HUMAN RIGHTS QUARTERLY

Guarantees of Non-Recurrence: An Approximation

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ABSTRACT

In response to massive human rights violations, states are obliged not only to prosecute the perpetrators, provide reparations to the victims and tell the truth about the violations but also to guarantee their non-recurrence. The literature on prosecution, truth-telling and reparation abounds but guarantees of non-recurrence remain under-explored. This article begins to develop a more systematic understanding of this concept, situating it at the interface between corrective and distributive justice. While defining guarantees of

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non-recurrence broadly, the article provides criteria for developing specific prevention strategies in a given context. Particularly relevant in this regard are measures to disable abusive capacities.

I. INTRODUCTION

The United Nations Principles to Combat Impunity list four obligations of states in response to massive human rights violations: to prosecute the perpetrators, to provide reparations to the victims, to tell the truth about the violations, and to guarantee their non-recurrence.[1] The obligation to guarantee non-recurrence is the least developed category of the measures to combat impunity. The 1997 version of the Principles to Combat Impunity devote only six out of forty-two principles to guarantees of non-recurrence; the 2005 updated version of the Principles devote only four out of thirty-eight principles to this obligation. Not surprisingly, these four principles come last in the Principles to Combat Impunity. Generally, little systematic attention has been paid to the topic. The literature on prosecution, truth-telling and reparation abounds, but guarantees of non-recurrence remain under-explored. While the human rights community broadly agrees on the importance of preventing recurrence, it has limited understanding of what it entails and how it is done.

At the same time, the development and peace building communities are heavily engaged in many of the specific activities that are commonly referred to under the category of guarantees of non-recurrence. Development actors generally do not use the term "guarantees of non-recurrence" even though activities such as the reform of public institutions, the establishment of civilian oversight over security forces, the disbandment of unofficial armed groups, or the demobilization and reintegration of child combatants fall in their areas of expertise and are familiar terrain to them. Numerous programs are funded to implement such activities. Countless academic articles and practical guidance have been written on these topics. While the human rights community talks about guarantees of non-recurrence, the development and peace building communities do most activities grouped under the category of guarantees of non-recurrence without using the term or considering its implications.

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1. *The Administration of Justice and the Human Rights of Detainees. The Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet*, U.N. ESCOR, Comm'n on Hum. Rts., 49th Sess., Agenda Item 9, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, Principle 18 (2 Oct. 1997); *Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, U.N. ESCOR, Comm'n on Hum. Rts., 61st Sess., Agenda Item 17, U.N. E/CN.4/2005/102/Add.1, Principle 1 (8 Feb. 2005) [hereinafter *Updated Principles to Combat Impunity*].

This article attempts to provide a modest contribution to a more systematic understanding of guarantees of non-recurrence. Section II traces their origins and normative foundations in several key reference documents and describes the concrete activities listed under this category. On the basis of this textual approximation, sections III and IV distill several basic characteristics of guarantees of non-recurrence situating them at the interface between corrective and distributive justice. Section V provides strategic criteria for applying preventive measures in a concrete context. These considerations may help elucidate the relations of guarantees of non-recurrence with the other state obligations to combat impunity, with general measures to prevent atrocities, and with development more broadly.

II. GUARANTEES OF NON-RECURRENCE IN RELEVANT TEXTS

This article takes as a starting point three sets of key reference documents: the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, in its final version of 1996,[2] in its revised final version of 1997 (Principles to Combat Impunity),[3] and in its updated version of 2005 (Updated Principles to Combat Impunity);[4] the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, in its initial version of 1993, in its revised version of 1996, and in its adopted version of 2006 (Basic Principles and Guidelines on Reparation);[5] and the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility).[6]

The English versions of these documents use both the term "guarantees of non-recurrence" and the term "guarantees of non-repetition."[7] These terms are interchangeable, without difference in meaning.

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2. *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Final Report Prepared by Mr. L. Joinet,* U.N. ESCOR, Comm'n on Hum. Rts., 48th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (29 June 1996).
3. *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet,* U.N. ESCOR, Comm'n on Hum. Rts., 49th Sess., Agenda Item 9, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (2 Oct. 1997) [hereinafter *Principles to Combat Impunity*].
4. *Updated Principles to Combat Impunity*, *supra* note 1.
5. Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/147 (21 Mar. 2006) [hereinafter Basic Principles and Guidelines on Reparation].
6. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, in* Yearbook of the International Law Commission, Vol. II, Rep. of the Int'l Law Comm'n, 53rd Sess., 23 Apr.–1 June, 2 July–10 Aug. 2001, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001) [hereinafter Draft Articles on State Responsibility].
7. The French versions of the reference documents use the terms "*garanties de non-renouvellement*" and "*garanties de non-répétition*."

The term "principle" as used in the reference documents does not refer to the concept of general principles of international law that constitute a source of international law.[8] The Principles to Combat Impunity are not "legal standards in the strict sense but guiding principles," or guidelines that ought to provide a "broad strategic framework for action against impunity."[9] This is particularly the case with the guarantees of non-recurrence described in the Principles. Whereas states clearly have a legal obligation to prevent the recurrence of a violation, the specific guarantees of non-recurrence enumerated in the Principles largely do not constitute legal obligations but rather concrete measures or categories of measures that have proven to effectively contribute to preventing recurrence in certain contexts. (The contextual nature of guarantees of non-recurrence is explored in more detail in Sections II.C and III.C below.)

A. Drafting History

In 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights (UNCHR) requested two of its members, Louis Joinet and El Hadji Guissé, to draft a working paper on the approaches that a study on impunity might take, which Joinet and Guissé submitted to the Sub-Commission in 1992. On the basis of the recommendations in the working paper, the Sub-Commission requested the co-authors to undertake a study on the impunity of perpetrators of human rights violations. Joinet and Guissé submitted preliminary reports to the Sub-Commission in 1993 and 1994. In 1994, the Sub-Commission decided to split the study in two: Louis Joinet was entrusted with exploring impunity in the context of civil and political rights whereas El Hadji Guissé was to study impunity within the framework of economic, social and cultural rights. In 1995, Joinet submitted to the Sub-Commission a progress report with comments on matters of principle. In 1996, Joinet submitted a final report, which contained a first set of principles for the protection and promotion of human rights through action to combat impunity. The Sub-Commission did not have time to consider the report in 1996 and asked Joinet to continue his consultations and submit a revised and extended final report in 1997. The revised final report with an amended set of principles was submitted to the Sub-Commission in 1997. The Sub-Commission requested the Secretary-General to transmit the revised final report to the UNCHR. In its 1998 session, the UNCHR took note of the report but neither endorsed nor transmitted it to the General Assembly.

Joinet does not discuss the concept of guarantees of non-recurrence in his preparatory reports drafted prior to 1995. In these reports, he groups

8. Statute of the International Court of Justice, art. 38(1), *annexed to* U.N. Charter, *signed* 26 June 1945, 59 Stat. 1055, T.S. No. 993 (*entered into force* 24 Oct. 1945).
9. *Principles to Combat Impunity*, *supra* note 3, ¶ ¶ 46(1), 49.

the proposed set of principles to combat impunity along three fundamental rights of victims: the right to know, the right to justice, and the right to reparations.[10] At the same time, Joinet stated in the preparatory documents that his final report should take account of the proposals made by Theo van Boven on reparations to victims of gross human rights violations.[11] In 1989, the Sub-Commission had tasked van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross human rights violations. Following considerable preparatory work, in 1993 van Boven submitted his final report with proposed Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law. According to van Boven, reparation should include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In 1995, a working group of the Sub-Commission chaired by Joinet considered these Basic Principles and Guidelines on Reparation. In 1996, further revisions to the Basic Principles and Guidelines on Reparation were made during a meeting of experts, which was chaired by van Boven and at which Joinet participated.[12] In developing the Basic Principles and Guidelines on Reparation, van Boven drew on a number of sources: the International Law Commission's work on state responsibility; the decisions and views of international human rights organs on state obligations towards victims of human rights violations, including the Human Rights Committee; the European Court on Human Rights and the Inter-American Court of Human Rights; as well as on national law and practice. The section on guarantees of non-repetition in the Basic Principles and Guidelines on Reparation reflects these sources.[13]

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10. *The Administration of Justice and the Human Rights of Detainees. The Question of Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Guissé and Mr. Joinet, Pursuant to Sub-Commission Resolution 1992/23*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Agenda Item 10(a), U.N. Doc. E/CN.4/Sub.2/1993/6, ¶ ¶ 127, 130 (19 July 1993).
11. *Id.* ¶ 131.
12. *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political): Final Report Prepared by Mr. L. Joinet*, U.N. ESCOR, Comm'n on Hum. Rts., 48th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/18, ¶ 6 (29 June 1996); *The Administration of Justice and the Human Rights of Detainees. Revised Set of Basic Principles and Guidelines on the Right to Reparation for the Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr. Theo van Boven*, U.N. ESCOR, Comm'n on Hum. Rts., 48th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1996/17, ¶ 2 (24 May 1996).
13. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Agenda Item 4, U.N. Doc. E./CN.4/Sub.2/1993/8, ¶ ¶ 40–130, 58 (2 July 1993) [hereinafter van Boven 1993 Report]. Following several years of further intergovernmental consultations and revisions, the General Assembly adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 5.

