

Chapter 12

Seeking the Truth About Serious International Human Rights and Humanitarian Law Violations: The Various Facets of a Cardinal Notion of Transitional Justice

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Abstract The notion of truth and the search for it constitute central tenets of transitional justice processes and mechanisms in societies recovering from an armed conflict or from a period of large-scale human rights abuses. Truth lies at the heart of human nature, when victims of international human rights and humanitarian law violations want to know what happened. However, to date, the concept of truth seems to have suffered from the many assumptions that shape the emerging field of transitional justice. The most common of those is that truth should necessarily bring about reconciliation. Similarly the notion of truth would be a straightforward and simple concept. It is only recently that experts and scholars have begun to question such assumptions. Against this backdrop, this chapter therefore intends to go beyond the often oversimplified notion of truth in transitional justice. It seeks to explore some of the various and complex dimensions of the truth to better understand tensions that may exist when, for example, efforts favour the collective dimension of truth for a whole society over the needs of victims as individuals. This chapter then reviews to what extent some of the transitional justice mechanisms contribute to ascertaining the truth in its full complexity. Ultimately in as much as transitional justice requires a combination of mechanisms and processes to achieve its goals, this chapter will show that considering the many facets of the truth about past abuses is critical to ensure victims' rights are respected.

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12.1 Introduction

The brutal Khmer Rouge regime governed Cambodia from 1975 to 1979 and caused the deaths of approximately 1.7 million Cambodians by killings, starvation and forced labour. On 21 November 2011, Chum Noeu, a 62-year-old survivor who lost 13 relatives under the regime attended the opening day of the trial of three Khmer Rouge leaders before the Extraordinary Chambers in the Courts of Cambodia (ECCC), a Cambodian court consisting of Cambodian and international personnel and supported by the United Nations and international donors. He said: “We want justice so that the dead can finally close their eyes. What is the truth behind all of torture and killings? What happened?”¹

There are thousands of testimonies from victims of atrocities and abuses around the world expressing this visceral human need for them to know the truth. The above statement, however, also illustrates in part the complex dimensions and expectations underlying the notion of truth, notably in the case of large-scale and serious human rights and international humanitarian law violations. Truth is firstly about knowing what happened, establishing the facts and the circumstances surrounding a certain abuse. While knowing the truth is an individual demand for a victim or his or her relatives, it also has a collective dimension, for the community of victims or the entire Cambodian people who suffered from the Khmer Rouge regime as expressed by this survivor. In this respect, truth is a prerequisite for any victim, as well as the dead depending on cultural beliefs, to find closure. Truth would also be closely related and associated with obtaining justice through the prosecution of the main leaders of the Khmer Rouge regime.

Those preliminary remarks only partially account for the role and facets of the notion of truth when considering it in the broader perspective of the emerging field

¹ Walker 2011.

of transitional justice. Transitional justice is commonly described as comprising the mechanisms and processes associated with societies recovering from armed conflicts or a period marked by large-scale abuses to address the legacy of crimes under international law in order to ensure accountability, to serve justice and to achieve reconciliation.² In that context, the role of truth about serious violations of international human rights and humanitarian law and the analysis of truth-seeking mechanisms have received extensive attention from scholars and practitioners. Due to the vastness of this topic, its interdisciplinary nature and the space constraints, this chapter intends only to address truth within the area of transitional justice through a particular angle based on the following premises.

Truth is a central tenet of transitional justice. It is commonly contemplated in two different ways. On the one hand, truth is considered as an overarching goal of what must be achieved in post-conflict societies.³ On the other hand, it is also related to specific processes among the transitional justice mechanisms that aim at seeking the truth. For example, truth commissions are “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years”.⁴ As highlighted by one particular scholar, it is striking to note that truth is sometimes considered as a rather clear notion,⁵ when in reality it is not. Furthermore, the field of transitional justice is based on numerous assumptions, such as the positive interaction between truth and reconciliation that has only recently been challenged by some experts.⁶ Such assumptions also contribute to oversimplifying what truth really means. The understanding of the notion of truth about crimes under international law varies depending on the beneficiaries, be they the individuals, the community, or society as a whole. Beyond those individual and collective dimensions, the truth has also a legal dimension, with the emerging right to know the truth. Furthermore, the importance of truth can also be influenced by the gravity and type of violations considered. The truth and recognition that a crime against humanity was committed will have more significance than the mere acknowledgment that a series of killings took place.

Against this backdrop, this chapter seeks to examine some of the various facets of truth and how it relates to other transitional justice goals and mechanisms. It considers the intrinsic human dimension of the truth as a starting point to explore some of its complex dimensions. It will first look into the manifold notion of truth, including its individual and collective dimensions, as well as its legal and psychological elements. It will then elaborate on how truth relates to and to what extent it is served by the various transitional justice mechanisms. Truth being a complex notion, transitional justice processes would then only contribute in part to

² United Nations Secretary-General 2004, para 8.

³ *Ibid.*, para 25; McAdams 2011, pp. 304–305.

⁴ United Nations Secretary-General 2004, para 50.

