

---

## Advance unedited version

Distr.: General  
24 October 2016

Original: English

---

### Seventy-first session

Agenda item 68 (b)

**Promotion and protection of human rights: human rights questions, including alternative approaches for improving 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 members of the General Assembly the report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, in accordance with Human Rights Council resolution 27/3.

---

\* The present report was submitted after the deadline, in order to include the most recently available information.

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

### *Summary*

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence addresses the issue of national consultations concerning the design and implementation of transitional justice measures. This report is to be read in conjunction with the report presented by the Special Rapporteur to the Human Rights Council on 'Participatory mechanisms and transitional justice' (A/HRC/34/62).

The present report addresses pre-conditions for success of national consultations on transitional justice mechanisms, their operational challenges as well as their contribution to the legitimacy of transitions. In relation to the first issue, effective and legitimate consultations require that participants must feel confident that they can contribute in the process without putting their safety at risk; consultations must be free of coercion, threat and (implicit) reprisals. One of the main aims of consultations is to elicit the views of, and thereby include, those most affected by past violations and abuses, hence individuals rarely ever consulted, such as various victims (groups), subject to multiple forms of victimization, discrimination and marginalization. As a third pre-condition, the report stresses the importance of capacity building prior to the conduct of the consultations.

Regarding the operational challenges and opportunities, the analysis underscores that critical issue of the timing, ideally ahead of the conception and design of transitional justice measures; however, not insensitive to other key political and legal processes, such as constitutional reforms. The report also underscores the importance of establishing an entity in charge of the consultations, which is objective and unbiased so that it can act impartially in relation to crucial dimensions of consultation processes, including the selection of participants, the determination of the agenda, methodology, venues and reporting.

Regarding the consultations' potential contribution to legitimacy, the conduct of national consultations is in itself an act of recognition, which is one of the basic aims of transitional justice measures. People, whose rights were systematically trampled, are now being called for to express their views in the design of mechanisms to redress exactly those violations and abuses. Consultation processes with victims, in particular, sends to them and to society at large, a powerful message of inclusion, and ultimately empowers them as rights holders.

National consultations are not one-off events, but require more systematically the establishment on-going processes of communication

among different constituencies. Such dynamic conception of consultations can take advantage of learning processes, and enables a transmission of the changing understanding of rights, needs, and measures. Consultation processes, if designed with a genuine wish to strengthen relationships among constituencies, and based on shared experiences and needs on the one hand, and common values and principles on the other, can contribute to the general strengthening of civil society, ultimately essential for redress, reconciliation, and hence prevention.

## Contents

	<i>Page</i>
I. Introduction.....	4
II. Legal framework.....	5
III. Pre-conditions for success .....	6
A. Security.....	7
B. Inclusiveness .....	8
C. Capacity building .....	11
IV. Operational challenges and opportunities .....	13
A. Timing .....	13
B. Leadership and organisational issues .....	15
V. Contributions to legitimacy .....	16
VI. Conclusions and recommendations .....	18

## I. Introduction

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the General Assembly in accordance with resolution 27/3 of the Human Rights Council.

2. This report addresses the issue of national consultations concerning the design and implementation of transitional justice measures.

3. While national consultations have for the past decade been intensely promoted in the field of transitional justice, there is neither much literature on the topic nor thorough comparative analysis of different domestic experiences, despite the fact that the sample of consultations is more than large enough. This report cannot make up that deficit. Rather, it seeks to provide an incentive for that type of systematic analysis, and, more immediately, to make the case for consultations despite the challenges that they almost invariably face.

4. The report, however, is not a ‘how-to guide,’ and does neither offer a detailed description of the elements of a consultation process<sup>1</sup> nor guidance on some of the basic issues including financing, staffing or methodological questions that should be the subject of technical attention and expertise.

5. Consultations, like participation in general,<sup>2</sup> are usually defended in terms of two types of argument. The first, ‘epistemic’ argument refers to the type of knowledge or insight consulting people may produce, and on the positive consequences that improvements in understanding may have. On this account, consultations about transitional justice can:

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

6. The second type of argument in defense of participation generally and of consultations more specifically are ‘legitimacy’ arguments. On this account, consultations are important not just because of the specific contributions that canvassing opinions may have, measured in terms of ‘proposals,’ but rather, because:

- the process of consulting is itself a measure of recognition to, and empowerment of, victims and helps them gain a place in the public sphere which may have been denied to them before;<sup>3</sup>
- similarly, consultation processes may widen the circle of stakeholders in justice processes, pulling into the discussions both official and unofficial groups previously

---

<sup>1</sup> See, e.g., OHCHR Rule of Law Tools for Post Conflict States: National Consultations on Transitional Justice (2009).

<sup>2</sup> See forthcoming report of the Special Rapporteur on *Participatory approaches and transitional justice*, A/HRC/34/62.

<sup>3</sup> This report should be read in conjunction with the report which the Special Rapporteur will present to the Human Rights Council in March 2017 which will focus specifically on the issue of victims’ participation in transitional justice processes.

not included, on whose consent and participation the success and sustainability of transitional justice measures may depend to some extent; and

- Finally, consultations may facilitate the identification of commonalities of experiences, values, and principles, between different groups, which is important for the sake of coalition- and consensus-formation and crucial in the adoption of policies about contentious issues.

7. This report will give attention to both types of arguments and demonstrates that while there is much room to realize the full potential of the ‘epistemic’ contributions of consultation processes, the ‘legitimacy’ contributions of such processes by themselves, justify sustained interest and exploration of, and investment, in the topic of national consultations.

8. Having praised consultations, it must be acknowledged that successful consultation processes are neither easy to run, nor, a substitute for tangible measures to restore the rights to truth, justice, reparations, and guarantees of a non-recurrence of affected persons and others. Consultations are certainly not a box-checking exercise; they are a form of communication between the state and society, and among different parts of society. As other forms of communication, especially in low-trust environments, typical of contexts where mass violations and abuses have taken place, unless they are planned carefully, resourced adequately, and engaged in with the intention of serious uptake, they can also generate expectations the defeat of which might significantly further entrench mistrust, confirm suspicions of exclusion, and, at the limit, generate yet another grievance to a list that had already manifested its potential for conflict.

