist, former colonizing Powers and former independent colonies.

Contents

	<i>Page</i>
I. Introduction	4
II. Need to examine gross human rights violations committed during colonial times	4
III. Colonial contexts and challenges to transitional justice.....	5
IV. Components of transitional justice in addressing violations of human rights arising from colonial and historical injustices	7
V. Conclusions	21
VI. Recommendations	21

I. Introduction

1. The present report is submitted to the General Assembly by Fabian Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolution 45/10. The Special Rapporteur devotes the report to analysing the role of transitional justice measures in addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts. In preparing the report, three expert meetings and one open consultation were held with States, members of civil society, victims, experts and relevant stakeholders. The Special Rapporteur is grateful for the responses received.

2. The mandate of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence includes “to study trends, developments and challenges, and to make recommendations thereon”.¹ The search for truth, justice and reparation relating to colonial injustices is an ineluctable duty, posing inherent challenges that make it particularly apt for the involvement of the Special Rapporteur. Prior to the presentation of this report, the Special Rapporteur addressed the issue in his communications with States.²

3. Other mandate holders have examined this topic, albeit from different standpoints. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has addressed the human rights obligations of States in relation to reparations for racial discrimination rooted in slavery and colonialism.³ Similarly, the Expert Mechanism on the Rights of Indigenous Peoples has examined the issue of colonialism in its reports on recognition, reparation and reconciliation, and on the right to land.⁴ More recently, the United Nations High Commissioner for Human Rights issued a report in which she stressed the need to address the legacies of slavery, the transatlantic African slave trade and colonialism, through accountability and reparations.⁵

II. Need to examine gross human rights violations committed during colonial times

4. Given the lack of effective response to violations of human rights and international humanitarian law stemming from colonialism and the realization that those violations continue to have negative effects today, it is important to emphasize that the components and tools developed by transitional justice over the past 40 years offer lessons and experiences that could be useful in responding to the legacy of these violations and in some cases are already being put into effect.

5. One criticism that has been levelled at transitional justice pertains to the limits that it has imposed on itself in dealing only with the consequences, namely, the violations of rights to life and bodily integrity, and not the root causes of conflict, such as structural violence and systematic exclusion in the economic, political and social spheres. In short, critics have argued that transitional justice has not sufficiently addressed underlying structural inequalities and historical grievances.

¹ A/HRC/RES/45/10.

² See, for example, communications JPN 1/2016, KOR 2/2016, GBR 13/2020, KEN 3/2021, GBR 5/2021 and CAN 4/2021, which will be available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

³ A/74/321.

⁴ A/HRC/EMRIP/2019/3/Rev.1 and A/HRC/45/38.

⁵ A/HRC/47/53.

6. Nonetheless, transitional justice offers a privileged vantage point from which to address the deeper causes of colonial violence, through the establishment of its own mechanisms, namely truth commissions with a holistic mandate to address the colonial past and violations of civil, cultural, economic, political and social rights; reparation programmes that remedy the structural inequalities suffered in particular by the victims; public apologies that restore the dignity of the victims; memorialization and education measures that comprehensively address the patterns, causes and consequences of rights violations; and guarantees of non-recurrence that change the cultural and institutional standards, structures and processes that perpetuate discrimination, racism and the exclusion of affected populations. The adoption across the board of inclusive mechanisms with the strong and active participation of victims empowers affected populations and provides legitimacy and sustainability to efforts to address the legacy of colonialism and, ultimately, to achieve reconciliation.

7. The Special Rapporteur emphasizes that, for transitional justice processes to be holistic and appropriately comprehensive, it is imperative to include the study of the colonial legacy, where appropriate.

III. Colonial contexts and challenges to transitional justice

8. The report examines the legacy of rights violations resulting from colonialism in the following contexts:

(a) Settler States and other contexts of dispossession and oppression of indigenous peoples and people of African descent;

(b) Former colonies that are now independent States. These contexts have a common denominator: those rights violations have clear direct and indirect consequences today.

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

9. In these cases, the settlers who arrived in new territories and settled in them appropriated the land and resources of the original peoples; displacing and dispossessing them. In many cases, the indigenous populations were extraordinarily reduced as a result of disease – mostly caused by dispossession – and massacres, some of which amounted to genocide. In turn, there was what might be termed a “cultural logic of elimination” in support of settler hegemony,⁶ which included invasion and dispossession, incarceration in reservations or missions, and assimilation programmes that took on brutal and inhumane characteristics.

10. In these contexts, the impact of colonialism remains evident in the overrepresentation of indigenous people in detention, the distrust harboured by indigenous people for the police, the general social disadvantages experienced by these people and the lack of any official and comprehensive commitment fully to redress the abuses suffered by them.⁷ Colonialism resulted in a State that perpetuated it through a legal, institutional and cultural apparatus that subjected colonized

⁶ See Jennifer Balint and Julie Evans, *Transitional Justice and Settler States* (Sydney, Institute of Criminology, Sydney Law School, University of Sydney, 2011), p. 6. Available at <https://ses.library.usyd.edu.au/bitstream/handle/2123/7361/Balint%20and%20Evans%20ANZ-CCC2010.pdf?sequence=1>.

⁷ Ibid.

populations to discrimination, assimilation, criminalization and, in some cases, violence; and denied them basic rights such as ownership of ancestral lands and resources, and access to justice, health, education and economic opportunities.

11. When the transition processes adopted in these contexts do not seek to reverse the situation of domination still suffered by the colonized peoples, they are bound to fail. Components of transitional justice may, however, offer important contributions in this regard, such as establishing the facts and conditions that made such rights violations possible; the acknowledgement of responsibility and public apology; individual and collective action; the memorialization and restoration of the dignity of the victims; and the inclusion in various educational curricula of an accurate account of the rights violations committed.

12. Among the components that can bring about the most extensive changes in these contexts are guarantees of non-recurrence, insofar as they make it possible to identify and reform the oppressive standards and structures of the State, and also the material and ideological conditions that maintain the structural injustices suffered by indigenous peoples.

13. Some mechanisms adopted in these contexts that we now associate with transitional justice were established years ago, such as the Waitangi tribunals in New Zealand, set up in 1975, which provide truth-telling measures, reparations, and other responses to gross human rights violations. More recently, transitional justice mechanisms to address the colonial legacy have been developed in Australia, Belgium, Canada, Greenland, Norway and Sweden, among other countries.