Joinet largely based the section on reparation in the 1996 version and then also in the revised 1997 version of the Principles to Combat Impunity on the 1996 version of the Basic Principles and Guidelines on Reparation.[14] Joinet ensured that the reparation section in the Principles to Combat Impunity benefited from and was consistent with the Sub-Commission's work on reparation. Joinet also incorporated a subsection on guarantees of non-recurrence in the reparation section. However, the specific prevention measures included in this subsection were not drawn from the Basic Principles and Guidelines on Reparation. Joinet incorporated measures that he had already discussed in his own preparatory reports—albeit not under a heading of guarantees of non-recurrence—that were particularly relevant to combat impunity with preventive means at the time when the principles were drafted, especially in Latin American transitions, such as disbanding paramilitary groups, abolishing emergency courts or purging abusive officials.[15]

Following a few years of inactivity, the UNCHR tasked the Secretary-General in 2003 to commission a study on best practices to combat impunity. The Secretary-General appointed Diane Orentlicher as independent expert who presented her study at the Commission's 2004 session. Based on the study's recommendations, Orentlicher was appointed to update the Principles to Combat Impunity in light of recent developments and state practice in international law. Orentlicher drafted the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity and submitted them to the UNCHR in 2005.

The Updated Principles to Combat Impunity kept but revised the subsection on guarantees of non-recurrence included in the 1997 Principles to Combat Impunity and added further measures aimed at ensuring non-recurrence. These revisions reflected recent developments in law and practice, and took into consideration concerns that arose in regions other than those reflected in the 1997 version of the principles. For instance, a new measure introduced the need to establish effective institutions of civilian oversight over security institutions. In 2005, the UNCHR took note with appreciation of the Updated Principles to Combat Impunity "as a guideline to assist States in developing effective measures for combating impunity."[16]

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14. *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights): Final Report Prepared by Mr. L. Joinet, supra* note 12. There are small differences between the reparation section in the 1996 version of the Principles to Combat Impunity and the reparation section in the revised 1997 version of the Principles to Combat Impunity. In the 1997 version, the reparation section was shortened. The paragraphs on guarantees of non-recurrence were hardly affected by these changes. The name changed, however, from non-repetition to non-recurrence.
15. The preparatory reports dealt repeatedly with the issue of so-called purges. A detailed description of all specific measures is provided below in Section II.C.
16. U.N. High Commissioner for Human Rights, *Impunity: Human Rights Resolution, 2005/81*, U.N. ESCOR, Comm'n on Hum. Rts., ¶ 20, U.N. Doc. E/CN.4/RES/2005/81 (21 Apr. 2005).

Again, the UNCHR, the Human Rights Council, nor the General Assembly formally adopted the principles.

B. Normative Foundations

Generally in international law, a breach by a state of an international obligation entails, *inter alia*, the state's responsibility to cease that wrongful act and prevent its repetition.[17] Whereas cessation may be understood as the "negative aspect of future performance, concerned with securing an end to continuing wrongful conduct . . . guarantees [of non-repetition] serve a preventive function and may be described as a positive reinforcement of future performance."[18] Both cessation and prevention of repetition express and underline the continuing validity of the obligation violated and, respectively, the state's obligation to respect and ensure the right.

International human rights law knows not only an obligation of states to respect but also to ensure human rights. Article 2 of the International Covenant on Civil and Political Rights specifies, for instance, that state parties undertake "to respect and to ensure . . . the rights recognized in the present Covenant."[19] This duty to ensure includes a comprehensive obligation to prevent future violations of human rights. States are required to "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations."[20] The duty to ensure human rights implies not only a general obligation to prevent any form of future violation, but also a specific obligation to prevent the recurrence of a violation that has already taken place. Indeed, the "purposes of the Covenant would be

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17. *Responsibility of States for Internationally Wrongful* Acts, G.A. Res. 56/83, at annex art. 30, U.N. GAOR, 56th Sess., Agenda Item 162 (28 Jan. 2002).
18. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 30, Commentary, ¶ 1 (2001), adopted by the International Law Comm. at its Fifty-Third Session, and submitted to the General Assembly session A/56/10.
19. International Covenant on Civil and Political Rights, *adopted* 16 Dec 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. (No. 16), art. 2, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar 1976); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., art. 2, U.N. Doc. A/39/51 (1985), 1465 U.N.T.S. 85 (*entered into force* 26 June 1987); International Convention for the Protection of All Persons from Enforced Disappearance, *adopted* 20 Dec. 2006, G.A. Res. 61/177, U.N. GAOR, 61st Sess., art. 22–23, U.N. Doc. A/Res/61/177 (2007) (*entered into force* 23 Dec. 2010); Basic Principles and Guidelines on the Right to a Remedy and Reparation, *supra* note 5, ¶ 3.
20. General Comment No. 31 [80], *The Nature of the General Obligation Imposed on States Parties to the Covenant*, *adopted* 29 Mar. 2004, U.N. GAOR, Hum. Rts. Comm., 80th Sess., ¶ 7, 2187th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

defeated without an obligation . . . to take measures to prevent a recurrence of a violation of the Covenant."[21] States are, therefore, obliged to "ensure that victims do not again have to endure violations of their rights"[22] and "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[23] Along these lines, the Committee Against Torture stated that by undertaking guarantees of non-repetition states "may also be fulfilling their obligations to prevent acts of torture under Article 2 of the Convention."[24]

The obligation to prevent recurrence in international human rights law is based not only on the overall duty to ensure human rights but also on the specific duty to make reparation for a violation of human rights.[25] This understanding of guarantees of non-recurrence was largely developed in the context of jurisprudence exploring the scope of reparations owed to victims of human rights violations, particularly in the Inter-American human rights system.[26] A state's duty to make reparation arises when an obligation under international law to respect and ensure human rights is violated. Reparation has "the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations."[27] Reparation should respond to the needs of victims and should be proportional to the gravity of the violations and the harm suffered.[28] According to the Basic Principles and Guidelines on Reparation, reparation should be provided in

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21. *Id.* ¶ 17. *See also* Velásquez Rodríguez Case, ¶ 166, Case 7920, Ser. C, No. 4, Inter-Am. C.H.R. 35, O.A.S. Doc. OEA/Ser.L/V/III.19, doc. 13 (1988) (judgment of 29 July 1988):

    > As a consequence of this obligation [to ensure], the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

22. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 35; see also *Principles to Combat Impunity*, *supra* note 3, Principle 37.
23. Velásquez Rodríguez Case, *supra* note 21. Similarly, international humanitarian law requires the contracting parties not only to respect but also "to ensure respect" for its rules in international and in non-international conflicts (Common Article 1 of the Geneva Conventions and Article 1 of the Additional Protocol I). Again, this duty to ensure respect contains obligations to prevent violations of humanitarian law, to halt ongoing violations, and to prevent their recurrence.
24. Comm. against Torture, General Comment No. 3, *Implementation of Article 14 by State Parties*, U.N. Doc. CAT/C/GC/3, ¶ 18 (13 Dec. 2012).
25. Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ 23.
26. van Boven 1993 Report, *supra* note 13, ¶ ¶ 40–130.
27. *Id.* ¶ 137.
28. *Id.*

five forms if it is to be full and effective: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[29]

In the 1997 Principles to Combat Impunity, Joinet follows the structure of the Basic Principles and Guidelines on Reparation and presents the guarantees of non-recurrence of violations as a subcategory of the right to reparation.[30] The 2005 Updated Principles to Combat Impunity separate more clearly the right to reparation from the guarantees of non-recurrence. When generally discussing the obligations of states to combat impunity, the Updated Principles list the obligation to provide reparation to victims separately from the obligation to take other necessary steps to prevent a recurrence of violations.[31] In the detailed description of the two categories, they are presented in one section but its title refers to both categories and they are discussed separately in two subsections.[32] Guarantees of non-recurrence are more accurately understood as a distinct obligation rather than a subset of reparations. States have an obligation to cease a violation and prevent its repetition not just because they should provide reparations to victims but because they already have a general duty to comply with their obligations under international law.[33] At the same time, the justiciability of guarantees of non-recurrence presupposes the existence of a victim whose rights have been violated. Hence both understandings of guarantees of non-recurrence have their merits and complement each other.

Vetting the public service to screen out abusive officials is a preventive measure that receives particular attention in relevant texts. In the 1997 Principles to Combat Impunity, three out of the six principles on guarantees of non-recurrence deal with vetting.[34] Human rights treaty bodies have repeatedly recognized the role of vetting in fulfilling the states' general ob-

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29. Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ ¶ 18–23. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance explicitly states in art. 24 that guarantees of non-repetition are one form of reparation.
30. *Principles to Combat Impunity*, *supra* note 3, Principles 36–42. However, when discussing the scope of the right to reparation in Principle 36, Joinet seems to imply that reparation covers restitution, compensation, rehabilitation, and satisfaction but not guarantees of non-recurrence. In the revised final report that is part of the same UN document, Joinet clearly separates guarantees of non-recurrence from the right to reparation. *See also Principles to Combat Impunity*, *supra* note 3, ¶ ¶ 16, 43.
31. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 1.
32. *Id.* Principles 35–38.
33. The inclusion of cessation within the concept of reparation "seems to imply that in the absence of a victim there is no cessation. It undermines the rule of law which is the basis of the obligation to cease any conduct that is not in conformity with an international duty." Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents, in* Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations 11, 22 (K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens eds., 2005).
34. *Principles to Combat Impunity*, *supra* note 3, Principles 40–42.

ligation to prevent human rights violations.[35] The Human Rights Committee in its observations on state party reports continually urged the removal of abusive officials. In recent observations on a report of Nepal, for example, the Committee requested Nepal to "adopt guidelines for vetting to prevent those accused of violations of the Covenant from holding public office and being promoted."[36] Along similar lines, UN special procedures have called for the removal of officials responsible for human rights violations.[37] In his 2004 report on the rule of law and transitional justice in conflict and post-conflict societies, the UN Secretary-General did not broadly elaborate on guarantees of non-recurrence but instead focused his entire discussion of preventive measures on vetting.[38] Vetting is a preventive measure that states are strongly encouraged if not obliged to take.

