

UTRECHT UNIVERSITY

European Master's Degree in Human Rights and Democratisation
A.Y. 2017/2018

Searching the Truth in Syria:

A Study on the Contribution of the International, Impartial and
Independent Mechanism towards the Right to Truth of Victims in
Light of its Unique Mandate.

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ABSTRACT

This paper explores the contribution of the recently-established International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011 (the IIIM) towards the right to truth of victims. The analysis first describes how this legal right has emerged in international law, conferring States a duty to provide victims with a full account of the truth about the circumstances that made them so become. Because it is believed to be a general principle of international law, although it seems to offer a powerful tool of redress for human rights violations, the right to truth suffers from a certain degree of broadness and indeterminacy. Accordingly, it is not clear how the international community lives up to its demands. The analysis thus tries to pin down some activities which can meaningfully pay a contribution to its realization in a criminal context. In particular, it identifies practices of documentation, evidence preservation and criminal proceedings as especially useful for the ascertainment of truth. In light of this analysis, a Framework Criteria is laid out and applied to the IIIM to evaluate its contribution in this respect, in view of its unique mandate. The overall finding is that while the Mechanism is an important tool to establish truthful accounts of the violations occurring in Syria, it is rather limited in the extent it can do so. This is mostly due to the prosecutorial-oriented mandate that characterizes it.

LIST OF ACRONYMS

ACHR	American Convention on Human Rights
COI	Independent International Commission of Inquiry on the Syrian Arab Republic
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FFM	Fact Finding Mission
HLC	Humanitarian Law Center
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IIM	International, Impartial and Independent Mechanism
ISIS	Islamic State of Iraq and Syria
JIM	Joint Investigative Mechanism
KMB	Kosovo Memory Book
NGO	Non-Governmental Organization
OCHA	Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OPCW	Organisation for the Prohibition of Chemical Weapons
TRC	South African Truth and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly

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I.

INTRODUCTION

1.1 Problem Statement

It is contended that a “right to truth” or victims of gross human rights violations and serious breaches of international humanitarian law has emerged as a fundamental principle of international law in the past decades. The origins of this right in human rights law can be traced back to the 1970s phenomenon of enforced disappearances in Central and South America, where victims’ relatives, anguished by the lack of information on the whereabouts of their beloved ones, started to demand States access to information in these regards.¹ A “right to truth”, as intended in this context, was later formally included in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.² Here, a “right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end” is mentioned in the Preamble and also later clearly spelled out in article 24 of the Convention³.

Closely linked to the right to a remedy and the right to reparations, as well as to a right to access information, the right to truth later expanded to cover gross human rights violations as well as serious breaches of international humanitarian law and it is now a widely supported tool to come to terms with legacies of state-sponsored violence.⁴ In the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation

¹ For more information on the right to truth as a right to a remedy, see Thomas M Antkowiak, ‘Truth as Right and Remedy in International Human Rights Experience’ (2002) 23 Michigan Journal of International Law 977, 977-980.

² International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED).

³ Ibid, art 24(2) provides 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.”

⁴ See Brianne McGonigle Leyh, ‘The right to truth in international criminal proceedings: an indeterminate concept from human right law’ in Yves Haeck, Brianne McGonigle Leyh et al (eds), *The Realisation of Human Rights: When Theory Meets Practice* (Intersentia 2014); Alice M Panepinto, ‘The right to the truth in international law: The significance of Strasbourg’s contributions’ (2017) 37 Legal Studies 739.

for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law such link is evident: Principle X entails that “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations”.⁵ Only a year later, the Office of the UN High Commissioner for Human Rights, played a significant contribution towards affirming the right to truth as a stand-alone, inalienable right by publishing a study following resolution 2005/66⁶ of the former UN Commission on Human Rights.⁷

A similar support has been garnered at the regional level, particularly thanks to the jurisprudence of human rights courts and most notably of the Inter-American Court of Human Rights (IACtHR), which has been a pioneer in recognizing a right to truth of victims under the right to effective domestic remedies.⁸ As explained by scholar Thomas Antkowiak, the jurisprudence of the IACtHR “has suggested that an individual and societal right to the truth provides several key remedial possibilities to the victim of gross human rights violations”.⁹ Similarly and more recently, the European Court of Human Rights (ECtHR) has also recognized the right to truth, by explicitly referring to it in the 2012 Grand Chamber judgement in *El-Masri* case on extraordinary renditions.¹⁰ The Court decision brought about the relation between the right to truth and the procedural obligations arising from article 3 of the European Convention on Human Rights on the prohibition of torture. Such obligations include effective state

⁵ UNGA, ‘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’ (hereafter: ‘UN Basic Principles’) (16 December 2005) UN Doc A/RES/60/147, Principle X.

⁶ UN Commission on Human Rights Res 2005/66 (20 April 2005) UN Doc E/CN.4/RES/2005/66.

⁷ Office of the High Commissioner for Human Rights (OHCHR), ‘Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights’ (hereafter: ‘2006 OHCHR ‘Study on the right to the truth’’) (8 February 2006) UN Doc E/CN.4/2006/91 2.

⁸ American Convention on Human Rights (Pact of San Jose) (hereafter: ‘ACHR’)(adopted entered into force 18 July 1978) OAS Treaty Series No 36 (1978) arts 8, 24.

⁹ Antkowiak, 995.

¹⁰ *El-Masri v. The Former Yugoslav Republic of Macedonia* App no 39630/09 (hereafter: ‘*El-Masri* Judgement’) (ECtHR, 13 December 2012).

investigations in the context of cases of the enforced disappearance and ill-treatment of the applicants. In this instance, the Court found that inadequate state investigations indeed impacted on the right to truth.¹¹

Despite today, as it been briefly discussed, the right to truth enjoys widespread support by international and regional human rights bodies, there is still much uncertainty on its normative content, whether it is a legally enforceable right or whether it is just an elusive concept. Some scholars have indeed been sceptical in giving the right to truth a validated and formal legal standing.¹² For the purpose of this research, it will be assumed that a right to truth exists in international law as at least a general principle of international law, which, therefore places an incumbent obligation on States towards its realization.¹³ It is contended that the fact that the right to truth only amounts to a general principle of international law rather than being a clear conventional norm, “does not detract from (its) effectiveness” and from its binding nature.¹⁴ Moreover the principle of “State Responsibility” under international general law, obliges States who commit internationally wrongful acts to remedy to the violations and afford adequate reparation,¹⁵ within which the right to truth can be argued to be implied.

In the context of the ongoing Syrian conflict, which has since 2011 been the theatre of systematic human rights and international humanitarian law violations possibly amounting to crimes against humanity, war crimes and genocide at the hands of different actors,¹⁶ victims under international law thus have a right to know the truth

¹¹ Panepinto 747.

¹² See for eg. Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’ (2006) 88 International Review of the Red Cross 245.

¹³ Mahoud Cherif Bassiouni, ‘A Functional Approach to General Principles of International Law’ (1990) 11 Michigan Journal of International Law 768.

¹⁴ Juan Méndez, ‘The Right to Truth’ in Christopher C Joyner and Mahmoud C Bassiouni (eds) *Reining in impunity for international crimes and serious violations of fundamental human rights: proceedings of the Siracusa Conference 17-21 September 1998* (érès 1998), 256.

¹⁵ International Law Commission (ILC), ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ in ‘Report of the International Law Commission on the work of its Fifty-third session’ (November 2001) UN Doc A/56/10.

¹⁶ For an updated account of the most recently reported human rights and humanitarian law violations in Syria, see eg. Human Rights Watch, ‘World Report 2018’ (Human Rights Watch 2018) 524

about the circumstances that made them so become. Their right specifically entails “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”.¹⁷ As it derives, once the conflict will come to an end, the Syrian State will have an obligation to “reveal to the victims and the society everything known about the facts and circumstances of such violations”.¹⁸ Given the implication of the current regime in committing the violation, the efforts to provide a full account of the truth surrounding the violations will more likely be handled at the international level.

International efforts to investigate into the violations occurring on the ground had already been made apparent by the creation of several mechanisms with documentation mandates. The most recent among these mechanisms is the International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011” (the ‘IIIM’ or ‘the Mechanism’). The IIIM, established by resolution 71/248 of the United Nations General Assembly (UNGA) in 2016, has a twofold mandate.¹⁹ On one hand it seeks to “collect, consolidate, preserve and analyse evidence” and on the other it is tasked with preparing files “to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law”.²⁰

While accountability and establishing criminal responsibility is evidently the primary goal of the Mechanism, this research will answer the following main research question:

“To what extent does the IIIM contribute to the right to truth of Syrians in light of its unique mandate?”

<https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf> accessed 30 June 2016.

¹⁷ 2006 OHCHR ‘Study on the right to the truth’ para 59.

¹⁸ Méndez 255.

¹⁹ UNGA Res 71/248 (21 December 2016) UN Doc A/RES/71/248.

²⁰ Ibid, para 4.

Establishing the “truth” regarding crimes against humanity and war crimes is in fact an extremely complex exercise in general, let alone in the context of the Syrian conflict, where a plethora of actors are involved on different fronts. Collecting and preserving evidence that might otherwise get destroyed or compromised at a later stage can be vital for the ascertainment of the truth about the events unfolded in the country. This has been recognized as an important tool of transitional justice²¹ to protect the right to truth of victims once the conflict will come to an end.²² However, one must be cautious when talking about ‘truth’ in the context of a prosecution-oriented mechanism such as the IIM. Assuming the Mechanism will succeed in collecting and consolidating evidence regarding the most serious crimes committed in Syria, there are inherent limitations to its ability to fulfil a “broader” truth. These limitations are mainly those connected with the more general limitation of criminal law in achieving the “truth” as that prescribed by the right to truth.²³ Among others, for instance, the focus on a small number of violations only, which automatically will leave aside other crimes.²⁴

Moreover, while prosecutions (the ultimate goal of the IIM) may constitute important tools for ensuring the right to truth of victims, as also recognized in the 2006 OHCHR Study on the right to the truth,²⁵ the truth-seeking function of courts is inherently limited to the ascertainment of facts related to the responsibility of specific individuals in committing criminal acts. In this sense, scholars have affirmed that

²¹ Transitional justice is hereby intended as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”. Definition taken from UNSG, ‘The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General’ (hereafter ‘UN ‘Report on transitional justice’’) (23 August 2004) UN Doc S/2004/616, para 8.

²² OHCHR ‘Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Right to the truth. Report of the Office of the High Commissioner for Human Rights’ (hereafter: 2009 OHCHR Report on the right to the truth) (21 August 2009) UN Doc A/HRC/12/19, para 19-22.

²³ See Sam Szoke-Burke, ‘Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies’ (2015) 33 Berkeley Journal of International Law 526.

²⁴ Ibid 552ff; Sofia Stolk, ‘The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity’ (2015) 13 Journal of International Criminal Justice 973.

²⁵ 2006 OHCHR ‘Study on the right to truth’, para 61.

Courts can only help towards establishing a judicial, or legal truth but can have a limited role in establishing the broader truth, or even a “historical truth”.²⁶ Arguably, in fact, international criminal law is not sufficiently equipped to deal with such an – uncertain- concept of international human rights law as it is the right to truth, nor it should necessarily aspire in embracing this concept unreservedly.²⁷

Whereas existing literature has extensively explored the relationship between the right to truth and criminal law, and the contribution that the latter can give towards the realization of the former, this thesis will research on a rather unexplored territory, namely the role of an investigative mechanisms vis-à-vis the right to truth of victims. With regards to the IIIM, not much research exists yet due to the relatively recent birth of the mechanism. Where it does, it mostly looks at its potential contribution towards accountability and justice.²⁸ This thesis will, therefore, offer a fresh and new perspective while contributing to the debate on the right to truth.

1.2 Methodology and Research Questions

This thesis is an explorative study, which will be conducted through a qualitative analysis of several sources. In order to reply to the main research question, namely: “To what extent does the IIIM contribute to the right to truth of Syrians in light of its unique mandate?”, the following five sub-questions will be answered: 1) “What is the right to truth?”; 2) “What does the right to truth in criminal contexts mean?”; 3) “What are the criteria that an investigative mechanism should satisfy to fulfil the right to truth?”; 4) “What is the IIIM?”; 5) “How do these criteria apply to the IIIM?”.

In order to answer the first sub-question, secondary sources (including journal articles, books and reports) on international law and transitional justice will be

²⁶ Fergal Gaynor, ‘Uneasy Partners - Evidence, Truth and History in International Trials’ (2012) 10 *Journal of International Criminal Justice* 1257; Martti Koskeniemi, ‘Between Impunity and Show Trials’ (2002) 6 *Max Planck Yearbook of United Nations Law* 1;

²⁷ See eg. McGonigle.

²⁸ See eg. Ingrid Elliott, ‘“A Meaningful Step towards Accountability”?: A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria’ (2017) 15 *Journal of International Criminal Justice* 239.

examined to understand the importance of truth. Subsequently, what is the right to truth and how it has emerged in international law will be described, one hand through a historical and legal analysis of primary sources, including the International Convention for the Protection of All Persons from Enforced Disappearance, the General Comment on the Right to the Truth in Relation to Enforced Disappearances of Working Group on Enforced or Involuntary Disappearances,²⁹ the UN Commission on Human Rights resolution 2005/66, the 2006 OHCHR Study on the right to the truth, 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 and other UN resolutions. A few “milestone cases” of the IACtHR and ECtHR will be looked at to evaluate the development of the jurisprudence on the right to truth at the regional level. On the other hand, secondary sources will be examined, including the work of leading scholars on the right to truth (such as Juan Méndez and Yasmin Naqvi) in order to explore what is the current standing of this right within international law.

To answer the second sub-question, a combination between secondary sources (particularly journal articles of transitional justice, international human rights law and international criminal law as well as reports of investigative bodies), and primary sources, (especially the 2005 updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity as well as the 2009 OHCHR Report on the right to truth), will be examined so to understand what the right to truth in criminal contexts means. From these analysis, a Criteria Framework will be discerned so to reply to the third sub-question.

The focus will then shift on the IIIM and its mandate. In order to answer the fourth sub-question the main founding documents of the Mechanism will be analysed. In particular, UNGA resolution 71/248 establishing the Mechanism, but also the Report of the Secretary-General on the Implementation of the resolution establishing the

²⁹ UN Working Group on Enforced or Involuntary Disappearances, ‘General Comment on the Right to the Truth in Relation to Enforced Disappearances’ in ‘Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance’ (July 2010) UN Doc A/HRC/16/48.

International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011,³⁰ containing its Terms of Reference, will be used. Existing literature on the Mechanism will be examined together with other secondary sources, including articles, websites and reports, to outline the context of its establishment.

Finally, the Framework Criteria will be applied to the Mechanism and assessed against its main functions so to finally answer the main research question. In doing so, mainly its first biannual report will be used as well as secondary sources on the right to truth in criminal proceedings. Finally, a comparative analysis between the IIIM and the Independent International Commission of Inquiry on the Syrian Arab Republic (COI) against the Framework Criteria will be provided so to evaluate which body is better suited to uphold the right to truth. To do so, the founding documents of both mechanisms, as well as reports of the COI, will be used.

1.3 Structure

Chapter II of this paper will first explore why truth is important for victims of mass atrocities and, second, it will analyse the historical and legal emergence of a right to truth in international law. This initial analysis seems of utmost necessity given that there is still much uncertainty over the content of this right as well as its normative strength in international law. Finally a section will be devoted to place the right to truth in the Syrian context. Chapter III will then assess what the right to truth in criminal contexts means, particularly by discussing practices of documentation and evidence collection,

³⁰ UNGA, ‘Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. Report of the Secretary-General’ (hereafter: ‘2017 Secretary-General Report’ (19 January 2017) UN Doc A/71/755.

evidence preservation and archiving and criminal prosecutions and their respective contribution to the right to truth. A last section will lay out the Framework Criteria.

Chapter IV will introduce international truth-seeking efforts in Syria, with a major focus on the IIIM, object of this study. Its mandate and functions will be outlined as well as its relationship with other similar mechanisms, including the COI. Finally, Chapter V will apply the Framework Criteria to the IIIM so to assess its contribution to the right to truth.

II.

THE VALUE OF TRUTH AND ITS EMERGENCE IN HUMAN RIGHTS LAW

Truth as a concept has gained prominence in the field of transitional justice and human rights law in recent years as a tool to deal with past human rights violations. While Syria is undergoing its seventh year of civil war, it is expected that if any transitional justice will ever take place in the aftermath of the conflict, knowing the truth about gross violations will be a central focus of it. This is especially the case due to, among others, the vast number of enforced disappearances, summary executions and cases of torture of detainees, very much covered by a layer of secrecy.³¹

Therefore, to reply to the first sub-question: “What is the right to truth?”, it is interesting to first understand why knowing the truth is important for victims of human rights abuses. Without grasping the relevance of truth, it is hard to imagine why the concept of a legal right to truth emerged in international human rights law, and why transitional justice has placed so much emphasis on truth-seeking activities. Nor a discussion on the contribution of the IIIM towards the right to truth of victims of the Syrian conflict would seem justified.