14. Other contexts that may be mentioned in this section include those in which the settlers arrived in territories and displaced the original peoples, yet these original peoples continue to constitute a high percentage of the total population, as is the case in some Latin American countries, the occupied Palestinian territories, the Western Sahara and the island of Okinawa, where the majority of the inhabitants are Ryukyuan or Okinawan, although Japan does not recognize them as indigenous groups.

15. In settler States, it is also important to highlight the issues facing slavery-based economies, especially where there are significant lingering socioeconomic consequences, such as in Brazil, Colombia and the United States of America, including systematic racism and the disproportionate number of people of African descent among those suffering from police violence, criminalization, poverty and lack of opportunity. In the United States today, there is a need for transitional justice, which is seen as a key framework for confronting the systematic oppression, police brutality and racial injustice that African Americans have suffered for centuries. This may be useful in responding to calls from citizens and social movements (such as Black Lives Matter) for police reform; prosecutions; the creation of a truth commission; the removal of Confederate statues and symbols; and the payment of reparations. On 14 April 2021, the Judiciary Committee of the House of Representatives voted to move the Commission to Study and Develop Reparation Proposals for African-Americans Act (bill H.R. 40) to the House floor for full consideration. Other official initiatives relating to truth, reparations and justice are emerging at the local, municipal, state and federal levels.

B. Former colonies that are now independent States

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

17. Transitional justice measures established in this context require a conversation between the former colonizing Power and the former colony; and their nature will depend on which of these entities initiates the processes and the reasons for doing so, for example, whether this was it is at the request of victims or civil society or both.

18. The recent agreement between Germany and Namibia includes acknowledgement of the genocide against the Herero and Nama peoples (albeit with some reservations), public apologies and development assistance as compensation, although the agreement was negotiated without the participation of the affected communities.⁸

19. As there are two States involved in these cases, there are obligations and expectations of response to past or continuing rights violations that should require compromise by both parties. The duties to provide effective remedies to victims, ensure accountability, contribute to truth and memory, facilitate unrestricted access to archives and grant reparations to victims are clearly incumbent on the former colonizing Power.

20. As a new State-level manager, the State that has gained independence must also assume obligations. Although these obligations do not cover responsibility for the acts committed by the colonizing Power, they do relate to rehabilitation, socioeconomic reintegration and guaranteed access to justice, education, health and essential services for the victims; and also the quest for truth and memorialization. With regard to justice, in cases where perpetrators (who are still alive) have remained in the jurisdiction of the newly independent State, for example the settlers that were involved in the gross human rights violations that accompanied the forced displacement and dispossession of victims, that State also has a duty to ensure the accountability of these perpetrators. In that undertaking, it should be supported by the international community, through the development of the capacities of the national judiciary or establishment of hybrid or international accountability mechanisms.

21. In January 2021, a court in Seoul, Republic of Korea required Japan to accept legal responsibility for the systematic sexual enslavement of the “comfort women”. In April 2021, however, it dismissed claims brought by a group of victims against the Government of Japan for damages.

IV. Components of transitional justice in addressing human rights violations arising from colonial and historical injustices

A. Accountability

22. Accountability for gross violations of human rights and international humanitarian law is an obligation under international human rights law. Customary international law also establishes the obligation to investigate and punish genocide, war crimes and crimes against humanity.

23. Some former colonizing Powers have invoked the principle of intertemporality, according to which only the rules of criminal law that were valid at the time of the alleged conduct may be applied, to exclude the possibility of prosecutions being brought for offences prior to the following events: the adoption of the Nuremberg Statute of the International Military Tribunal and the Universal Declaration of Human

⁸ A petition on this matter may be found at the following website: www.change.org/p/the-president-of-the-republic-of-namibia-no-bilateral-genocide-negotiations-we-demand-global-ovaherero-nama-representation.

Rights; and the designation of crimes under international criminal law, such as genocide, war crimes and crimes against humanity. Certain human rights violations committed during the Second World War were classified, however, as crimes against peace, war crimes or crimes against humanity, despite the ex post facto nature of this classification.

24. A problem is also posed by acceptance of State responsibility for crimes committed after the initiation of the normative development of international human rights law, such as during the struggles for independence in Indochina, South-East Asia and Africa, which were challenged by the colonial Powers through the bombing of civilian populations, forced displacement of sections of the population, mass imprisonment, torture and enforced disappearance.⁹

25. While the commission of war crimes and crimes against humanity was a common feature of colonial wars during this period, “there have never been serious efforts to investigate colonial crimes before national or international courts, nor to punish any of the surviving perpetrators, nor sanction the governments involved or to compensate the victims for the ongoing health problems triggered by the crimes”.¹⁰

26. In France, the 1968 amnesty act and the restrictive definition of crimes against humanity have allowed impunity for torture and other crimes committed in Algeria.¹¹ In Belgium, the complaint filed against Belgian officers for the death of Patrice Lumumba has remained pending at the pretrial stage for 10 years.¹²

27. Following legal complaints filed by victims from the Mau Mau community in Kenya, the High Court of the United Kingdom of Great Britain and Northern Ireland ruled against the Government of the United Kingdom, which in its defence had argued that State responsibility for the grave violations of human rights that had been committed rested with the successor State and that the passage of time imposed a statute of limitations on criminal prosecution.¹³ In 2013, the Government agreed to settle the dispute by offering the amount of 20 million pounds in compensation, apologies for the damage caused and the construction of a memorial in Nairobi. Subsequent court decisions, however, have applied the statute of limitations set out in the Limitation Act 1980, preventing other Kenyan victims from pursuing their claims.¹⁴

28. In the Netherlands, the courts rejected the statute of limitations argument put forward by the Government of the Netherlands in relation to violations committed by Netherlands soldiers during the Indonesian War of Independence (1945–1950). In response, the Government of the Netherlands offered compensation to the widows and

⁹ Wolfgang Kalek, “Double standards: international criminal law and the West”, FICHL Publication Series No. 26 (2015), pp. 25–33, available at www.toaep.org/ps-pdf/26-kaleck; and Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law* (Brussels, Torkel Opsahl Academic EPublisher, TOAEP publication series No. 40, 2020), pp. 10–12, available at www.toaep.org/ps-pdf/40-bergsmo-kaleck-kyaw.