⁵ Clark 2011, p. 248

⁶ *Ibid.*, p. 241.

establishing it. This will help shed some light on some potential tensions that can exist between the meaning of truth for individuals and the role of truth for a society recovering from large-scale abuses. Disclosing the truth through the prosecution of the perpetrators bearing the greatest responsibility for some international crimes might not meet the needs of victims of acts committed by low-ranking perpetrators. Similarly the fact that some international crimes are dealt with through international judicial mechanisms while others are addressed through traditional justice mechanisms may not achieve the same result for the disclosure of the truth.

Ultimately truth is part of a process composed of various elements ranging from establishing the facts and their recognition and classification as certain crimes under international law to certain consequences such as the conviction of the perpetrators and the awarding of reparations. Truth remains the essence of any attempt by societies to come to terms with the past.

12.2 The Truth: A Manifold Notion in Transitional Justice

12.2.1 *The Truth: A Question of Facts*

The notion of truth is primarily about ascertaining the facts related to a given incident. Faced with situations of a denial or of a conflicting account of certain facts, the truth about human rights and international humanitarian law violations relates to establishing objectively a range of facts to determine what really happened. In the context of an armed conflict or a situation of violence, each side tends to claim that abuses were committed. This reinforces the need to establish the factual truth to distinguish between alleged abuses that turn out to be unfounded and proven acts.

Most importantly, seeking the truth about a given crime is not limited to the facts about the act itself. The truth must be about a series of aspects. As highlighted in the UN Office of the High Commissioner for Human Rights' (OHCHR) Study on the right to the truth it implies knowing "the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them".⁷ Under this definition, the truth about certain events also encompasses the context in which those acts occurred, identifying the perpetrators and why such acts were committed. For example, the TRC in Liberia was tasked with "investigating the antecedents of the crises which gave rise to and impacted the violent conflict in Liberia".⁸

⁷ Office of the United Nations High Commissioner for Human Rights 2006, para 59.

⁸ Truth and Reconciliation Commission of Liberia Mandate, enacted on May 12, 2005, by the National Transitional Legislative Assembly, Section 4 (c). <http://trcofliberia.org/about/trc-mandate>. Accessed 19 January 2012. The TRC Mandate is the Act That Established the Truth and Reconciliation Commission (TRC) of Liberia.

12.2.2 The Individual and Collective Dimensions of the Truth

At first establishing the truth about human rights violations seems to have the most importance for the victims and their relatives as individuals. Not knowing what happened would result in a second victimisation for persons already traumatised. In as much as the truth is a condition for the healing process of victims, the establishment of the facts participates in the process of recognising individuals as victims of abuses. The truth is intrinsically related to the trauma suffered by victims. There is a psychological element to knowing the truth that lies at the core of any attempts to grasp its nature and role. The most telling example is the case of enforced disappearances or missing persons, people whose fate or whereabouts is unknown.⁹ In both situations, their relatives or the power on which they depend have no information on their fate as a result of armed conflict or internal violence. For the families affected, the uncertainty about the fate of a relative causes some of the worst suffering that is humanly difficult to comprehend for any observer. This is about finding out whether their loved one is alive or dead. This uncertainty also prevents relatives from engaging in the mourning process to achieve personal healing. Similarly withholding or denying the truth about the circumstances of unlawful killings in the wake of an armed conflict or repression bars the families of the victims from proper mourning as an individual process.

Knowing the truth for victims and hearing the truth from perpetrators are commonly recognised as having a therapeutic effect, although it cannot be a goal in itself. Firstly because the truth may only contribute in part to the healing process which also depends on other factors such as the reintegration of the victim in his or her family circle as well as within the community and the society as a whole. Secondly, the truth being a complex multi-fold notion, the form of truth delivered to a victim may not meet his or her expectations, in which case it could hamper its therapeutic effect. A victim of economic loss from Kitgum district in northern Uganda insisted that “Truth telling leads to emotional healing which can be followed by reconciliation and compensation”.¹⁰ Ultimately this therapeutic effect very much depends in which context the truth telling process takes place. There may be a risk of the re-traumatisation of victims if guarantees are not met.¹¹

However, mass human rights abuses, by their scale and nature, surely also have a collective dimension. Such violations or certain patterns of abuses create a collective trauma and affect entire communities and the society as a whole. There are countless examples in the Democratic Republic of Congo (DRC) of local communities in villages being identified by reference to a massacre that took place

⁹ The scope of the issue of missing persons appears to be broader than that of disappearances, which are strictly speaking a human rights law matter. The latter term commonly refers to persons being abducted or killed by State agents of dictatorship regimes.

¹⁰ Office of the United Nations High Commissioner for Human Rights 2007, p. 32.