## II. Legal framework

9. The participation and consultation of persons directly affected by the State’s decision-making is recognized as a right in several international human rights treaties. Several UN human rights mechanisms, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women (CEDAW), and the Committee on the Rights of the Child, have developed an authoritative interpretation of the relevant provisions in these instruments. The Human Rights Committee, for example, establishes that the right to participation in the conduct of public affairs covers “all aspects of public administration, including the formulation and implementation of policy at international, national, regional and local levels”.<sup>4</sup> Consultation with Indigenous People is also a component of the Indigenous and Tribal People’s Convention of the International Labour Organization (1989) (ILO Convention No 169).

10. Other instruments, such as the Declaration on the Right to Development refers to “active, free and meaningful” participation, also state specific provisions promoting participation of groups and individuals in decision-making processes.

11. The issue of consultations and participation has also been addressed by several Special Rapporteurs. The Special Rapporteur on extreme poverty and human rights developed a human rights-based framework for meaningful, empowering and effective participation of people living in poverty in the design, implementation and evaluation of policies and programmes that affect them (A/HRC/23/36, 2013). The Special Rapporteur on

<sup>4</sup> General comment No. 25 (1996) (art. 25), para. 5.

the human right to safe drinking water and sanitation also provided guidance on the elements and requirements for active, free and meaningful participation relating all stages of decision-making processes on water and sanitation (A/69/213, 2014). The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people also recommended that consultations take place before decisions affecting the fundamental freedoms of indigenous peoples, citing the consensus building potential of consultations as well as their confidence building function (A/HRC/12/34, 2009).

12. Regarding transitional justice, specifically, international human rights instruments and mechanisms also specifically refer to the participation of victims and civil society. The Updated Set of principles for the protection and promotion of human rights through action to combat impunity emphasize the meaningful role of victims and other sectors of civil society in transitional justice processes.<sup>5</sup> The Human Rights Committee, for instance, urged Canada to implement, in consultation with indigenous people, the recommendations of the Truth and Reconciliation Commission with regard to the Indian Residential Schools (CCPR/C/CAN/CO/6 (CCPR, 2015)). The Committee on the Elimination of Racial Discrimination expressed concern and presented recommendations to Peru relative to “the delays in the implementation of the comprehensive collective reparations plan, particularly with regard to members of indigenous peoples who were victims of the armed conflict between 1990 and 2000, and the lack of proper participation by such persons in developing and implementing reparation programmes” CERD/C/PER/CO/18-21 (CERD, 2014), para 22). Several UN Special Procedures have also addressed recommendations to States relative to the participation and consultations with victims, victims’ associations and civil society in relation to transitional justice processes, including in truth-seeking initiatives, commemoration and memorialization efforts, reparations and resettlement programmes.<sup>6</sup>

### III. Preconditions of success

13. There is no single blue-print for effective consultations about transitional justice issues. Indeed, the term, albeit not the practice, is of relatively recent vintage. An early example of a process of deliberation about transitional justice that did not use the term ‘consultation’ or the mechanisms that are now associated with it, but that in fact involved the function, was the long and drawn out process of articulation of the platform of the *Concertación*, the coalition of parties that led Chile in the democratic transition post-Pinochet. That political platform, was debated amongst relevant constituencies for a long

---

<sup>5</sup> A/RES/60/147

<sup>6</sup> See e.g. Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence reports on Spain (A/HRC/27/56/Add.1), Uruguay (A/HRC/27/56/Add.2), Burundi (A/HRC/30/42/Add.1), and Tunisia (A/HRC/24/42/Add.1); WG on Enforced Disappearances report on Timor Leste (A/HRC/19/58/Add.1, 2011) [The WGEID recommended to Timor-Leste the building of places that commemorate and memorialize the events of the past, in consultation with victims and associations of victims]; SG Representative on the human rights of internally displaced persons, report on Côte d’Ivoire (A/HRC/4/38/Add.2, 2006) [The SG Rep. on IDPs stated to Côte d’Ivoire that appropriate restitution, compensation or another form of reparation to IDPs should be addressed in consultation with the people most affected, the displaced persons themselves]; Special Rapporteur on Sudan (E/CN.4/2006/111, 2006) [The SR on Sudan indicated that mechanisms for reparation and reconciliation should be adopted in consultation with the victims and civil society, in order to fully respect their human dignity]; Special Rapporteur on Myanmar (A/HRC/22/58, SR Myanmar, 2013), [The SR on Myanmar recommended the initiation of a process of consultation with all relevant stakeholders on the establishment of a truth commission].

time, and included references to the elements of a transitional justice policy that was subsequently unfurled over a period of years.<sup>7</sup>

13. Consultations now have been in many places formalized, and special, dedicated ‘instruments’ have come to be used for that purpose. Consultative processes can involve direct and indirect engagement, such as town halls, focus groups and face-to-face interviews and statement taking, as well as questionnaires, group and individual submissions, polls and referenda. And all of these can be applied at the national, regional and local levels.

14. In order for consultations to be effective and legitimate some minimum conditions need to be satisfied. These cannot be taken for granted but must be carefully planned and guaranteed. The following is not an exhaustive list but merely sets forth some of the minimum conditions, which have proven problematic in many contexts.

## A. Security

15. In order for consultations to be effective and legitimate those to be consulted must feel confident that they can participate in the consultations without putting their safety at risk. As a form of communication, consultation processes must be free of coercion.

16. In areas most affected by violations and abuses or by conflict, proper security assessment should be conducted to determine the prevailing climate of insecurity, fear and risks of intimidation and reprisals. Security risks can be particularly high if alleged perpetrators or groups allegedly responsible of serious human rights violations or abuses are still present, active or even with authority or control in these areas, including cases where local trust in state security services has been eroded. Such a threatening atmosphere impedes the ability of participants to contribute openly about their experiences, needs, and understanding of their rights.