¹⁰ Morten Bergsmo, p. 12.

¹¹ Stiina Löytömäki, “The law and collective memory of colonialism: France and the case of ‘belated’ transitional justice”, *International Journal of Transitional Justice*, vol. 7, 2013, 205–223, in particular p. 221.

¹² Civil society response to the Special Rapporteur’s questionnaire on accountability, available at www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/CallLegacyColonialism.aspx.

¹³ See Théophraste Fady, “The Mau Mau case: post-colonial justice on the Strand”, *Strandlines*, 7 October 2019, available at www.strandlines.london/2019/10/07/post-colonial-justice-on-the-strand; and Leigh Day, “The Mau Mau case: five years on”, available at www.lexology.com/library/detail.aspx?g=a376823b-224d-4551-821d-abb7f32c8065.

¹⁴ See the communications KEN 3/2021 and GBR 5/2021, which will be available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

some relatives of 11 Sulawesi men who had been executed and promised compensation of 5,000 euros for the children of any Indonesian executed during the war.¹⁵

29. The arguments put forward by the former colonizing Powers run counter to the prohibition on the application of the statute of limitations to war crimes and crimes against humanity and grave breaches of human rights and international humanitarian law, as set out in the following instruments:

- (i) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
- (ii) Customary rules of international humanitarian law;¹⁶
- (iii) Updated set of principles for the protection and promotion of human rights through action to combat impunity;¹⁷
- (iv) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹⁸

The Inter-American Court of Human Rights has ruled on the inadmissibility of statutes of limitations in several judgments, including those handed down in the cases of *Barrios Altos v. Peru* and *Massacre of Las Dos Erres v. Guatemala*.¹⁹

30. It should be noted that there are also crimes that by their nature are continuous: many anti-colonial resistance fighters and others in colonial contexts were victims of enforced disappearances. Enforced disappearance is the archetypal continuous crime, which begins at the moment of arrest and continues until either the State acknowledges the person's detention and converts it into lawful detention with full guarantees, or the person is found alive, or his or her mortal remains are found: it is therefore "possible to convict a person of disappearance on the basis of a legal instrument enacted after the enforced disappearance began notwithstanding the fundamental principle of non-retroactivity".²⁰

31. It should also be emphasized that violations of international human rights law and international humanitarian law are the responsibility of the States that committed them, in this case, the colonial Powers. At the time of the violations, colonies or protectorates were dependent territories administered by the colonial Powers and lacked their own international legal personality. In view of the status of colonies, it cannot be argued that responsibility has passed to the independent States that emerged from them. The new State does, however, have a key role to play in respect of non-recurrence and certain other measures.

32. Owing to the length of time that has elapsed and the death of perpetrators, victims and witnesses, the prosecution and conviction of perpetrators are no longer

¹⁵ See Reuters, "Netherlands offers compensation to children of executed Indonesians", 19 October 2020, available at www.reuters.com/article/us-netherlands-indonesia-compensation-idUSKBN2741XY.

¹⁶ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Geneva, International Committee of the Red Cross, and Cambridge, Cambridge University Press, 2005), pp. 614–618, available at www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

¹⁷ E/CN.4/2005/102/Add.1, Principle 23.

¹⁸ General Assembly resolution 60/147, annex, principle 6.

¹⁹ Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment of 14 March 2001 (*Merits*), para. 41, and *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009 (*Preliminary objection, merits, reparations and costs*), para. 233 (a).

²⁰ A/HRC/16/48, p. 12, para. 5.

an option in most cases.²¹ Given this limitation, it is even more important that other components of transitional justice are properly developed.

B. Truth

33. Truth-seeking initiatives shed light on and gather information about past violations of human rights and contribute to combating impunity, restoring the rule of law and facilitating reconciliation.²² In particular in colonial contexts, truth-telling must also be understood as forming part of reparations.

34. Often, when truth commissions are established, the question arises as to how far back in time they should go: the question is particularly legitimate when we are dealing with rights violations that were committed during colonial periods.

35. Most traditional transitional justice processes have been short-sighted, leaving rights violations committed during colonial periods out of their scope. In Timor Leste, the analysis focused on the damage perpetrated after the invasion by Indonesia in 1975, although it was during the colonial period that the land was taken, leading to the subsequent structural injustice. In South Africa, the process focused on the damage perpetrated after the rise to power by the National Party in 1948, but did not examine the complex history of Netherlands and British colonial exploitation, which established the initial lines of segregation. In Rwanda, despite the recognition that the Belgian colonial past had contributed to the 1994 genocide, this issue was not discussed in legal proceedings at the national or international level.

36. The temporal mandate is indicative of the limits imposed on truth commissions not to examine the colonial past. Of the more than 40 truth commissions established in transitional contexts over the past four decades, very few have addressed the colonial period or examined the economic and social injustices rooted in that period.

37. Prominent among these commissions are some truth-seeking mechanisms established in situations of classic transition (following a conflict or an authoritarian regime) that have embraced a more holistic study of the rights violations suffered. The commissions in Kenya, Liberia and Sierra Leone examined violations of economic, social and cultural rights, and the economic injustices that occasioned them, although this did not lead to reparations or economic reforms aimed at remedying those violations.

38. Other truth commissions have begun to study the colonial past and its impact on the present. The Mauritius Truth and Justice Commission (2009–2011) examined the impact of the legacy of slavery from 1638 onwards, including the various colonial periods. The Tunisian Truth and Dignity Commission included the pre-independence period in its mandate. The Truth and Reconciliation Commission of the Republic of Korea examined the period 1905–2005. The Commission for the Clarification of the Truth, Coexistence and Non-Repetition in Colombia seeks to clarify the origins of the conflict, including the experiences of indigenous communities. The mandate of the Truth and Reconciliation Commission in Burundi was extended to investigate colonial crimes committed since 1885.