¹¹ Brounéus 2010, p. 408.

during the war. Atrocities committed by the Lord Resistance Army (LRA) in the DRC, Uganda, South Sudan or the Central African Republic lead international actors to talk of “LRA-affected communities”. The truth about those abuses becomes a condition for the affected communities and for the society to recover. The very purpose of transitional justice processes and mechanisms is to consider this collective dimension to address how a post-conflict society as a whole can recover. There is therefore an intrinsic dual dimension of the truth in cases of mass human rights violations. According to a psychiatrist, “remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims”.¹² Furthermore, addressing the truth about such atrocities is a condition for any other processes to take place such as reconciliation. As outlined in the objectives of South Africa’s Truth and Reconciliation Commission, “establishing and making known the fate and whereabouts of victims” is one of the means of achieving national unity and reconciliation.¹³

An interesting parallel can be drawn with the current debate on the forms of reparation for former child soldiers in the context of the legal proceedings before the International Criminal Court (ICC) in the Lubanga case. There seems to be tension between reconciling the individual and collective forms of reparation. A Congolese lawyer representing 19 victims before the ICC expressed doubts that collective reparations would work for former child soldiers and their families: “Child soldiers are not a community”. “It is not like a village that has been victimized. They are very often in conflict with their own families. I cannot see my clients as a group. They are really individuals”.¹⁴ On the other hand, when so many human rights abuses took place, one may wonder how practically it is possible to address all victims’ need individually, the collective reparations being a tool to recognise the atrocities committed while overcoming the challenge of the scale of abuses. As for reparations, the disclosure of the truth must respond to both the collective and individual dimensions of the victims. While a specific act turned an individual into a victim, who has a right to be recognised as such, this act also took place in the context of mass atrocities that affected hundreds or thousands of persons. Failing to consider the individual perspective of the truth risks impacting on the collective assertion of the truth as each victim may not recognise himself or herself in this general approach, creating a somehow fake result. On the other hand, an aggregation of individual victims may not reflect what the truth is about for a community or the society as a whole, thereby limiting the overall transition of a country.

¹² Herman 2001, p. 1, quoted by Henri 2009, p. 122.

¹³ South African Promotion of National Unity and Reconciliation Act, 26 July 1995, Act No. 34 (1995) - G16579, Section 3(1)(c). http://www.saflii.org/za/legis/num_act/ponuara1995477/. Accessed 19 January 2012.

¹⁴ IRIN 2012.

These individual and collective dimensions may also account for the complex nature of the truth in post-conflict societies. First, the expectations, imperatives and solutions when addressing the legacy of large-scale abuses will vary depending on whether one considers the viewpoint of victims as individuals or the society as a whole. The need to uncover the comprehensive truth will not be dealt with according to the same criteria and motives when addressing it as a collective matter. Second, this collective dimension sheds some light on another element of the truth. One thing is to establish the facts, another thing is for an entire community to accept and acknowledge them. The relationship is no longer between a victim and a perpetrator but it is about a collective recognition. The work carried out by a researcher in the case of post-conflict societies in the former Yugoslavia and the efforts to establish the truth illustrates this complexity and the role of denial by a local community. Janine Clark insists that in Bosnia-Herzegovina, “there are essentially three ethnic versions of truth—the Bosnian Serb, the Bosnian Muslim and the Bosnian Croat—that quintessentially disagree on what happened during the country’s three year war, on who were the aggressors and who were the principal victims”. And this is so despite the International Criminal Tribunal for the former Yugoslavia’s (ICTY) numerous trials.¹⁵ She points out that due in part to the importance of denial, “truth in post conflict societies is a far more ambiguous and problematic concept than supporters of criminal trials and truth and reconciliation commissions sometimes appear to assume”.¹⁶

12.2.3 Legal Dimensions of the Truth

The legal dimensions of the notion of truth relate to the emergence of a right to know the truth about gross human rights violations and serious violations of human rights law. The truth is no longer a mere need of victims that must be taken into account, but it is enshrined in a right with legal implications and cannot be denied. The truth must also be considered within the broader legal framework of victims’ rights. In addition, there is a close link between establishing the facts about certain abuses and determining their legal classification under human rights and international humanitarian law.

12.2.3.1 The Development of a Right to the Truth

The development of a right to know the truth lies in the individual dimension of the truth for victims and the growing recognition of their rights under human rights and

¹⁵ Clark 2011, pp. 247–249.

¹⁶ *Ibid.*, p. 242.

international humanitarian law. In that respect, it is worth noting that the right to know the truth illustrates the interplay between human rights and humanitarian law.

This right, as an individual right under human rights law, finds its origins in the provision of international humanitarian law (IHL) related to missing persons. Article 32 of the 1977 Additional Protocol I lays down the “right of families to know the fate of their relatives”. It is critical to note that originally the specific norms of IHL on missing persons were not primarily designed for the protection of those persons *per se*. Rather, as highlighted during the 1974–1977 Geneva Diplomatic Conference that led to the adoption of the two Additional Protocols to the 1949 Geneva Convention, they aimed at mitigating the suffering of the families of those who have disappeared in war.¹⁷ Article 26 of the Geneva Convention IV already implicitly referred to this principle. Article 32 of the 1977 Additional Protocol I spells out the motive behind the obligations the protocol sets out regarding missing persons. For example, Article 33 (1) of the same treaty introduces the general obligation for each party to the conflict, as soon as circumstances permit and at the latest after active hostilities have ended, to search for the persons who have been reported missing by an adverse party. Although the 1977 Additional Protocol II does not contain any provision regarding missing persons in times of non-international armed conflict, the general obligation to account for them and to transmit information was recognised as applying in both international and non-international armed conflict. In this regard, the International Committee of the Red Cross (ICRC) Study on customary international humanitarian law refers to a norm of customary international law which is applicable in both international and non-international armed conflict, according to which “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.¹⁸

As stated in the UN Office of the High Commissioner for Human Rights Study on the right to the truth for victims and their relatives, this right finds its roots in IHL.¹⁹ With the abundance of enforced disappearances in the 1970s,²⁰ the concept of the right to the truth attracted more attention from international and regional human rights bodies and special procedures. While this right was mainly related to the context of enforced disappearances, its scope extended to other serious human rights violations such as torture.²¹ One of the most recent treaties to recognise the right to the truth is the International Convention for the Protection of All Persons

¹⁷ Boutruche 2010, para 6.