17. The magnitude of the security challenge involved is revealed by the fate of many witness protection measures in different countries, measures that are supposed to offer protection not to large swathes of people but to relatively small numbers of particular individuals. The weaknesses of witness protection measures in general are well known.<sup>8</sup> In the case of national consultation processes, the objective is to enable the participation of large groups of people and to elicit from them views about issues that in many contexts are deeply contested, and that lie at the heart of the origins or the continuation of conflict, including questions about responsibility, adequate remedy and redress, and effective prevention.

18. In the case of **Nepal**, it is reported that some political actors, fearing accountability for the violations committed, put pressure on victims and their relatives not to participate in the consultations. Such pressure limited the range of potential participants and thus the range of possible perspectives and input.

19. In the Northern province of **Sri Lanka**, where there is still heavy presence of the armed forces, concerns were expressed about the chilling effect that such presence could have on those wishing to participate in the recent consultations.

20. The context of insecurity during the consultations in **Yemen** seriously limited the travel and participation of external actors including international experts on transitional

---

<sup>7</sup> See, e.g., Elizabeth Lira, “Reparations in Chile,” in *The Handbook of Reparations*, P. de Greiff, ed. (2006).

<sup>8</sup> See A/HRC/31/55.

justice. The expertise of external actors could have been instrumental in bringing specialized knowledge and comparative perspectives. Local UN staff (UNDP and OHCHR) and national actors familiar with transitional justice partially made up for the absence of international participants, and the process was enriched by the insights and indeed the courage of nationals to take the lead in such initiatives. Nevertheless, the country was deprived of contributions that people familiar with other experiences may have made to the deliberations.

21. In **Colombia**, in order to mitigate some of the risks and exposure of those participating in the consultations, only persons holding a personal invitation letter from the organizers could attend the regional and national forums held in 2013-2014 in the context of the peace negotiation process. Police officers screened participants, allowing access to the location of the forums. The presence of the Police involved challenges of its own. To minimize some of them, the role of the police was limited to checking IDs and invitations at the entrance of the premises, but no police or security agents were present inside the consultation venues. Similarly, in order to minimize security risks for those taking the floor during the forums, the press was not allowed in the forums, nor were pictures, use of cell phones, or audio or video recording permitted.

22. Nowadays electronic media that allow for the ‘anonimization’ of submissions to consultations processes, may mitigate, to some extent, security risks. The use of such media deserves further consideration, if only as a complement to more face-to-face interactions. Electronic media of this sort involve some limitations, including the skewing of participants in favour of the literate and those with access to computers, the absence of the give-and-take of live interactions, and the very important potential of face-to-face interactions to uncover commonalities of principles, views, and experiences, including shared experiences of pain.

23. Similarly, methodologies for grouping participants in ways that mitigate security risks, for example, by disaggregating participants in ways that might lower the probability of exposing victims to alleged perpetrators deserve further exploration. However, some of the costs just mentioned pertain to these initiatives as well. Once groups are disaggregated in this fashion, the tendency is also to limit consulting each to certain topics rather than others (e.g., offering IDPs opportunities to offer views only about those aspects of the program most directly related to them, consulting women only about sexual and gender-based crimes, etc.).

24. Guaranteeing coercion- and risk-free participation is one of the many challenges that transitional justice faces given the current trend to attempt the implementation of such measures not as means to solidify a transition that has already taken place but to enable transitions. Contexts in which a conflict is not fully solved, and, particularly, contexts in which conflict is on-going (e.g., South Sudan, Central African Republic, Mali) highlight the challenges of designing participatory mechanisms.

## **B. Inclusiveness**

25. Consultations are of value provided that they manage to canvas the views of a critically broad range of stakeholders. One of the many ways in which consultations can go wrong, either through manipulation or insufficiently careful design, is by excluding, wilfully or inadvertently, those who, arguably, should be included.

26. A national consultation process, however, should not attempt to become something akin to a national plebiscite or referendum on a proposed transitional justice policy, nor the equivalent of a national poll. These are distinct processes, with different aims, methodologies, and facing different constraints.

27. One of the important aims of consultations is to elicit the views of those most affected by violations and abuses, frequently those that are seldomly consulted, which in most countries happen to include various victims groups, usually subject to multiple forms of victimization, discrimination and marginalization.

28. As important as the participation of victims is in the design and implementation of transitional justice measures, national consultations, for good reason, rarely target victims exclusively. Since even ambitious consultation processes are temporally bound, meant to inform processes that are finite, and operate under material and other forms of constraints, the success and legitimacy of consultations depends upon targeting the right combination of participants.

29. Here again there is no one formula to guarantee success, but it is certain that (both hidden and apparent) biases in the selection of participants undermine the credibility of the consultations. Successful consultations call for a very careful selection of groups whose participation should be secured.

30. In **Colombia** the organizers of the consultations prioritized the participation of victims and victims' organizations, but, additionally, identified 18 categories of groups whose participation they tried to secure. These included peasants movements; indigenous populations; afro-descendant populations; labour and business organisations; trade unions; political parties; human rights organisations; development and peace programmes; churches; academia; children and adolescents; youth organisations; LGBTI organisations; minority communities (Palenqueros, Raizales and Roma); environmental organisations; and the media. Gender and regional considerations were also applied across the different categories, aiming for a 50% female representation and significant participation by people from different regions (an aim also served by the decision concerning the location of the consultations). Finally, regarding victims, efforts were made to achieve participation by victims of the different armed agents (not only FARC and State agents, but also ELN, Paramilitaries, other criminal organizations), and victims of different types of violations (including displacement, forced disappearance, extrajudicial executions, kidnappings, etc.) This sort of thorough mapping of relevant constituencies and stakeholders is a crucial pre-condition to achieve broad representation.

31. In the consultations in **Burundi** (2009-10), efforts were also made to promote the participation of specific groups including public officials, government representatives, parliamentarians, political representatives, civil society organisations, women's groups, academics, journalists, elderly and youth organisations, persons with disabilities, churches and religious communities, displaced persons, demobilized persons, former child soldiers, widows and orphans, among others, and sampling methods were used to equalize the chances of participation of members of different ethnic groups.