The first section of this initial Chapter therefore explores the notion of the truth and its indeterminacy by combining transitional justice literature with philosophical studies on truth. A sub-section will then discuss why searching for the truth is important in the context of serious human rights violations. Subsequently, an analysis on the emergence of truth in human rights law and its legal basis will be provided. This will set the background for contending that Syrian victims indeed have a right to the truth, and, at the same time, it will open the doors to the main discussion in the next chapters, namely to what extents the IIIM can realistically contribute to it.

³¹ See eg. Amnesty International, ‘Syria: Secret Campaign of Mass Hangings and Extermination at Saydanaya Prison’ (*Amnesty International Press Release*, 7 February 2017) <<https://www.amnesty.org/en/press-releases/2017/02/syria-investigation-uncovers-governments-secret-campaign-of-mass-hangings-and-extermiation-at-saydnaya-prison/>> accessed 12 July 2018.

2.1 The Truth Is...

The concept of truth in the context of human rights abuses, according to scholar Michelle Parlevliet, has been initially associated with certain kinds of violations, such as enforced disappearances and torture, as these involve a large amount of secrecy and denial. The truth thus emerges as a concept against a background of silence, as something that needs to be revealed to the public.³²

This however, seems to presuppose the existence of one, objective, truth.³³ In this sense, several philosophical theories tried to explain what exactly “truth” is, resulting on different accounts, which range from truth intended as corresponding to a fact (corresponding theory), truth as socially-constructed (constructionist theory) to truth as part of coherent system of beliefs (coherence theory) or truth as the end of an inquiry (pragmatist theory).³⁴

Famously, the South African Truth and Reconciliation Commission (TRC), in an attempt to define truth, has identified four kinds, namely factual truth, narrative truth, social truth and restorative truth.³⁵ While the factual truth is more in line with the idea of an “objective” truth, in the legal and forensic sense of it,³⁶ the narrative and social truths are more “subjective” kinds. The former is a product of personal experience and the

³² Michelle Parlevliet, ‘Considering Truth. Dealing with a Legacy of Gross Human Rights Violations’ (1998) 16(2) *Netherlands Quarterly of Human Rights* 141, 143.

³³ *Ibid* 144.

³⁴ For more detailed information on philosophical theories of truth, see ‘Truth’ (*Stanford Encyclopedia of Philosophy*, 22 January 2013) <<https://plato.stanford.edu/entries/truth/#CorThe>> accessed 19 June 2018. See also Ralph Walker, ‘Theories of Truth’ and Stephen Schiffer, ‘Deflationist Theories of Truth, Meaning, and Content’ in Bob Hale, Crispin Wright et al (eds.) *A Companion to the Philosophy of Language* (2nd edn John Wiley 2017).

³⁵ ‘Truth and Reconciliation Commission of South Africa Report’ (29 October 1998). <<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>> accessed 29 June 2018, 110.

³⁶ In terms of “factual truth”, the South African Truth and Reconciliation Commission identifies two main areas of findings. The first relates to findings on the individual level, meaning a specific incident concerning specific people (“what happened to whom, where, when and how, and who was involved”). The second involves findings at the societal level, on the broader context and on patterns of violations. *Ibid* para 32-33.

latter a result of social and inter-personal interactions. Finally, restorative truth³⁷ is defined by the TRC as “the kind of truth that places facts and what they mean within the context of human relationships”.³⁸

Similarly, former Judge Albie Sachs identifies a “microscopic truth”, which is a narrow truth obtained by positive scientific experimentation, a “logical truth”, meaning one that “doesn't require further observation”. He also identifies a “experiential truth”, which, as the name suggests is the truth filtered by personal experience and subjectivity, and finally a “dialogical truth”, which is a product of all truths interacting together. Sachs observes that this last truth is rather fluid, in the sense that it “emerges and changes, never-endingly”.³⁹

This illustrates that talking about one single truth can be misleading as in fact there is not one single defined and experienced truth.⁴⁰ As scholar Erin Daly rightly points out events are influenced by a number of factors, including time and motivations.⁴¹ However it may be intended or defined, truth cannot be disentangled from the purpose it has to fulfil. In other words, the meaning of truth in the context of gross human rights violations must be understood against and in light of its purpose.⁴² And so, what is the purpose of truth? Why does should the “veil of secrecy” be lifted? This will be the object of the next sub-section.

³⁷ Restorative truth involves “acknowledgement”, meaning the disclosure of information to the public. According to the commission this truth is “an affirmation that a person’s pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims”. Ibid, para 45.

³⁸ Ibid 111-114.

³⁹ Albie Sachs, ‘Truth and Reconciliation’ (1999) 52 SMU Law Review 1563, 1571f.

⁴⁰ See eg. Wendy Lambourne, ‘Transformative Justice, Reconciliation and Peacebuilding’ in Susanne Buckley-Zistel, Teresa Koloma Beck et al (eds) *Transitional Justice Theories* (Routledge 2014) 26ff. See also Wendy Lambourne, ‘Transitional Justice and Peacebuilding after Mass Violence’ (2009) 3 The International Journal of Transitional Justice 28, 39.

⁴¹ Erin Daly, ‘Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition’ (2008) 2 The International Journal of Transitional Justice 23, 26.

⁴² Parlevliet 149.

2.1.1 A Multipurpose Truth

Survivors of atrocity crimes, as well as the families and loved ones of those who were injured or murdered, want to know first and foremost what happened, who committed the crimes, and why the crimes were committed. Put another way, victims seek the truth because the truth, to some extent at least, alleviates their anguish, vindicates their status, encourages individual accountability, and has the potential of removing the perpetrators and their allies from power.⁴³

This quote by scholar Markus Funk well transmits the idea that there exists an inherent value associated with knowing the truth in the context of gross human rights violations, which justifies the need for individual victims –who might be confronted with the reality of what they faced long after the violations occurred- to first, “learn the factual circumstances” in a clear and concrete way.⁴⁴ To use the words of the South African TRC, knowing “what happened to whom, where, when and how, and who was involved” can help victims and their families make sense of what happened to them, while, at the same time, it can trigger some forms of justice. The UN goes even further by claiming that “truth is fundamental to the inherent dignity of the human person” and confers it the status of individual right (as it will be explained in the next section).⁴⁵

Similarly, knowing the truth about mass human rights violations is deemed necessary at the societal level, in a more “diffuse and abstract” way, because it is not limited to mere concrete facts, but in fact entails a moral component.⁴⁶ As Parlevliet puts it, on the public level, truth offers a chance to re-organize societies and their inter-relations in a 'it should never happen again' view.⁴⁷ In addition, as indicated by the

⁴³ Markus Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010) 127.

⁴⁴ Parlevliet 147.

⁴⁵ OHCHR Study on the right to truth, para 57.

⁴⁶ Parlevliet 148.

⁴⁷ Ibid 150.

IACHR, societies in transition need to know the truth about past abuses so that they understand who the victims and perpetrators are and what groups they belong to.⁴⁸

On both an individual and collective level, knowing the truth is also deeply entrenched with the concept of acknowledgement of past wrongdoings. The value of acknowledgment lies in the recognition of victims as individuals and rights-holders.⁴⁹ According to the TRC of South Africa, it further helps restore their dignity while offering a chance to perpetrators to confront their own past.⁵⁰

Because of the inherent individual and societal value attributed to truth, scholars of transitional justice have placed a great emphasis on this notion, to the point that it became one of the four complementary pillars and objectives to be pursued in the aftermath of mass violence, together with justice, reparations and guarantees of non-recurrence.⁵¹ In this context, the search for truth, or better said, “truth-seeking”, which is typically operationalized by judicial and non-judicial mechanisms (including criminal prosecutions, fact-finding missions and truth commissions),⁵² is said to contribute not only to individual and societal healing, but also to reconciliation among divided societies⁵³ and even to peace-building.⁵⁴

⁴⁸ Inter-American Commission on Human Rights (IACHR), ‘The Right to Truth in the Americas’ (hereafter: ‘IACHR, ‘Report on the right to truth in the Americas’’) (13 August 2014) OEA/Ser.L/V/II Doc. 2, para 108.

⁴⁹ ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’ (9 August 2012) UN Doc A/HRC/21/46, para 30.

⁵⁰ ‘Truth and Reconciliation Commission of South Africa Report’ para 3.

⁵¹ See eg. UN ‘Report on transitional justice’. See also ‘Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice’ (hereafter: ‘United Nations Approach to Transitional Justice’) (March 2010) <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 15 June 2018. The same interpretation is adopted by the IACHR in ‘Report on the right to truth in the Americas’, para 48-49.

⁵² See UN ‘Report on transitional justice’ para 50. See also ‘United Nations Approach to Transitional Justice’ 8.

⁵³ See A/HRC/21/46, para 28. For more information on the relation between truth and reconciliation, see also Luc Huyse, ‘The Process of Reconciliation’ in David Bloomfield, Teresa Barnes et al (eds.), *Reconciliation After Violent Conflict. A Handbook* (International Institute for Democracy and Electoral Assistance 2003).

⁵⁴ See also Parlevliet 149. See also Eduardo González and Howard Varney (eds) *Truth Seeking: Elements of Creating an Effective Truth Commission* (2013) Amnesty Commission of the Ministry of Justice of Brazil and International Center for Transitional Justice, 4.

However, these perhaps too ambitious goals are not out of challenges. In terms of reconciliation, the idea is that by sharing their truths, divided groups and communities can set the grounds for forgiveness. The South African TRC indicated that reconciliation, while entailing an element of forgiveness, does not, however, mean that the wrongs of the past shall be forgotten.⁵⁵ However, the idea that truth automatically leads to reconciliation has been challenged.⁵⁶ In certain instances, truth can in fact impede reconciliation altogether. Daly explains that this can occur in deeply divided societies, where resentment against the cruel acts of the perpetrators is rampant and a different understanding of the conflict remain.⁵⁷ At times, truth can even exacerbate division, as explained by author Michelle Carmody in relation to the transitional justice efforts in Latin America. As she argues, reconciliation initiatives in the instances of Chile, Argentina and Uruguay were opposed and instead gave rise to new social conflicts.⁵⁸

When it comes to the even more far-reaching goal of peace-building through truth-seeking, the assumption is that revealing the truth about the legacy of mass violence of the past is a precondition for building long-lasting peace. However, as author Tristan Borer contends, peace-building is a multifaceted notion, which encompasses a plethora of activities and different aspects, to which truth does not necessarily have an impact on. Likewise, truth-seeking mechanisms vary greatly in terms of nature and objectives, and a truth-seeking mechanism in a determinate context may be more or less successful than others. What Borer and other authors have found is that truth can contribute to certain

⁵⁵ 'Truth and Reconciliation Commission of South Africa Report' para. 50.

⁵⁶ See ch. Daly. See also James L. Gibson, 'Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation' (2004) 48 *American Journal of Political Science* 201; Rosalind Shaw, 'Rethinking Truth and Reconciliation Commissions. Lessons from Sierra Leone' (2005) Special Report 130, United States Institute of Peace.

⁵⁷ Daly 36-38.

⁵⁸ Michelle F Carmody, *Human Rights, Transitional Justice, and the Reconstruction of Political Order in Latin America* (Palgrave Macmillan 2018) 5.

elements of peace, such as for example building a human rights culture⁵⁹, but it is not sufficient alone.⁶⁰

So, to the question on whether truth has proved to be a value in practice for victims of mass atrocities, some reply that there is no empirical evidence that proves so.⁶¹ Scholar David Mandeloff answers that it depends on the context. In cases of deeply divided societies “truth-telling may help dampen security fears that could spark conflict in the event of state weakness”.⁶² It is certainly agreeable that truth-seeking mechanisms need to be tailored on the specific situation of the country as well as on the nature of the violations, if the desired outcomes wish to be achieved.

To sum up, truth is an ambiguous concept at the very least, primarily because it does not exist as a single, easily-graspable entity. Nevertheless, knowing the truth about gross human rights violations is attributed importance for individual victims, who can arguably benefit on several levels by understanding the factual details as to what happened, why, and who did it. In the *El-Masri* concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller convincingly point out that “the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery”.⁶³ At the same time, truth is also deemed to be a value for societies at large, who can use it to heal, reconcile and – more ambitiously- to build the grounds for future peace. In this sense truth is viewed as a proper “healing balm”.⁶⁴ However, on the practical level, truth-seeking mechanisms may face certain difficulties in translating their ambitious goals into reality.

⁵⁹ David Mandeloff, however, contends that there is little evidence that truth-seeking establishes respect for human rights. See David Mandeloff, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’ (2004) 6 International Studies Review 355, 375.

⁶⁰ See Tristan A. Borer ‘Truth-telling as a Peace-Building Activity: a Theoretical Overview’ in Tristan A. Borer (ed.) *Telling the Truths. Truth Telling and Peace Building in Post-Conflict Societies* (University of Notre Dame Press 2006) 42f.

⁶¹ Daly 35.

⁶² Mandeloff 375.

⁶³ *El-Masri* Judgement, ‘Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller’, para 6.

⁶⁴ Fergal Gaynor, ‘Uneasy Partners - Evidence, Truth and History in International Trials’ (2012) 10 Journal of International Criminal Justice 1257, 1259.

Overall, these initial sections have attempted to briefly lay the background on truth and its importance for victims of human rights abuses, in order to give the context as to why the truth as emerged as an inalienable right in international human rights law, which will be the object of the section to come.

2.2 The Emergence of a “Right to Truth” in International Law

In light of the relevance that has been attributed by scholars and policy-makers to knowing the truth, described above, a claim for a legal “right to the truth” has emerged in the realms of international law, and particularly within human rights law. As briefly outlined in the introduction of this paper, debates on the right to truth and its existence as an independent and enforceable right have sparked in the past decades, underlining that still much uncertainty surrounds this concept. Therefore, for a discussion on this right in against the potential ability of the IIIM to contribute to, it appears important to first understand its current legal standing. In order to do so, it is relevant to first recall how this right has emerged in international law, from a historical and legal perspective.

2.2.1 The Right to Truth and the Phenomenon of Enforced Disappearances: the Contribution of the Inter-American System

Before finding its place within human rights law, something similar to an entitlement of victims to know the truth was provided by international humanitarian law (IHL) and specifically by Articles 32 and 33 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, in relation to the missing persons. While in the Protocol the term “truth” was not explicitly mentioned, it was provided that, in the context of an international armed conflict, families have a right “to know the fate of their relatives”.⁶⁵ Each Party to a conflict should therefore “search for the persons who have been reported

⁶⁵ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3, art 32.

missing”⁶⁶ and “transmit all relevant information concerning such persons in order to facilitate such searches”⁶⁷. Today such norm has reached customary status and, hence, it applies to situations of both international and non-international armed conflicts.⁶⁸

It was in the context of the 70s and 80’s widespread state-sponsored enforced disappearances in Central and South America, with families of the victims demanding for information on the whereabouts of the loved ones, that a right to truth started to emerge as a concept of human rights law.⁶⁹ The jurisprudence of the IACHR and the IACtHR, in this respect, paid an essential contribution towards its affirmation and the development of its content, as well as the emanating States’ obligations in the context of enforced disappearances and beyond. As stated in the Report on the Right to Truth in the Americas, as an autonomous, stand-alone right to the truth is absent from the two main regional human rights instruments (American Convention on Human Rights (ACHR) and American Declaration of the Rights and Duties of Man), both the Commission and the Court have interpreted it as “subsuming” in the rights to judicial guarantees and judicial protection,⁷⁰ the right to seek and receive information,⁷¹ as well the rights to a remedy and reparation.⁷²

When it comes to the right to truth as implied in the rights to judicial guarantees and judicial protection, one milestone case of IACtHR is the *Bámaca Velásquez* case,⁷³ where it was for the first time recognized that victims or relatives of human rights violations possess a right to truth. In this context, the right to truth was intended as a right to obtain information on the circumstances of the violations, including concerning those responsible for them, through investigation and prosecution procedures. The

⁶⁶ Ibid, art 33(1).

⁶⁷ Ibid.

⁶⁸ See ICRC, ‘Rule 117. Accounting for Missing Persons’ (*ICRC IHL Database Customary IHL*) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule117> accessed 24 June 2018.

⁶⁹ Antkowiak 979.

⁷⁰ ACHR, arts 8, 25.

⁷¹ ACHR, art 13.

⁷² IACHR, ‘The Right to Truth in the Americas’, para 69.

⁷³ *Bámaca Velásquez v. Guatemala Case* (Judgment Inter-American Court of Human Rights Series C No 70 (25 November 2000)).

Court interpreted these as being positive obligations arising from the above-mentioned rights to judicial guarantees and judicial protection as per provided in the ACHR.⁷⁴ The ACtHR has continued along this line of interpretation in a consistent manner throughout the years, as it can also be illustrated by the 2011 case *Contrera v Ecuador*,⁷⁵ in which the right to truth is again understood as stemming from the rights to judicial guarantees, judicial protection as well as the right to seek and receive information. Here, again, the Court spells out the positive obligation of the State to investigate into grave human rights violations for the sake of the individuals affected as well as the society as a whole.⁷⁶

As mentioned above, the right to truth has also been interpreted by the IACHR and the IACtHR as implied in the right to remedy, which derives from Article 1(1) of the ACHR, and namely from the “Obligation to Respect Rights”,⁷⁷ as well as from Article 63, by which States found in violation of rights and freedoms shall remedy to them and afford adequate reparation. In this sense, the Inter-American bodies have seen the right to truth as being itself a form of reparation for human rights violations.⁷⁸ As put by the Commission, disclosing the truth with regards to “the circumstances of manner, time and place, motives and the identification of the perpetrators” of human rights violations, on one hand recognizes the inherent value of victims as individuals and rights-holders, and on the other, it is “fundamental for full reparations”.⁷⁹

⁷⁴ IACHR, ‘The Right to Truth in the Americas’ para 73; *Velásquez v. Guatemala* para. 201..