Several UN entities issued guidance on vetting. Both the Office of the UN High Commissioner for Human Rights (OHCHR) and the UN Development Programme (UNDP) released public guidelines on vetting public

35. *Promotion and Protection of Human Rights. Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*, U.N. ESCOR, Comm'n on Hum. Rts., 61st Sess., ¶ 68, Agenda Item 17, U.N. Doc. E/CN.4/2005/102 (18 Feb. 2005) [hereinafter *Updated Principles to Combat Impunity 2*).
36. *Concluding Observations on the Second Periodic Report of Nepal*, U.N. GAOR, Hum. Rts. Comm., 110th Sess., U.N. Doc. CCPR/C/NPL/CO/2 (15 Apr. 2014). *See also Concluding Observations of the Human Rights Committee: Argentina*, U.N. GAOR, Hum. Rts. Comm., 70th Sess., U.N. Doc. CCPR/CO/70/ARG (3 Nov. 2000); *Concluding Observations of the Human Rights Committee: Bolivia*, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. CCPR/C/79/Add. 74 (5 May 1997). The Committee has made such observations also regarding Chile, Colombia, Haiti, and Paraguay. Other treaty bodies have made similar observations: *Concluding Observations on the Second Periodic Report of Kenya, Adopted by the Committee at its Fiftieth Session (6 to 31 May 2013),* U.N. GAOR, Comm. Ag. Torture, 50th Sess., U.N. Doc. CAT/C/KEN/CO/2 (19 June 2013); *Concluding Observations: Democratic Republic of Congo*, U.N. GAOR, Comm. on Rts. of the Child, 59th Sess., U.N. Doc. CRC/C/OPAC/COD/CO/1 (7 Mar. 2012); *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the Democratic Republic of Congo*, U.N. GAOR, Comm. on the Discrim. Ag. Women, 55th Sess., U.N. Doc. CEDAW/C/COD/CO/6-7 (30 July 2013).
37. *See, e.g., Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff. Addendum: Mission to Burundi (8–16 December 2014)*, U.N. GAOR, Hum. Rts. Council, 30th Sess., U.N. Doc. A/HRC/30/42/Add. 1 (10 Aug. 2015); *Report of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination. Addendum: Mission to the United States of America (20 July to 3 August 2009)*, U.N. GAOR, Hum. Rts. Council, 15th Sess., Agenda Item 3, U.N. Doc. A/HRC/15/25/Add.3 (15 June 2010); HRC, *Report of the Working Group on Enforced or Involuntary Disappearances. Addendum: Mission to Bosnia and Herzegovina*, U.N. GAOR, Hum. Rts. Council, 16th Sess., Agenda Item 3, U.N. Doc. A/HRC/16/48/Add.1 (28 Dec. 2010).
38. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Security Council, ¶ ¶ 52–53, U.N. Doc. S/2004/616 (3 Aug. 2004).

employees in post-conflict settings.[39] The Police Division of the Department of Peacekeeping Operations (DPKO) issued an internal policy on support for vetting of local police in peacekeeping settings.[40] The UN also issued guidance on vetting candidates for UN peacekeeping assignments and other UN positions.[41]

In addition to the UN, other international organizations published guidance on vetting and highlight the importance of vetting. The World Bank in its 2011 World Development Report underscores the importance of vetting for dismantling abusive networks and for establishing trustworthy and effective security and justice institutions.[42] In 1996, the Council of Europe adopted a resolution on measures to dismantle the heritage of communist totalitarian systems that include detailed guidelines on lustration, as vetting-type processes are called in former communist countries.[43]

C. The Specific Measures to Guarantee Non-Recurrence

Whereas the first three obligations in response to serious human rights violations—the obligations to ensure the right to know, the right to justice and the right to reparation—refer to specific measures that states should take to meet these obligations, guarantees of non-recurrence relate to a function that can be achieved, in principle, by an open-ended variety of measures. In describing guarantees of non-recurrence, the Updated Principles to Combat Impunity declare: "States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake *institutional reforms and other measures* necessary to ensure respect for the rule of law."[44]

In fact, the measures described in the various texts cover a broad range of activities. The preventive measures listed in the Basic Principles and Guidelines on Reparation fall largely into the following five categories: reforming institutions; protecting human rights defenders; human rights training; promoting conflict resolution mechanisms; and reforming laws allowing human

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39. OHCHR, Rule-of-Law-Tools for Post-Conflict States. Vetting: an Operational Framework (2006), *available at* http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf; UNDP, Vetting Public Employees in Post-Conflict Settings: Operational Guidelines (2006), *available at* https://www.ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf.
40. U.N. Policy: Support for Vetting of Police and other Law Enforcement Personnel. Ref. 2008.03 (2008) (on file with author).
41. U.N. Policy, Human Rights Screening of United Nations Personnel (2012), *available at* http://dag.un.org/bitstream/handle/11176/387395/Policy%20on%20Human%20Rights%20Screening%20of%20UN%20Personnel%20December%202012.pdf?sequence=1&isAllowed=y.
42. World Bank, World Development Report 2011: Conflict, Security, and Development (2011).
43. *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems*, Council of Europe, 23rd Sess., Doc. No. 7568 (1996).
44. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 35 (emphasis added).

rights violations.[45] The specific preventive measures included in the 1997 Principles to Combat Impunity vary considerably from those referred to in the Basic Principles and Guidelines on Reparation. They can be grouped in three categories: disbanding unofficial armed groups; repealing emergency legislation and abolishing emergency courts; and administrative measures relating to abusive state officials, particularly vetting in the security and justice sectors.[46] The measures to prevent recurrence in the 2005 Updated Principles to Combat Impunity keep the measures listed in the 1997 Principles but broaden their scope and application. In addition, the 2005 principles add some new measures. As a result, some of the more general measures that were included in the Basic Principles and Guidelines on Reparation reappear in the Updated Principles to Combat Impunity. Largely, they fall into the following three categories: reforming state institutions including vetting; disbanding parastatal armed groups and demobilizing child combatants; and reforming laws that contribute to impunity.[47]

A few general observations can be made in comparing the measures included in these documents. First, the measures listed are *not exhaustive*. For instance, the 1997 Principles to Combat Impunity state that priority consideration should be given to the measures listed but leave room for other "appropriate measures" to prevent recurrence.[48] The 2005 Updated Principles to Combat Impunity emphasize that states must take "all necessary measures" to protect human rights.[49] From experience, the measures described in the documents have proven to be important in preventing recurrence. But this does not mean that prevention could and should not be done differently at another time in another context.

Second, while certain measures have been updated or added in the 2005 Updated Principles (see third conclusion below), they largely remain *within the framework* adopted by the 1997 Principles. As a result, certain measures one would expect to find are absent. For instance, principle 37 in the Updated Principles, which corresponds to principle 38 in the 1997 Principles, deals with the demobilization of unofficial armed groups linked with state institutions but does not discuss disarmament, demobilization and reintegration (DDR) of non-state armed groups. Mainstream DDR literature and practice does not ignore these critical actors.

Third, the additions and amendments in the Updated Principles can be explained by the *context* that served as a reference for the measures. For

45. Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ 23; CAT, General Comment No. 3, *supra* note 24, ¶ 18.
46. Principles to Combat Impunity, *supra* note 3, Principles 37-42.
47. Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ 23; *Updated Principles to Combat Impunity*, *supra* note 1, Principle 36.
48. Principles to Combat Impunity, *supra* note 3, Principle 37.
49. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 36.

instance, the measures in the 1997 Principles on the disbandment of armed groups linked to the state and on administrative and other measures relating to state officials draw heavily on the provisions on purification of the armed forces in the 1992 El Salvador peace agreement and, to a lesser extent, on experiences with lustration processes in former communist countries in central and eastern Europe.[50] Reflecting a broader range of contexts and experiences, particularly with DDR, the 2005 Updated Principles to Combat Impunity broaden the approach and begin to use the terminology of demobilization and reintegration.[51] However, the link of certain measures to combating impunity is hardly explored in the Updated Principles. For instance, the demobilization and reintegration of former child combatants draws attention to their specific needs as victims but why doing so is particularly relevant to combating impunity remains unanswered.