32. In the case of **Bosnia** thirteen basic participating constituencies were identified as main targets for consultations: victims, youth, women, religious communities, journalists, academics, legal community, civil society organisations, veterans, artists, returnees, historians and governmental representatives at the state, cantonal and local levels.

33. The usefulness of national consultation processes as means for the identification of stakeholders that may not appear obvious but that have much to contribute not just to the design but to the implementation, and hence sustainable impact of a transitional justice process bears highlighting. The examples already cited illustrate this point. Beyond those directly affected, those whose insight, support, decision-making power, impact on opinion-formation, among other factors, are worthy subjects of consultation (compatible of course, with the idea that consultations are exercises that always take place under specific constraints). Thus, for instance, up to present labour unions, the business sector, minority or religious groups, indigenous peoples, displaced persons, journalists, youth organizations,

new political movements, are not frequent interlocutors in transitional justice discussions, and yet, they may have a lot to contribute to them. Separate consultations can also take place with judicial actors and with security sector personnel, including military and police forces, to inform them of what to expect from these processes and to ascertain their perspective. Such consultations should take place independently of consultations with participants.

34. Whatever the final composition of the groups whose participation in the consultations should be secured, consultations must not perpetuate past patterns of marginalization of certain groups (particularly as imbalances have in some cases been identified as themselves catalysts for conflict). Oft-overlooked identity groups affected by violations and abuses usually include women, youth, indigenous communities, the disabled, those in extreme poverty, LGBTQ communities, and religious, linguistic or ethnic minorities.

35. Similarly, efforts should be made to avoid the frequent over-representation of organisations from urban areas, favouring predominantly organizations already comfortable interacting with national authorities and international donors. This is not easy to avoid. In **Tunisia**, for example, a country that made great efforts to formalize a consultation process for the design of its transitional justice policy, the charge was often raised that the composition of the National Committee in charge of the consultation was entirely formed by associations from the capital, Tunis.

#### *Women's participation*

36. The participation of women in consultations should be prioritized in all circumstances. Parity between men and women should be one of the basic principles for determining the composition of participants in all consultations.

37. Quotas at all levels of national consultations processes, including in the bodies tasked to design, implement and report on the consultations should be considered. Quotas alone however are insufficient, and should be matched with efforts that include empowering women's rights organizations and civil society groups, training for women at all levels of the consultations process, providing special sessions for women only, and ensuring adequate privacy and psychosocial support in discussions about stigmatizing crimes should all be part of the planning of national consultations.

38. In the case of **Colombia** 50% of participants in the consultation forums had to be women. The example of consultations in **Bosnia** however, illustrates the limits of an approach exclusively based on quotas. While over 40% of participants in consultations were women and half of the members of the Transitional Justice Working Group were female, the outcome of the consultations in Bosnia do not show evidence of a full integration of a general understanding of the differentiated impact of the violations on men and women.

39. The participation of women should not be limited to forums where gender-based or sexual violence have been identified as part of the patterns of violations. While women's participation is crucial in such forums, women's voice and opinions should not be reduced to pre-determined roles or pre-conceived perceptions related, for instance, to their condition as frequent victims of gender-based violations.

40. On the participation of and consultation with women in context of peace negotiations and transitional justice processes and related decision-making, CEDAW is particularly emphatic. It has formulated specific recommendations in relation the planning

and management of resettlement, reintegration, rehabilitation and reparation programmes; recommended the adoption of temporary special measures for participation, including quotas; and capacity building programmes for women.<sup>9</sup> The importance of women equal participation and full involvement in transitional justice efforts is also enshrined in the landmark resolution 1325 and subsequent resolutions of the Security Council on women, peace and security.

#### *Displaced populations*

41. Specific challenges related to the selection of participants also arise in contexts of large scale displacements of population, including IDPs and persons displaced abroad, either in neighbouring countries or more remote locations.

42. Yet, the Special Rapporteur stresses the importance of making efforts to include conflict-generated diasporas, internally displaced persons (IDPs) and refugees in consultations about transitional justice measures that directly concern them.

43. Displaced peoples have been instrumental in pushing for transitional justice processes in many countries. Their participation can raise international awareness of the transitions and their needs, and ameliorate divisions between groups. Furthermore, these groups can provide information that is critical (and perhaps unique) for a comprehensive account of violations and abuses.

44. The challenges of eliciting the views of displaced populations are manifold and involve overcoming logistical, security, and financial constraints, amongst others. The difficulties, however, are not insurmountable. The views of displaced populations have been elicited with different degrees of rigour and systematicity from populations in refugee camps displaced by conflicts and violations occurring in **Sierra Leone** (1999), **Afghan** refugees in Iran and Pakistan (2004), **East Timorese** refugees in West Timor and other parts in Indonesia (2000), **Liberians** in the US (2006), **Burundians** in Tanzania and in Belgium (2009-10) and **Sri Lankans** in different parts of the world during the long conflict in that country.

45. The **Liberian** Truth and Reconciliation Commission engaged with diaspora, including refugees, through the Liberian TRC Diaspora project. Coordination with groups representing refugees in fact started during the peace process, when various groups facilitated transport of refugees from camps into the country in order to advocate for an agreement to the negotiating parties. This coordination persisted in the preparatory period for the TRC. Liberia partnered with human rights organizations in the US and elsewhere to facilitate diaspora involvement in the statement-taking process. Despite hurdles, including limited resources, insufficient support from international partners, and others, there was significant participation in the truth-telling process by people outside the country (indeed, there was no commensurate system for the participation of IDPs).

### **C. Capacity building**

46. The level of prior knowledge of participants on human rights and transitional justice concepts impacts the outcome of consultative processes. The Special Rapporteur recalls the importance of ensuring, prior to the consultations, general knowledge and common understanding of participants of key concepts and terms pertinent to the topics addressed in the consultations, including the very idea of transitional justice, the basic elements of a

---

<sup>9</sup> See also CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.

transitional justice policy, legal terminology relevant in human rights, such as impunity, accountability, rule of law, reparations, among others.