39. That said, some of these approaches to the colonial past were superficial or insufficient. The final report of the Liberian Truth and Reconciliation Commission studied the roots of the conflict that took place in the country, but it did not translate into a commitment to address the structural problems of the colonial era that fuelled it. While the Kenyan Truth, Justice and Reconciliation Commission examined the role

²¹ Morten Bergsmo, p. 38.

²² A/HRC/24/42, para. 20.

of colonialism in the establishment of the State, its temporal jurisdiction is only effective from the day on which Kenya became independent.

40. Besides the processes adopted in some classic transitional contexts, truth commissions have been established with the explicit aim of addressing the colonial legacy suffered by indigenous peoples in settler States and former colonizing Powers.

41. Canada saw the establishment of the Royal Commission on the Peoples of Canada (1991–1996), which investigated the period 1500–1996; the Truth and Reconciliation Commission of Canada (2009–2015), which examined human rights violations that occurred in indigenous residential schools over the period 1874–1996; and the National Inquiry into Missing and Murdered Indigenous Women and Girls (2016–2019). In Australia, the Human Rights and Equal Opportunity Commission and the Yoo-rrook Justice Commission were established, the former to investigate the separation of Aboriginal and Torres Strait Islander children from their families (1995–1997), and the latter to examine the impact of European colonization on the Aboriginal communities of Victoria State (2021 to date).

42. In Scandinavia, mechanisms were established to investigate the policies of dispossession and assimilation suffered by indigenous peoples, such as the Greenlandic Reconciliation Commission (2014–2017); the Commission to Investigate the Norwegianization Policy and Injustice against the Sámi and Kven/Norwegian Finnish Peoples (2018 to date); and the Truth and Reconciliation Commission for the Tornedalians, Kvens and Lantalaïset in Sweden (2020 to date); there are also plans to set up a truth commission for the Saami community in Sweden and a truth and reconciliation commission for the Saami peoples in Finland.

43. Truth-seeking initiatives were also adopted in former colonizing Powers. In July 2020, the Federal Parliament of Belgium established a Special Commission to examine its colonial past, in response to the Black Lives Matter movement.²³ Recently, the President of France reported on the creation of a Commission of Memory and Truth to review the country's colonial history in Algeria, and the opening of classified archives related to that period.²⁴

44. Nations that have gained independence must also adopt truth-seeking initiatives. In 2019, the Kenyan National Land Commission determined, for example, that the Kipsigis and Talai peoples had been victims of historical land injustices perpetrated during the colonial period and adopted recommendations addressed to the Government of the United Kingdom, the Government of Kenya and transnational corporations that maintain ownership of land expropriated from these victims. In the Niger, no formal truth-seeking initiatives about the colonial past have been established, despite the fact that, for generations, affected communities have been conducting informal community-based investigations.²⁵

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

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

²³ Civil society response to the Special Rapporteur's questionnaire.

²⁴ "France is confronting its history in Algeria", *The Economist*, 15 May 2021, available at www.economist.com/international/2021/05/13/france-is-confronting-its-history-in-algeria.

²⁵ Civil society response to the Special Rapporteur's questionnaire.

grievances or claims). If this connection is not established, the truth-seeking exercise could lose political and historical credibility. This is no easy matter, as there can often be a chain of events that stretches over decades or centuries and facts that, by their nature, are subject to different interpretations; for that reason, serious and detailed studies must be carried out.

47. The National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada was able to address historical grievances against indigenous peoples, and to situate contemporary physical violence against indigenous women and girls in the broader context of colonial harm.²⁶

48. A thorough search for the truth may also require forensic investigation, as in the case of the lawsuits brought by indigenous peoples in Canada following the discovery of mass graves of hundreds of children on the grounds of former boarding schools for indigenous children.

49. At the same time, it is necessary to examine the reasons and ways in which policies of discrimination, oppression, dispossession and marginalization of indigenous populations and of people of African descent were instituted, along with the mechanisms facilitating their perpetuation. In the case of the former independent colonies, although the power structures were reformed at independence, it is important to analyse whether there was any continued application of some of these policies and how they subsequently influenced the emergence of conflicts and human rights violations. In a number of cases, the marginalization of victimized communities continued after independence.

50. The full participation of affected communities is essential to the success of truth commissions and the sustainability of transitional justice processes that address colonial legacies, from the design of these processes to the monitoring of their effective implementation. Belgian civil society and the diaspora of the former colonies concerned were not involved in the formation of the commission set up to examine the country's colonial past.²⁷

51. The Yoo-rook Justice Commission provides a positive example of a broad approach and the involvement of affected communities. Four of its five members are indigenous people from Victoria, three of them – including its Chair – women. Created after years of activism by indigenous communities, the Commission will investigate historical systematic injustices committed against Aboriginal Victorians since colonization (such as the destruction of cultural heritage, massacres, wars and forced removal of children), and current systematic injustices (including problems with the police, criminalization – including of young people – and the lack of child protection, health and health care). The Commission will determine how to recognize and redress historical injustices in an effective, just and culturally appropriate manner.²⁸

52. In order to ensure access to information and facilitate fact-finding, settler States, former colonial Powers and nations that have gained independence should cooperate fully and in good faith with the work of truth commissions by providing unrestricted access to the necessary information and archives. In former colonizing Powers such as Belgium and the United Kingdom, among others, there have been problems gaining

²⁶ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol. 1a, available at www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf.

²⁷ Civil society response to the Special Rapporteur's questionnaire.

²⁸ First People's Assembly of Victoria, "Yoo-rook Justice Commission", available at www.firstpeoplesvic.org/our-work/truth-telling/yoo-rook-justice-commission/, and Government of Victoria, "Truth and Justice in Victoria", available at www.aboriginalvictoria.vic.gov.au/truth-and-justice.

access to archives.²⁹ It is also important that the Holy See should cooperate in affording access to archives under its authority that may shed light on the pattern of rights violations committed in Catholic institutions established in certain colonial contexts.

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

54. The Special Rapporteur recalls that truth, albeit an indispensable component, is not the end point of the transitional justice process; victims often have a legitimate expectation that the revelation of the truth will lead to other necessary responses. Transitional justice, through its multiple components and holistic approach, can respond to those expectations. Such remedies must be provided without excuses in order to strengthen the peacebuilding process.