⁷⁵ *Contreras et al v El Salvador* (Judgement (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 232 (31 August 2011)), paras 170. The Court held that “(...) the right to know the truth has the necessary effect that, in a democratic society, the truth is known about the facts of grave human rights violations. (...) (O)n the one hand by the obligation to investigate human rights violations and, on the other, by the public dissemination of the results of the criminal and investigative proceedings.”

⁷⁶ Panepinto 746.

⁷⁷ IACHR, ‘The Right to Truth in the Americas’, para 74. See eg. *Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos and Celina Mariceth Ramos, El Salvador* (IACHR Report No 136/99, Case 10.488 (22 December 1999)), paras 221-232. In this case, the Commission recognizes the existence of a right to know the truth under art 1(1), 8(1), 25 and 13 of the ACHR.

⁷⁸ *Ibid*, para 124.

⁷⁹ *Ibid*. For more information on the right to truth in the Inter-American system see also Eduardo Ferrer Mac-Gregor, ‘The right to the truth as an autonomous right under the inter-american human rights system’ (2016) 9(1) Mexican law review 121.

2.2.2 The “Right to Know the Truth” at the International Level

At the international level, the first time that a “right to know the truth” was formally recognized in a treaty, yet still only in the context of disappearances, is in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Article 24, in fact, provides that victims (including those who have “suffered harm as the direct result of an enforced disappearance”) own “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”.⁸⁰ In the General Comment on the Right to the Truth in Relation to Enforced Disappearances, the UN Working Group on Enforced or Involuntary Disappearances explains that the State’s obligations deriving from this right are procedural in nature and include i) carrying out investigations to clarify the fate of the missing; ii) communicating the results of these to families; iii) granting access to archives; and iv) ensuring protection of those participating to the investigation, and particularly witnesses and families.⁸¹ Moreover, the Working Groups advises that measures to promote truth and reparation for victims are important means to implement the right to truth as well as to guarantee non-repetition.⁸²

A “right to know what happened” in the context of enforced disappearances is also recognized by the UN Human Rights Committee, as an emanation of the right to an effective remedy, enshrined in Article 2(3) of the ICCPR.⁸³ In this sense, the Committee

⁸⁰ ICPPED, art. 24(1)(2). See also Preamble [“*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end”].

⁸¹ UN Working Group on Enforced or Involuntary Disappearances, ‘General Comment on the Right to the Truth in Relation to Enforced Disappearances’ in ‘Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance’ (July 2010) UN Doc A/HRC/16/48, para 5..

⁸² Ibid 2.

⁸³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). A right to an effective remedy is widely recognized in many legal instruments, including The Universal Declaration of Human Rights (art 8), ACHR (art 63(1)), International Convention on the Elimination of All Forms of Racial Discrimination (art 6), European Convention on Human Rights (art 13), African Charter on Human and Peoples' Rights (art 7). See Theo van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and

expands the procedural and substantive obligations of the States, not only to include prompt investigation, prosecution and punishment of those responsible, but also the disclosure of the truth to victims and next of kin.⁸⁴ One milestone case in this regard is the *Quinteros* case, where the Committee explains that States have a duty “to conduct a full investigation” into cases of disappearance as the victims and next of kin have a right to know what happened.⁸⁵ However, the Committee’s interpretation is rather indeterminate as, seemingly, victims do not have an individual right to require investigation and prosecutions, although Article 2(3) acknowledges such an individual right.⁸⁶

2.2.2.1 The OHCHR Comprehensive “Study on the Right to the Truth”

As the interest for the right to truth sparked at the international and regional level, in 2005 the Commission on Human Rights, through resolution 2005/66, requested the Office of the High Commissioner for Human Rights (OHCHR) to prepare a comprehensive study (‘OHCHR Study on the right to the truth’ or ‘Study’) on this subject.⁸⁷ This Study, completed in 2006, recognized that:

The right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.⁸⁸

Guidelines’ in Carla Ferstman, Mariana Goetz et al (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Koninklijke Brill 2009) 22ff.

⁸⁴ James Sweeney, ‘The Elusive Right to Truth in Transitional Human Rights Jurisprudence’ (2018) 67 *International and Comparative Law Quarterly* 353, 362. See also McGonigle 4.

⁸⁵ *Quinteros v Uruguay*, United Nations Human Rights Committee Communication No 107/1981 (21 July 1983), para 14-15.

⁸⁶ McGonigle 10. For more information on the right to truth as an effective remedy see Antkowiak.

⁸⁷ UN Commission on Human Rights Resolution 2005/66 (20 April 2005) UN Doc E/CN.4/RES/2005/66.

⁸⁸ 2006 OHCHR ‘Study on the right to the truth’ UN Doc E/CN.4/2006/91 2.

In line with the the IACtHR interpretation, the Study thus recognized the broad scope of the right to truth beyond cases of enforced disappearances to encompass all gross human rights violations and serious breaches of international humanitarian law. Accordingly, its content was also expanded to include the entitlement to seek and obtain information in all situations of serious violations of international human rights law and serious violations of international humanitarian law. Such information relates to:

The causes leading to the person's victimization; the causes and conditions pertaining to the 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.⁸⁹

On to the last point, problems of conflict between different human rights (such as the principle of presumption of innocence) may arise if the right to truth seeks to be enforced through extra-judicial truth-seeking mechanisms. Such conflict put into question whether the right to truth should or should not entail within its content the identification of perpetrators. So far, jurisprudential interpretations seem to have agreed that knowing the perpetrator constitutes an essential part of the content of this right (eg. Human Rights Committee and IACHR).⁹⁰ It is not clear, however, in what instances this applies to suspects and thus, how far it extends.

As for implementation measures, the Study identifies a variety of institutional and procedural mechanisms which can contribute to the realization of the right to truth, including national and international criminal proceedings, that while providing justice, are nevertheless able to “test the truth according to rigorous evidential and procedural standards and lay down the facts in a court record”, making their contribution to the

⁸⁹ Ibid, para 38.

⁹⁰ Ibid, para 39.

right to truth worthwhile.⁹¹ Other non-judicial mechanisms, particularly truth commissions and national human rights institutions, are important for fact-finding investigations, which help uncover the truth about broad pattern of human rights violations. Finally, official archives containing records of the violations are also considered means for the exercise of the right.⁹²

2.2.2.2 The Twofold Dimension of the Right to Truth

The OHCHR Study reaffirmed that the right to truth has two dimensions, namely an individual and a societal dimension: while on one hand individual victims are entitled to know the circumstances and facts that led them to so become, the society at large, likewise, is endowed with the same right.⁹³ This must be understood as a way of ensuring the non-recurrence of the violations.⁹⁴ This view has been widely supported at the UN level.⁹⁵ In this sense, the link between the collective dimension of the right to truth as a way to prevent future violations was also emphasized by former UN Secretary-General in occasion of the International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims on 24 March 2015, when he stressed that “(t)he right to the truth - which is both an individual and collective right - is essential for victims, but also for society at large. Uncovering the truth of human rights violations of the past can help prevent human rights abuses in the future.”⁹⁶

The UN interpretation is also consistent with that of the IACHR and IACtHR, which have supported the societal relevance of knowing the truth, deemed crucial “for

⁹¹ Ibid, paras 47-48.

⁹² Ibid, paras 50-51.

⁹³ Ibid, para 36

⁹⁴ Ibid, para 58.

⁹⁵ See eg. HRC Res 9/11 (18 September 2008) UN Doc A/HRC/RES/9/11; HRC Res 12/12 (12 October 2009) UN Doc A/HRC/RES/12/12, Preamble; HRC Res 21/7 (10 October 2012) UN Doc A/HRC/RES/21/7.

⁹⁶ UN Secretary-General statement, ‘Right to Truth Essential Not Only for Victims, But Also Society at Large, Secretary-General Says in Message for International Day’ (*United Nations Meetings Coverage and Press Releases*, 24 March 2015) <<https://www.un.org/press/en/2015/sgsm16614.doc.htm>> accessed 13 May 2018.

the workings of democratic systems”, particularly in the context of reconciliation and transitional justice processes.⁹⁷ This societal entitlement corresponds to the state obligation to first and foremost investigate into the grave human rights violations and, subsequently, publicly disseminate information resulting from such proceedings.⁹⁸ This shall also serve the purpose of reconstructing the historical truth to the best extent possible.⁹⁹

2.2.2.3 *The Right to Truth in Other Soft Law Instruments*

Among several UNGA and HRC resolutions recognizing the importance of respecting and ensuring the right to the truth to contribute to ending impunity and to promote and protect human rights,¹⁰⁰ other soft law instruments adopted at the UN level exist to support the existence of this right in international law.

The 2005 updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (‘2005 updated Set of Principles’) is among the most prominent.¹⁰¹ Within this instrument, a victim’s right to know the truth about past systematic gross human rights violations is specifically recognized as an independent, inalienable right that, if promptly fulfilled, can play a pivotal role in ensuring non-recurrence.¹⁰² The updates Set of Principles also recognizes a series of guarantees that States must afford in order to uphold this right, including judicial and non-judicial measures, as well as the preservation of historical records of the

⁹⁷ See eg. Ignacio Ellacuría, case, para 224.

⁹⁸ IACHR, ‘The Right to Truth in the Americas’. paras 19, 81. See also *Velásquez v. Guatemala Case*, para 181; *Contreras et al v El Salvador Case*, para 170.

⁹⁹ Ibid, para 82.

¹⁰⁰ See eg. UNGA Res 68/165 (21 January 2014) UN Doc A/RES/68/165; HRC Dec 2/105 (27 November 2006) UN Doc A/HRC/DEC/2/105; A/HRC/RES/21/7; A/HRC/RES/12/12; A/HRC/RES/9/11; A/HRC/21/L.16.

¹⁰¹ UN Commission on Human Rights, ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (hereafter: ‘2005 updated Set of Principles’) (8 February 2005) UN Doc E/CN.4/2005/102/Add.1.

¹⁰² Ibid, Principle 2.

violations.¹⁰³ In a less explicit way, the 2005 UN 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 ('UN Basic Principles') provide that:

(V)ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.¹⁰⁴

In this context, the right to truth is clearly intended in connection to the right to access information.¹⁰⁵ This is problematic, as this right can notably be limited by respect for the rights of others, including for instance the right to privacy. Access to information has also been denied on national security grounds.¹⁰⁶ Arguments as such have been often used by States so to avoid telling the truth about human rights violations. In this sense, an autonomous inalienable right to truth would exclude this possibility.¹⁰⁷ Finally, in the UN Basic Principles, verification of the facts and full disclosure of the truth are also indicated as measures of satisfaction, which the state should, where applicable, grant to victims in the context of reparations.¹⁰⁸

2.2.3 ECHR and *El-Masri* Case Contribution Towards the Right to Truth

On its side, the ECtHR has also played its contribution towards affirming the existence of right to truth in the fairly recent Grand Chamber judgement in *El-Masri*

¹⁰³ Ibid, Principle 5.

¹⁰⁴ UN Basic Principles, Principle X, para 24.

¹⁰⁵ ICCPR, art 19(2). But also, UN Basic Principles, Principle XIII.

¹⁰⁶ See eg. ICCPR, art 19(3)(a)(b).

¹⁰⁷ Miguel R Vidosa, 'Light in Shadows? The Promise of a "Right to Truth" for Victims of Extraordinary Renditions in the European Court of Human Rights' (Université Libre de Bruxelles 2014) 58.

¹⁰⁸ UN Basic Principles, Principle IX, para 22(c).

case on extraordinary renditions.¹⁰⁹ The Court decision affirms the existence of a right to truth in the context of enforced disappearances and ill-treatment, which is relevant not only for the victims and their next of kin, but also for the “general public” who has “a right to know what happened”.¹¹⁰ Such right, however, is not recognized as an autonomous right, but rather as a right linked to the procedural obligations to carry out effective investigations emanating from Article 3 of the ECHR on the prohibition of torture.¹¹¹ In a joint concurring opinion, Judges Tulkens, Spielmann, Sicilianos and Keller criticize such “timid allusion to the right to the truth in the context of Article 3” of the Court,¹¹² and at the same time take a somewhat a different standing by contending that a right to truth would be better understood as deriving from the right to an effective remedy, recognized in Article 13 of the ECHR.¹¹³ As held by Alice Panepinto “the ECtHR is yet to formulate a coherent analysis of the right to the truth: its jurisprudence and separate opinions on the issue reveal the Court’s interest and ambiguity towards this emerging principle”.¹¹⁴

2.2.4 The Right to Truth: a State Responsibility?

A legal basis for the right to truth comes also from the principle of “State Responsibility” under general international law, by which States who commit internationally wrongful acts are obliged to cease the violation, remedy for the injury caused, afford adequate reparation and ensure non-repetition.¹¹⁵ This principle has also been understood by legal experts as applying not only in inter-state contexts (as it was originally conceived by the International Law Commission), but also in the context of States breaching their international human rights obligations vis-à-vis persons in their

¹⁰⁹ *El-Masri v. The Former Yugoslav Republic of Macedonia* App no 39630/09 (hereafter: ‘*El-Masri* Judgement’) (ECtHR, 13 December 2012).

¹¹⁰ *El-Masri* Judgement, para 191.

¹¹¹ *El-Masri* Judgement, paras 192-194.

¹¹² *El-Masri* Judgement, ‘Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller’ para 9.

¹¹³ *Ibid*, para 4.

¹¹⁴ Panepinto 748.

¹¹⁵ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts 30-31.

jurisdiction.¹¹⁶ As contended by former Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights Theo van Boven:

(...) The obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches. The principal right these victims are entitled to under international law is the right to effective remedies and just reparations.¹¹⁷

Thus, if we understand the right to truth as emanating from the rights to remedy and reparation (in line with international and regional interpretation), then it can be argued that ensuring it is also a matter of State Responsibility. Put in other words, when a State is found in breach of its international human rights obligations (deriving from treaty law, customary law and the so-called peremptory norms or *jus cogens*),¹¹⁸ a right to the truth for victims, understood as a remedy and reparation, automatically arises.

2.2.5 A General Principle of International Law

Overall, despite the wide recognition of the right to truth by international and regional bodies, today much controversy remains on its content and on whether it constitutes a stand-alone, enforceable right, considering it is not explicitly enshrined in any convention, except for the ICPPED. What most legal scholars seem to have agreed upon is that, while the right to truth may not be an autonomous right as yet, it is nevertheless a general principle of international law, which has emerged out of manifestation of international consensus, through the jurisprudence of international and

¹¹⁶ See eg. Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 451. See also Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' 25-27.

¹¹⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' (2 July 1993) UN Doc E/CN.4/Sub.2/1993/8, para 45-46.

¹¹⁸ United Nations, Statute of the International Court of Justice, 18 April 1946, art 38.

regional human rights bodies as well as other soft law instruments above discussed.¹¹⁹ General principles of law, as provided by the International Court of Justice (ICJ) Statute,¹²⁰ are in fact primary sources of law, and, despite disagreement over their hierarchical ranking, their binding character is now well-established.¹²¹ Accordingly, the binding nature of the right to truth is “not in dispute”.¹²²

In this regard, Juan Méndez, one of the most prominent experts on the right to truth, contends that when gross and systematic violations of human rights take place, “the state is obliged to reveal to the to the victims and society everything known about the facts and circumstances of such violations”. As he argues, the right to truth thus emerges as a principle of international law from a greater right to justice of victims of massive and systematic violations.¹²³ This, in turn, poses four separate but interconnected but separate obligations on the state, namely the obligations to i) investigate and publicly disclose the truth, ii) prosecute the perpetrators and achieve justice for victims, iii) repair the damage caused and, finally, iv) remove the responsible from the positions they hold within the state system.¹²⁴ Similarly, the famous legal analysis on the right to truth by legal scholar Yasmin Naqvi acknowledges, though not without caution, that the jurisprudence of various human rights courts provides evidence that a right to truth exists as a principle of international law, which has emerged firstly in domestic systems “as an expected response by a state to a violation”.¹²⁵ While some legal experts have gone as far as claiming that the right to truth may be a customary norm, due to “the existence of concurring jurisprudence in these systems”,¹²⁶ Méndez and Naqvi’s interpretations seem to be favoured.¹²⁷

¹¹⁹ More about general principles of international law and their legal implications: Mahmoud C Bassiouni, ‘A Functional Approach to “General Principles of International Law”’.

¹²⁰ Statute of the International Court of Justice, art 38(1)(c).

¹²¹ Ibid 787.

¹²² Méndez 256; see also Méndez, ‘The Human Right to Truth’ in Tristan A. Borer (ed.) *Telling the Truths. Truth Telling and Peace Building in Post-Conflict Societies* 115ff.