¹⁸ Henckaerts et al. 2005, p. 421.

¹⁹ Office of the United Nations High Commissioner for Human Rights 2006, para 5.

²⁰ As noted in United Nations High Commissioner for Human Rights, *supra* note 19, para 8: “the ad hoc working group on human rights in Chile, the Working Group on Enforced or Involuntary Disappearances and the Inter-American Commission on Human Rights developed an important doctrine on this right with regard to the crime of enforced disappearances”.

²¹ For an overview of the legal instruments, practice and jurisprudence recognising the right to the truth: United Nations High Commissioner for Human Rights 2006, *supra* note 19, paras 8–24.

from Enforced Disappearance of 20 December 2006, which affirmed in its preamble “the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person”. Article 24 (2) of this convention states that: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.” The establishment by the Human Rights Council of a Special Rapporteur on the promotion of truth, justice, reparation and the guarantee of non-recurrence in 2011 whose mandate includes “to identify, exchange and promote good practices and lessons learned, as well as to identify potential additional elements with a view to recommend ways and means to improve and strengthen the promotion of truth” reinforces the institutional framework pertaining to the development of the right to the truth.²²

12.2.3.2 Reconciling the Right to the Truth with Victims’ Perceptions and Expectations

Considering the truth as a right with legal implications surely constitutes progress, not least as it provides a normative framework as well as protection for victims of human rights and IHL violations. However, it also raises some issues when considering the complexity of the truth at the individual and collective levels and in relation to the perceptions of what truth means for victims and what they expect.

The first legal implication that may act as a limitation is to determine who is legally entitled to claim this right to the truth. As stressed earlier, the truth about large-scale abuses comprises a collective dimension for communities and for the whole society. Recognising the collective trauma experienced by communities or by the society begs the question as to whether communities or the society in a post-conflict period can claim a collective right to the truth. There was already considerable discussion over the use of the term “right” during the Geneva Diplomatic Conference. By referring to this expression, delegates clearly and carefully went beyond the mere recognition of the “basic need” to know the fate of one’s relatives. Rather, it was much more controversial whether such a provision granted an individual right to the representatives of a family to call for specific action from a government. This debate arises once again in the context of the development of the right to the truth under human rights law.

As highlighted in the OHCHR Study on the right to the truth, all the human rights instruments confer this right on victims and their relatives.²³ This is in line with the traditional understanding of an individual entitlement to human rights.

²² United Nations Human Rights Council, Resolution 18/7 of 29 September 2011, A/HRC/18/L.22. <http://www2.ohchr.org/english/bodies/hrcouncil/18session/resolutions.htm>. Accessed 19 January 2012.

²³ Office of the United Nations High Commissioner for Human Rights 2006, para 35.

However, the concept of a “victim” may also have a collective dimension. Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UN General Assembly resolution 60/147 of 16 December 2005 envisages this collective element when defining “victims”:

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

While this definition of victims would entail a collective right to the truth, this remains within the framework of the notion of a victim. Considering that the communities or the society as such require a broader approach, that may not be endorsed by State practice at this stage of the development of international law. International law would still be in a phase of development regarding a concept of a society’s right to the truth. State practice exists, however. Some Latin American countries, which are strong supporters of the right to the truth in international fora, have expressed the view that society is entitled to the truth about serious human rights violations.²⁴

The second issue of recognising a right to the truth relates to its content. The OHCHR Study on the right to the truth spells out the following elements of this right: “These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators”.²⁵ For victims of human rights violations, it seems obvious that knowing the truth entails knowing the identity of the persons who committed those abuses. While this may not be in conflict with the international criminal law principle of the presumption of innocence when the right to the truth is addressed in the framework of criminal judicial procedures, this might be more problematic when perpetrators are named pursuant to an extrajudicial mechanism.²⁶ This is in particular the case when such processes do not apply due process guarantees. Provided that such guarantees are met,

²⁴ Ibid., para 37.

²⁵ Ibid., para 38.