C. Reparation

55. Reparations are a component of transitional justice that, from its inception, seeks to benefit victims directly. For a measure to count as reparation, it must be accompanied by recognition of responsibility, be aimed at remedying the harm suffered by the victims and be linked specifically to truth, justice and guarantees of non-recurrence.³⁰

56. The international legal basis for the right to a remedy and reparation was firmly enshrined in the complex assemblage of international human rights instruments now widely accepted by States.³¹ 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, adopted by consensus by the General Assembly in 2005, codify the rights already recognized by the international community.³²

57. In the context of the rights violations arising from colonialism or slavery and other racial injustices, reparations pose a number of challenges. On the one hand, restitution – one of the components of reparations – is difficult to achieve given the gravity, and therefore irrevocability, of the rights violations committed, and also the impossibility of fully restoring the status quo ante, namely the pre-occupation situation. Some forms of restitution, however, such as that of expropriated land and cultural heritage, are possible and usually claimed in these contexts. Moreover, it is difficult to determine which individual victims should be the beneficiaries of reparations when the violations have been suffered on a massive scale and have affected not only the direct victims but also their descendants, in particular – but not only – in cases of the violation of economic, social and cultural rights.

58. The final report of the United Nations Commission on Human Rights on the question of the impunity of perpetrators of human rights violations, prepared by

²⁹ Civil society response to the Special Rapporteur's questionnaire. See also Théophraste Fady, "The Mau Mau case: post-colonial justice on the Strand", *Strandlines*, 7 October 2019, available at www.strandlines.london/2019/10/07/post-colonial-justice-on-the-strand.

³⁰ A/69/518, paras.3 and 11.

³¹ Universal Declaration of Human Rights (art. 8); International Covenant on Civil and Political Rights (art. 2); International Convention on the Elimination of All Forms of Racial Discrimination (art. 6); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 14); Convention on the Rights of the Child (art. 39); The Hague Convention respecting the Laws and Customs of War on Land (art. 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (art. 91); and Rome Statute of the International Criminal Court (arts. 68 and 75).

³² A/69/518, para. 18.

El Hadji Guissé in 1997, triggered an important debate on the extension of the definition of “victim” to descendants and in relation to violations of economic, social and cultural rights.³³ The definition of “victim” adopted by the 2005 Basic Principles and Guidelines was restricted, however, to the person directly harmed by an individual or collective violation and his or her immediate family of dependents, although economic loss was included among the recognized grievances.³⁴ For its part, the International Criminal Court established that “for the purposes of reparations, the harm manifested in the form of loss of life plan, transgenerational trauma, as well as that suffered collectively by individual members of a family or community, shall be personally suffered by the victim. Moreover, the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established.”³⁵

59. An additional obstacle is posed by the refusal of the former colonizing Powers to recognize that the compensation offered to victims constitutes reparation, since this would suggest an implicit recognition of their legal responsibility. The acknowledgement that rights violations had occurred and that those violations might even be responsible for some of today’s systematic inequalities and violations extends to the admission of a moral, historical and political responsibility, but under no circumstances a legal responsibility, as it is feared that this could set a precedent. Thus, instead of reparations for past rights violations, aid is provided through development cooperation, or other means that do not implicitly entail accountability.

60. Development aid is not genuine reparation, however, because it perpetuates and reinforces an economic and political system that is based on colonial hierarchies of submission. Reparations, by contrast, imply that the former colonizing Power has a debt to the former colony. On the other hand, as has been made clear by the previous holder of this mandate, development programmes are not strictly speaking reparation programmes, for they do not target victims specifically and their aim is to satisfy basic and urgent needs to which beneficiaries have a right as citizens, not necessarily as victims.³⁶

61. In the recent joint declaration by Germany and Namibia, Germany offered 1.1 billion euros, to be disbursed over the next 30 years in the framework of a programme to support development and reconstruction. Germany makes no mention, however, of reparations and acknowledges only moral responsibility.³⁷

62. It is worth noting that, in 2019, the European Parliament adopted a resolution on the fundamental rights of people of African descent in Europe, in which it “recalls that some Member States have taken steps toward meaningful and effective redress for past injustices and crimes against humanity” and “calls for the EU institutions and the remainder of the Member States to follow this example”.³⁸

Restitution

63. The restitution of land expropriated from colonized populations is a central issue in the demands for reparations for the victims of colonialism. Both in countries where the settlers continued to settle on the occupied lands and in those where the majority of the settlers withdrew from the colony after losing wars of independence, the

³³ E/CN.4/Sub.2/1997/8.

³⁴ General Assembly resolution 60/147, annex, principle 8.

³⁵ International Criminal Court, *The Prosecutor v. Bosco Ntaganda; Public Reparations Order*, 8 March 2021, ICC-01/04–02/06, para. 75, available at www.icc-cpi.int/CourtRecords/CR2021_01889.PDF.

³⁶ A/69/518, para. 41.

³⁷ Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, available at www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf.

³⁸ Resolution 2018/2899 (RSP) of 26 March 2019.

colonized peoples who had been expelled from their ancestral lands did not recover them. Instead, these lands remained for decades and centuries in the hands of settler governments, people involved in killings or the dispossession of indigenous lands, and even in the hands of transnational corporations. For their part, communities dispossessed of their ancestral lands and natural resources have seen their livelihoods, jobs, subsistence, basic services, cultural roots and social cohesion taken away and have been plunged for generations into poverty and exclusion.

64. The Special Rapporteur has received chilling testimonies from victims of colonized peoples who have detailed their urgent need for medical and psychosocial rehabilitation for the rights violations that they have suffered, restitution of their lands and reparations to enable them to escape the poverty in which they have languished for decades and, in this way, to open up a future of full access to human rights for their future generations.

65. In Kenya, in the case of the Kipsigis and Talai peoples, the National Land Commission recommended, among other measures, that:

(a) The Government of the United Kingdom apologize to the victims and provide direct reparations to the victims;

(b) The Government of Kenya formally recognize the illegal seizure of the lands of the Kipsigis and Talai peoples that should have been returned to them after Kenya gained independence;

(c) The Government of the United Kingdom and the multinational tea companies installed on those lands build schools, hospitals, roads, a museum and a university and provide services such as water or electricity to alleviate or compensate for the suffering of the victims;

(d) Multinational companies lease the land at commercial rates;

(e) Leases of land which have expired not be renewed without the consent of the respective county government;

(f) The Government of Kenya identify and acquire land for the purpose of resettling members of the Kipsigis and Talai community.