Fourth, the measures do not just deal with the individual circumstances of human rights violations but mostly target the *institutions responsible* for certain violations and aim to address the reasons why the members of these institutions committed the violations. The measures largely aim to reform structures and systems that allowed, facilitated or promoted violations. Along these lines, individual reparation measures such as restitution, compensation and rehabilitation are distinguished in the 1996 version of the Principles to Combat Impunity from general and collective reparation measures such as satisfaction and guarantees of non-recurrence.[52] Individual measures provide redress to the victims directly whereas general measures benefit not just victims but all members of society—as potential future victims.[53]

Fifth, many of the measures focus in various ways on strengthening *accountability*, particularly of institutions that are more prone to committing serious human rights violations such as security institutions because they

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50. *Letter Dated 27 January 1992 from the Permanent Representative of El Salvador to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 46th Sess., Agenda Item 31, U.N. Doc. A/46/864 (30 Jan. 1992). Purges were also extensively discussed in Joinet's preparatory reports, but initially more as a punitive rather than a preventive measure. *See The Administration of Justice and the Human Rights of Detainees. The Question of Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Guissé and Mr. Joinet, Pursuant to Sub-Commission Resolution 1992/23*, *supra* note 10, at ¶ ¶ 119–26.
51. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 37. For more information on DDR, see U.N., Integrated Disarmament, Demobilization and Reintegration Standards (2006), *available at* http://cpwg.net/wp-content/uploads/sites/2/2013/08/UN-2006-IDDRS.pdf; *See also Updated Principles to Combat Impunity 2*, *supra* note 35, ¶ 64.
52. *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights): Final Report Prepared by Mr. L. Joinet, Pursuant to Subcommission Resolution 1995/35*, U.N. ESCOR, Comm'n on Hum. Rts., 48th Sess., at ¶ 22, U.N. Doc. E/CN.4/Sub.2/1996/18 (29 June 1996).
53. *See also* Juan E. Méndez, *Accountability for Past Abuses*, 19 Hum. Rts. Q. 255, 261 (1997): "Society at large and not the victim is the titular head of this last right."

possess means to use force and have a mandate to do so. Such measures include vetting and removing abusive officials from service; establishing civilian control over security institutions; and assuring effective civilian complaint procedures. In some instances, the measures propose to disband perpetrator institutions rather than to strengthen their accountability. Accountability is the natural counterpart to impunity, so the focus on accountability is rather self-evident. The measures recommending a focus on strengthening accountability meet with the agenda of security sector reform (SSR), for which the establishment of effective accountability, governance and oversight over the security sector is a central concern.[54] Of course, the development of the SSR doctrine was only in its initial stages when the Updated Principles were drafted, so it does not come as a surprise that SSR is mentioned in passing only.[55]

In summary, this exploration of the origins and normative foundations of guarantees of non-recurrence revealed that, next to prosecuting the perpetrators, repairing the victims and telling the truth about the violations, states are obliged to prevent the recurrence of violations. But while preventing recurrence constitutes a legal obligation, the specific guarantees of non-recurrence enumerated in the Principles are not necessarily legal obligations but represent measures that have proven to contribute to preventing recurrence in a number of contexts. The list of measures is neither exhaustive nor universally applicable. In other contexts, other measures may have to be taken to effectively prevent the recurrence of violations. Nevertheless, effective prevention of recurrence will generally require a reform of abusive institutions and systems, particularly through vetting and the establishment of effective accountability mechanisms.

III. EXPLORING PREVENTION OF RECURRENCE

Based on the approaches applied in the key reference documents, this section begins to construct a more systematic understanding of prevention of recurrence. In particular, the section explores how guarantees of non-recurrence relate to other transitional justice measures; underlines the preventive and contextual character of guarantees of non-recurrence; and begins to develop elements of an effective approach to prevention in the aftermath of serious and massive human rights violations.

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54. U.N. Secretary-General, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform,* U.N. GAOR, 62nd Sess., Agenda Item 34, at ¶ 15, U.N. Doc. A/62/659-S/2008/39 (23 Jan. 2008); OECD DAC, OECD DAC Handbook on Security System Reform (SSR): Supporting Security and Justice 21 (2007) [hereinafter Handbook on Security System Reform].
55. *Updated Principles to Combat Impunity 2, supra* note 35, n. 92.

A. A Distinct but Complementary Obligation

The reference documents emphasize that states must undertake a range of measures to meet their legal obligations in response to serious human rights violations.[56] Preventing recurrence constitutes an obligation that is distinct from other obligations that states should fulfill in the aftermath of serious violations.[57] Satisfying an obligation such as prosecuting those responsible for serious violations does not relieve a state of its duty to prevent recurrence.[58]

In addition to any legal arguments, justice in the aftermath of serious human rights violations cannot be reduced to ad hoc measures of prosecution, truth-telling and reparation but must at the same time include institutional and other more permanent reforms that directly aim to prevent the recurrence of these violations. If we imagine for a moment a "perfect" transition in which each and every perpetrator is prosecuted, all violations are documented and acknowledged, and all victims receive reparations proportional to the harm suffered, these measures are unlikely perceived as instances of justice without additional reform steps to stop the continuation of these violations and to prevent them from happening again in the future. More than prosecution, truth-telling and reparation is needed to do justice in the aftermath of serious human rights violations. This "more" is the terrain of guarantees of non-recurrence.

The reference documents also affirm "the need for a comprehensive approach towards combating impunity. An effective policy requires a multifaceted strategy, with each component playing a necessary but only partial role."[59] Generally, implementing just one type of transitional justice measure will not do justice in the wake of serious human rights violations. For instance, reparations without prosecutions, truth-telling, or institutional reforms to prevent recurrence are likely perceived as buying the silence of victims, as evading rather than doing justice. The need to link the different measures is further heightened by the fact that, in the aftermath of atrocity, each type of measures is usually limited in reach. Often, only a small number of perpetrators can be prosecuted; truth-telling can clarify the fate of many but not all victims and cannot fully acknowledge all violations; the reparations provided cannot be proportional to the harm the victims suffered; and the reform of institutions that were implicated in violations

56. *Principles to Combat Impunity*, *supra* note 3, Principle 18(1). *See also Updated Principles to Combat Impunity*, *supra* note 1, Principle 1.
57. *Id.* Principle 37; Méndez, *supra* note 53, at 263–64; *see also* Section II.B above.
58. *Updated Principles to Combat Impunity 2*, *supra* note 35, ¶ 16.
59. "Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher," *in Promotion and Protection of Human Rights: Impunity*, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., Agenda Item 17, at ¶ 10, U.N. Doc. E./CN.4/2004/88, ¶ 10, (27 Feb. 2004).

remains incomplete. In such situations, the individual measures are more likely understood as justice measures if they are not implemented in isolation from each other but as parts of a comprehensive transitional justice strategy, in which they can positively reinforce each other and, in doing so, jointly affirm the validity of basic human rights norms. It is sensible to expect, as Pablo de Greiff notes, that "measures that are weak in relation to the immensity of the task that they face are more likely to be interpreted as *justice* initiatives if they help to ground a reasonable perception that their coordinated implementation is a multi-pronged effort to restore or establish anew the force of fundamental norms."[60]

Guarantees of non-recurrence in the form of institutional reforms are related to other transitional justice measures not only on legal grounds or at the level of overall aims but also in a more basic, instrumental way: they can *enable* other institutions to better perform transitional justice functions in that they weaken institutional sources of opposition, strengthen the accountability of security and justice actors, or generally create implementation conditions for other transitional justice measures. A reformed police service, for instance, can more professionally investigate human rights violations committed in the past; a reformed prosecutor's office can more effectively issue indictments; a reformed court can more impartially render judgment or grant reparations; truth-telling mechanisms can be more effective if they enjoy the cooperation of reformed institutions; and functioning hospitals may be necessary to provide reparation in the form of specialized health care to victims. Institutional reforms may, therefore, serve as an enabling function of other transitional justice measures.

This is not to say that institutional reforms will in fact do so in a concrete situation. Institutional reforms can go wrong in many ways and actually become an impediment to rather than a catalyst for other transitional justice measures. The enabling potential of institutional reforms depends, among other things, on the timing and sequencing of the various measures.[61]

B. A Focus on Prevention

The reference documents underline the preventive character of guarantees of non-recurrence. The Basic Principles and Guidelines on Reparation explicitly state that guarantees of non-repetition "contribute to prevention."[62] When

60. Pablo de Greiff, *Theorizing Transitional Justice, in* Transitional Justice 31, 38–39 (Melissa S. Williams, Rosemary Nagy, & Jon Elster eds., 2012).
61. Pablo de Greiff, *Vetting and Transitional Justice, in* Justice as Prevention: Vetting Public Employees in Transitional Societies 522, 527 (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007).
62. Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ 23.

describing the general obligations of states to combat impunity, both the 1997 Principles to Combat Impunity and the 2005 Updated Principles to Combat Impunity refer to "necessary steps to prevent a recurrence of violations."[63] The 1997 Principles to Combat Impunity emphasize that administrative and other measures relating to abusive officials "should be of a preventive, not punitive character."[64] Orentlicher in her 2005 Report states that "human rights treaty bodies have recognized the role of vetting in fulfilling States' general obligation to prevent violations of human rights."[65] The 2005 Updated Principles to Combat Impunity introduce the section on guarantees of non-recurrence with the following programmatic sentence: "States shall ensure that victims do *not again* have to endure violations of their rights."[66] Dealing with the past implies preventing in the future.