¹²³ Méndez, ‘The Right to Truth’ 255.

¹²⁴ Ibid. 263.

¹²⁵ Naqvi 268.

¹²⁶ Commission on Human Rights, ‘Eighth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy,

Nevertheless, one must acknowledge that general principles suffer from a certain degree of abstractness, and their normative force has often been challenged. Scholar Christina Voigt suggests that this is so because general principles have hardly ever been referred to as a basis for a legal claim due to their indeterminacy in terms of legitimacy but also origins.¹²⁸ In other words, a right to truth as a general principle may have indeed emerged, but it is not so clear what it entails.

To conclude, what appears from this overview on the historical and legal emergence of the right to truth is that while it is still an indeterminate concept with an uncertain legal standing, it is nevertheless being affirmed by regional and international body more insistently. If rightly implemented, this right can undoubtedly constitute a far-reaching tool to come to terms with human rights violations. As put by Panepinto, “through the applications of the right to the truth, victims and survivors can attempt to challenge prevailing versions of history and compel authorities to investigate and make public contested accounts of the past”.¹²⁹ It seems, thus, pertinent to extend the discussion on the right to truth to the Syrian context.

2.3 A Right to Truth for Syrians

As Syria undergoes its seventh year of civil war, the extent of the humanitarian catastrophe witnessed in the country has reached unprecedented levels. As of March 2018, 13.1 million of people are reportedly in need of humanitarian assistance, while 8.2 million civilians are still living in conflict-affected areas, lacking food and adequate

Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37’ (26 June 1995) UN Doc E/CN.4/Sub.2/1995/20, para 40. See also Sam Szoke-Burke, ‘Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies’ (2015) 33 Berkeley Journal of International Law 526, 539ff.

¹²⁷ See eg. McGonigle; Panepinto; Sweeney; see also Dermot Groome, ‘The Right to Truth in the Fight against Impunity’ (2011) 29(1) Berkeley Journal of International Law 175.

¹²⁸ Christina Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law* (2008) 31 Retfaerd Årgang 3, 5.

¹²⁹ Panepinto 741.

health facilities.¹³⁰ As now well-known, this war has been characterised by a plethora of serious human rights and international humanitarian law violations committed against civilians, at the hands of different forces and groups. The Syrian government and its allied forces have been condemned for, among others, the use of indiscriminate weapons such as cluster bombs and barrel bombs, as well as the illegal use of chemical weapons, and particularly sarin.¹³¹ Widespread use of ill-treatment and torture, systematic cases of mass enforced disappearances, arbitrary executions and extrajudicial killings were also consistently reported throughout the entire duration of conflict by both governmental forces and terrorist groups, such as ISIS and Jabhat Al-Nusra.¹³²

Against this appalling background, a right to truth seems to offer redress human rights violations in Syria once the conflict will end, in several ways. But first, it is important to apply the legal basis of the right to truth above discussed in the Syrian case.

Indeed, this research shares the view of several scholars that a right to truth exists in international law at least as a general principle.¹³³ As it has been discussed in the previous section, this status confers this right a binding character, regardless of it not being explicitly incorporated in any convention or treaty. Consequently, the Syrian state has the duty, *inter alia*, to investigate into the full circumstances of the violations, identify perpetrators, and, in the cases of disappearances and death, disclose information on the fate and whereabouts of the victims.¹³⁴ Furthermore, as discussed, this right can be said to implicitly exist under a series of other conventional rights. Specifically, it

¹³⁰ 'The Syria Crisis in Numbers' (*United Nations Office for the Coordination of Humanitarian Affairs*, March 2018) <<https://unocha.exposure.co/the-syria-crisis-in-numbers>> accessed 23 March 2018>.

¹³¹ See eg. HRC Res S-25/1 in HRC, 'Report of the Human Rights Council on its twenty-fifth special session' (13 January 2017) UN Doc A/HRC/S-25/2.

¹³² For more information see eg. Commission of Inquiry on the Syrian Arab Republic (hereafter: 'COI'), 'Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic' (3 February 2016) UN Doc A/HRC/31/CRP.1; COI, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (8 August 2017) UN Doc A/HRC/31/CRP.1; COI, "They came to destroy": ISIS Crimes Against the Yazidis' (15 June 2016) UN Doc A/HRC/32/CRP.2; Human Rights Watch, 'World Report 2018'.

¹³³ See sec 2.2.5.

¹³⁴ 2006 OHCHR 'Study on the right to the truth', para 38.

has been interpreted as emanating from the right to an effective remedy.¹³⁵ This right is enshrined in Article 3(2) of the ICCPR, to which Syria, despite having a regrettably scarce record of international human rights treaty ratification, is a party.¹³⁶ Thus, it has arguably an obligation to uphold the right to truth of victims as a component of the procedural and substantive obligations deriving from Article 3(2). A right to remedy has also been claimed to exist in international customary law, binding Syria alike.¹³⁷

In addition, as seen above, the right to remedy and reparation is also a matter of State Responsibility.¹³⁸ This principle poses an obligation on the State to remedy to the violations, which arises as a direct consequence of a State committing human rights violations. On many occasions, the UN has reiterated this to be the case, by stating that the Syrian state “is (...) responsible for wrongful acts, including crimes against humanity, committed by members of its military and security forces” and, hence, has “the duty to ensure that individual perpetrators are punished and that victims receive reparation”.¹³⁹

Having now assessed that there is legal ground to claim that Syria owns victims their right to know the truth, it appears necessary to understand what the added value of this right is. First, invoking a right to truth would could compel the government to release information with regards to the violations. Second, it could trigger forms of reparation, including “acknowledgement of the past wrongs”. Third, and perhaps most importantly, the right to truth could impact on the government’s obligation to investigate into the violations, including reveal the fate of the disappeared, and punish those responsible.¹⁴⁰

¹³⁵ See sec 2.2.1, 2.2.3 and 2.2.5.

¹³⁶ For more information on the status of human rights treaty ratification of Syria, see: ‘Status of Ratification Interactive Dashboard’ (*OHCHR*) <<http://indicators.ohchr.org/>> accessed 23 June 2018.

¹³⁷ See eg. Mahmoud C Bassiouni, ‘International Recognition of Victims’ Rights’ (2006) 6(2) Human Rights Law Review 203.

¹³⁸ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art 31.

¹³⁹ See eg. COI, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (23 November 2011) UN Doc A/HRC/S-17/2/Add.1, paras 109-110.

¹⁴⁰ Szoke-Burke 552.

Because the post-conflict government may be unwilling or might lack capacity to carry out its duties vis-à-vis the right to truth, the international community could realistically play an important role by for instance establishing truth-seeking mechanisms, which may help its implementation. In fact, this is already happening as a series of bodies have been created to investigate in the violations occurring in the country. The latest among such mechanisms, is indeed the IIIM.

In conclusion, this chapter highlighted that knowing the truth is not simply a way for victims to alleviate their suffering in the aftermath of gross abuses. Knowing the truth is something so inherent to their human dignity, that international human rights bodies have conferred it the status of right under human rights law. In Syria, because the situation has reached unprecedented level of violence, the right to truth is not only relevant, but arguably a tool for individual victims and the society at large to trigger justice mechanisms, reparations, and possibly guarantee that events as such will never occur again. However, it still remains to be seen what it exactly means in specific contexts.

III.

THE RIGHT TO TRUTH IN CRIMINAL CONTEXTS

The previous Chapter has highlighted how the right to truth is still quite indeterminate in the realms of international law. Despite its most fervent supporters confer it a good potential in redressing human rights violations and combat impunity, it is still not clear how this right takes shape in concrete and specific situations, and doubts remain on its autonomy as well as on how far it extends. Nor it is clear how the international community lives up to its ambitious demands.¹⁴¹

Because this research focuses on Syria and the newly established IIIM, it is important to understand what a right to truth therefore means in a criminal context and what are the ways in which investigative mechanisms can contribute to its implementation. In order to reply to the sub-question “What does the right to truth in criminal contexts mean?”, the practices of documentation and evidence collection, evidence preservation and archiving, and criminal prosecutions will be examined to understand their contribution, including advantages and limitations in upholding the right to truth. This appears important also in order to answer the sub-question “What are the criteria that an investigative should satisfy to fulfil the right to truth?”. In this sense, a Framework Criteria, laid out in the last section, will be elaborated to evaluate investigative mechanisms wishing to support the right to truth. Later in the paper, this Framework Criteria will be applied to the IIIM in order to reply to the main research question.

3.1 Documentation and Evidence Collection: a Paramount Practice for Reconstructing the Truth

Reconstructing the truth regarding gross and systematic human rights violations in the aftermath of devastating conflicts, as previously examined, is crucial to victims. However this practice is far from being an easy task and, predictably, the challenges are

¹⁴¹ See eg. Sweeney.

manifold, starting from the compromise or loss of important information to security concerns for the collectors.

In this sense, documentation and the collection and preservation of evidence of human rights violations plays a crucial role, both within accountability efforts as well as in the context of other transitional policies. In a criminal context, the most valuable types of evidence are oral and written testimonies from witnesses and victims.¹⁴² However, such evidence needs to be corroborated by other kinds of documentary material, including: official records (including governmental, police and prison records), but also audio and video recording, photographs, letters, newspaper articles, leaflets, etc.¹⁴³ This practice is also relevant for reparation processes, for it proves “the harms suffered”, as well as memorialization and other reconciliation initiatives, like truth commissions.¹⁴⁴ Collecting and preserving accurate accounts of the full circumstances of violations, moreover, is said to help construct past and future narratives, shape the new social contract between States and citizens and foster institutional reform.¹⁴⁵

Evidently, documentation is also fundamental for the realization of the right to truth of victims as it gathers essential concrete evidence for this legal claim.¹⁴⁶ The United Nations Approach to Transitional Justice indeed emphasizes that “(m)apping and documenting serious violations of human rights abuses is an important step in reconstructing the truth and realizing the right to the truth”.¹⁴⁷ Similarly, the practice of documenting human rights violations as a way to ensure the realization of the right to

¹⁴² ‘Manual: Documenting Human Rights and Humanitarian Law Violations in Syria’ (Syria Justice and Accountability Centre (SJAC) 2013) 18.

¹⁴³ Louis Bickford, Patricia Karam, et al, ‘Documenting Truth’ (International Centre for Transitional Justice (ICTJ) 2009) 3.

¹⁴⁴ See ICTJ, ‘Documenting Truth’. See also Megan Price and Patrick Ball, ‘Data Collection and Documentation for Truth-Seeking and Accountability’ (SJAC, Memorandum Series: Documentation in Transitional Justice 2014); Christalla Yakinthou, ‘Syria: Using Data, Documentation, and Evidence in Reparations Processes Prepared’ (SJAC 2014); Ereshnee Naidu, ‘Syria: Documentation and its Role in Memorialization’ (SJAC 2013); Patricia A Gossman, ‘Documentation and Transitional Justice in Afghanistan’ (Special Report 337, United States Institute for Peace 2013).

¹⁴⁵ Daniel Serwer, ‘Syria: Data, Documentation and Evidence to Support Institutional Reform’ (SJAC 2013). See also Elisabeth Baumgartner, Brandon Hamber et al, ‘Documentation, Human Rights and Transitional Justice’ (2016) 8 *Journal of Human Rights Practice* 1, 1.

¹⁴⁶ ‘Documenting Truth’ 30.

¹⁴⁷ ‘United Nations Approach to Transitional Justice’ 8.

truth was also emphasized by former UN Secretary-General during the observance of the International Day for the Right to the Truth, who highlighted that documenting violations for the purpose of fulfilling the right to truth is also important so to ensure an “undistorted historical record”.¹⁴⁸

In light of its ambitious objectives, documentation and evidence collection, which authors Megan Price and Patrick Ball describe as an ever “evolving process”, has been undertaken by different actors, as for instance international organizations (through fact finding missions and other investigative and truth-seeking mechanisms), and civil society groups but also by national human rights institutions.¹⁴⁹ This is particularly crucial when conflicts are still ongoing and the government is involved in the commission of violations, but also once the conflict is over and the “new” government prefers more “forward-looking” policies that perpetuate the silence of the previous regime.¹⁵⁰ An emblematic example of the latter is perhaps the case of post-Franco Spain, after the fall of the totalitarian regime in 1952. Whilst during the dictatorship serious human rights violations were committed, the successor democratic regime adopted what scholars define as a “silencing and forgetting” approach to transition, which included “amnesia” policies, including amnesties to those who committed political crimes during the regime.¹⁵¹ As a result, no investigation took place, nor any activity that would have helped to reconstruct the truth, which still remain hidden today.¹⁵² This, in turn, denied victims their right to the truth, and it also limited the

¹⁴⁸ ‘Secretary-General Urges Action by States to Promote Truth, Reparations for Victims of Human Rights Violations, in Message during International Observance’ (*United Nations Meeting Coverage and Press Releases*, 24 March 2016) UN Doc SG/SM/17628-HR/5295-OBV/1596 <<https://www.un.org/press/en/2016/sgsm17628.doc.htm>> accessed 5 July 2018.

¹⁴⁹ Megan Price and Patrick Ball, ‘Data Collection and Documentation for Truth-Seeking and Accountability’ (Syria Justice and Accountability Centre (SJAC), Memorandum Series: Documentation in Transitional Justice 2014) 2.

¹⁵⁰ ICTJ, ‘Documentation’ (*ICTJ*) <<https://www.ictj.org/gallery-items/documentation>> accessed 3 July 2018.

¹⁵¹ Ley de Amnistia 1977, Ley 46/1977 BOE No 24.

¹⁵² Rafael Escudero, ‘Road to Impunity: The Absence of Transitional Justice Programs in Spain’ (2014) 36 *Human Rights Quarterly* 123, 132.

creation of a collective and historical memory of that period.¹⁵³ Moreover, a large amount of evidence regarding the repression, including documents, archives and official papers was completely destroyed.¹⁵⁴ Initiatives to document and collect information about the violations perpetrated during the Spanish Civil War were carried out by civil society organizations instead.¹⁵⁵

As mentioned previously, there are some difficulties encountered by those who take charge of documenting human rights abuses. The International Centre for Transitional Justice (ICTJ) in its comprehensive study on ‘Documenting the Truth’ usefully identifies a series of challenges, particularly referring to documentation by local civil society organizations. *Inter alia*, it first identifies technical and strategical challenges, including the selection of what documents to prioritize. For instance, documents to be used for prosecutions will include legal evidence, while documents used for other truth-seeking activities, like truth commissions or memorialization projects, will need to focus on “broader social experiences”.¹⁵⁶ Accordingly, the approach to documentation and data collection can be broader or narrower.¹⁵⁷

Other technical issues may range from funding to storing and securing the documents collected. Second, documentation may be hampered by political considerations, including political affiliation of local organizations. In this sense, the ICTJ recommends that documenting be as objective as possible.¹⁵⁸ Third and most logically, there are security concerns in documenting human rights violations, not only for those who undertake the task, who can be threatened at various levels, but also for

¹⁵³ Sergio Gálvez Biesca, ‘El proceso de la recuperación de la ‘memoria histórica’ en España: Una aproximación a los movimientos sociales por la memoria’ (2006) 19(1) *International Journal of Iberian Studies* 25, 26ff.

¹⁵⁴ Escudero 138.

¹⁵⁵ ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’ (22 July 2014) UN Doc A/HRC/27/56/Add.1, paras 44, 48. See also ICTJ, ‘Much Work Ahead for Spain in Facing the Ghosts of the Past’ (*ICTJ*, 10 October 2014) <<https://www.ictj.org/news/much-work-ahead-spain-facing-ghosts-past>> accessed 3 July 2018.

¹⁵⁶ ICTJ, ‘Documenting Truth’ 7.

¹⁵⁷ *Ibid* 18.

¹⁵⁸ *Ibid* 8.

victims and witnesses who provide the statements.¹⁵⁹ In this context, the principle of *no harm* should always apply to ensure their protection and safety.¹⁶⁰

Where the conflict is still ongoing and governmental forces are involved, documentation can become an even more complex exercise. First of all, evidence can ended up lost or destroyed. This is because authoritarian regimes have an interest in keeping the truth well concealed, usually in order to withhold power in the aftermath of conflicts.¹⁶¹ Secondly, violent regimes may restrict access to human rights organizations to places where violations occur, hence limiting their documentation efforts. This has been the case of Syria, where foreign organizations (such as the COI on Syria as it will be seen in the next Chapter) have been denied access.¹⁶² Other restrictions to freedom of speech may also prevent efficient documentation efforts.¹⁶³

Overall this section sought to emphasize the importance of documentation and evidence collection as a mean to support the right to truth of victims of serious crimes. This practice is fundamental also for prosecutions and other transitional justice policies, such as memorialization initiatives. However, especially where the conflict is still ongoing, evidence collection needs to go hand in hand with evidence preservation and securitization, which will be analysed in the next section.

3.2 Evidence Preservation and Public Access: Creating Archives as a Mean to Realize the Right to Truth

Once violations have been thoroughly documented, in order for the right to truth to be exercisable, such evidence must be preserved and organized, particularly where the risk of losing it is high. In this sense, archives constitute an important tool for the

¹⁵⁹ Ibid.

¹⁶⁰ For more details on the “no harm” principle, see OHCHR, ‘Manual on human rights monitoring’ (OHCHR Publications, 2011) 4.