²⁶ Ibid., para 39.

knowing the identity of the perpetrators is, however, part of the general process of establishing the truth about particular abuses. The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were.²⁷

The right to the truth is also linked to other principles with regard to the fight against impunity and other victims' rights such as the right to an effective remedy, the right to legal and judicial protection, the right to family life, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal and the right to obtain reparation.²⁸ This is so in particular because certain processes, such as an investigation or a trial, contribute to the full exercise of this right. However, one may ask to what extent, for some victims, the truth as a concept should not also include bringing the perpetrators to justice or receiving reparation as a recognition of the truth. While these processes could be seen as some of the mere consequences of the establishment of the truth, if they fail to happen, victims could see this as an incomplete manifestation of the truth, beyond a legal restricted definition of what the right to the truth entails. Furthermore, under the victims' rights framework, there is a close link between the truth and the right to obtain reparation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation state that full and effective reparation includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Principle 22 defines satisfaction as including the verification of the facts and a full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses or persons who have intervened to assist the victim or prevent the occurrence of further violations.²⁹

12.2.3.3 The Truth, Patterns of Violations and the Legal Qualification of Facts

The truth about gross human rights violations or serious IHL violations is primarily about establishing the facts, the circumstances and the reasons for such violations. In the context of post-conflict and post-dictatorial societies addressing the scores of violations committed, this relates to individual victims and their families. However, patterns of violations also contribute to accurately representing the truth. Certain types of violations are characterised by different patterns of

²⁷ United Nations Human Rights Committee 1996, para 25.

²⁸ Orentlicher 2005; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the United Nations General Assembly Resolution 60/147 of 16 December 2005, A/RES/60/147. <http://www2.ohchr.org/english/law/remedy.htm>. Accessed 19 January 2012.

²⁹ Orentlicher 2005, Principles 18 and 22 (b).

violence that need to be identified to correctly reflect the reality. For instance, the OHCHR fact-finding mission in Kenya identified “three patterns of violence—spontaneous, organised and retaliatory” following the elections.³⁰ Similarly, in the context of the violence, which included torching and looting houses, during and after the conflict in Georgia in 2008, the Independent International Fact-Finding Mission on the Conflict in Georgia noted that “patterns of violence differed depending on the area concerned” and that “[t]he most extensive destruction and brutal violence seem to have taken place in South Ossetia, with certain characteristics that appear to be different from what happened in the buffer zone”.³¹ Due to the nature of certain violations it is fundamental that the scale of facts should be identified and qualified. In the case of sexual violence committed during the September 2009 massacre in Guinea, Human Rights Watch underlined that: “[t]he almost simultaneous occurrence of attacks by multiple perpetrators in several different areas of the field, and, later, in different areas of the sports complex, strongly suggests that the sexual violence was organised and part of a widespread pattern, not random acts by rogue soldiers”.³² Denying those specific patterns or their large scale would mean denying a part of the truth. It is therefore essential to consider both the individual case of a violation and the possible pattern it may be related to. Discussing the work and selection carried out by the UN Truth Commission for El Salvador, Thomas Buergenthal underlined that “[t]he more we learned about El Salvador’s civil war (...) the clearer it became that some cases were paradigmatic of a practice of violence that terrorized the country”.³³ Under the mandate of the Truth and Reconciliation Commission of Liberia, this commission had to determine “whether these were isolated incidents or part of a systematic pattern; establishing the antecedents, circumstances, factors and context of such violations and abuses; and determining those responsible for the commission of the violations and abuses and their motives as well as their impact on victims”.³⁴

At first, establishing the factual truth about abuses seems to be separated from any legal classification of such acts. Resorting to a legal qualification and standards may well prove to be too restrictive to fully account for what happened. On the other hand, through a legal classification, the specificity or gravity of certain acts can be recognised, which could be as important as finding out about the facts themselves. Qualifying certain acts as of crime against humanity implies that they have been “committed as part of a widespread or systematic attack directed against any civilian population”, thereby demonstrating the scale and specificity of

³⁰ Office of the United Nations High Commissioner for Human Rights 2008.

³¹ Independent International Fact-Finding Mission on the Conflict in Georgia 2009, p. 353. See also p. 369.

³² Human Rights Watch 2009, p. 61.

³³ Buergenthal 1994, p. 506.

³⁴ Truth and Reconciliation Commission of Liberia Mandate, *supra* note 8, Section 4 (a).

the violations.³⁵ Among the crimes under international law, the crime of genocide is often referred to as the “crime of crimes”.³⁶ Qualifying some acts as genocide constitutes the recognition of the horrific nature of the violence directed against certain victims, as it requires a specific psychological element, the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.³⁷ As such this legal qualification could be seen as part of the collective dimension of the truth about acts that intend to destroy a whole group.

This overview of some of the many dimensions and elements of the truth accounts for the complexity of this notion when considering large-scale human rights or IHL violations. In light of this manifold notion, which lies at the heart of transitional justice, the question remains to what extent transitional justice processes and mechanisms contribute to the establishment of a comprehensive truth in all its facets.

12.3 The Contribution and Limits of Transitional Justice Mechanisms and Processes to the Truth

Transitional justice is commonly presented as a set of mechanisms and processes through which societies address the legacy of past large-scale and mass human rights or IHL violations to ensure accountability, to serve the truth and justice and to achieve reconciliation. Such mechanisms and processes should be complementary in contributing to those objectives, each of them having advantages and limitations. But a cross-cutting issue seems also to affect the way those mechanisms interact with one another. As a rather new field, transitional justice seems to be based on assumptions that result in a limited focus on victims. It is essential to consider this criticism before addressing some of the transitional mechanisms with regard to the search for the truth.

12.3.1 *Assumptions in Transitional Justice: The Need to Consult the Victims*

Reflecting on the UN experience, the UN Secretary-General stressed that “strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an

³⁵ The Rome Statute of the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 7(1). <http://untreaty.un.org/cod/icc/statute/rome/rome.htm>. Accessed 19 January 2012.