The term "guarantees of non-recurrence" is somewhat misleading in that non-recurrence can never be fully guaranteed by any set of measures. Hardly any measure taken by a state can be a definitive guarantee that a violation does not recur. Hence, a state does not have "obligations of results" but "of means." What a state should do is to make good faith efforts and undertake all what is "reasonably within its means" to ensure the non-recurrence of a violation.[67] The terms "preventing recurrence" or "measures to prevent recurrence" more adequately express what these measures should aim to do.[68]

Prosecution, truth-telling and reparation are also preventive. In redressing past human rights violations prosecution, truth-telling and reparation give force, in various ways, to basic human rights norms that were systematically violated and hence foster civic trust and contribute to reconciliation and the democratic rule of law.[69] Prosecutions deny "the implicit claim of superiority made by the criminal's behavior through a sentence that is meant to reaffirm the importance of norms that grant equal rights to all."[70] Truth-telling efforts officially acknowledge violations as violations and victims as victims,

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63. *Principles to Combat Impunity, supra* note 3, Principle 18(1), *see also Updated Principles to Combat Impunity*, *supra* note 1, Principle 1.
64. *Principles to Combat Impunity*, *supra* note 3, Principle 40.
65. *Updated Principles to Combat Impunity 2*, *supra* note 35, ¶ 68.
66. *Updated Principles to Combat Impunity*, *supra* note 1, Principle 35 (emphasis added). This preventive, forward-looking perspective is also expressed in the title and recommendations of the final report of the Argentine National Commission on the Disappeared, (CONADEP), *Nunca Más* (1984), *available at* http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm.
67. Méndez, *supra* note 53, at 264.
68. Along these lines, the *Updated Principles to Combat Impunity, supra* note 1, Principle 1, refer to the obligation of states to the "necessary steps to prevent a recurrence of violations."
69. de Greiff, *Theorizing Transitional Justice*, *supra* note 60.
70. Pablo de Greiff, *A Normative Conception of Transitional Justice*, 50 Politorbis 17, 22 (2010), *available at* https://www.eda.admin.ch/content/dam/eda/en/documents/publications/Politorbis/politorbis-50_EN.pdf.

thereby recognizing basic human rights.[71] Reparations represent "the material form of the recognition owed" to victims.[72] While these measures may have retributive and other functions, they also contribute to prevention in that they reaffirm the equal validity of basic human rights norms. Guarantees of non-recurrence, however, do not just have a preventive effect but prevention is their core function. They encompass the transitional justice measures most directly and explicitly aimed at prevention. The effectiveness of guarantees of non-recurrence will be measured by the extent to which they ensure that violations do not happen again.

Prevention is not just of concern to transitional justice but a function that guarantees of non-recurrence share with other fields such as genocide prevention[73] and the responsibility to protect.[74] However, prevention in the transitional justice context is understood not just in terms of establishing conditions in which human rights violations in general are less likely to occur but specifically in terms of preventing certain violations that already happened. Preventing recurrence is not dealing with an abstract threat but is confronting specific acts that were committed in the past and may be committed again in the future, and that can be studied in terms of their causes, effects, agents, resources and structures used to make them happen. Preventing recurrence connects the past with the future; it analyzes past violations to develop measures that avert future violations of the same kind.

C. Contextual Nature of Prevention

Orentlicher recognizes in her 2004 study on best practices to combat impunity that there is "no 'one-size-fits-all' response to serious violations of human rights."[75] Hence guarantees of non-recurrence can vary significantly. The approach adopted in the key reference documents does not sufficiently heed this insight and elevates to the level of principle certain measures that were

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71. Thomas Nagel highlighted the difference between knowledge and acknowledgement. He argued that truth commissions rarely uncover new facts but officially recognize known facts. *See* Lawrence Weschler, A Miracle, A Universe: Settling Accounts with Torturers 4 (1990).
72. de Greiff, *A Normative Conception of Transitional Justice*, *supra* 70, at 22.
73. For an overview of genocide prevention see Federal Department of Foreign Affairs, *Genocide Prevention*, 47 Politorbis 47 (2009), *available at* https://www.eda.admin.ch/content/dam/eda/en/documents/publications/Politorbis/politorbis-47_EN.pdf.
74. *See, e.g.*, U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, U.N. GAOR, 67th Sess., Agenda Item 14 & 113, U.N. Doc. A/67/929-S/2013/399 (9 July 2013); for an overview of the responsibility to protect see Alexander Mayer-Rieckh, Atrocity Prevention in a Nutshell: Origins, Concepts and Approaches (2016).
75. "Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher," *supra* note 59, ¶ 5.

relevant in particular historical circumstances but do not apply universally or are not a priority in other circumstances. As a result, some of the measures proposed appear somewhat haphazard. Rather than adopting an approach that is insufficiently contextualized, the contextual nature of guarantees of non-recurrence could have been introduced as a principle and some specific measures could have been introduced by way of example rather than principle. For instance, measures aimed at disbanding parastatal armed groups could have been cited as examples of comprehensive responses to dealing with the legacies of an abusive past including through broader measures such as DDR of all types of combatants and security sector reform to build effective and accountable security institutions.

Guarantees of non-recurrence aim at preventing the recurrence of *specific* human rights violations that happened for *certain* reasons in a *concrete* context. Rather than applying the misleading toolbox approach adopted in the key reference documents, guarantees of non-recurrence should be developed in response to the context in which the violations occurred. Before adopting any measure, a careful analysis needs to establish what violations took place, why they occurred, how they were implemented, what effects they had, and how they can be best prevented in future. In analyzing the causes and effects of certain violations, and in identifying measures to prevent the recurrence of these violations, significant attention must be paid to the perspectives of victims,[76] specifically of female victims.[77] Their perspectives provide particular insight into the causes and effects of violations, as well as what it takes to prevent them from recurring.[78] The participation of victims can also contribute to restoring their citizenship status.[79]

D. Elements of Effective Prevention

Effective prevention cannot just deal with the individual circumstances of human rights violations but must address their structural causes.[80] The preventive measures proposed in the key reference documents largely focus

76. *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr. Theo van Boven*," *supra* note 13, ¶ 133.
77. "Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher," *supra* note 59, ¶ 9.
78. *Updated Principles to Combat Impunity 2*, *supra* note 35, ¶ 7.
79. "Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher," *supra* note 59, ¶ 11.
80. Carla Ferstman, *Reparation as Prevention: Considering the Law and Practice of Orders for Cessation and Guarantees of Non-Repetition in Torture Cases* 20 (n.d.), *available at* http://projects.essex.ac.uk/ehrr/V6N2/Ferstman.pdf.

on institutions and groups that allowed, facilitated, promoted or committed violations. The institutions targeted in the documents mostly belong to the security and justice sectors.

Access to weapons and ammunition, logistical and operational capacities, and expertise and practice in using force and firearms facilitate, if not enable, the commission of serious human rights violations. This is particularly the case with "system" crimes such as genocide, crimes against humanity and war crimes if committed on a large scale. System crimes require, in addition to a political context that facilitates and possibly encourages criminal conduct, a degree of organization, resources and skills to perpetrate, and usually involve a division of labor between planners and executants.[81] Typically, such crimes are perpetrated by institutions belonging to the security apparatus of a state or by unofficial armed groups with a certain level of organization such as paramilitary units, long-term armed opposition groups or private security companies. Efforts to effectively prevent recurrence of such crimes should, therefore, pay particular attention to perpetrator structures and systems in the security sector, which includes both state and non-state security actors. Preventing system crimes requires systemic reform.[82]

While system crimes are often perpetrated by security actors they are usually instigated by political actors. Perpetrator systems encompass not just the operational but also the political level. Preventing system crimes can, therefore, not just focus on security actors but should also target the political level and how it relates to the operational level. Rather than applying a traditional concept of security sector, prevention efforts should adopt the more comprehensive notion of security system that comprises not just state security providers and non-state security actors but also management, governance, political and oversight actors who establish constitutional frameworks, pass laws, set policy, define budgets, manage human resources, provide oversight, and monitor performance of security actors.[83]

The reasons why security actors perpetrated serious human rights violations and may repeat them relate usually less to capacity deficits. On the contrary, organizational and operational capacities represent a catalyst or perhaps even a condition for violations to be committed and repeated. Measures to prevent institutions and groups from repeating violations will, therefore, frequently not fall within the realm of what in development as-

81. United Nations, Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives 11–17 (2006).

82. de Greiff notes that "transitional justice is interested not merely in correcting isolated, 'token' abuses, but also in correcting systematic violations, which obviously requires systemic reform." Pablo de Greiff, *Articulating the Links Between Transitional Justice and Development: Justice and Social Integration, in* Transitional Justice and Development: Making Connections 63 (Pablo de Greiff & Roger Duthie eds., 2009).

83. For a holistic definition of the security sector or system see Handbook on Security System Reform, *supra* note 54, at 5.

sistance is commonly called "capacity building." On the contrary, effective prevention may require *disabling abusive capacities* that enabled or facilitated the commission of serious violations. Such disabling measures may include cantoning or disbanding abusive groups, units or institutions; disarming, demobilizing and reintegrating combatants; decommissioning and destroying ammunition, weapons, armored vehicles and other equipment used to commit such violations; overcoming group domination within an institution or sector;[84] blocking direct access of the political level to the operational level and restricting opportunities for political interference;[85] or dismantling networks of criminal activity by means of vetting, which is discussed in detail in the reference documents.[86] De Greiff refers to the "disarticulat[ion] potential" of transitional justice measures when he describes how measures such as vetting prevent recurrence.[87]

Needless to say that disabling organizational and operational capacities also carries risks. Such measures not only render it more difficult for these institutions and groups to commit violations but may also undermine their ability to effectively provide security and other responsibilities that fall within their mandate including preventing crimes. The potential gains and risks of disabling abusive capacities need to be carefully analyzed and weighed before it is implemented.