¹⁶¹ Nousha Kabawat and Fernando Travesí, ‘Justice for Syrian Victims Beyond Trials The Need for New, Innovative Uses for Documentation of Human Rights Violations in Syria’ (ICTJ Briefing, 2018) 6f.

¹⁶² Brianne McGonigle Leyh, ‘Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations’ (2017) 33(84) Utrecht Journal of International and European Law 44, 49.

¹⁶³ Ibid 48.

exercise of the right to truth of victims in the framework of transitional justice.¹⁶⁴

“Archives” are hereby defined as:

(C)collections of documents pertaining to violations of human rights and humanitarian law from sources including (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.¹⁶⁵

The 2005 updated Set of Principles, in this regard, specifically entails that there exists an obligation to preserve an accurate record of human rights violations, as a guarantee to give effect to the collective dimension of the right to know the truth and as a duty to preserve memory, since this constitutes part of a people's national heritage.¹⁶⁶ Accordingly, such archives must also be appropriately accessible to the public, as also stressed in the 2006 OHCHR Study on the right to truth as well as in the later 2009 OHCHR Report on the right to the truth.¹⁶⁷

The importance of archiving as a measure for the realization of the right to truth is indeed repeatedly emphasized in several UN instruments.¹⁶⁸ In 2009, through Resolution 12/12, the Human Rights Council even mandated the OHCHR to conduct a seminar on best practices on “creation, organization and management of public systems of archives as a means to guarantee the right to the truth”.¹⁶⁹ The report on the outcome of the discussions first, recognized that, regardless of what policies States may choose to adopt in order to address past human rights violations (including criminal

¹⁶⁴ 2006 OHCHR ‘Study on the right to the truth’, para 52; E/CN.4/RES/2005/66, preamble.

¹⁶⁵ Definition taken from the 2005 updated Set of Principles 6(E).

¹⁶⁶ 2005 updated Set of Principles, Principles 3 and 5.

¹⁶⁷ OHCHR ‘Report on the right to truth’, para 52; 2009 OHCHR Report on the right to the truth, paras 26-31.

¹⁶⁸ See eg. A/RES/68/165, para 5; ‘United Nations Approach to Transitional Justice’ 8;

¹⁶⁹ A/HRC/RES/12/12, para 9.

prosecutions, institutional reforms, truth-seeking or reparation initiatives), they all depend on the existence of archives.¹⁷⁰ In other words, archives contain the evidence, such as paper, audio-visual and digital files, fundamental for accountability or other non-judicial purposes.¹⁷¹ In this sense, this practice becomes relevant not only with regards to the right to truth of victims, but also with their rights to justice, reparations, and guarantees of non-recurrence, as already provided in the 2005 updated Set of Principles.¹⁷²

Secondly, it was acknowledged that transitioning governments usually have an archival deficit, both because they might not have archival institutions in place and, if they do, these may not necessarily follow international standards practices, nor be particularly trusted. This is particularly the case of governments that emerge from a repressive past.¹⁷³ This automatically gives rise to one question: who should be thus in charge of preserving archives both during and after the transition when the government is unable or untrusted with carrying out this task?

The OHCHR report in these regards stresses that, during transitions, the task of preserving archives could be left temporarily to special archival units, such as intermediate transitional records centres, which shall ensure an accountable, uninterrupted chain of custody.¹⁷⁴ However, the permanent and final objective should be to hand the task over to national governments. During conflicts, non-governmental organizations and other international and regional organizations, including UN-established institutions, can also contribute to the creation of archives containing important evidence, particularly where States are not trusted or if there is an imminent danger that the evidence contained in them may be destroyed. As advised in the report,

¹⁷⁰ OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth' (14 April 2011) UN Doc A/HRC/17/21, para 5.

¹⁷¹ Ibid, para 49.

¹⁷² Ibid, para 7.

¹⁷³ Ibid.

¹⁷⁴ Ibid, para. 9.

“(t)he archives held by human rights groups are crucial resources for truth commissions and judicial processes.”¹⁷⁵

The possibility to preserve archives internationally, on the other hand, can also arise and particularly in two instances: when a conflict is ongoing or imminent, and records may be destroyed, or when records may be destroyed by natural causes. This was, as indicated, the case of the records of the truth commissions in Guatemala and El Salvador truth commissions, which were preserved in archives at the UN New York headquarters.¹⁷⁶ Expectedly, this can well apply to the case of Syria.

A third aspect touched in the report regards the issue of access to such archives. While access to information is an important guarantee for the exercise of the right to truth, this cannot be unrestricted, particularly when information is confidential and the rights of other would be undermined (eg. right to privacy). Especially during transitional times, access to records must be, therefore, regulated.¹⁷⁷ In the case of records produced by commissions of inquiry, according to the 2005 updated Set of Principles, the bodies should in fact specify the conditions of access to their records in their terms of references so to “preserve the confidential information while facilitating public access to their archives”.¹⁷⁸

Due to their strong link to criminal accountability, prosecutors and human rights defenders should be granted access to the records contained in archives on human rights violations. Similarly, truth commissions may require access to such records. Practice has shown that judicial records, but also truth commissions’ records, have likewise largely been made public in view of exposing the truth to societies. This was the case of the post-Apartheid Truth and Reconciliation Commission in South Africa (though not out of difficulties) but also of the ICTY, which has taken measures to facilitate access to

¹⁷⁵ Ibid, para 52.

¹⁷⁶ Ibid, para 17.

¹⁷⁷ Ibid, para 10.

¹⁷⁸ 2005 updated Set of Principles, Principle 8(f).

its records.¹⁷⁹ However, with regards to the latter, it must be kept in mind that only a small portion of its archive is publicly accessible, as most of the material is confidential.

As it follows, other forms of documentation and archiving practices have been undertaken by private organizations with different purposes. One distinct example, also mentioned in the report and discussed in the seminar, is an archiving project initiated by the Humanitarian Law Center (HLC) for the 1998-2000 conflict in Kosovo. The organization gathered thousands of statements from witnesses and victims and other personal documents, as well as records from the ICTY, and consolidated them into a comprehensive virtual volume known as the ‘Kosovo Memory Book’ (KMB), a memorialization initiative.¹⁸⁰

To conclude, this sub-section has sought to highlight the importance of preserving and securing evidence on human rights abuses, particularly in official archives, as a mean of realization of the right to truth of victims. The following sub-section will move towards criminal proceedings as means to implement the right to truth, with the aim of exploring on their advantages and limitations in this sense.

3.3 Criminal Proceedings and the Right to Truth

With the development of a human right to truth for victims of abuses, the ascertainment of truth in the context of criminal proceedings became object of discussion among legal scholars and practitioners. Increasingly, criminal courts, and particularly international, have been assigned wider, far-reaching objectives, including “to produce historical record of the context of international crime, to provide a venue for giving voice to international crime’s many victims, and to propagate human rights values”.¹⁸¹

¹⁷⁹ OHCHR, ‘Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth’, paras 10, 30, 21.

¹⁸⁰ Gezim Visoka, ‘Arrested Truth: Transitional Justice and the Politics of Remembrance in Kosovo’ (2016) 8 *Journal of Human Rights Practice* 62, 63.

¹⁸¹ Mirjan Damaska, ‘What Is the Point of International Criminal Justice’ (2008) 83 *Chicago-Kent Law Review* 329, 331.

For its part, the UN has repeatedly attributed to criminal judicial bodies, including national, international and hybrid courts and tribunals, a truth-seeking function. In particular, criminal justice has been explicitly assigned a role in the implementation of the right to truth in a number of UN documents.¹⁸² The OHCHR Study on the right to the truth, for instance, emphasizes that national and international criminal procedures are important instruments to implement the right to truth. On one hand, this is because there is an established link between the right to truth and the obligation of a state to investigate into human rights violations in order to identify and punish the perpetrators, so to end impunity and avoid recurrence of the crimes. Indeed, part of the very material content of this right includes the establishment of the circumstances of gross human rights and serious IHL violations as well as the identification of the responsible, which may require judicial investigations.¹⁸³ On the other hand, in addition to establishing criminal responsibility, national and international courts participate to the ascertainment of the truth as they “test (it) according to rigorous evidential and procedural standards and lay down the facts in a court record”.¹⁸⁴ As former ICTY Judge Christine Van den Wyngaert maintains, the truth produced by criminal courts is indeed “credible” to the public. Accordingly, judicial proceedings turn victims’ accounts into “the official narrative of the post-conflict society”.¹⁸⁵ However, others have been more reluctant in empowering criminal justice with wider purposes than that of establishing criminal responsibility.¹⁸⁶

¹⁸² See eg. 2006 OHCHR ‘Study on the right to the truth’, para 47-48; see also: OHCHR ‘Right to the truth. Report of the Office of the High Commissioner for Human Rights’ (7 June 2007) UN Doc A/HRC/5/7, para 52-57, 85. In this document the important role of criminal proceedings in upholding the right to the truth is stressed, and recommendations are given to that the role of victims and their families in criminal proceedings is studied further. See also A/HRC/27/56/Add.1, para 76-82; ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland’ (17 November 2016) UN Doc A/HRC/34/62/Add.1, para. 20.

¹⁸³ Ibid, para. 38.

¹⁸⁴ 2006 OHCHR ‘Study on the right to the truth’, para 47-48.

¹⁸⁵ Christine Van den Wyngaert, ‘International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts Be Avoided?’ (2006) 100 Proceedings of the Annual Meeting (American Society of International Law) 63, 64.

¹⁸⁶ Hannah Arendt is one of the most fervent opponents to wider interpretations of the goals of criminal justice. As she famously stated in her best-selling book *Eichmann in Jerusalem*, “The purpose of a trial is to render justice, and nothing else”. See Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (Penguin Books 1994) 253.

The following discussions will, therefore, first look at the ability of criminal bodies in general to ascertain the truth, intended here as an accurate account (to the extent possible) of the facts, and second, to the challenges of international criminal courts to establish the broad, historical truth.

3.3.1 The Search for Truth in Criminal Trials

Indisputably, the primary goal of criminal courts and tribunals and, more in general, of criminal justice, is to establish individual criminal responsibility for a particular event that classifies as a crime. Accordingly, criminal procedures exclusively adjudicate those matters which are relevant to it. As Groome rightly pointed out in reference to *ad-hoc* tribunals, “(t)he parameters of the exercise are no broader”.¹⁸⁷ Nevertheless, by examining and testing facts with very rigorous evidentiary and procedural standards, including the standard of proof of “beyond reasonable doubt”, criminal processes, logically, try to establish truthful accounts, making their contribution towards truth one worth to examine.

In the context of national proceedings, civil law and common law traditions have largely influenced the way truth is understood and searched, with the former arguably giving more weight to it than the latter.¹⁸⁸ Lawyer Caroline Buisman explains that civil law systems, or inquisitorial systems, see the ascertainment of truth as the very objective of criminal proceedings, in which the judge is mandated to inquire into the facts and establish the most accurate account possible, through a factually-sound verdict. Accordingly, the methodology used allows for the collection, presentation and assessment of large amount of evidence, which must be as truthful as possible. In contrast, in common-law systems, or adversarial systems, the conception of ascertainment of truth is not as present in the discourse. In this system, the burden to prove the innocence or guilt of the accused is on the two equal parties (prosecution and defence), who select the evidence they wish to present to support their cases. The judge

¹⁸⁷ Groome 186.

¹⁸⁸ Caroline Buisman, Ascertainment of the truth in International Criminal Justice (Brunel University, 2012) 41.

will, subsequently, adjudicate the case, not on the basis of which account is believed to be true, but depending on the preponderance of evidence.¹⁸⁹ As explained, “common law trials are more focused on procedural fairness than the search for an objective truth”.¹⁹⁰ Nevertheless, Méndez sees adversarial systems, particularly in light of their focus on the equality of parties and the ability to cross-examine evidence, more apt to establish a less contestable truth. He asserts that “(t)he (adversarial) judicial approach to evidence is certainly not infallible, but the truth thus established has a “tested” quality that makes it all the more persuasive”.¹⁹¹

The search for truth in international proceedings has also been object of discussion. According to Buisman, while ascertaining the truth was not formally included in the founding documents of neither the ICTY nor the ICTR, the importance of truth within criminal procedures was emphasized on different occasions, to the point that it was considered among the objectives of the international tribunals.¹⁹² The search for the truth was later formally included in the Rome Statute of the International Criminal Court (ICC) and placed among the objectives of the mandate of the Prosecutor.¹⁹³ At the same time, the ascertainment of truth was reaffirmed by ICC judges, particularly with reference to the Trial Chamber, which is where the guilt of the accused is determined. In this context, the search for truth is said to influence the questions asked to witnesses as well as the ability of victims to raise particular questions.¹⁹⁴

However, though the rhetoric around the ascertainment of truth has garnered support in international criminal courtrooms, legal experts have warned that the ability of criminal procedures to establish the truth, in its epistemological sense, is hampered and limited by several procedural obstacles.

¹⁸⁹ Mirjan Damaska, ‘Truth in Adjudication’ (1998) 49 *Hastings Law Journal* 289, 305.

¹⁹⁰ Buisman 43-47.

¹⁹¹ Juan E. Méndez ‘Accountability for Past Abuses’ (1997) 19 *Human Rights Quarterly* 255, 278.

¹⁹² Buisman 33ff. See also Gaynor 1259. Both authors indicate that Judge Antonio Cassese was among the most fervent supporter of the truth-seeking function of international courts.

¹⁹³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, arts 54(1)(a), 69(3). See Buisman 35.

¹⁹⁴ Buisman 36.

Legal philosopher Edgar Aguilera in this respect identifies what he calls “truth-thwarting patterns” in the international justice system, which according to him result from the absence in international courts of a “truth-promoting profile”, able to meet the requirements of the right to truth. Talking about the ICTY, he indicated that the “indiscriminate admission of whatever the parties regard as evidence” is one of these deficiencies. This is because there is a chance that the evidence in question “may have been manufactured or subjected to some sort of distortion by the parties”.¹⁹⁵ Moreover, he points at the dubious truthfulness of witnesses’ accounts. Indeed, witnesses’ testimonies are a product of memory, which can result in inaccurate and at times untruthful information. As he argues, sometimes testimonies may also prove inconsistent with previous statements or with those of others. “(Such) testimonial deficiencies (...) stand in the way of the tribunal’s broader and main task of determining the facts of the case”.¹⁹⁶ Controversially, he also identifies what is defined as a “pro-conviction bias”, according to which international judges are less likely to issue acquittals because they would cause victims’ outrage and would be “politically costly”. This, in turn, has an impact on how truth is searched and delivered.¹⁹⁷

All in all, the ascertainment of the truth in criminal trials is neither a fixed nor a determined concept, which may also depend on whether the system in question is adversarial or inquisitorial. Perhaps, what comes out from a courtroom is only a “trial truth” rather than the “real truth”.¹⁹⁸ The ultimate question, however, is whether establishing the truth should be among the objectives of the criminal justice system at all. Buisman identifies a certain degree of concern among legal experts that concentrating efforts on establishing the truth, “would distract the triers of fact from the

¹⁹⁵ Edgar Aguilera, ‘Truth and victims’ rights: Towards a legal epistemology of international criminal justice’ (2013) 6(1) Mexican Law Review 119, 129.

¹⁹⁶ Ibid 147.

¹⁹⁷ Ibid 156. For more information on the search for truth in criminal law see Elijah Adlow, ‘The Search for Truth’ (1956) 36 Boston University Legal Review 571.

¹⁹⁸ Gaynor 1260. The author reports a discussion between Judge Cassese and Judge Röling, in the context of the International Military Tribunal at Tokyo, in which it was argued that in adversarial trials, “the verdict ‘is often taken by a jury of laymen, who may easily have been deceived by statements and documents. For that reason many rules have been adopted to protect the jury from misleading and untrustworthy evidence’”.

essence of the criminal trial”, which is ultimately that of determining if the indicted is guilty or innocent.¹⁹⁹ In this context it is often held that while this should remain the primary objective of criminal proceedings, “the truth required by victims and their families may emerge simply as a by-product of the criminal action”.²⁰⁰

3.3.2 Establishing a Broad Truth in International Courts: Writing History?

If ascertaining the truth is a contested issue in the field of criminal law, the ability for international criminal justice to contribute to establish an ‘historical truth’ generates even more problems. Such debates have sparked as a result of the transitional justice discourse around truth-seeking as well as the growing affirmation of a right to truth in human rights law, which require that a broad truth be established, so to create “a credible historical record and thereby to prevent the recurrence of such events”.²⁰¹ While some authors believe that international criminal courts and tribunals are platforms in which such historical truth can be pursued, others have opposed this view.

The attribution of a role for international criminal law to write history seemingly derive from the idea that, in contrast with domestic criminal proceedings, international trials deal with crimes, including war crimes, crimes against humanity and genocide, which have a major historical significance and that have affected societies to great extents. Ultimately, along with serving justice, exposing the truth and writing an historical record, are said to bring about long-lasting peace and reconciliation of societies devastated by harsh conflicts (see Chapter II). At the same time, it is a way to realize the right to truth of victims. Scholar Regina Rauxloh explains that such record should also aim at acknowledging victims’ suffering and exposing “the hierarchy of the power structure, the planning policies and any contributing factors”.²⁰² Hence,

¹⁹⁹ Buisman 40.