³⁶ Schabas 2000, p. 1.

³⁷ The Rome Statute of the International Criminal Court, *supra* note 35, Article 6.

appropriately conceived combination thereof". He also pointed out that "[t]he United Nations must consider through advance planning and consultation how different transitional justice mechanisms will interact to ensure that they do not conflict with one another".³⁸ However, beyond the scholars and practitioners' discussions of whether transitional justice is an emerging field or a discipline of its own,³⁹ one of the recurring critics towards this area is that it relies heavily on assumptions that have not been empirically demonstrated, such as with regard to the positive relationship between truth and reconciliation and not least about what victims of mass human rights violations want as individuals. The transitional justice literature increasingly focuses on the need for a victim-centred approach⁴⁰ and on the importance of an evidence-based approach to fill the empirical gaps created by such assumptions.⁴¹ A certain author has rightly noted that with respect to the issue of the role of the victim in the transitional justice field, "there remains no meaningful consensus as to what victims can, or should, be able to expect from the process, and the few studies with empirical data concerning both their needs and expectations are laced with mixed results".⁴² He further stresses "there is an unfounded assumption in place that the search for the truth and/or justice is capable of fulfilling the needs of individual victims, whilst at the same time, meeting the apparently more pressing goals of punishment and/or societal reconciliation". He warns that transitional justice is not a "magic bullet" and that "care should be taken not to conflate the concept of individuals and societal healing" that "are distinct processes and progress at different rates".⁴³ It is, however, a very challenging task to overcome such assumptions and this top-down approach that often dominates transitional justice strategies.

The question of the victims' needs and expectations and the transitional justice options to address large-scale human rights and IHL violations in Northern Uganda show the importance of overcoming such assumptions. It was often contended that Ugandans were more prone to pardoning than other people. A study conducted by the OHCHR on Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda noted that:

Recent debates about the northern Ugandan conflict have been dominated by analyses based on artificial dichotomies, including peace versus justice, local versus international responses to harm, and the population's desire for forgiveness and reconciliation versus punishment. The effect of this polarisation has been to cloud debates about the most appropriate ways to address conflict and its aftermath, implying either/or choices when combinations of these elements often better reflect popular perceptions and lead to more effective practical strategies.⁴⁴

³⁸ United Nations Secretary-General 2004, para 26.

³⁹ Weinstein 2011, pp. 1–10.

⁴⁰ Robins 2011, pp. 75–98; See also McDonald 2006, pp. 237–276.

⁴¹ Clark 2011, pp. 241, 242.

⁴² Doak 2011, p. 264.

⁴³ *Ibid.*, pp. 264, 265.

⁴⁴ Office of the United Nations High Commissioner for Human Rights 2007, pp. 1–2.

Based on interviews with victims, this study demonstrated on the contrary that:

Respondents stated consistently that truth-recovery and reparation in the form of compensation are their principal needs in terms of transitional justice responses to the conflict. However, they provided highly variable accounts of which local, national or international mechanisms can best deliver truth and compensation. In particular, perceptions of the virtues of the International Criminal Court (ICC) and traditional practises – the two broad transitional justice approaches that have dominated recent discussions of the northern Ugandan situation – were greatly mixed. Many respondents argued that a multi-faceted transitional justice response, combining several processes and institutions to address different types of harm caused by different levels of perpetrators, is required.⁴⁵

It further noted that “it will be important for decision makers to address the overwhelming need expressed by the victims groups for truth about past harms and consider the need for a systematic process of historical clarification mandated to explore the long view of the current conflict, even before 1986”.⁴⁶ While, of course, such findings do not solve the remaining question of designing the appropriate transitional justice strategy, they do provide a more nuanced picture based on victims’ perceptions. For any transitional justice to have a possibility of success, it is key not to overlook the expectations of victims as individuals through seeking the truth for the society as a whole. As noted by one author:

[I]t seems inappropriate to view a community or a society as “healed” as though it were an individual with a conscience, identity and memory. The most common consequences of victimization, which include fear, self-blame, insomnia, depression, anxiety, a sense of loss of control and post-traumatic stress, are not experienced on a collective basis and cannot be cured through processes that prioritise broader objectives, whether these are the punishment of perpetrators or societal reconciliation.⁴⁷

This reinforces the need to ensure comprehensive and thorough national consultations prior to designing any transitional justice mechanisms.⁴⁸ This consultation process should include victims and not just the main stakeholders at the national level. It should also inform the next steps of a transitional process rather than being a mere formality to legitimate the process. This is the only way to downplay the influence of assumptions and to take into account victims’ perceptions and expectations as individuals. This is of the utmost importance when considering that existing transitional justice mechanisms contribute only in part to establishing the truth in all its facets.

⁴⁵ Ibid., p. ii.

⁴⁶ Ibid.

⁴⁷ Doak 2011, p. 265.

⁴⁸ United Nations Secretary-General 2004, para 25.