66. Institutions of this kind can play a very important role in ensuring that victims and their descendants have somewhere to turn when they are unable to exercise their right to an effective remedy in the courts of their own countries or of the colonizing Powers.

67. The restitution of the plundered cultural heritage of indigenous peoples, such as artefacts, monuments and archaeological remains, represents another indispensable and still outstanding element of reparations in post-colonial settings and in settler States. For example, the people of Okinawa are demanding the return of 26 human skeletons extracted from graves in 1928 and 1929 and taken to Japan. The United Nations Declaration on the Rights of Indigenous Peoples stipulates that States shall endeavour to facilitate the obligation to “enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”³⁹

68. New Zealand is actively seeking the return of human remains removed from the country during its colonial period through the Protected Objects Act 1975. The Karanga Aotearoa Repatriation Programme at Te Papa has made it possible to recover Maori remains from over 40 museums around the world. The Government of Australia and its museums have developed agreements and programmes with other countries to

³⁹ General Assembly resolution 61/295, annex, art. 12, para. 2.

facilitate the return of archaeological remains. The United States enacted the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990.

69. Worrying manifestations of institutional and legal reticence and impediments to repatriation have been identified in several European countries.⁴⁰ Recently, however, a collection of Aboriginal remains discovered at the University of Birmingham and the Birmingham Museum and Art Gallery were returned to their traditional owners in Australia. Germany will start returning the Benin Bronzes to Nigeria from 2022, as announced by the ministries of culture and foreign affairs of the two countries in April 2021. A number of Swiss museums have faced restitution claims for colonial artefacts. Eight Swiss museums have joined forces in the “Benin Switzerland Initiative”, with a view to stepping up research into the provenance of their bronzes and engaging in dialogue with Nigeria. Sweden has concluded an agreement with the Yaqui Pueblo in Mexico to initiate a process of repatriation of the Maaso Kova and other items in the Yaqui Collection.

Rehabilitation

70. Rehabilitation of the victims of colonialism is still pending and a matter of urgency. In many post-colonial contexts and in settler States, victims of gross human rights violations have received no medical and psychosocial rehabilitation to enable them to deal with the trauma that they have experienced. As a result, they have suffered for decades from the continued presence of physical injuries and physical and mental health problems associated with that trauma, including post-traumatic stress disorder, depression and addictions. Victims of the indigenous residential schools in Canada have reported many of these symptoms. Studies have observed that survivors of residential schools and their offspring have poorer health outcomes.⁴¹ The Special Rapporteur has received testimonies of the same kind of physical and mental consequences suffered by Kipsigis and Talai victims in Kenya and of the failure to provide rehabilitation measures over the decades since decolonization.⁴²

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

Satisfaction

72. Public apologies are an essential element of reparation for the harm caused to colonized populations. In this regard, it is important to analyse the nature of the apology and the acknowledgement of the facts, the authority offering the apology, the responsibilities that have been accepted, and the participation and acceptance of the victims in the apology process. The effects of an apology will depend critically on whether the affected communities and descendants of victims were involved in the process and perceive it as authentic. For its part, the gesture of apology will be purely

⁴⁰ International Council of Museums, “International repatriation of human remains of indigenous peoples”, 8 August 2018, available at <https://icom.museum/en/news/international-repatriation-of-human-remains-of-indigenous-peoples/>.

⁴¹ CBS News, “Residential school survivors and their descendants show poorer health outcomes: survey”, 14 March 2018, available at www.cbc.ca/news/politics/residential-school-health-survey-1.4576430.

⁴² See the communications KEN 3/2021 and GBR 5/2021, which will be available at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

symbolic if it is not connected to other means of reparation and other transitional justice mechanisms such as truth-seeking or memorialization.⁴³

73. In 2008, 2017 and 2020, the Government of Canada apologized to the indigenous peoples for the role played by Canada in the indigenous residential schools.⁴⁴ The Government of Belgium apologized for the mistakes made by Belgium during the colonial period that had contributed to the genocide of the Tutsis in 1994, for the kidnapping of thousands of mixed-race children from the Congo between 1959 and 1962, and for the role played by Belgium in the assassination of Patrice Lumumba; these apologies were not accompanied by reparations, however, and were considered insufficient by some communities.⁴⁵ The Australian Government apologized in 2008 for systemic oppression and racism practised against Aboriginal Australians, in particular those known as the “Stolen Generations”. The King of the Netherlands apologized to Indonesia in March 2020 for political violence administered during colonial rule. The United Kingdom offered an apology to Kenya as part of the settlement reached with a victims’ group.⁴⁶ The Government of Mexico offered apologies to the Mayan people for abuses committed during colonial rule and after independence, and requested the same from the Government of Spain and the Holy See, but the Mayan communities rejected the apologies for not having included reparations.⁴⁷ Germany offered apologies in the context of the agreement reached with Namibia, although representatives of the Nama and Herero communities criticized the process.⁴⁸

Compensation

74. Lastly, serious consideration may be given to the possibility of debt cancellation for the former colonies as a form of reparation. The argument in favour of this measure stresses that colonialism and slavery have been responsible for engendering the sovereign debt of the former colonies and that its cancellation would therefore constitute a form of compensation for loss of earnings, in other words, the loss of potential income due to the damage suffered.

D. Memorialization

75. The processes of memorializing past violations, the context in which they occurred and the harm suffered by victims are a basic tool of transitional justice and an indispensable element of any mechanism that seeks to address a violent past and promote reconciliation. These processes are particularly relevant in the settings studied here, given the long-standing grievances that characterize colonial legacies. It is essential that settler States, former colonizing Powers and former independent colonies conduct public processes of memorializing the rights violations that occurred, the conditions, patterns and responsibilities that led to them, their current impact and the harm suffered by the victims.

⁴³ There are recommendations to this effect in document [A/74/147](#).

⁴⁴ Government of Canada, “Statement of apology to former students of Indian Residential Schools”, 11 June 2008, available at www.rcaanc-cirnac.gc.ca/eng/1100100015644/1571589171655.