²⁰⁰ Melanie Klinkner and Ellie Smith, ‘The Right to Truth, Appropriate Forum and the International Criminal Court’ in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice Towards a More Holistic Approach* (Springer 2015) 17.

²⁰¹ 2006 OHCHR ‘Study on the right to the truth’, para 15.

²⁰² Regina E. Rauxloh, ‘Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining’ (2010) 10 *International Criminal Law Review* 739, 740.

according to Gaynor, international courts “bear a special responsibility to ensure that their contribution to the collective memory of mass atrocity is objective, clear and accessible”.²⁰³ These broader objectives of international criminal justice have been much praised at the UN level.²⁰⁴ The UN Secretary-General, at the closing ceremony for the ICTY remarked in fact that the tribunal not only served justice for the atrocities committed in former Yugoslavia by issuing 90 convictions, but thanks to the monumental amount of documentation gathered in its archives, it served the greater purpose of writing an historical account of the war. As he commented “(t)hese records ensure that the world will not forget, that history cannot be re-written, and that the victims’ voices will continue to resound down the decades”.²⁰⁵ However, other authors have been cautious, if not strongly opposed the view that courts should and could seek to establish an historical truth, because considered unsuitable forums to carry out this task.

In this sense, legal philosophers found one first explanation for this in the cognitive model of causation typical of criminal law. What has been argued is that criminal law attempts to establish relations of cause and effect by applying strict tests, including that of “beyond reasonable doubt”. On one hand, it tries to establish what legal doctrine identifies as a “material cause”, meaning the actual cause of an event, by analysing sound evidence that proves the direct causation. On the other it tries to establish a “legal cause”, meaning the cause determined as a “matter of policy or statute”, also called “the proximate cause”. As a matter of facts, criminal law is more suited to identify proximate causes which are “temporally and physically adjacent to the commission of the crime” rather than those more remote. Historical research, in contrast, by applying different

²⁰³ Gaynor 1263.

²⁰⁴ By establishing special criminal tribunals, the UN declared it sought to achieve several objectives, including “bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace”. See UNSG, ‘The rule of law and transitional justice in conflict and post-conflict societies’ (23 August 2004) UN Doc S/2004/616, para. 38.

²⁰⁵ To read the full statement, see: ‘Secretary-General’s remarks at Closing Ceremony for the International Criminal Tribunal for the Former Yugoslavia (ICTY) [as delivered]’ (*United Nations Secretary-General*, 21 December 2017) <<https://www.un.org/sg/en/content/sg/statement/2017-12-21/secretary-generals-remarks-closing-ceremony-international-criminal>> accessed 20 June 2018.

cause-effect methodologies, is more apt to identify remote causes that may be irrelevant or of secondary importance to criminal law.²⁰⁶

Furthermore, there are number of more practical and procedural obstacles that seemingly hinder the ability of criminal courts to establish the broader truth, and mainly jurisdictional and evidentiary.

Gaynor's analysis, in this sense, is quite useful. One first obstacle he identifies is of jurisdictional nature: indeed, international criminal tribunals have temporal, territorial, personal and subject-matter constraints when it comes to their jurisdiction. Consequently, only limited facts will be looked at, leaving aside the overall picture. Gaynor illustrates this by looking for instance at the different territorial jurisdictions of the ICTR and the ICTY: while the former had jurisdiction over Rwanda's neighbouring countries, the latter was restricted to the territory of former Yugoslavia. Secondly, he explains that courts will only examine what is strictly relevant to the case, rather than what is relevant to history. In other words, irrespective of the historical importance of certain facts, if these have little legal relevance to the ascertainment of the criminal responsibility of the accused, then they will be disregarded. This can also mean that certain evidence presented by one party, which could be historically important, may result inadmissible at the trial. A third obstacle has to do with the Prosecutor's discretion to initiate a particular case. As Gaynor maintains, this "will greatly affect the evidence admitted at trial". While at times this can play in favour of history, as in the *Blaskic* case before the ICTY, where it was required to provide proof of the military intervention of Croatia in Bosnia, in some others it may not. This was the instance of the *Lubanga* case at the ICC, where the Prosecution focused on the crime of child recruitment, leaving aside many other mass crimes relevant to history.²⁰⁷

²⁰⁶ Richard Wilson, 'The Spark for Genocide? Propaganda and Historical Narratives at International Criminal Tribunals' in Nanci Adler, Nicole L. Immler et al (eds) *Understanding the Age of Transitional Justice : Crimes, Courts, Commissions, and Chronicling* (Rutgers University Press 2018).

²⁰⁷ Gaynor 1263-1266.

Moreover, plea bargains, used by both ICTY and ICTR, also have an impact on the ability of criminal courts to establish an historical record for a number of reasons. Rauxloh identifies “the loss of trial” as one first issue, meaning that the large amount of evidence that would otherwise been examined during the trial is bypassed at the expenses of history. Plea agreements may also involve charge bargains, where the Prosecution retreats certain charges in favour of a guilty plea by the indicted on other, thus resulting in loss of important evidence. Furthermore, guilty pleas may not be done genuinely but as a result of misinformation or threat, Rauxloh warns. This not only challenges the establishment of a historical record, but the credibility of the truth-seeking exercise of the court altogether. However, some have favoured plea bargains as positive contributors to the truth. Scholar Jenia Turner agreeably pointed out that “when defendants plead guilty, they may reveal inside information that would otherwise not surface during a trial”. Moreover, if guilty pleas are genuine and wrongdoings are acknowledged, then this have a positive contribution towards history.²⁰⁸

Another obstacle has to do with confidentiality, particularly with regards to sensitive information such as witnesses’ identity. In light of the public resonance of international trials, “(e)vidence given in closed session of protected witnesses comprises significant proportion of the total evidence admitted in trials at the ICTY, ICTR and ICC, and is rarely later released to the public”. Confidentiality restrictions also apply to intelligence information that may affect States’ security.²⁰⁹

Finally, a last significant obstacle regards the decision of international criminal courts to concentrate their investigations only on the individuals most responsible for the most serious crimes, excluding a large number of other perpetrators and crimes. This

²⁰⁸ Jenia I Turner, ‘Plea Bargain in International Criminal Justice (2017) 48(2) *The University of the Pacific Law Review* 219, 244. Turner explains that the ICC is more advanced than the ICTY and ICTR in terms of rules for plea agreements. See 245. See also Rauxloh 744 and Gaynor 1268f. For an extensive analysis of guilty pleas in international criminal law, see also: Nancy Combs, *Guilty pleas in international criminal law: Constructing a restorative justice approach* (Stanford University Press 2007). For specific information on plea bargains at the ICTY see also: Ralph Henham and Mark Drumbl, ‘Plea bargaining at the international criminal tribunal for the former Yugoslavia’ (2005) 16(1) *Criminal Law Forum* 49; Naqvi 270f.

²⁰⁹ Gaynor 1263-1266.

is understandably due to the limited availability of resources. Nevertheless it has a big impact on the ability of international criminal justice to exhaustively contribute to writing history.²¹⁰

In light of the above-described procedural constraints of international courts and tribunals, it can be concluded that international criminal justice is quite limited in the extents it can contribute to establish an historical truth about past atrocities.²¹¹ Nevertheless, this does not mean that they play no contribution to the right to truth at all. International criminal justice, according to some, establishes persuasive, truthful accounts. Both the ICTY and the ICTR in fact did not only shed light on major international crimes and the most responsible for them, but, by doing so, they also produced a huge amount of documentation that has built a significant account on the war in former Yugoslavia and Rwanda respectively. With regards to the ICTY, Judge Wyngaert further affirms that “(t)hrough the process of judicial fact finding, international criminal courts help to sort out competing accounts of traumatic events in a conflict situation and to determine the account that will count as the official history that society”.²¹² To her opinion, establishing the truth is thus among the “core missions” of international criminal justice.²¹³

Nevertheless, scholars alert that while trials can indeed contribute to truth, they should do so only within the framework of what they were originally intended for.²¹⁴ As legal scholar Koskeniemmi argues, if trials are presupposed to record history and expose a broad truth to the public, the risk is that they become nothing more than “show

²¹⁰ Rauxloh 743.

²¹¹ See also Thijs Bouwknecht, ‘The International Criminal Trial Record as Historical Record’ in Nanci Adler, Nicole L. Immler et al.

²¹² Wyngaert 64.

²¹³ Ibid.

²¹⁴ Méndez, ‘Accountability for Past Abused’ 278f.

trials”, with little legitimacy left.²¹⁵ Therefore, assigning to international criminal justice wider goals in view of peace and reconciliation, is for some pure aspiration.²¹⁶

3.4 The Right to Truth in its Implementation Mechanisms: a Framework Criteria

What has emerged from the previous sections of this Chapter, as well as from Chapter II on the legal content and scope of the right to truth, is that there are some criteria that are necessary for the implementation of the right to truth in contexts of serious and systematic crimes. Such criteria have emerged by the interpretation of the right to truth by international and regional bodies and have been mostly laid out in documents such as the OHCHR Study on the right to truth and the 2005 updated Set of Principles. Moreover, some of the requirements also emerged from practice of truth-seeking bodies. This section will therefore lay out these criteria into a Framework (the ‘Framework Criteria’), which will then be applied to the IIIM in Chapter IV in order to evaluate the extents of its contribution towards the right to truth in view of its unique mandate.

First of all, as it was discussed, the right to truth in criminal contexts entails an individual and collective dimension. The former requires that all circumstances, including identity of the responsible be revealed through effective and prompt investigations. The collective component, on the other hand, requires a truth which is not only specifically related to a specific incident, but that entails the exposure of the broader patterns of violence to the society for greater healing purposes, including the creation of a collective memory. Szoke-Burke defines this as a “structural truth”, which includes the causes and circumstances of the event, and, among others, eventual

²¹⁵ See Martti Koskeniemi, ‘Between impunity and show trials’ (2002) 6(1) Max Planck Yearbook of United Nations Law Online 1.

²¹⁶ See eg. Buisman. For more information on the discussions on the ability of international courts to establish an historical record, see eg. Richard Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’ (2005) 27 Human Rights Quarterly 908.

demographic tendencies.²¹⁷ For the purpose of this paper, however, it will be just called “broad truth”.

In order to achieve these objectives, mechanisms which intend to support and realize the right to truth shall therefore meet the following criteria:

- 1) Documentation and collection evidence on gross violations. This can include the use of forensic genetics to identify remains of victims.²¹⁸
- 2) Securitization and preservation of the evidence collected so that it can be used for other purposes, such as prosecutions or memorialization projects. This can include archival practices.
- 3) Reconstruction of an accurate and broad truth, which encompasses all circumstances of the violations, including the identity of the perpetrators, the full context in which the violations occurred as well as the fate of the dead and missing. This include the ascertainment of an historical truth. This criterion is closely related to Criterion 1, as the broader the truth to be ascertained is, the broader the approach to evidence collection will consequently need to be.
- 4) Disclosure of the information to the public.

All in all this Chapter sought to explain what the right to truth in a context where serious crimes have been committed entails and requires. These findings have been summarized in the above provided Framework Criteria and they will be used, as suggested above, to assess the contribution of the IIIM against its mandate, functions and methodology of work, which will be explained in the next Chapter. Moreover, an overview of the other international investigative efforts in Syria will also be provided so to understand why and how the Mechanism is unique in its genre.

²¹⁷ Szoke-Burke 533f.

²¹⁸ See HRC Res 10/26 (23 September 2009) UN Doc A/HRC/RES/10/26.

IV.

THE CREATION OF INVESTIGATIVE MECHANISMS IN SYRIA: THE INTERNATIONAL, IMPARTIAL, AND INDEPENDENT MECHANISM

Given the fact that the conflict in Syria is still ongoing, and that the current regime is allegedly involved in the commission of war crimes and crimes against humanity, present and future efforts to investigate into these actions will most likely be handled at the international or foreign level.²¹⁹ This has in fact become a widespread practice in the past decades, particularly at the UN level, which has increasingly established, under its different bodies²²⁰, human rights fact-finding missions, commissions of inquiry and other types of international mechanisms to carry out independent investigations into serious violations of human rights and humanitarian law, in view to achieve both State and individual criminal accountability and end impunity.²²¹ This usually occurs in extreme situations of violence and where States are unable or unwilling to set up their own investigation procedures, often because directly involved. However, accountability is not the only purpose: mechanisms as such have also been set up in order to offer victims “avenues of justice and redress”, including by “triggering transitional justice mechanisms that address the rights to truth, justice, remedies and reparations, as well as guarantees of non-recurrence”. At the same time, they could constitute good tools towards reconstruction of historical records.²²²

²¹⁹ See eg. Lee A Tucker, Shabnam Mojtahedi et al, ‘A Step towards Justice: Current accountability options for crimes under international law committed in Syria’ (Ceasefire Centre for Civilian Rights and Syrian Justice and Accountability Centre 2015) 5.

²²⁰ Particularly under the UNSC, HRC, OHCHR, UNGA and the Secretary-General. See OHCHR, ‘Manual on human rights monitoring’, ch. 3.

²²¹ The OHCHR only has established or supported close to 50 commissions and missions, since 1992. For more information see ‘International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations’ (*United Nations Human Rights Council*) <www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx> accessed 6 June 2018.

²²² OHCHR, ‘Manual on human rights monitoring’ 13. See also ‘United Nations Approach to Transitional Justice’ 8. The Guidance Note explicitly acknowledges that “(...) Commissions of inquiry and other fact-finding mechanisms similarly seek to unravel the truth behind allegations of past human rights abuses, but

With respect to Syria, several investigative mechanisms have been successfully set up by the international community. The first one of them, still operating at present, is the Independent International Commission of Inquiry on the Syrian Arab Republic (COI), established by the HRC on 22 August 2011, pursuant resolution S-17/1.²²³ The COI is mainly mandated to investigate into allegations of human rights violations (including those amounting to crimes against humanity) in Syria since March 2011 and, where possible, identify perpetrators.²²⁴ Already after a few months of operation, the independent experts of the COI were able to conclude, based on the evidence collected mostly through victims and witness interviews and second-hand information, that gross violations of human rights had been committed at the hands of the Syrian military forces and other terrorist groups, since the very early days of March 2011 protests.²²⁵

The second of such mechanisms was a Fact Finding Mission (FFM) established by the Organisation for the Prohibition of Chemical Weapons (OPCW) in May 2014 and deployed on several occasions to investigate into allegations of chemical attacks in the country, prohibited under international law.²²⁶ Investigations, conducted mainly through witness interviews and sample evidence analysis, concluded that toxic chemicals, and specifically chlorine, had been used as weapons in Syria.²²⁷

The findings of the FFM led to the establishment of another independent and impartial investigative mechanism in August 2015, namely the Joint Investigative

generally operate under more narrowly defined mandates. Mapping and documenting serious violations of human rights abuses is an important step in realizing the right to the truth”.

²²³ HRC Res S-17/1 (22 August 2011) UN Doc A/HRC/RES/S-17/1 (Contained in the report of the HRC special session), para 13.

²²⁴ Ibid.

²²⁵ COI, ‘Report of the independent international commission of inquiry on the Syrian Arab Republic’ (23 November 2011) UN Doc A/HRC/S-17/2/Add.1.

²²⁶ Chemical weapons attacks are prohibited under the Organisation for the Prohibition of Chemical Weapons (OPCW), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC) (entered into force 29 April 1997) 1975 UNTS 45, art. 1. Syria ratified the CWC on 14 September 13. See OPCW, ‘Note to the Secretariat. Status of Participation in the Chemical Weapons Convention as at 17 October 2015’ (19 October 2015) OPCW Doc. S/1315/2015.

²²⁷ ‘What is the OPCW Fact-Finding Mission in Syria?’ (*Organization for the Prohibition of Chemical Weapons*) <<https://www.opcw.org/special-sections/syria/the-fact-finding-mission/>> accessed 29 May 2018. See also OPCW, ‘Third Report of the OPCW Fact-Finding Mission in Syria’ (18 December 2014) Doc S/1230/2014, para 1.6.

Mission of OPCW and the UN.²²⁸ The mandate of the JIM, authorized by the UNSC under Chapter VII, encompassed identification (to the most feasible extents) of those responsible of the use of toxic substances as weapons, where this was ascertained by the findings of the FFM.²²⁹ The investigative methodology utilized by the JIM included, *inter alia*, the following: information collection and assessment, witness, analysis of photograph, videos and other relevant material and consultation with experts on “medical effects, munitions and their delivery methods, aircraft configurations and capabilities, plume dispersion, and chemistry of toxic agents”.²³⁰ As a result of the investigations conducted, the JIM found in several occasions that the Syrian government was very plausibly responsible for the use of toxic substances as weapons.²³¹ However, several other chemical attacks against the population were attributed to the terrorist groups operating in the country.²³² The JIM mandate ultimately terminated in December 2017, one month after the release of its Seventh and final report, for lack of support by Russia, which previously criticized the mission for what were alleged methodological flaws in the investigation processes (such as lack of on-site visits, disregard of the principle of chain of custody, etc.).²³³

The latest of the mechanisms put in place by the international community, and in this instance by the UNGA, is the International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011 (IIIM or the ‘Mechanism’), the object of this study. The IIIM was created pursuant resolution 71/248 on 21 December 2016, in light of the deteriorating situation in the

²²⁸ Established by UNSC Res 2235 (7 August 2015) UN Doc S/RES/2235. The mandate of the JIM was renewed for another year pursuant UNSC Res 2319 (17 November 2016) UN Doc S/RES/2319.