12.3.2 Transitional Justice Mechanisms and the Establishment of the Truth

While establishing the truth is an overarching goal of any transitional justice strategy in a post-conflict society, specific transitional justice mechanisms are labelled as “facilitating truth telling” or “truth seeking”.⁴⁹ They are particular processes that aim at disclosing the truth. On the other hand, other transitional justice mechanisms also contribute to this goal, in one way or another. However, in as much as ascertaining the truth does not necessarily bring about reconciliation, it is increasingly argued that those mechanisms, be they specific truth-seeking mechanisms or other processes such as criminal prosecution, do not automatically contribute to the manifestation of the comprehensive truth in its full complexity.

12.3.2.1 Truth Seeking and Truth Telling Processes

Truth commissions are commonly defined as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years”.⁵⁰ Beyond the lack of consensus on a more specific definition,⁵¹ discussions have focused on the assessment of the work of dozens of truth commissions that have been created. Generally, they were recognised as having “the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms”.⁵² Truth commissions that include a mandate to conduct public hearings can also contribute to triggering national debates. Results very much depend, however, on the way they are designed and how well resourced they are.

TRCs established in the past made a significant contribution to disclosing the truth about past large-scale human rights and IHL violations, including through documenting the specific characteristics of an armed conflict or the particular crimes that were committed. The Liberia TRC released its report in December 2009. It was, for example, the first TRC to extensively explore economic crimes as a key factor in fuelling the armed conflict.⁵³ The Moroccan Equity and Reconciliation Commission created in January 2004, whose mandate was to investigate forced disappearances and arbitrary detention between Morocco’s independence in 1956 and 1999 and to rule on reparation requests, adopted an innovative approach

⁴⁹ *Ibid.*, respectively p. 17 and para 8.

⁵⁰ *Ibid.*, para 50.

⁵¹ Dancy et al. 2010, p. 47.

⁵² United Nations Secretary-General 2004, para 50.

⁵³ James-Allen et al. 2010.

to collective reparations. Due to the damage incurred by certain communities and regions, the Commission primarily focused on communal reparation. It recommended the adoption of socio-economic and cultural development projects serving the interest of cities and regions, and it further specifically recommended the conversion of former illegal detention centres.⁵⁴ Truth commissions are also considered an important tool to shed some light on the various components of a repressive regime, as well as identifying the complex levels of responsibility in past abuses. Unsurprisingly, in the post-Gaddafi Libya, it was suggested to set up a TRC to contribute to the debate over how far the vetting of anyone connected with the previous regime should go in order to avoid revenge-motivated decisions.⁵⁵

As stressed by the UN Secretary-General, many factors can hamper the work of TRCs. Such shortcomings in turn affect the results in terms of what type of truth is established through those mechanisms. The Truth and Reconciliation Commission (TRC) which operated from July 2003 to February 2007 in the DRC and that was designed to support democracy during the political transition period produced “poor results”.⁵⁶ This was explained by a series of reasons ranging from the nature of its composition and the lack of a consultation process to the lack of human and material resources.⁵⁷ The Lessons Learnt and Reconciliation Commission (LLRC) set up by Sri Lanka’s President in May 2010 to look into the conflict between government forces and the Liberation Tigers of Tamil Eelam blatantly illustrates the institutional weaknesses of a body which cannot genuinely contribute to establishing the truth. The LLRC did not even have an explicit mandate to investigate violations of human rights and humanitarian law and was chaired by Sri Lanka’s former Attorney General who was accused of obstructing the investigation and prosecution of human rights abuses cases from the period of his tenure.⁵⁸

The Truth and Reconciliation Commission established in South Africa in 1995 to investigate gross human rights violations that were perpetrated during the period of the Apartheid regime from 1960 to 1994, while seen as a milestone in the history of such commissions, also illustrates the complexity of establishing the truth through TRCs. South Africa’s TRC constitutes in many ways a landmark in the practice of TRCs. It for example included public hearings which proved to be a key element of the overall transition in this country. However, as pointed by Archbishop Desmond Tutu, the chairman of this commission, “one of the greatest weaknesses in the Commission was the fact that we failed to attract the bulk of the white community to participate enthusiastically in the Truth and Reconciliation process”,⁵⁹ noting in particular that the military “hardly cooperated with the Commission at all [leaving] a

⁵⁴ National Commission for truth justice and reconciliation 2005.

⁵⁵ Pack and Zaptia 2011.

⁵⁶ International Center for Transitional Justice 2009.

⁵⁷ Office of the United Nations High Commissioner for Human Rights 2010, pp. 478–480.

⁵⁸ Amnesty International 2011.

⁵⁹ Quoted by Clark 2011, p. 249.

considerable gap in our truth-gathering process”.⁶⁰ Based on the experience in South Africa, one scholar stresses the issue regarding the comprehensiveness of truth established through TRCs and, once the truth is ascertained, the importance of the acceptance, acknowledgment and internalisation thereof by local communities.⁶¹ The South African TRC’s controversial power to grant amnesties also illustrates another dimension of truth-seeking processes. The TRC was indeed mandated to grant amnesties to perpetrators under certain conditions, including when they confessed their crimes truthfully and completely to the commission. This power gave rise to heated debates and controversy. Disclosing the truth was seen as a critical part of the process, but this power to grant an amnesty would prevent drawing all the consequences from the establishment of the truth. A judge of the South African Constitutional Court in a case brought against the TRC recognised this difficulty, especially concerning the link between an amnesty and the full disclosure of the truth: “[The granting of an amnesty] is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement of wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations”.⁶²

12.3.2.2 International Fact-Finding Mechanisms and Criminal Courts and Tribunals

Various international actors increasingly resorting to fact-finding missions to address alleged human rights and international humanitarian law violations as well as the development of international criminal tribunals and courts as part of transitional justice institutional processes contribute to the establishment of the truth. However, such mechanisms also contain significant limitations.