An additional prevention strategy next to disabling abusive organizational and operational capacities is *building integrity capacities* in the secu-

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84. Conflict or authoritarian rule are often partially caused by and frequently contribute to the domination and exploitation of security institutions (and other public sector institutions) by one particular group or segment of society. Such groups can be ethnic, geographical, religious, factional, or gender-based, among others. Domination by a group frequently results in discriminatory practices, abusive conduct, and misuse of public funds. Overcoming group domination helps to establish internal checks and balances. The agreement in Burundi that no ethnic group should represent more than 50 percent of the personnel in security institutions provides an example to overcome group domination and ensure internal checks and balances (see section V. below).
85. The police in communist Bosnia and Herzegovina was, for instance, an integral part of the ministry of interior. During the armed conflicts, the police served nationalist constituencies and became an instrument of war executing the policy of ethnic cleansing. After the end of the conflict, the post of independent police commissioner was established in all police services to separate the political/policy level, i.e. the minister of interior from the operational level, i.e. the police. For more information see International Crisis Group, Policing the Police in Bosnia: A Further Reform Agenda 33–36 (2002), *available at* https://d2071andvip0wj.cloudfront.net/130-policing-the-police-in-bosnia-a-further-reform-agenda.pdf.
86. Disabling measures have some similarities with the so-called "inhibitors," identified within the framework of the responsibility to protect, to mitigate the risk of atrocity crimes. See U.N. Secretary-General, *Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect*, U.N. GAOR, 68th Sess., Agenda Items 14 & 118, U.N. Doc. A/68/947-S/2014/449, ¶ ¶ 43–58 (11 July 2014).
87. Pablo de Greiff, Transitional Justice, Security, and Development: Security and Justice Thematic Paper, World Development Report 2011: Background Paper 17–18 (29 Oct. 2010).

rity system. This term is used here to refer to structures and processes that enforce the validity of basic human rights by strengthening accountability mechanisms and by promoting the inclusion of victims and other marginalized groups. Efforts to strengthen accountability include reinforcing internal accountability, such as ethics codes, internal accountability procedures, line supervision and internal discipline; building external oversight, such as parliamentary oversight, executive oversight, independent civilian complaint and review bodies, ombudsperson services and judicial review; and fostering informal accountability provided by the media, human rights organizations and other monitoring groups.[88] Promoting the inclusion of victims and other marginalized groups can be done by ensuring their participation in reform processes; enhancing their representation in security and other state institutions; establishing structures to meet their specific security needs; and by their empowerment as citizens.[89]

In addition to disabling abusive capacities and strengthening integrity capacities, a third prevention strategy consists in *verbally or symbolically signaling* a commitment to overcome the legacy of human rights violations and an endorsement of fundamental human rights norms. Such measures include, for instance, official apologies; memorials and museums; activities of remembrance such as commemorative days; renaming of streets and removal or monuments that relate to individuals or institutions with histories of human rights violations; and the changing of coats of arms, insignia and uniforms that are associated with the abusive past.[90] Signaling measures may also cover educational reforms such as amendments to textbooks and school curricula that acknowledge the abusive past, revise discriminatory histories and affirm a commitment to human rights.

The focus of the reference documents on institutional and legal reform is important because these structures were aligned to facilitate or commit human rights violations. At the same time, interventions should not be limited to the institutional sphere but also target the cultural and the individual spheres.[91] Prevention can be achieved more effectively when preventive measures target all three spheres and heed the correlations between them. Interventions in the cultural sphere include, for instance, publications in the press

88. *See supra* note 54 above. *See also* Alexander Mayer-Rieckh, *Dealing with the Past in Security Sector Reform* 27–31 (DCAF SSR Paper No. 10, 2013).
89. *Id.* at 22–27.
90. *Id.* at 31–35. Verbal and symbolic reform measures may also be understood to be a form of reparation. *Updated Principles to Combat Impunity, supra* note 1, Principle 34, refers to satisfaction as a reparation measure. Satisfaction is described in more detail in Basic Principles and Guidelines on Reparation, *supra* note 5, ¶ 22, include, among other measures, official declarations restoring the dignity, reputation and rights of victims; public apologies; and commemorations and tributes to victims.
91. *See* Pablo de Greiff, *On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes, in* Transitional Justice, Culture, and Society: Beyond Outreach 11 (Clara Ramírez-Barat ed., 2014).

and activities by other media; social mobilization using new social media; advocacy by civil society organizations; and works of art such as novels, movies, paintings or plays. In numerous ways, and distinct of more formal expressions, these interventions can contribute to making victims visible, to acknowledging their suffering, and to recognizing their rights. Interventions in the individual sphere include, for instance, efforts to empower victims as citizens,[92] legal empowerment and efforts to provide access to justice,[93] or counseling of victims to overcome trauma. Civil society and individual actors are the primary agents in the cultural and individual spheres. State actors can support or create space for intervention in these spheres but cannot intervene directly. Cultural and individual interventions are well suited to identify and address the long-term effects and complex nature of violations but less fitting to tackle rights-based claims.

Culture and personality structures are more resistant to intervention. Change in these spheres is, therefore, more difficult and takes longer to achieve, but it is more resilient once it has been obtained. Interventions in the cultural and individual spheres can also provide entry points in environments in which interventions in the institutional sphere are not possible due to political or organizational resistance to change.

Effective prevention must also consider the range of lasting effects of serious human rights violations on victims and society as a whole. The past remains present and threatens the future. Such effects include, among other things, a continuing marginalization and disfranchisement—actual and/or perceived—of victims and others, which entails a sense of isolation; a climate of impunity in which norm-breaking is normal and further violations come more easily; and a lack or absence of trust in norms, institutions and the transition itself. It is a context that de Greiff describes as an "unreconciled" society in which victims and citizens generally experience resentment because their norm-based expectations have been and continue to be threatened or defeated.[94] In an unreconciled society, the capacity and willingness to resolve conflict without violence remain low and the risk of further violence and human rights violations remains high.

But implicitly, the experience of resentment presupposes a claim about the validity of the threatened or violated norm and therefore calls for holding accountable those responsible for the threats or violations.[95] Address-

92. Mayer-Rieckh, *Dealing with the Past in Security Sector Reform, supra* note 88, at 26–27.
93. On legal empowerment see Stephen Golub, *Legal Empowerment's Approaches and Importance, in* Open Society Justice Initiative, Justice Initiatives. Legal Empowerment 5–14 (2013), *available at* https://www.opensocietyfoundations.org/sites/default/files/justice-initiatives-legal-empowerment-20140102.pdf; on access to justice see, for instance, Avocats sans Frontières, Access to Justice, *available at* http://www.asf.be/action/asf-programmes/access-to-justice.
94. de Greiff, *A Normative Conception of Transitional Justice, supra* note 70.
95. *Id.*

ing these effects of massive and serious human rights violations calls for a comprehensive effort to affirm the validity of the norms violated. Measures to ensure the rights to justice, truth, and reparation do so in different ways. But guarantees of non-recurrence also need to be articulated so that they contribute to overcoming an unreconciled society. One way of doing so is to conceive preventive measures as constitutive parts of a comprehensive transitional justice strategy (see Section III.A above).

In addition, preventive measures themselves should be designed in ways that explicitly account for the ongoing effects of violations and reinforce in various forms the validity of the norms violated. For instance, the continuing marginalization of victims and others may not be overcome by promoting their inclusion and recognizing them as citizens but may require addressing socio-economic and psychological effects of violations on victims such as impoverishment, unemployment, traumatization, stigmatization, or lack of education.[96] Or, accountability should not be promoted in a piecemeal fashion but be provided comprehensively for past and future violations, and "to multiple audiences through multiple mechanisms,"[97] thereby ending impunity effectively and conveying a zero tolerance approach to any form of norm-breaking. Also, verbal or symbolic measures that signal a turning away from the abusive past and a turning to the democratic rule of law should not be conceived as one-off events but need to be repeatedly reinforced such as in annual ceremonies and other recurring rituals to remember victims and martyrs, the overcoming of an authoritarian regime, or the end of an armed conflict.[98]

IV. PREVENTION BETWEEN CORRECTIVE AND DISTRIBUTIVE JUSTICE

The classical distinction between corrective and distributive justice can further help to construct a more systematic understanding of guarantees of non-recurrence.[99] Corrective justice refers to redressing past harms while distributive (or social) justice deals with equitably distributing goods and

96. Cristian Correa, *Integrating Development and Reparations for Victims of Massive Crimes*, The Center for Civil and Human Rights 8–12 (2014).
97. David H. Bayley, The Contemporary Practices of Policing: A Comparative View, Paper Presented at the Center for Strategic and International Studies and Police Executive Research Forum, 6 Oct. 1997, *quoted in* Christopher E. Stone & Heather H. Ward, *Democratic Policing: A Framework for Action*, 10 Policing & Soc'y 15 (2000).
98. Correa, *supra* note 96, at 17(c).
99. Aristotle, Nicomachean Ethics, V, 2–5, 1130a14–1133b28 (Terence Irwin trans., 1985). Needless to say that the term justice as used here does not refer to the right to justice and the correspondent state obligation to prosecute perpetrators of human rights violations as introduced in the Principles to Combat Impunity but is understood in its broad, philosophical sense.

opportunities.[100] The two forms of justice differ in the form they construe equality. Whereas distributive justice allocates goods and opportunities in accordance with some criterion of general equity, corrective justice re-establishes the notional equality that existed between two parties, whatever the initial baseline may have been.[101] Corrective justice is concerned with individuals or groups and aims to "bring people back to where they were before the harm suffered."[102] Distributive justice, on the other hand, "creates not agent-relative but general reasons for action, central among which is that of upholding and supporting just social institutions."[103]

Prosecution, truth-telling and reparation generally fall in the sphere of corrective justice in that they represent efforts of redressing past human rights violations and repairing the harms suffered.[104] To the extent that guarantees of non-recurrence are conceived as direct efforts to address past human rights violations they also constitute forms of corrective justice. At least three types of guarantees of non-recurrence can be understood to do so. The first corrective type of guarantees of non-recurrence includes measures to disable abusive capacities. They are corrective in that they disarticulate political and operational structures that were used to commit violations and that provide opportunities for continued or repeated violations of the same kind. They are also corrective when they have retributive functions such as vetting. The second corrective type of guarantees of non-recurrence comprises measures to enable integrity capacities. They are corrective in that they establish conditions to correct future violations of the same kind. Building up accountability mechanisms, for instance, helps creating conditions for the "correction" of future wrongs. The third corrective type of guarantees of non-recurrence refers to measures that disavow the abusive past such as apologies, commemorative days or new insignia, as well as educational reforms that correct discriminatory histories. They are corrective in that they signal a "corrected" basic attitude that has turned away from the abusive past and is now committed to human rights.