⁴⁵ Civil society response to the Special Rapporteur’s questionnaire.

⁴⁶ Government of the United Kingdom, “Statement to Parliament on settlements of Mau Mau claims”, 6 June 2013, available at www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims.

⁴⁷ Civil society response to the Special Rapporteur’s questionnaire.

⁴⁸ Petition available at www.change.org/p/the-president-of-the-republic-of-namibia-no-bilateral-genocide-negotiations-we-demand-global-ovaherero-nama-representation.

76. In Kenya, the initiative to memorialize the rights violations suffered by the Mau-Mau community, undertaken with the participation of the affected communities and paid for by the United Kingdom, is an interesting example of memorialization involving recognition and reparation, with significant meaning for the community.⁴⁹ Another example is the creation of the International Slavery Museum in Liverpool.⁵⁰

77. Beyond the adoption of measures to memorialize rights violations, it is also important to review the way in which colonialism is commemorated, in particular in settler States. In many of these countries, ceremonies offensive to indigenous peoples continue to be celebrated, such as Australia Day, commemorating Captain Cook's landing; or the "Day of the Race" or "Discovery of America Day" in several Latin American countries. State initiatives have been mounted, however, that seek to expiate this wrong. For example, in Australia, National Sorry Day is celebrated every 26 May to remember and commemorate the mistreatment of indigenous peoples.

78. Statues honouring colonial periods and figures are still displayed in many former colonial Powers and settler States, and also in independent countries. In the central square of the village May Jirgui in the Niger, graves are preserved of the French soldiers who led the Central African Mission, in which tens of thousands of people were massacred, but there are no memorials to the victims.⁵¹ All this is indicative of a lack of awareness of the legacy of colonialism and its insufficient inclusion in historical records and educational curricula. Civil society campaigns seeking to remove memorials of colonialism have recently sprung up around the world. In the United Kingdom, Bristol's Colston Hall, named after a slave trader, was renamed after decades of protests and the toppling of a statue of Colston by Black Lives Matter protesters.⁵²

79. In memorialization processes, the participation of victims is of critical importance. Furthermore, while some of these processes may have been undertaken on the initiative of the victims or their families, they should be officially promoted and supported. In the United States, the most important memorialization processes concerning the harm suffered by the Lipan Apache community have emerged from civil society.⁵³

80. In any event, it is important not to close the debate by organizing a meaningless commemoration for the victims. Some burial ceremonies were held in Tunisia for people who had fought for independence, but victims' groups did not feel that the ceremony had any value for them. One of the petitions submitted by these groups to the Truth and Dignity Commission was for them to participate in a ceremony in which the remains of the victims (martyrs) would be duly dignified. Memory must be the expression of the feelings and suffering of the victims, otherwise it loses value.

E. Guarantees of non-recurrence

81. Guarantees of non-recurrence are relevant in the contexts of violations addressed in this report, including, first, legal, constitutional and institutional reforms; second, the creation of enabling environments for the development of civil society and its empowerment; and third, the reform of education, arts and culture.⁵⁴

⁴⁹ Museum of British Colonialism, "Visit to the Mau-Mau Memorial", 11 July, available at www.museumofbritishcolonialism.org/ourblog/2018/7/11/visit-to-the-mau-mau-memorial.

⁵⁰ International Slavery Museum, www.liverpoolmuseums.org.uk/international-slavery-museum.

⁵¹ Civil society response to the Special Rapporteur's questionnaire.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ A/HRC/30/42.

82. State standards, institutions and processes are determinants in the treatment of indigenous peoples in settler States. In many cases, the State apparatus actually perpetuates racism and the exclusion of these peoples and denies them rights such as access to justice, education or health and ownership of ancestral lands, among others.

83. The need for reform of the security apparatus and the judiciary lies at the root of the demands of communities affected by colonialism, both indigenous and of African descent, in view of the treatment and violence that they receive at the hands of the former, and the criminalization that is inflicted on them by the latter. In the United States, the Black Lives Matter movement is calling for pending reforms and the passage of the Breathe Act, which proposes that taxpayer money be used to invest in alternative community-based approaches to public safety.⁵⁵

84. Reforms must reach all public procedures, practices and infrastructure in order to remove any remnants of colonialism or of oppression and discrimination against indigenous or formerly colonized peoples. In the Niger, the country's main thoroughfare almost exactly follows the route of the Central African Mission, a road built with the forced labour of the survivors of the massacres.⁵⁶ In Texas, roads display signs praising the "accomplishments" of settlers.⁵⁷

85. Legislative and institutional reforms that guarantee the effective enjoyment of the human rights of indigenous peoples and former colonized peoples, without discrimination, and favour their empowerment are State obligations and essential guarantees of non-recurrence. This purpose is also served by the promulgation of treaties with these peoples, recognizing their existence and the dispossession that they have suffered. In Australia, the absence of a treaty is evidence of the insufficient engagement and relationship between indigenous and non-indigenous Australians. It is a positive development that the Government of Victoria and the indigenous peoples of that State are currently developing a treaty that seeks to improve legal protections, strengthen the rights of Aboriginal peoples in Victoria and facilitate the transfer of authority and resources.⁵⁸

86. Another important measure is the inclusion of information on the legacy of colonialism in curricula and educational material at all levels to ensure that society and future generations are aware of that past.⁵⁹ It is also important to protect and ensure access to the cultural heritage of indigenous or formerly colonized peoples, including their narratives of violence suffered. For communities that have endured and survived gross and systematic human rights violations (genocide, apartheid, crimes against humanity), these experiences are often a crucial part of their history, culture and identity.⁶⁰ International human rights law obliges States to protect a community's right to its cultural heritage and to ensure that educational materials provide a fair, accurate and informative picture of indigenous peoples' societies and cultures.⁶¹

⁵⁵ https://breatheact.org/wp-content/uploads/2020/07/The-BREATHE-Act-PDF_FINAL3-1.pdf/.

⁵⁶ Civil society response to the Special Rapporteur's questionnaire.

⁵⁷ Ibid.

⁵⁸ Government of Victoria, "Treaty in Victoria", available at www.aboriginalvictoria.vic.gov.au/treaty, and "Treaty process", available at www.aboriginalvictoria.vic.gov.au/treaty-process.