Verifying alleged violations of human rights and IHL norms necessitates a critical look at individual and specific cases. Determining facts in this context requires the establishment of a number of factual elements related to individual cases, ranging from information on the victim to the time, location and

⁶⁰ Quoted by Clark 2011, p. 250.

⁶¹ Clark 2011, p. 250.

⁶² South African Constitutional Court, *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, Case CCT 17/96, 25 July 1996, 1996 (8) BCLR 1015, para 21. <http://www.saflii.org/za/cases/ZACC/1996/16.pdf>. Accessed 19 January 2012.

circumstances of the incident.⁶³ While fact-finding missions usually look at patterns of violations, they also have to choose among certain facts, thereby limiting the extent of the truth revealed by fact-finding missions. As noted by the International Commission of Inquiry on Darfur in reference to the Darfur case:

It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding.⁶⁴

Conversely, international criminal courts and tribunals have focused on individual cases and, due to their mandate, they have usually prosecuted the perpetrators bearing the greatest responsibility.⁶⁵ Although their significant investigative means, such as resorting to forensic experts, contribute to the establishment of the truth, this is only for a handful of perpetrators. Furthermore, as they focus on punishment, they are often criticised for neglecting victims.⁶⁶ Specific international criminal law procedural elements also limit the comprehensiveness of the truth being established through criminal trials. For example, it is suggested that plea bargaining, “whereby a defendant pleads guilty in return for certain charges to be dropped and/or for a reduced sentence (...) arguably impact(s) on the fullness of any truth established”.⁶⁷ Fact-finding missions and international criminal tribunal and courts must be complemented by other transitional justice mechanisms to contribute to ascertaining the truth to its fullest extent.

12.4 Conclusion

This brief overview of some of the various dimensions of the truth in transitional justice processes demonstrated the necessity to reconsider assumptions and structural issues when addressing the legacy of past abuses. In as much as there is a lack of empirical data on the positive impact of the truth on reconciliation in a post-conflict society, the truth itself should not be oversimplified. The complexity and inherent human nature of the truth for victims require any transitional justice mechanism to be carefully designed if it is to genuinely and comprehensively contribute to the establishment of the truth. As pointed out by one author, “[c]ontemporary writings

⁶³ Boutruche 2011, p. 115.

⁶⁴ International Commission of Inquiry on Darfur to the United Nations Secretary-General 2005, p. 223; United Nations Human Rights Council 2009, p. 157.

⁶⁵ See for example Article 1 of the Statute of the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone, Freetown, 16 January 2002. <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>. Accessed 19 January 2012.

⁶⁶ Doak 2011, p. 264.

⁶⁷ Clark 2011, p. 252.

about the needs of survivors of mass atrocity are peppered with terms like ‘healing,’ ‘closure,’ forgiveness,’ and ‘reconciliation’ and phrases such as ‘coming to terms with the past’”.⁶⁸ As a prerequisite for any additional meaningful transitional justice processes such as prosecution or institutional reform, truth must be recognised as a manifold concept.

While the notion of truth is primarily about ascertaining the facts related to a given incident, as demonstrated in this chapter, it goes far beyond this factual aspect. The truth about past abuses is a complex concept encapsulating not only a psychological and legal dimension for individual victims, but it also relates to a collective dimension for a community or the society as a whole. In as much as the development of a right to the truth strengthens the rights of victims, the legal prism should not be the Alfa and Omega of how the truth is considered within the field of transitional justice. This simplification would amount to a limitation on what the truth encompasses and would therefore hamper its positive effects. Similarly, transitional justice processes and mechanisms taken separately only partly contribute to the establishment of a comprehensive truth in all its facets. For example, criminal prosecutions, due to the procedural requirements of international criminal law and the limited participation of victims, cannot in themselves serve the imperatives of the truth. There is a need to systematically consult with victims and to take a holistic approach in designing transitional justice mechanisms to ensure a tailored framework capable of delivering truth in all its components, paying due attention to local community mechanisms and dynamics.

With an increasing debate concerning the various forms of reparations in the context of the ICC framework, with tensions between favouring individual, collective or symbolic reparations, it is key to reconsider the many facets of truth in order to genuinely achieve the goals of transitional justice. In that respect, the importance of truth for victims as individuals should never be lost on the way to searching for the truth for a society as a whole.

Through her research, teaching and publications, Avril McDonald had always been a fervent advocate of victims’ rights, consistently trying to counterbalance political realities with an expert legal analysis to ensure that the human voices of victims are heard beyond the technicalities of the law.⁶⁹ This contribution pays tribute to this tireless supporter of the truth.

⁶⁸ Stover 2005, p. 11.

⁶⁹ McDonald 2000, pp. 11–26.

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