But guarantees of non-recurrence that primarily aim at equitable outcomes rather fall in the sphere of distributive justice. In particular, institutional reforms that address structural discrimination and redistribute opportunities belong in this category. Such distributive measures include, for instance,

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100. Roger Duthie, *Transitional Justice, Development, and Economic Violence, in*: Justice and Economic Violence in Transition, Springer Series in Transitional Justice 171 (Dustin N. Sharp ed., 2014).
101. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 Univ. Toronto L. 349 (2002).
102. Pablo Kalmanovitz, *Corrective Justice Versus Social Justice in the Aftermath of War, in: Distributive Justice in Transitions* 75 (Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz, & Maria Paula Saffon eds., 2010).
103. *Id.* at 77.
104. de Greiff, *Articulating the Links Between Transitional Justice and Development*, *supra* note 82, at 63.

reforms to provide victims and other marginalized groups with equal or preferential access to public service; the establishment of structures catering to the needs of marginalized groups including victims in order to provide effective and equal services to them; and measures to include victims and other marginalized groups in the design and implementation of the reform process itself to ensure that their voices are equally heard in decisions about what reforms are made and how they are implemented. In addition to institutional reforms that aim at redistributing opportunities, policies to redress socio-economic inequalities also fall in the sphere of distributive justice. Such policies aim to address root causes of violations and to establish conditions of equality that render conflict over resources and opportunities less likely.

The boundary between corrective and distributive measures is not clear-cut. A measure could primarily aim at addressing past human rights violations but have a secondary distributive effect. For instance, while disabling abusive capacities puts perpetrators and victims on a more equal footing, its primary aim is to respond to past violations. Disabling abusive capacities rather falls, therefore, in the domain of corrective justice. At the other end of the spectrum, policies aimed at redressing socio-economic inequalities may have an indirect corrective effect in that they tackle root causes of human rights violations and also benefit victims, but their primary aim remains to establish conditions of equality. Such policies rather fall, therefore, in the domain of distributive justice. Measures in between these two poles can have elements of both corrective and distributive justice. Depending on how their primary aims and target groups are articulated they fall more on the side of corrective or distributive justice. For instance, depending on whether a measure to redistribute opportunities targets victims of violations or broader groups that were discriminated against (victims of distributive injustice), the measure may qualify as corrective or distributive justice. Rather than placing preventive measures in two strictly separate categories of corrective and distributive justice, it may be more appropriate to place them on a continuum in which corrective and distributive justifications more or less outbalance each other.

The preventive measures listed in the key reference documents aim either to disable abusive capacities or to strengthen integrity capacities. With the exception of measures to promote the inclusion of women, children and minorities, these measures clearly fall in the domain of corrective justice. The reference documents do not discuss distributive measures that address socio-economic economic inequalities.

Measures to disable abusive capacities or to strengthen integrity capacities focus on the more immediate structural causes of human rights violations such as inadequate civilian oversight of the security sector or the existence of parastatal armed groups. Usually, such immediate structural causes are

not the root causes of a situation that resulted in serious violations.[105] More often than not, the immediate structural causes of human rights violations are symptoms of underlying root causes that are related to economic or social inequalities such as controversies over access to land and resources, deprivation and marginalization of certain social groups, situations of oppression and exploitation, or similar. Addressing immediate structural causes of violations—in addition to one-off transitional justice measures such as criminal prosecution, truth-seeking and reparation—without addressing the socio-economic root causes of violations may not be sufficient to quell future human rights violations. In other words, correcting past wrongs and establishing conditions to correct future wrongs may not be enough to prevent future violations if it leads to restoring an original status of socio-economic inequality that triggered the commission of the violations in the first place. Next to corrective measures, some form of socio-economic transformation of society that entails a redistribution of goods and opportunities may be needed to construct a more just order and so effectively prevent recurrence.[106]

Effective efforts to prevent future human rights violations cannot artificially separate corrective and distributive justice but rather need to adopt a unitary approach in tackling impunity that understands the indivisibility and interdependence of human rights, civil and political rights, as well as economic and social rights.[107] When the UNCHR tasked the Secretary-General, in 2003, to commission an independent study on best practices, it was "to assist States in strengthening their domestic capacity to combat *all aspects* of impunity, taking into account the Set of Principles."[108] While the wording of this mandate may have provided an opportunity to go back to a more unitary approach of combatting impunity as originally envisaged by the UNCHR between 1991 and 1994, key state party representatives insisted that the study should concentrate on civil and political rights with a view to updating the Principles to Combat Impunity.[109] More recently, the UN has begun to explicitly recognize the need to consider economic

105. "Social justice is more often than not at the origin of the troubles that engender impunity." *The Administration of Justice and the Human Rights of Detainees. The Question of Human Rights of Persons Subjected to Any Form of Detention or Imprisonment: Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations, Prepared by Mr. Guissé and Mr. Joinet, Pursuant to Sub-Commission Resolution 1992/23*, *supra* note 10, ¶ 127.

106. Ismael Muvingi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies*, 3 Int'l J. Transitional Just. 178 (2009): "The transition phase creates space for redistribution during which the main objective is not the protection of privilege but the correction of injustice as groundwork for the construction of a more just order."

107. *See* Louise Arbour, *Economic and Social Justice for Societies in Transition* (Centre for Human Rights and Global Justice, Working Paper No. 10, 2006).

108. *Impunity*, C.H.R. Res. 2003/72, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess., U.N. Doc. E/CN.4/RES/2003/72 (emphasis added).

109. Conversation with Diane Orentlicher, 15 May 2014.

and social rights violations in the context of transitional justice. According to the 2010 guidance note of the Secretary-General on transitional justice, for instance, socio-economic root causes of conflict or repressive rule must be addressed in transitional justice to achieve sustainable peace.[110] In his 2011 report on rule of law and transitional justice, the Secretary-General states that the UN "must promote dialogue on the realization of economic and social rights and provide concrete results *through transitional justice mechanisms*, legal reform, capacity-building, and land and identity registration efforts, among other initiatives."[111] Such a broader understanding of transitional justice knows that overcoming a legacy of human rights violations requires a comprehensive approach to justice that includes both corrective and distributive dimensions.

At the same time, the concept of guarantees of non-recurrence always heeds the abusive past, even in its distributive dimensions: it is concerned with preventing the *recurrence* of specific human rights violations, after all. When guarantees of non-recurrence are directed towards a more equitable distribution of goods and opportunities, they are designed in response to specific past violations and with a view to preventing them from happening again. This link with a specific abusive past is also what distinguishes guarantees of non-recurrence from development in general. Whatever socio-economic inequality is addressed by a measure, it should qualify as guarantee of non-recurrence—and not just as a development policy—as long as it is intended to be part of the overall answer to the question of how the recurrence of specific violations can be effectively prevented. In other words, guarantees of non-recurrence in the sphere of distributive justice are also reflective of the abusive past.

V. STRATEGIC CONSIDERATIONS ON ADOPTING PREVENTIVE MEASURES

The understanding of guarantees of non-recurrence proposed in this article is broad and unspecific. It is broad because effective prevention of recurrence cannot be provided by a single measure or even by a few measures but requires a comprehensive effort to address the immediate and root causes that led to the human rights violations. It is unspecific because guarantees of non-recurrence can be specified only when they are applied to preventing the recurrence of specific violations that happened for certain reasons in a concrete context.

110. Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice 7 (2010), *available at* https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

111. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634, ¶ 52 (12 Oct. 2011) (emphasis added).

What specific measures need to be adopted in a concrete situation requires, therefore, a thorough analysis of the specific human rights violations that occurred, the agents, structures and resources used to perpetrate them, the reasons for perpetrating them, as well as the effects of these violations on the victims and society as a whole. Specific attention in this analysis must be given to the perspective of victims, particularly of female victims. In addition, the analysis ought to identify the available resources and opportunities for adopting specific measures to prevent recurrence. The measures to be adopted are also likely to change over time. The focus of prevention in an early and fragile transitional environment with scarce resources is likely to be different from preventive efforts in a later context in which the conditions have stabilized, a political settlement has been reached, and economic recovery is underway.