⁵⁹ General Assembly resolution 60/147, annex, principle 22.

⁶⁰ Pok Yin Chow, 2015. "Memory denied: a commentary on the reports of the UN Special Rapporteur in the field of cultural rights on historical and memorial narratives in divided societies", *The International Lawyer*, vol. 48, No. 3 (Winter 2015), pp. 191–213.

⁶¹ International Covenant on Economic, Social and Cultural Rights, art. 15, para. 1; General Comment No. 11 (2008) on plans of action for primary education (art. 14) (HRI/GEN/Rev.9 (Vol. I)); United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 60/147, annex), art. 15, para. 1; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135, annex), art. 4, para. 4.

87. In Canada, recommendations in the 2015 final report of the Truth and Reconciliation Commission led to the inclusion of the history of the indigenous residential schools in educational curricula. In Belgium, the legislation establishing the Special Commission on the colonial past provides for an examination of the extent to which the colonial past is reflected in educational syllabuses.⁶²

F. Participation of victims

88. Besides the applicability of the components of the analytical framework of transitional justice to the violations examined in this report, this framework offers important lessons about the need to place victims and communities at the centre of its processes, as subjects and rights-holders.

89. Effective participation of victims and communities is not “only” a political issue, but also a human rights issue. International human rights law recognizes the right of persons directly affected by decision-making to participate in and be consulted on the process, by virtue of the rights to take part in the conduct of public affairs and to equal participation in cultural life, and also the right to an education that enables effective participation in society.⁶³ The right of indigenous peoples to adequate participation and the collective human rights to free, prior and informed consent and to freely elect representatives of a group are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

90. The adoption of a top-down approach in decisions on measures to address colonial legacy falls short of the standards set by current international law. On the contrary, that law requires States to actively seek the participation of representatives of affected communities and their free, prior and informed consent. In addition, the importance of consulting the victims entails the need to listen to and seriously analyse colonial grievances, in order to understand perceptions in the affected country. This requires a reflective and systematic presence on the part of those who listen and engage with the facts. The same criteria for participation in the negotiation of agreements apply to implementation of the agreed measures. It is important that civil society stakeholders and, in particular, affected communities, including those in the diaspora, are properly engaged.

91. One of the criticisms of the negotiations between Japan and the Republic of Korea regarding the “comfort women” was the lack of consultation with the victims. In their negotiations, the Governments of Germany and Namibia agreed to strict secrecy, with the result that in neither country did civil society have adequate access to information.⁶⁴

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

⁶² Chamber of Representatives of Belgium, “Commission spéciale chargée d’examiner l’état indépendant du Congo (1885–1908) et le passé colonial de la Belgique au Congo (1908–1960), au Rwanda et au Burundi (1919–1962), ses conséquences et les suites qu’il convient d’y réserver”, 17 July 2020, available at www.lachambre.be/kvvcr/pdf_sections/pri/congo/55K1462001.pdf.

⁶³ A/HRC/34/62, para. 31.

⁶⁴ Petition available at www.change.org/p/the-president-of-the-republic-of-namibia-no-bilateral-genocide-negotiations-we-demand-global-ovaherero-nama-representation.

V. Conclusions

93. Transitional justice offers valuable tools to properly address human rights violations committed during the colonial period. The colonial transfer of wealth and racist oppression have created a legacy of social, economic and cultural exclusion whose effects have been felt for generations. Leaving this historical debt unpaid has generated more pain and challenges the conscience of an international system that should be based on respect for and the guarantee of human rights. Transgenerational damage can no longer be ignored.

94. Unlike the traditional transitional justice processes that focus on recent human rights violations, addressing rights violations that occurred in colonial times poses challenges due to the length of time that has passed.

95. In general, processes of historical truth-seeking and the legal recognition of the harm done in the past and its repercussions in the present are indispensable to the establishment of restorative justice as a basis for a peaceful and sustainable future.

96. Transitional justice approaches to addressing the colonial past cannot and should not render invisible the victims and communities, who should occupy a central and privileged role.

97. It is essential to identify the obligations which are incumbent on each State and those which must be carried out jointly. To this end, all the tools and mechanisms that are put into practice must have a human rights focus, assigning due importance to the components of truth, land restitution, measures of non-recurrence and memorialization processes.

98. Reparations should not and cannot be dressed up as humanitarian aid, assistance or development cooperation, evading the assumption of due responsibilities.

99. The unacceptable idea of racial or national superiority continues to be explicit in some political discourse and implicit in many societies, including within the international community. It is essential to bring about cultural change based on the recognition of and a holistic approach to the violations of rights committed during the colonial past; this will furnish a vital tool for preventing and properly addressing contemporary discrimination and racism.

100. The responsibilities and expectations relating to efforts to address the legacy of violations of human rights and international humanitarian law in colonial settings through measures of truth, justice, reparation, memorialization and guarantees of non-recurrence differ among those States that were colonizing Powers, those that were colonies and are now independent nations, and those where the colonization of indigenous peoples and the oppression of people of African descent persist in different forms. As the Special Rapporteur details below, however, in all cases the authorities must take appropriate measures tailored to their specific contexts and responsibilities to respond promptly and effectively to the long-standing grievances of victims and affected communities.

VI. Recommendations

101. The Special Rapporteur offers the following recommendations on the adoption of transitional justice mechanisms designed to address the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts.

Participation

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

Truth

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

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

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

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

Reparation

107. States that were colonizing Powers and States where the colonization of indigenous peoples and the oppression of people of African descent persists in various forms should consider mechanisms to redress the harm caused to victims and affected communities. Such reparations, whether individual or collective, should aim to be comprehensive and include the following:

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

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

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

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

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

109. **The independent States must, for their part, guarantee the urgent needs of the victims and affected populations under their jurisdiction, as guarantors of economic and social rights in their country, as detailed in paragraphs 107 (b) and (d).**

Memorialization

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

Guarantees of non-recurrence

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

112. **Former colonizing Powers and the now-independent States must ensure that the legal and institutional frameworks and the material, ideological and cultural conditions in their countries do not reproduce stereotypes or discriminatory practices from the colonial period, or any other persistent form of racism or exclusion.**

Accountability

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

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

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

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