²²⁹ UNSC S/RES/2235 para 5.

²³⁰ JIM, ‘Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism’ (26 October 2017) UN Doc S/2017/904, para 11.

²³¹ Eg. Ibid, para 46 on the release of sarin in Khan Shaykhun on 4 April 2017.

²³² ‘Security Council Unanimously Adopts Resolution 2314 (2016), Extends Mandate of Joint Investigative Mechanism Identifying Perpetrators Using Chemical Weapons in Syria’ (*Reliefweb*, 31 October 2016) <<https://reliefweb.int/report/syrian-arab-republic/security-council-unanimously-adopts-resolution-2314-2016-extends-mandate>> accessed 30 May 2018.

²³³ See ‘Letter dated 6 October 2017 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General’ (6 October 2017) UN Doc A/72/526-S/2017/848.

country and the persistent reports of serious human rights and humanitarian law violations.²³⁴

The next sections of this chapter will therefore analyse its establishment, mandate, functions as well as the investigative methodology used. A comparison between the IIIM and the COI will then be provided to highlight similarities and differences between these two mechanisms, in terms of work carried out. This preliminary information is essential in order to answer the question: “What is the IIIM?” and set the basis for the application of the Framework Criteria to evaluate its contribution towards the right to truth, and, hence, to reply to the question: “How does the IIIM satisfy the criteria for the right to truth?”.

4.1 The Establishment of the IIIM: a General Assembly’s Reaction Against the Security Council Staggering Passivity in Syria

The political climate surrounding the establishment of the IIIM in December 2016 At the end of the fifth year of what seemed (and still seems) to be an unstoppable conflict, the international community had blatantly failed every single attempt to carry out peace talks with the Syrian regime and put an end to what Mr. Zeid Ra'ad Al Hussein, High Commissioner for Human Rights, has defined as the “worst man-made disaster the world has seen since World War II”²³⁵. Since the very beginning of the war, the UN Security Council had in fact been unable to “live up its responsibilities” and restore peace and security in the country, mostly due to the failure in adopting resolutions to cease hostilities and protect the civilian population, which were in fact

²³⁴ UNGA Res 71/248 (21 December 2016) UN Doc A/RES/71/248.

²³⁵ ‘Syria worst man-made disaster since World War II – Zeid. Text of a statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein to a high-level panel discussion at the Human Rights Council on the situation of human rights in the Syrian Arab Republic’ (UN HRC, 14 March 2017) <www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=21373&LangID=E> accessed 7 June 2018.

systematically vetoed by Russia (as well as by China, in several instances), long allied to the Syrian regime.²³⁶

At that stage of the conflict, the humanitarian crisis in the country had reached disturbing levels, with a dead toll of reportedly 280,000 persons circa and a country almost completely reduced to rubbles. As stated in a press release by the *Reliefweb*, at that point “every major principle of international law (had) been violated with impunity”.²³⁷ In particular, this referred to the indiscriminate and deliberate attacks on civilians, the persistent denial of humanitarian access and the systematic sieges of cities, to name some.²³⁸ The situation in Eastern Aleppo, at that time held by the rebel forces, was cause of particular distress due to the bombing campaign of September-October 2016. Such military operations, carried out by the Syrian military and notably supported by Russian air forces, had been strongly criticized for being in violation of humanitarian law: according to Human Rights Watch, the airstrikes allegedly targeted medical facilities and killed at least 440 civilians, including more than 90 children.²³⁹ The COI also reported that multiple indiscriminate attacks against civilians and civilian objects, including medical facilities, had been taking place. In a press release of September 2016, COI Chair Paulo Pinheiro strongly condemned “(t)he intensifying attacks on medical care – including maternity hospitals, paediatric units and emergency wards – (which) are in flagrant disregard of the letter and the spirit of international humanitarian law”.²⁴⁰ Less than two months after, a HRC resolution was adopted, expressing concern for the deteriorating situation in Aleppo and urging all parties to the conflict to respect

²³⁶ ‘Syria: Five Years, Five Vetoes, 280,000 Dead’ (*Reliefweb*, 8 October 2016) <<https://reliefweb.int/report/syrian-arab-republic/syria-five-years-five-vetoes-280000-dead>> accessed 30 May 2018.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ ‘Russia/Syria: War Crimes in Month of Bombing Aleppo. UN General Assembly Should Organize Emergency Special Session’ (Human Rights Watch, 1 December 2016)

<<https://www.hrw.org/news/2016/12/01/russia/syria-war-crimes-month-bombing-aleppo>> accessed 31 May 2018.

²⁴⁰ ‘Independent International Commission of Inquiry on the Syrian Arab Republic As peace talks stall, violence soars once again in Syria – New UN report’ (United Nations Human Rights Council, 6 September 2016)

<www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=20456&%3bLangID=E> accessed 31 May 2018.

their obligations under international human rights and humanitarian law, including with regards to the besieged areas.²⁴¹

The Eastern side of the Syrian city was in fact also under an alarming state of protracted siege at the hands of the Syrian government, with humanitarian aid unable to reach it since July 2016.²⁴² The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in December 2016 warned that the humanitarian situation in the city was “catastrophic”, with humanitarian actors striving to obtain access to besieged areas and extremely worried with “insufficient and inadequate shelter space”, especially with winter approaching.²⁴³

It is against this appalling background that on 21st December 2016, at its 66th meeting, with 105 votes in favour, 15 against and 52 abstentions²⁴⁴, the UNGA adopted resolution 71/248 establishing an impartial and independent mechanism, the IIIM, with a “quasi-prosecutorial” function.²⁴⁵ The mandate of the Mechanism, which will be further discussed in the next section, is in fact that of assisting in the investigation and prosecution of the most serious crimes committed in Syria since March 2011.²⁴⁶ This decision, welcomed with much praise by NGOs and other human rights organizations, was unprecedented in the history of the UNGA and was perceived by most as the long-awaited reaction to both the devastating extent of the crimes committed in Syria as well as the staggering inaction of the Security Council, on one hand in urging the parties to

²⁴¹ See HRC Res S-25/1 (25 October 2016) UN Doc A/HRC/RES/S-25, para 1.

²⁴² ‘Syria: Urgent Need for Aleppo Aid Access. Immense Suffering from Lack of Food, Water, Medical Supplies’ (*Human Rights Watch*, 12 December 2016) <<https://www.hrw.org/news/2016/12/12/syria-urgent-need-aleppo-aid-access>> accessed 31 May 2018.

²⁴³ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), ‘Syrian Arab Republic: Aleppo Situation Report No. 2’ (3 December 2016).

²⁴⁴ ‘General Assembly Takes Action on Second Committee Reports by Adopting 37 Texts. Resolution Establishing International Mechanism Concerning Syria Passed in Direct Plenary Action’ (*United Nations Meeting Coverage and Press Releases*, 21 December 2016) <<https://www.un.org/press/en/2016/ga11880.doc.htm>> accessed 1 June 2016.

²⁴⁵ UN Secretary-General, ‘Note to Correspondents: International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011’ (26 January 2017) para 8. <<https://www.un.org/sg/en/content/sg/note-correspondents/2017-01-26/note-correspondents-international-impartial-and>> accessed 1 June 2018.

²⁴⁶ A/RES/71/248, para 4.

end such atrocities and on the other in referring the situation to the ICC²⁴⁷. Balkees Jarrah, Senior International Justice Counsel at Human Rights Watch, stated that by establishing the IIIM, “(t)he General Assembly (...) demonstrated that it can take the reins on questions of justice in the face of Security Council deadlock”.²⁴⁸

Expectedly, however, the creation of such quasi-prosecutorial body was not wholeheartedly supported by all: Russia opposed the IIIM on the basis that the UNGA lacked a legal foundation to establish an organ that could exercise functions which are “prosecutorial in nature” - task which is only strictly reserved to the Security Council.²⁴⁹ Legal scholars in this regard contend that such legal argument is unfounded for a series of reasons. First and foremost, as it will be analysed later in this research, the IIIM mandate is not prosecutorial *per se*, but rather it uses prosecutorial standards in carrying out its investigative functions.²⁵⁰ Second, as compellingly argued by Professor Alex Whiting, the UNGA indeed has the authority for the creation of such type of subsidiary body, pursuant to Article 10 of the UN Charter, which empowers the UNGA to consider all matters related to peace and security, and Article 22, which allows the UN body to establish organs to assist in the performance of its function, as per required. In other words, Whiting argues that not only the UNGA is authorized to discuss the situation in Syria, but that in order to be able to make relevant recommendations, it is empowered to create an organ such as the IIIM to inform the body on evidence of international

²⁴⁷ Since the beginning of the conflict in March 2011 and up until the establishment of the IIIM (December 2016) as many as six draft resolutions, respectively S/2011/612 4 (October 2011), S/2012/538 (4 February 2012), S/2012/77 (19 July 2012), S/2014/348 on a referral of the situation in Syria to the ICC (22 May 2014), S/2016/846 (8 October 2016), S/2016/1026 (5 December 2016) and S/2018/321 on the use of chemical weapons (10 April 2018), had been vetoed by Russia as well as by China (on five occasions). Data obtained from ‘Security Council - Veto List (in reverse chronological order)’ (*Dag Hammarskjöld Library*) <<http://research.un.org/en/docs/sc/quick/>> accessed 1 June 2016..

²⁴⁸ ‘Syria: UN General Assembly Adopts Resolution on War Crimes Investigations’ (*Human Rights Watch*, 21 December 2016) <<https://www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution-war-crimes-investigations>> accessed 1 June 2018.

²⁴⁹ Official Records, ‘Reports of the Second Committee’ (21 December 2016) UN Doc A/71/PV.66.]

²⁵⁰ See eg. Alex Whiting, ‘An Investigation Mechanism for Syria. The General Assembly Steps into the Breach’ (1 May 2017) 15 *Journal of International Criminal Justice* 231, 234; Christian Wenaweser and James Cockayne, ‘Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice’ 15 *Journal of International Criminal Justice* 211, 224-228.

crimes.²⁵¹ Third, in terms of creating mechanisms to assist international criminal law processes for serious crimes, the UNGA had arguably already established a precedent in three instances. In 2003, the UNGA in fact approved the draft Agreement for the creation of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of the crimes committed during the Khmer Rouge regime. While in 2008, it supported the establishment of the International Commission against Impunity in Guatemala to assist and investigate into the serious crimes committed in the country. Finally, in 2010, pursuant to the United Nations Global Plan of Action to Combat Trafficking in Persons, the UNGA established a voluntary trust fund to provide victims with, among others, legal support to help them pursue justice.²⁵² In this context, it seems that the UNGA has over time found innovative ways to contribute towards justice and accountability, and thus the creation of a mechanism as the IIIM should not come as a total surprise.²⁵³ However, as illustrated above, until that point, such contribution was more in the form of support and endorsement, rather than in the explicit creation of almost-prosecutorial mechanisms under its own auspices. The IIIM, therefore, can be considered as one step further, which, at the same time, has established a precedent for future similar situations.²⁵⁴

All in all, regardless of any legal contestation, which indeed underlines more obvious political goals, the establishment of the IIIM has signified a lot in terms of taking a stand against the blatant passivity of the Security Council. As Whiting well puts it, “(t)he establishment of the Mechanism is a marker that reminds future political actors and diplomats that the crimes in Syria will not easily be forgotten or brushed aside.”²⁵⁵

²⁵¹ Whiting 234.

²⁵² Wenaweser and Cockayne 226-227.

²⁵³ For more detailed information on UNGA efforts towards accountability see Beth van Schaack, ‘The General Assembly and Accountability for International Crimes’ (*Just Security*, 27 February 2017) <<https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/>> accessed 4 June 2018.

²⁵⁴ Whiting 237.

²⁵⁵ Whiting 236.

4.2 Mandate and Methodology of Work: a Quasi-Prosecutorial Body

As established in paragraph 4 of resolution 71/248, the mandate of the IIIM is to assist in the investigation and prosecution of the most serious crimes (including genocide, crimes against humanity and war crimes) in Syria, since March 2011. The IIIM shall do so by performing two main tasks, and namely a) the collection, consolidation, preservation and analysis of evidence of violations of international humanitarian law and human rights violations and abuses and b) the preparation of files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.²⁵⁶

Already by looking at the mandate as it has been worded by the UNGA in its founding resolution, it is clear that the IIIM does not hold any prosecutorial power. This has also been explicitly stated in the Secretary-General report on the “Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011” (‘2017 Secretary-General report’), where the Mechanism is said to be in fact “quasi-prosecutorial”, for that it has “an explicit nexus to criminal investigations, prosecutions, proceedings and trials” but it is not itself a court with indicting powers.²⁵⁷ In other words, as put by Wenaweser and Cockayne, the Mechanism assists actors which indeed have a prosecutorial power in the preparation of the relevant documentation, but it is not itself such an actor.²⁵⁸ This is important to keep in mind, particularly in light of a discussion on its potential contribution towards the right to truth, which will be presented later in this paper.

²⁵⁶ A/RES/71/248 4.

²⁵⁷ Report of the Secretary-General, ‘Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’ (Secretary-General’s report) (19 January 2017) UN Doc A/71/755, para. 32.

²⁵⁸ Wenaweser and Cockayne 214.

Going back to the twofold mandate of the IIIM, the Terms of Reference annexed to the Secretary-General report offer useful guidance for understanding how the body will carry out its main tasks.²⁵⁹

4.2.1 Evidence Collection, Consolidation, Analysis, and Preservation

When it comes to collecting evidence and information on violations of human rights violations and abuses, the IIIM primarily relies on second-hand information, meaning that it is authorized to seek and receive it from “other sources”. Such sources are for instance the COI, the OPCW, as well as other international and regional organizations, but also civil society and individuals, whether it is so required. Furthermore, resolution 71/248 calls for States and parties to the conflict to cooperate with the Mechanism and provide information upon request. At the same time, the IIIM can collect evidence by its own efforts, through, for instance, “interviews, witness testimony, documentation and forensic material”. Once such crime-based evidence has been gathered, the Mechanism shall establish the link between the offence and the persons allegedly responsible, by focusing on the international criminal law principles of *mens rea* and criminal liability, including, as specified in the Terms of Reference, “the principle of command or superior responsibility”. In terms of consolidating the evidence and the information collected, including witness testimony, interviews and forensic material, the IIIM shall organize it in a systematic manner and make sure that “their use can be maximized in future criminal investigations and prosecutions”, and hence conduct a preliminary analysis to ascertain their reliability and probative value. As advised in the Secretary-General report, the methodical analysis of evidence is carried out thanks to the use of an advanced prosecutorial software “enabling the systematic exploitation of the information”²⁶⁰.

²⁵⁹ ‘Terms of reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’ annexed to the 2017 Secretary-General Report A/71/755 (IIIM Terms of Reference).

²⁶⁰ 2017 Secretary-General Report, para 15.

All evidence in its possession must be preserved in line with international criminal law standards, including by ensuring an “uninterrupted chain of custody”. If capacity for appropriate preservation lacks, States shall cooperate with the Mechanism so to provide it with the necessary assistance, always in respect of security and confidentiality.²⁶¹

4.2.2 Preparation of Files to Facilitate and Expedite Fair and Independent Criminal Proceedings

The second main task of the IIIM, as anticipated above, is the preparation of files so to expedite criminal proceedings, in all those courts or tribunals (national, regional or international) that may exercise jurisdiction over the crimes committed in Syria. As acknowledged in the 2018 report of the IIIM, at date these are mostly national courts (also those exercising universal jurisdiction²⁶² over certain crimes),²⁶³ but in the future they could include existing bodies that acquire jurisdiction – possibly a timid reference to the ICC – as well as a hypothetical *ad-hoc* tribunal created specifically to prosecute such crimes.²⁶⁴

When it comes to the preparation of files, the Terms of Reference indicate that the Mechanism should focus on the criminal conduct of the responsible, or “the most

²⁶¹ IIIM Terms of Reference, para 5-11.

²⁶² According to the ILC, “universal jurisdiction” is a principle of international law providing that “(a)ny State party in whose territory an alleged offender is present is competent to try the case regardless of where the crime occurred or the nationality of the offender or the victim”. See ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996) Yearbook of the International Law Commission A/CN.4/L.532 [and Corr.1 and 3], art 9 (commentary 7).

²⁶³ Currently, some European countries have initiated national proceedings on crimes committed in Syria under the principle of universal jurisdiction. Germany has been the most active in this regard, due to its more lenient interpretation of this principle. For more information see: Wolfgang Kaleck and Patrick Kroger, ‘Syrian Torture Investigations in Germany and Beyond. Breathing New Life into Universal Jurisdiction in Europe?’ (1 March 2018) 16 Journal of International Criminal Justice 165; Ana Carbajosa ‘Así se construye el caso contra El Asad’ (*El País*, 9 June 2018) <https://elpais.com/internacional/2018/05/29/actualidad/1527610510_296976.html> accessed 11 June 2018; HRW, “These are the Crimes we are Fleeing”. Justice for Syria in Swedish and German Courts’ (*Human Rights Watch*, 3 October 2017) <<https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>> accessed 11 June 2018.