47. There are very few countries where relevant stakeholders, including those most affected by the violations, have this sort of knowledge *ex ante*. Indeed, in many countries where transitional justice measures are being tried, the notion that individuals are rights-holders is only weakly institutionalized and weakly internalized. There are areas of transitional justice policy-making regarding which even in countries with sophisticated legal systems people do not have firm intuitions, as most discussions about massive reparations programs reveal.

48. Consultations in such settings, without a great deal of preparatory work in order to familiarize different constituencies beforehand with the basics of transitional justice are unlikely to have as outputs very concrete proposals.

(a) Preparatory work carried out prior to the consultations, for instance sharing copies of the relevant documents and legislation, disseminating information on their meaning through means appropriate to the constituencies whose participation is sought, including pictorial, audio and video material, disseminated through accessible communication channels (local radio, TV, flyers, press, etc.), with sufficient lead time in advance of the consultations, would greatly contribute to the process and increase the chances that the outcome of the consultations will address the substantive issues at stake.

(b) In addition, outreach and open communication is essential for managing expectations, which will be a crucial in the design of measures relating to the redress of violations leading to harms that strictly speaking, cannot be undone, through measures which, it must be acknowledged, suffer from all sorts of limitations relative to the immensity of the ends they are supposed to satisfy.

(c) The sort of capacity building for participants in consultation processes and even organizers is one of the areas where evidently, more progress is called for. There is plenty of evidence of the shortcomings that can be traced to a lack of previous familiarity with the relevant concepts and mechanisms. In **Yemen**, prior to the consultations, transitional justice was considered a new concept for most local actors. While many civil society organisations claimed to be working on these issues, they did not necessarily share a common understanding of key concepts of human rights and traded in not only conflicting but relatively uninformed understandings of transitional justice concepts. To illustrate, the most prevalent concept of reconciliation consisted basically of the notion of 'forgiving and forgetting' or 'getting over,' a way of understanding reconciliation that has now been broadly superseded in transitional justice discussions. Training sessions brought the discussions closer to international standards.

(d) It is widely agreed that consultations in **Nepal**, better preparation could have contributed to improve the knowledge and awareness of participants about transitional justice processes. A similar lesson was derived from the consultations in **Bosnia**, where one of the important challenges was precisely the relative lack of familiarity with the concept of transitional justice, both among participants as well as organisers. Not surprisingly, the outputs and recommendations of the consultations were quite general, not as specific as some would have hoped.

(e) Formal efforts to offer training in human rights and transitional justice to the staff organizing the consultations were undertaken both in Bosnia and in Tunisia. In both countries training sessions mainly targeting organizers and facilitators were organized prior to the actual consultations. The model was similar: three day

sessions covering the basics of transitional justice were outsourced to a specialized NGO, the ICTJ.

(f) In comparative perspective, it must be acknowledged that these training efforts were more than what most countries even attempted. Tunisia's formal approach to consultations deserves further study.<sup>10</sup> Having said this, it should be plain that even these 'crash courses' which targeted mostly organizers, rather than participants at large, can hardly lead to a stock of knowledge sufficient to yield outputs of a high level of concreteness.

(g) To conclude this point, if consultations are conceived primarily as vehicles for obtaining concrete inputs for the design of transitional justice measures a great deal of that potential depends on their ability to canvas *informed* views. Given that transitional justice policies (nowadays expected to be informed by consultations) are needed most in places where the reality, or even the idea of rights holders has been most diffuse, it is difficult to over-emphasize the importance of integrating into the planning of consultations effective means of strengthening the specific capacities of participants in the relevant topics.

## IV. Operational challenges and opportunities

### A. Timing

49. The preceding considerations rest upon an intuitively appealing and perfectly defensible understanding of the proper timing of consultations in the overall process of designing and implementing a transitional justice process: consultations, ideally, should precede the design of concrete measures. The consultations themselves should include a process for setting up the leading agency, and for selecting the leadership of such body, a mapping stage identifying constituencies the participation of which needs to be secured, an outreach and capacity building plan *both* for organizers and for participants, including the production and dissemination of relevant materials, a choice of methodologies, the organization and running of the actual consultations, and then the production of reports and other outputs which will become resources for the design and implementation of the transitional justice policy (all of this taking place only once security conditions are guaranteed).

50. While this ideal timing is perfectly sensible, it should come as no surprise that reality rarely affords such neatness. Indeed, the ideal abstracts from, among other considerations, the fact that transitional justice policies are never designed in a vacuum but in contexts that impose important constraints, impacting on the nature, function, and timing of consultations.

51. To begin with, some temporal constraints are unavoidable: consultations need to keep pace with political processes whose calendars are not infinitely flexible and that cannot always be adjusted to the needs of a perfect consultation.

52. Quite aside from the fact that a good number of transitions come about unexpectedly, as a result of more or less contingent events (e.g., Tunisia's transition and the

<sup>10</sup> The overall experience of the National Dialogue has come up for criticism of various kinds. See e.g., A/HRC/24/42, Annex 1, paras 30-34. Here the point is about training of one important cohort of consultation organizers.

transformations that it brought forth, in turn, in the region as a whole), once a transition starts, there are processes to which consultations have to accommodate, rather than the other way around.

53. To illustrate the point, some of the challenges faced by the National Dialogue process in **Tunisia** are attributable to the time pressure imposed by a political calendar related to the drafting of the new constitution and the organization of new elections. The interest of the Ministry of human rights and transitional justice in taking advantage of the momentum, and of actors funding the consultations and training sessions also favoured a speedy process, mainly due to budgetary constraints. The compressed calendar had an impact on the trainings, hampering a better understanding of transitional justice concepts among the sub-committee members, and moreover, among participants at large. The narrow time frame may also have increased difficulties in mobilizing further participation, especially within the regions, and did not allow the time necessary for proper analysis and systematization of the results of the consultations by the National Committee.