An early prevention strategy should focus on measures that (1) can, with limited resources, effectively and quickly stop ongoing human rights violations or prevent their recurrence; that (2) provide entry points for a comprehensive and long-term prevention policy; or that (3) enable prosecution, truth-telling and reparation initiatives in order to facilitate a multi-pronged prevention effort:

First, early efforts to prevent recurrence, particularly in transitional contexts in which not all human rights violations have ceased, the risk of a resurgence of violations is significant, or violations continue in a different form, should focus on the immediate causes of human rights violations and adopt measures that effectively address these immediate causes in the short term. Such early preventive measures should deliver quick results in order not only to stop the violations but also to signal a new commitment to basic norms and values. Usually, such measures need to focus on perpetrator structures and need to disable their abusive capacities or discourage abusive behavior. Ideally, the implementation of these measures is technically simple and requires modest resources. This does not mean that they are not politically sensitive. On the contrary, measures that effectively prevent recurrence are often fiercely resisted because they force a reversal of abusive practices that have become the norm, thereby delegitimizing and weakening those who committed them. Examples of early measures that targeted immediate causes of human rights violations with limited means and simple mechanisms include the following:

- *Introducing uniform vehicle license plates to facilitate return*: The 1995 Dayton Peace Agreement ended the fighting in Bosnia and Herzegovina but the conflict continued by other means. Significantly, the parties did not respect the right to return of refugees and displaced persons, and were not committed to the territorial integrity of Bosnia and Herzegovina. Internal administrative boundaries were treated like state borders, and freedom of movement was not respected. In one effort to address this situation, the international community

introduced uniform vehicle license plates, which used letters common to the Latin and Cyrillic alphabets (A, E, J, K, M, T) and did not indicate the region or place where the vehicle originated. As a result, freedom of movement improved, harassment of vehicle owners decreased, vandalism was reduced, and return was facilitated.[112]

- *Tearing down walls in police stations to reduce ill-treatment*: In Georgia, two simple, technical measures were put in place to reduce instances of ill-treatment by the police. First, the internal walls in police stations were removed to enhance transparency and expose all police activities. Second, police stations were moved to ground-floor offices to pre-empt threats to detainees that they would be thrown down from offices located on higher floors.[113] A further example of a simple measure to reduce ill-treatment in police custody constitutes the establishment of detention registries in police stations.
- *Rendering police controllable and identifiable*: Census and identification programs to register and issue service cards to police and other security officers constitute another example of a technical measure with significant preventive effects in early transitional contexts. Often, the number of officers belonging to security institutions is not known and personnel movements are informal in transitions. As a result, police officers can continue to commit human rights violations with impunity. Verifying the identity of all officers and formalizing personnel flows represents not only a basis for other reforms but also a condition for managerial supervision and oversight. Rendering the officers identifiable enables the public to attribute actions to officers, which constitutes an important condition for holding them to account.[114]
- *Establishing ethnic balance rather than ethnic representation in the security sector*: During the many years of internal tension and conflict in Burundi, the Tutsi minority controlled the government and security sector to maintain power and dominate the Hutu majority population and other minority groups. The 2000 Arusha peace agreement did not introduce ethnic representation according to the size of the various ethnic groups but provided that "no more than 50 percent of the national defense force [and the national police] shall be drawn from any one particular ethnic group with a view to achieving necessary balances and preventing acts of genocide or *coups d'état*."[115] The text of this provision indicates that it was put in place to prevent recurrence rather than to correspond to ideal-type democratic concepts of ethnic representation in the security sector. A regular security sector reform program would have aimed at establishing a composition of security sector personnel that corresponds to the overall composition of the Burundian population comprising around

112. Press Release, Office of the High Representative, Decision on the Deadlines for the Implementation of the New Uniform License Plate System (20 May 1998), *available at* http://www.ohr.int/?p=67188.
113. Conversation with Pablo de Greiff, 14 Oct. 2014.
114. Arezou Azad, Alexander Mayer-Rieckh & Serge Rumin, Census and Identification of Security Personnel after Conflict: A Tool for Practitioners (2009). A census and identification of the Burundi police was implemented from 2008 to 2009.
115. Arusha Peace and Reconciliation Agreement for Burundi of 28 Aug. 2000, Protocol II, Ch. I, art. 11(4)(d).

85 percent Hutu, 15 percent Tutsi, and less than 1 percent Twa. The reason for the no-more-than-50 percent rule was preventive in that neither the Hutu nor the Tutsi could dominate the other.

The activities described in these examples have little in common. Nevertheless, these measures share several characteristics: they are designed to stop ongoing human rights violations or prevent the recurrence of violations; they address immediate structural causes of human rights violations; and they use fairly simple mechanisms to disable abusive capacities or discourage abusive activities.

A second consideration for developing an early prevention strategy should be to identify and use entry point measures that open doors for a more comprehensive and long-term prevention policy. Certain structural measures to address the immediate causes of human rights violations may meet significant resistance from within these institutions or may be too politically sensitive to be implemented early on. Alternatively, less contested institutional reforms may be approached as entry point measures or civil society actors may intervene in the cultural sphere to prepare the ground for later, more comprehensive measures.

Third, an early prevention strategy should focus on measures that facilitate other transitional justice efforts. Institutional measures can enable other transitional justice efforts in various ways, in particular in that they strengthen the accountability of security and justice actors, and weaken institutional sources of opposition against prosecution, truth and reparation (see Section III.A above). Doing so enables other transitional justice measures not only to better achieve their specific goals but also to promote the overall goals of transitional justice including prevention. Prevention can be achieved more effectively if guarantees of non-recurrence do not carry the entire burden but are complemented by prosecution, truth-telling and reparation.

But early prevention strategies are in many ways only stop-gap measures that are not sustainable if they are not followed by a comprehensive prevention program that identifies the root causes of human rights violations and does not draw an artificial line between corrective and distributive aims but adopts a unitary approach to combating impunity. Such a comprehensive prevention policy can have more resilient results if its measures are not limited to the institutional sphere but also target the cultural and individual spheres.

VI. CONCLUSION

In summary, guarantees of non-recurrence can be thought to include all measures, next to prosecution, truth-telling, and reparation, which can be taken to provide justice in the aftermath of atrocity. On the one hand, they are *different* from prosecution, truth-telling and reparation; measures that

fall in any of these three categories do not qualify as guarantees of non-recurrence. On the other hand, they are *complementary* to other transitional justice measures; in addition to prosecution, truth-telling and reparation, efforts to stop the continuation of human rights violations and to prevent them from happening again in the future are needed to do justice in the aftermath of atrocity. Guarantees of non-recurrence can also *enable* other institutions to perform transitional justice functions better in that they weaken institutional sources of opposition, strengthen the accountability of security and justice actors, or generally create implementation conditions for other transitional justice measures.

Guarantees of non-recurrence are of a *preventive* character. They encompass the transitional justice measures most directly aimed at prevention. Rather than guarantees of non-recurrence, they may more adequately be called measures to prevent recurrence. However, different from general prevention strategies, preventing recurrence is not understood in terms of establishing conditions in which human rights violations are generally less likely to occur but of preventing specific violations that already took place, that may happen again, and that can be studied in terms of their causes, effects, agents, resources and structures used to make them happen.

Guarantees of non-recurrence should be *context-specific* and deal with the *causes and effects* of human rights violations. The kind of guarantees of non-recurrence to be adopted depends on the type of violations they aim to prevent and the context in which they occurred. Before adopting any measure, a careful analysis needs to establish what violations took place, why they occurred, how they were implemented, how they affected the victims and society as a whole, and how they can be prevented in future. Particular attention must be paid to the views of victims, specifically of female victims, because their perspectives help better understand the causes and effects of violations, as well as what it takes to prevent them from recurring.

Effective prevention should focus on *disabling abusive capacities* that facilitated the commission of serious violations; on *building integrity capacities* that strengthen accountability mechanisms and promote the inclusion of victims; and on *verbally or symbolically signaling* a commitment to overcome the legacy of human rights violations. Effective prevention should also account for the *effects* of atrocity and be articulated so that it contributes to overcoming an unreconciled society. For instance, socio-economic and psychological effects of human rights violations on victims such as impoverishment, unemployment, traumatization, stigmatization, or lack of education should be addressed to overcome their isolation.

Guarantees of non-recurrence cannot just deal with the *immediate structural causes* of human rights violations but also must address their *root causes*. Usually, the immediate structural causes such as inadequate civilian oversight of the security sector are not the root causes of a situation that

resulted in serious violations. More often than not, these immediate structural causes of violation are symptoms of underlying root causes that are related to economic, social, or cultural conflicts. Eliminating immediate structural causes without addressing the root causes may not be sufficient to quell future human rights violations.

Effective efforts to prevent future violations cannot artificially separate *corrective* from *distributive* aims but need to adopt a unitary approach in tackling impunity that acknowledges the indivisibility and interdependence of human rights. Next to correcting past human rights violations, some form of deeper socio-economic transformation of society may be needed to prevent recurrence. But guarantees of non-recurrence should not be conflated with general development policies. A measure that addresses a socio-economic inequality qualifies as guarantee of non-recurrence as far as it is designed in response to specific human rights violations that occurred in the past.

The understanding of guarantees of non-recurrence proposed in this article is broad covering an open-ended number of corrective and distributive measures. Its application requires a thorough analysis of what is needed in a specific situation to effectively prevent recurrence. Early prevention strategies should focus on measures that stop ongoing human rights violations or prevent their recurrence, particularly by disabling abusive capacities; that enable prosecution, truth-telling and reparation initiatives in order to facilitate a multi-pronged prevention effort; and that provide entry points for a comprehensive and long-term prevention policy. Such a comprehensive policy should address both immediate and root causes of human rights violations to sustainably prevent recurrence. It will be more effective if it intervenes not just in the institutional but also in the cultural and individual spheres.