54. This sort of time pressure is the rule, rather than the exception, again, for reasons of various sorts. The government of **Sri Lanka** in 2016 agreed to carry out consultations on transitional justice. Facing demands for demonstrable progress in this area, it gave its newly appointed Consultation Task Force originally a three month deadline to design and carry out a national consultation. Despite the fact that the deadline in the end had to be extended, it was not feasible to adopt the sort of calendar that an ideal consultation process would have required, especially in order to allow for proper capacity building amongst the potential participants in the consultation.

55. There are other powerful contextual factors that impinge not only on the calendar but also on the substance of consultations. Some transitional justice processes come about as a result of peace agreements, which determine the basic framework of a transitional justice regime, at least in theory. Any consultations that take place afterwards must remain within that pre-established framework. This does not render the consultations moot, for frameworks stemming from peace agreements will need to be further specified in many dimensions, to which consultations can contribute –quite aside from the ‘non-epistemic’ functions that consultations can play.

56. Nevertheless, the agreements will impose both temporal and other constraints that cannot be ignored. A typical example of this is the case of **Burundi**, where the consultations (2008-10) took place within the framework of the Arusha Peace Agreement (2000) and its subsequent developments. Thus, the questionnaires used as a basis for the consultations naturally presupposed the accountability measures mentioned in the Agreement, namely, the Truth and Reconciliation Commission and the Special Tribunal (not one or the other), along with reparations and institutional reforms.

57. There is nothing objectionable about this, for crucial questions about these mechanisms had not been settled in the Agreement, including their concrete mandates, the procedures and criteria for the selection of their members, the periods in time that should be investigated, etc. The point is that consultations rarely act as the sole fulcrum on which policy design rests, and that therefore it is better to think both about their mode of operation and their essential functions in light of this fact, a point to which this report will return in section V.

58. It is not only peace agreements that have been signed already that bound possible consultations temporally and substantively; on-going peace negotiations have the same effect, as illustrated by the recent consultations in **Colombia**. In the context of the negotiation of the chapter on victims of the peace agreement, the Peace Negotiation Table in Havana asked the UN and the National University to carry out regional and national consultations in a very short time-frame to coincide with the expected pace of the

negotiations (3 weeks to prepare the consultations and 2 weeks to submit the report). This time frame obviously affected not just the preparations but also the treatment that different topics could receive.

59. Greater awareness of both the importance and of the conditions of success of consultations, as well as improvements in the methods employed particularly to strengthen the capacities of participants in consultations will bring the reality of consultations processes closer to the ideal timing described above. It will normalize the view that the design of a transitional justice policy requires the contributions of diverse stakeholders, whose views must be integrated through effective means into the process.

60. The fact that there is a gap between ideal and reality is no reason to surrender the ideal, but to redouble efforts and investments to realize the full potential of participatory methods in the design of transitional justice measures.

## **B. Leadership and organizational issues**

61. There is no single blueprint regarding who should be made responsible for the design and the implementation of national consultations. Whatever constraints national consultations need to overcome, it should be clear that deciding who participates in a consultation, what topics are addressed, what kind of inputs participants receive, what methods to employ, what kind of outputs the consultations produce, are crucial issues that play a significant role in determining the outcome of any consultation.

62. Impacting importantly the outcome of the consultations, decisions about such matters determine their credibility as well. For this reason, efforts have been made to come up with ways of discharging those responsibilities that protect the integrity and independence –and hence, at least procedurally, the trustworthiness—of consultations.

63. Typically, but not always, an institution is officially created for that purpose (Colombia's recent consultations were co-organized, as mentioned, by the UN and the National University without a formal, institutional set up). When institutions have been set up for this purpose their shape and composition varies across a broad range.

64. The government of **Sri Lanka** officially appointed a Consultations Task Force made up exclusively of representatives of civil society, all of them Sri Lankan nationals. In **Tunisia** the government, through the Ministry of Human Rights and Transitional Justice, appointed a Technical Committee of mixed composition with six members and six deputies, including two members of the Ministry and 10 members belonging to 5 different civil society organizations specializing in transitional justice. Although the selection process was not completely transparent, the final composition of the committee was widely accepted as all the different political, religious, and ideological tendencies were represented guaranteeing a certain equilibrium and independence.

65. In **Burundi** a 'Tripartite Steering Committee' (CPT) was established on the basis of an MOU between the Government and the UN, following negotiations between them in 2006-7 about the establishment of the Truth and Reconciliation Commission and the Special Tribunal for Burundi mentioned in the Arusha Agreement. The CPT had six members, equally distributed between the Government, civil society and the United Nations. On the Burundian side, ethnic and gender balance was respected. The CPT was responsible for the design and implementation of consultations. It was the guarantor of the independence, integrity and credibility of the National Consultations. It assured the

programmatic direction for the achievement of project results and the desired effects. The Government appointed the President and the UN appointed the Executive Secretary.<sup>11</sup>

66. While the shape of the entity in charge of consultations cannot be determined a priori, on the basis of principle alone, but requires adjustment to contextual factors including some political realities, the following are some relevant considerations:

- It is important to come up with a structure that can deflect possible charges of bias and partiality regarding any of the crucial dimensions of consultation processes, including the selection of participants, the determination of the agenda, methodology, trainings, reporting, etc. All things considered, a body made up entirely of government officials (or even one with a majority of those) is unlikely to be able to do this.
- Consultations require the deployment of resources, a capacious infrastructure which is difficult to create from scratch, and moreover, complex institutional coordination (think, for example about security arrangements). Follow-up of the conclusions of a consultation calls for political involvement, determination and support. It is unlikely (albeit not impossible) that a body with no government representation will achieve all of this.
- International participation is helpful in such bodies, but neither indispensable, nor, of course, a substitute for the sort of deep familiarity with context and the potential drive and sense of ownership that strong national participation can produce.<sup>12</sup>

67. The aim is to find a configuration that guarantees the integrity of consultations, and at the same time, their effectiveness.

## V. Contributions to legitimacy

68. It would be complacent to think that the state of our knowledge about how to carry out consultation processes maximizes the contributions they can make to the design and implementation of transitional justice measures. This report has both acknowledged some of the shortcomings characteristic of consultation experiences thus far, paying particular attention to the challenges that arise from deficits in capacity-building processes. Greater familiarity with the subject matter of the consultations would obviously lead to better, more concrete, more readily usable outputs.

---

<sup>11</sup> The CPT was only one part of a complicated structure another part of which is worth mentioning, the The Technical Monitoring Committee (CTS) composed of representatives of the Government, civil society, donors and the UN. This Committee had the primary role of strategic oversight of the implementation of the project and approval of the work plans, regular performance monitoring, settlement of any dispute that could occur and coordination between partners and other national and international actors involved in the implementation of the project. The Head of the Civil Cabinet of the President of the Republic assured the role of National Director of the overall project. He co-chaired the CTS with the Representative of the High Commissioner for Human Rights in Burundi and the Director of the Human Rights and Justice Division of BINUB.

<sup>12</sup> International participation, not unlike the participation of national civil society, sometimes comes at a price in terms of competition and possible divisiveness; in Yemen, for example, the differences between the office of the Special Advisor of the Secretary General on the one hand, and on the other, UNDP and OHCHR over transitional justice issues were challenging. Divisions between the civil society members of mixed bodies are well known.

69. Improvements in training, better planning, greater investments, different time lines, would make a difference. So would a more coherent and systematic integration of methods, qualitative and quantitative, and of consultation forums and media in order to improve the reliability of the efforts to capture the views of participants.

70. Similarly, a better sense of how the outputs of the consultations can be articulated, presently mostly in the form of reports with an uncertain fate, can enhance the impact of consultations.

71. Finally, at least in part because of the challenges mentioned, the idea that consultation processes are one-off opportunities should be replaced by more systematic thinking about the establishment of on-going processes of communication among different constituencies, so as to take advantage of learning processes. Deficits in capacities of organizers and participants become particularly problematic if consultations are conceived of in terms of sporadic interactions between stakeholders whose understanding of the relevant issues remains static. A more dynamic conception of consultations which acknowledges accretions in capacities over time, and that establishes means for the transmission of the changing understanding of rights, needs, and measures, would mitigate the timing problems.

72. These changes would make consultations more effective mechanisms to capture and transmit insights and proposals, or, to use the terms introduced before, better epistemically, and no efforts should be spared in achieving this objective. However, there is a different set of reasons, concerning legitimacy, which also justifies an interest in consultation processes.

73. Establishing forums and procedures in order to listen to people is, in itself, an act of recognition, which is one of the basic aims of transitional justice measures. As the Special Rapporteur has argued before, the critical sort of recognition is that which strengthens the idea and the reality of rights-holding.<sup>13</sup> Consultation processes with victims, in particular, sends to them and to society at large, a powerful message of inclusion, and ultimately empowers them. People whose rights were systematically trampled, now get a voice in the design of mechanisms to redress those violations and abuses. They are acknowledged, indeed called for, as interlocutors, in equal standing with others, in decisions about how institutions should express a new-found commitment to the norms of a shared political project of which victims are a part. This idea can inform all aspects of the design of consultation processes, from questions of venue (accessible, safe, reassuring), to issues of conversational dynamics (non-hierarchical, respectful, symmetrical). This process helps victims become visible, acquire a space in the public sphere which they did not have before.

74. Consultation processes, especially those that spend systematic efforts mapping the types of groups whose participation needs to be secured, offer the possibility of involving in discussions about transitional justice stakeholders that may have remained at the margins of such discussions. These need not be only previously marginalized and disfavoured groups; it may also be groups that either wilfully or contingently, remained on the side lines. Labour organizations, religious groups, businesses, amongst others, are not always active participants in discussions about transitional justice. Consultations may bring them into the fold, and ultimately, this is a crucial contribution to the comprehensiveness and sustainability of transitional justice measures, one of whose aims is the idea of social integration, or what is often referred to as reconciliation.

75. The interactions that are part and parcel of a well-designed consultation process also offers the potential for stakeholders to identify common grounds; they can come to an

---

<sup>13</sup> A/HRC/21/46

understanding of shared experiences (including shared experiences of pain and harm), shared needs (for various forms of support, security, responsive institutions), and of shared basic values and principles.

76. In previous reports the Special Rapporteur has both argued and documented the way in which transitional justice measures have as an initially unintended, but invariably documentable effect the articulation of social groups; in all countries where transitional justice becomes part of the agenda, a plethora of civil society organizations form in order to advocate around these issues. Consultation processes, if designed with an eye to this phenomenon, can contribute to the general strengthening of civil society, ultimately essential both for redress and for prevention.<sup>14</sup>

## VI. Conclusions and recommendations

### Conclusions

77. The need to design transitional justice measures in consultation with victims and other relevant stakeholders has become a sort of ‘mantra’ during at least the last ten years. The frequency with which the claim is made has not been matched by efforts to systematize analysis, especially in a comparative perspective, of the actually plentiful, and in some cases, sophisticated national experiences with consultations about the topic. This has deprived the field of the many benefits that come from a conscious and deliberate accretion of knowledge and expertise, leading to various inefficiencies, including the need to ‘reinvent the wheel’ with each new experience, the likelihood of repeating avoidable mistakes, and a failure to anticipate difficulties and, consequently, develop strategies to cope with challenges that would otherwise be readily identifiable and for which a range of solutions could be considered.

78. The present report identifies some basic pre-conditions for success of national consultations on transitional justice mechanisms, selected operational challenges as well as the contribution that consultations can make to the design and implementation of transitional justice policies. Consultations, like participation more generally, can be defended from two standpoints: first, consultations can improve both the quality of information on the basis of which design questions can be tackled, as well as broaden the range of alternatives that should be considered. This is an ‘epistemic’ defense of consultations. A second kind of argument focuses not on informational and propositional considerations, but on the contributions that consultations can make, in process terms, as a vehicle for offering recognition to victims, to strengthening the idea of rights-holding, to identifying stakeholders not typically included in discussions about transitional justice, and ultimately, to facilitating processes of social integration. These are ‘legitimacy’ arguments.

79. The report focuses on some preconditions of success of consultations that many countries have found challenging to meet: specifically, guaranteeing security conditions that allow for coercion-free participation; enabling the participation of a sufficiently inclusive set of stakeholders; and offering means to strengthen the capacity of participants such that the consultations do not consist in an exercise which captures only relatively uninformed opinions. The report offers information about how various countries have attempted to meet these challenges.

80. Regarding operational challenges, the report pays particular attention to issues concerning the timing of consultations and of the institutional set-up that would safeguard

---

<sup>14</sup> See e.g., A/HRC/30/42.

the integrity, independence, and reliability (in the sense of fidelity to the views expressed) of consultations. Ideally, consultations should precede the work of designing transitional justice options, and the actual consultations themselves should rest upon thorough and effective capacity building not just of organizers and of participants. Furthermore, the consultations should take place under the responsibility of bodies that by design and operation, are capable of securing their integrity, independence, and reliability.

81. It is easy to find fault with many consultation processes on these scores; consultations have rarely been adequately folded into the processes leading to the design and implementation of transitional justice measures. Moreover, none of them can be said to have fully met the immense challenges associated with increasing, in the short run, familiarity with the relevant concepts and alternatives so as to allow them, reliably, to lead to concrete proposals and other outputs readily usable in policy-making. The report, however, offers information about efforts that have been made in this direction, and about some of the institutional forms that have been adopted in order to safeguard the integrity and independence of consultations.

82. Finally, after offering analyses meant to help enhance the epistemic contribution of consultations, the report emphasizes the importance of the legitimacy contributions of such processes, recalling the crucial function that consulting victims and others can make to shoring up their status as rights-holders, their ability to identify stakeholders that may otherwise be left out of discussions about the design and implementation of transitional justice measures—despite the significance of their contribution to a sustainable transitional justice policy—and their role in aiding processes of social integration helping different sectors identify shared experiences, needs, values, and principles.

## **Recommendations**

83. On the basis of the aforementioned conclusions, the Special Rapporteur makes the following recommendations in relation to the main challenges identified in the present report:

a) Sustained efforts should be made to undertake systematic comparative analysis of national consultation processes on transitional justice so as to capitalize on a significant stock of a range of past domestic experiences. This would enable greater efficiency in the planning of consultations, in the deployment of resources, and, without veering towards formulaic approaches, avoid the tendency to think that every aspect of consultations needs to be designed for each new transition from scratch.

(b) Since different entities within the UN system have contributed to, or supported, a significant number of national consultation processes, gathering system-wide expertise in an institutionalized manner could greatly enhance understanding and identification of good practices. OHCHR, UNDP, and UN Women, for example, should be encouraged to cooperate in the production of systematic analysis of their experiences. The World Bank and other relevant international financial institutions, which have expertise in development-related consultations, should be invited to collaborate in such endeavours.

(c) The success of consultation processes depends upon a broad variety of factors. This report has focused on three in particular (although there are many others, including adequate financial and technical support, which should neither be ignored nor underestimated). The first basic precondition relates to security concerns. National authorities as well as international and regional actors have an important role to play, particularly in post-conflict and weakly

institutionalized settings, in guaranteeing conditions of coercion-free participation. Greater familiarity with the role and impact that different protection schemes may have in consultation processes, as well as the use of methods and technologies that mitigate risks (including through the ‘anonimization’ of submissions) should be encouraged.

(d) The second precondition of success of consultation processes is to identify a sufficiently inclusive range of stakeholders whose views need to be canvassed in any credible consultation. To this end, careful mapping of the various sectors of society throughout the country that should be a part of consultations must be an essential part of early planning processes.

(e) The participation of different victims groups, and of other sectors that have been traditionally marginalized must be one of the aims of such mapping exercises. In particular, no effort should be spared in securing the participation of women, and of both internally displaced and refugee populations. Quotas to guarantee equitable participation of women should be established. Lessons should be derived from previous experiences consulting victims and other stakeholders beyond national borders, and should be integrated in the planning of all consultations in contexts that have generated significant displacements.

(f) There is no other issue regarding consultations that calls for more attention than strengthening familiarity with, knowledge of and capacities regarding all aspects of transitional justice and even general human rights and international humanitarian law on the part of both organizers of, and participants in, consultations. On this topic, gathering of previous experiences will help, but most likely will be insufficient. Therefore, this is an issue that calls, urgently, for greater attention so as to strengthen the ability of domestic, regional, international and bilateral actors to devise targeted capacity building endeavours.

(g) Greater integration of consultation processes in the overall design of transitional justice policies will mitigate some of the tensions around questions of the timing of consultations. If consultations are a mere late ‘add on,’ an afterthought, their links to on-going processes, and subsequent efficiency become particularly problematic. Acknowledging that transitions obey various and not always coherent calendars and face a diversity of constraints, cannot, however, excuse bad planning.

(h) Thinking about consultation as a one-off event not only heightens difficulties regarding timing and linkages, but deprives both the design and implementation of transitional justice measures of the gradual accretion of knowledge and expertise that is manifested in all transitions. More dynamic conceptions of consultations should be adopted and institutionalized. The aim should be to establish processes that allow for efficient on-going communication among different stakeholders.

(i) The institutions in charge of consultations deserve greater attention and more thorough study. Here also there are lessons to be derived from earlier experiences, although none must be used as a blue print. The aim is to design institutional set-ups that can guarantee the integrity, independence, and reliability of consultations, and that offer reasons to expect that they will make an effective contribution to the complex institutional coordination that consultations require, and improve the chances of uptake of their recommendations.

(j) Greater attention should be paid to the legitimacy contributions that consultations can make, and means to enhance and solidify those contributions should be incorporated. In particular, consultations can be one important means to offer recognition to victims, especially as rights-holders; they can broaden the range of groups that see themselves and are seen by others as significant stakeholders in discussions about transitional justice, and hence, the future of the respective society and finally, they can contribute to processes of social (re-)integration and reconciliation by allowing for the opportunities to identify common experiences, needs, and shared values and principles. The planning of consultations should adopt effective prospective means that are adequate to the achievement of these ends.