²⁶⁴ IIIM, ‘Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’ (hereafter: ‘IIIM 2018 Report’) (28 February 2018) UN Doc A/72/764, para 7.

responsible” persons, without distinction of party affiliation.²⁶⁵ These should include also those responsible of “directing, allowing or tolerating the crimes, or by cooperating or assisting in their commission”, as prescribed by international criminal law²⁶⁶. Such files, which are to contain both inculpatory and exculpatory evidence as appropriate in relation to the imputable crimes as well as the modes of criminal liability, shall be shared only with those bodies that comply with human rights standards and do not recognize death penalty for the crimes considered. This can be done upon request of the bodies of by its own initiative, in view to expedite criminal proceedings.²⁶⁷

4.2.3 Prosecutorial Standards

While not being a prosecutorial body, the IIIM uses international criminal law standards to conduct its activities, reason why it has been defined as a quasi-prosecutorial entity, as advised above. This is indeed because, should this not be the case, it would be much harder for the Mechanism to be of any use for courts and tribunals once and if prosecutions will be initiated. Accordingly, the procedures and investigative methodology applied reflect those used in criminal proceedings, including standards of legal proof and informed consent with regards to the information collected and shared to third bodies. Moreover, all procedures shall observe international human rights law and, thus, guarantee the right to a fair trial and due process.²⁶⁸ Importantly to note, the Mechanism will not provide information to bodies which will conduct *in absentia* trials, on the basis of universal jurisdiction.²⁶⁹

Similarly to courts and tribunals, the IIIM shall guarantee due respect to the privacy and personal circumstances of victims, particularly in case of very sensitive offences, such as sexual violence, gender-based violence or violence against children. Furthermore, it must ensure that victims, witnesses and whoever wishes to cooperate

²⁶⁵ IIIM Terms of Reference, para 12.

²⁶⁶ Ibid, para 9.

²⁶⁷ Ibid, para 13-16.

²⁶⁸ Ibid, para 17-18.

²⁶⁹ 2017 Secretary-General Report, para 20.

with the Mechanism enjoys full protection and security. At the same time, vulnerable victims are guaranteed access to medical and psychosocial assistance.

One last feature that characterizes this Mechanism and brings it closer to the criminal law sphere is the strictly confidential character of the information in its possession. In other words, unlike most other investigative mechanisms, the information obtained is, expectably, not open to the public.²⁷⁰

All in all, the vicinity of the IIIM to the realm of international criminal law is out of debate. This is also evident by the fact that, as prescribed by the Terms of Reference, the Mechanism must be headed by a senior judge or prosecutor.²⁷¹ However, such vicinity is only in terms of procedural standards applied, as the Mechanism can neither prosecute individuals, nor it has a binding mandate to obtain information (it in fact relies purely on cooperation by witness, victims and other entities).²⁷² As Whiting provocatively stated in the wake of its establishment, “at bottom the Mechanism is simply a fact-finding body that will adhere to a criminal law standard in performing its functions.”²⁷³

4.3 The Independent International Commission of Inquiry on the Syrian Arab Republic: Mandate and Functions

The COI, established by HRC resolution S-17/1 on 22 August 2011 at the 17th Special Session on the "Situation of human Rights in the Syrian Arab Republic", is mandated to carry out three main functions, namely:

²⁷⁰ Ibid, para 19-23.

²⁷¹ Ibid, para. 31. At date, the appointed Head of the Mechanism is Ms. Catherine Marchi-Uhel who served as Ombudsperson for the Security Council Sanction Committee. For more information on her appointment see ‘Secretary-General Appoints Catherine Marchi-Uhel of France to Head International Impartial Independent Mechanism Investigating Serious Crimes in Syria’ (*UN Meetings Coverage and Press Releases*, 3 July 2017) <<https://www.un.org/press/en/2017/sga1744.doc.htm>> accessed 6 June 2018.

²⁷² Ingrid Elliott, ‘“A Meaningful Step towards Accountability”?: A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria’ (2017) 15 *Journal of International Criminal Justice* 239, 251.

²⁷³ Whiting 234.

(1) (T)o investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, (2) to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, (3) where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.²⁷⁴

This first two components of this three-fold mandate require the body to perform a fact-finding function, and therefore, to gather a “reliable body of evidence” and information that indicate that a specific incident has taken place. The standard of proof used by the Commission is that of “reasonable suspicion”, which is notably lower than that used in criminal proceedings. Then, the COI shall collect, where possible, reliable information with regards to which individuals who might be responsible for such human rights violations.²⁷⁵

The information collected by the COI is primarily first-hand: despite it does not have access to the country as this has been systematically denied by the Syrian government throughout the years, it conducts its own interviews with victims and witnesses both by telephone and in neighbouring countries. At the same time, it also relies on local actors to help in the investigations, including non-governmental organizations, human rights defenders, journalists and experts. Reports, scholarly analyses and media accounts have also been considered in certain instances.²⁷⁶ If required, the COI collects satellite imagery, photographs, videos and other relevant material useful to establish facts and circumstances behind certain incidents.²⁷⁷

Being the longest-standing investigative mechanism still in operation today in Syria²⁷⁸, its work has been of significant proportions. The Commission has so far

²⁷⁴ UN Res S-17/1, para13.

²⁷⁵ A/HRC/S-17/2/Add.1, para 5-6

²⁷⁶ Ibid 7-8. See also Elliott 243.

²⁷⁷ See eg COI, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (8 August 2017) UN Doc A/HRC/36/55, para 3-4.

²⁷⁸ The mandate of the COI has been renewed for another year in HRC Res 37/L.38 (19 March 2018) UN Doc A/HRC/37/L.38.

issued 20 public reports, several periodic and oral updates, and has conducted over 6,000 interviews with witnesses and victims.²⁷⁹

4.3.1 The Relationship between the COI and the IIIM

The relationship between the COI and the IIIM has been explicitly spelled out in the founding document of the latter, which provides that the two mechanisms shall “closely cooperate”.²⁸⁰ As described in the previous sections, such cooperation is mainly based on information-sharing, as in fact the IIIM uses (*inter alia*) information previously collected by the COI. But there is more: according to the Terms of Reference of the IIIM, the work of the two mechanisms is said to be “complementary”, in the fact that while the COI investigates into violations and recent incidents and subsequently reports on them, the IIIM prepares files for individual suspects in view of future criminal prosecutions.²⁸¹ The close relationship is further highlighted by the fact that the Unga purposely based the IIIM in Geneva, in order to be geographically near the COI rather than to the area of concern.²⁸²

When it comes to the mandates and functions of the two mechanisms, one of the concerns raised by some authors in the wake of the establishment of the IIIM was that the new mechanism might ultimately replicate the work of existing mechanisms, and particularly of the COI.²⁸³ This is indeed due to certain similarities in the mandate of the two bodies. First and foremost, both share the same territorial and temporal scope, namely they are able to investigate into violations occurred solely within the Syrian territory and only since March 2011. Secondly, they are similar with regards to their subject matter, meaning the types of violation that the two mechanisms can investigate

²⁷⁹ For more info on the COI, see 'Independent International Commission of Inquiry on the Syrian Arab Republic Back. About the Commission of Inquiry' (*United Nations Human Rights Council*) <www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx> accessed 7 June 2018

²⁸⁰ UN HRC Res 71/248, para 4.

²⁸¹ IIIM Terms of Reference, para 30.

²⁸² 2017 Secretary-General Report, para 33.

²⁸³ See eg Elliott 250;

on. Both in fact consider gross violations of human rights and humanitarian law, including those amounting to crimes against humanity and war crimes.²⁸⁴

Besides such similarities, as also specified in the very Terms of Reference of the IIIM, there are substantial differences in the methodology of work of the two bodies as well as in their overall mandate. First, while COI conducts investigations on certain events and incidents and produces reports on them and relevant recommendations, the overall purpose of the IIIM is, on one hand to preserve and consolidate evidence that might otherwise get lost or destroyed, and on the other to prepare files on individual criminal responsibility in specific view of future prosecution. This illustrates how the two bodies have actually quite different, yet complementary, purposes. Moreover, while the reports as well as the periodic updates produced by the COI disclosed to the public, the result of the investigations conducted by the IIIM is strictly confidential in nature, due, again, to the prosecutorial character of the Mechanism. Finally, another significant difference between the two mechanisms are the evidentiary standards use, including the legal standards of proof used when identifying perpetrators. While the COI builds on sufficiently reliable information when establishing the occurrence of a violation, including by using a relatively low standard of proof (“reasonable suspicion”) when identifying perpetrators, the IIIM uses way more rigorous international criminal law evidentiary standards, including stricter standards of proof (e.g. “beyond a reasonable doubt”).²⁸⁵ Besides, the former only establishes which party to the conflict is responsible of the serious violations, while the IIIM focuses on ascertaining individual criminal responsibility.

Overall, as it can be observed, the two mechanisms have a similar but at the same time rather different mandate as well as methodology of work. While the COI aligns itself with more traditional human rights fact finding mechanisms, the IIIM largely departs from this realm to fall within a criminal accountability framework.²⁸⁶ Against the risk of duplicating the work of the COI, but also of all those organizations which are

²⁸⁴ 2017 Secretary-General Report, para 31.

²⁸⁵ 2017 Secretary-General Report, para 23; IIIM Terms of Reference, para 17.

²⁸⁶ IIIM 2018 Report, para 9.

likewise collecting important evidence of crimes committed in Syria, Elliott advises that the IIIM should be “creative and bold” and thus adopt strategies and solutions that would allow it to truly play a meaningful contribution towards accountability, especially with regards to the engagement with civil society.²⁸⁷

²⁸⁷ Elliott 250.

V.

THE IIIM: APPLYING THE FRAMEWORK CRITERIA

The previous Chapter described the establishment of the IIIM and laid out its main functions, namely evidence collection, consolidation and preservation and criminal case file preparation. As it was seen in Chapter III, in order for the right to truth to be realized, investigative mechanisms should be able to satisfy the following criteria: 1) documentation and collection evidence on gross violations; 2) securitization and preservation of the evidence collected. This can include archival practices; 3) reconstruction of a “broad truth”, which encompasses all circumstances of the violations, including the identity of the perpetrators, the full context in which the violations occurred and the fate and whereabouts of the disappeared; 4) disclosure of the information to the public. The sub-question: “How do these criteria apply to the IIIM?” will be herewith answered, in view to ultimately reply to the main research question of this paper:

“To what extent does the IIIM contribute to the right to truth of Syrians in light of its unique mandate?”

The Chapter will therefore first explore what is the approach of the IIIM to evidence collection and to what extents this function allows it to contribute to the right to truth. Secondly, its approach to evidence preservation will be assessed against the criterion of public use of information and archiving. Subsequently, the criterion of the “broad truth” will be assessed against its quasi-prosecutorial nature as well as its ultimate purpose, criminal prosecutions. Finally, a comparison between the IIIM and the COI (in light of the differences outlined in the previous Chapter) will be provided so to assess which between the two mechanisms is better suited to fulfil the right to truth of Syrians, always given the Framework Criteria elaborated earlier.

5.1 The IIIM and Documentation and Evidence Collection

The first criterion of the Framework, as outlined in Chapter III, is that evidence of gross violations of human rights law and humanitarian law be collected with the purpose of satisfy the right to truth of victims. But before evaluating the work of the IIIM against this criterion, a few preliminary considerations about documentation in Syria appears necessary in order to understand how this challenging practice is particularly relevant for the satisfaction of the right to truth.

5.1.1 Documenting Crimes in Syria: a Dangerous Yet Necessary Practice

Documentation and evidence collection in Syria has been undertaken by countless human rights organizations as well as other international bodies, including the UN-set investigative mechanisms discussed in the previous chapter, to the point that the Syrian war has been defined as “the most documented conflict in history”.²⁸⁸ Such efforts are being made with accountability in mind, rather than in view of other post-conflict truth-seeking initiatives. This is indeed because the conflict is still ongoing, and, arguably, “(i)t is too early to know precisely which “truth” will be sought”, nor what transitional mechanisms will be set up once the conflict will end.²⁸⁹ As of today, it is, therefore, hard to foresee what purposes, other than accountability, the evidence collected may serve. However, the fact that the large amount of data is collected for future criminal proceedings against the responsible of the violations (as unlikely as they may seem at the current state of affairs),²⁹⁰ still does not exclude that, once the conflict will come to end, it could play an important role in other complementary truth-seeking strategies, which, among others, can serve to realize the right to truth of victims.

²⁸⁸ Nousha Kabawat and Fernando Travesí, ‘Justice for Syrian Victims Beyond Trials. The Need for New, Innovative Uses for Documentation of Human Rights Violations in Syria’ (ICTJ Briefing, 2018) 1. See also ‘IIIM 2018 Report’, para 72.

²⁸⁹ Megan Price and Patrick Ball, ‘Data Collection and Documentation for Truth-king and Accountability’ 4.

²⁹⁰ For likelihood of prosecutions see Lee A Tucker, Shabnam Mojtahedi et al.

Documenting and collecting evidence on human rights violations, however, is all but an easy task in Syria. Some of the challenges discussed in Chapter III indeed apply in this scenario as well. First of all, the fact that the conflict is still ongoing poses significant difficulties. One first implication is that large amount of evidence may be destroyed in the attacks. Other can be intentionally be subjected to theft by parties of the conflict involved in the commission of crimes.²⁹¹ This would not be something unprecedented and it is, in fact, more than plausible, particularly in the case of official records where regime forces are involved.²⁹² Second, there are security concerns for both victims and witnesses, who faces danger and threats and may not wish to come forward.²⁹³ The same great risks are faced by those who undertake the documenting task.²⁹⁴ A further challenge is also posed by the presence of many different groups: because some of them do not wear distinctive uniforms, it is hard to collect information about them.²⁹⁵ In addition, international documentation initiatives have been hindered by a denial of access to the affected area, meaning local actors have largely taken over the task.²⁹⁶

When it come to the IIIM, its premature establishment while the conflict is still ongoing presents the advantage that it can help gathering records on human rights violations before they eventually get lost or compromised. This is a crucial practice for reconstructing the truth. To recall the previous chapter, the Mechanism mostly collects secondary information and mostly relies on cooperation with local organizations to do so, due to the lack of access to the areas.²⁹⁷ This can offer the advantage that the data collected will be more contextualized. However, because organizations (but also other States) will share information on a voluntary basis, it may have an impact on the type of

²⁹¹ OHCHR, 'Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law. Guidance and Practice' (United Nations 2015) 54.

²⁹² Louis Bickford, Patricia Karam, et al, 'Documenting Truth' (International Centre for Transitional Justice (ICTJ) 2009).

²⁹³ 'Documentation Practices' (*Syrian Justice and Accountability Centre*)

<<https://syriaaccountability.org/documentation-practices/>> accessed 7 July 2018.

²⁹⁴ Kabawat and Travesí 5.

²⁹⁵ Price and Ball 8.

²⁹⁶ McGonigle, 'Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations' 49.

²⁹⁷ IIIM Terms of Reference, para 5(a).

information that the Mechanism ultimately builds upon. In other words, not all evidence required might be shared, thus hindering the truth-seeking process.²⁹⁸ Moreover, some challenges may arise concerning the quality of the evidence collected by local organizations. In this sense, the IIIM should enhance cooperation, including by providing guidance and feedback.²⁹⁹

This section has therefore briefly discussed documenting violations in Syria as a dangerous yet necessary practice to reconstruct the truth and it has emphasized the role of local organizations in assisting the IIIM in this task. The next section will explore the IIIM approach to evidence collection and whether this can make a meaningful contribution to the right to truth of victims.

5.1.2 The IIIM ‘Broad’ Approach to Evidence Collection

As an investigative body, one of the two main tasks of the IIIM is evidence collection, consolidation, preservation, and analysis, with the explicit purpose of assisting and facilitating criminal prosecutions in various jurisdictions. Accountability, is therefore, the primary objective of the IIIM, and thus, its approach to evidence collection at a first glance is expected to be oriented in that direction rather than towards any broader truth-seeking activities. In other words, it is expected that the IIIM would collect only such information and data relevant to ascertain the criminal responsibility of individuals, leaving aside information that, while not being useful in a criminal proceeding, may still be useful to reconstruct the truth about the broader circumstances of gross violations of human rights.³⁰⁰ This may include, for instance, the investigation into broader patterns of violence for the sake of the societal right to truth.

The truth produced by mechanisms specifically designed for criminal accountability purposes, such as the IIIM, but also in a later stage by courts and tribunals, is in fact

²⁹⁸ IIIM 2018 Report, para 15.

²⁹⁹ Ingrid Elliott, ‘‘A Meaningful Step towards Accountability’?: A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria’ (2017) 15 *Journal of International Criminal Justice* 239, 253.

³⁰⁰ See Szoke-Burke 555ff.

arguably a very narrow one and can only limitedly satisfy the right to truth of victims.³⁰¹ According to Price and Ball, “(accountability mechanisms) produce a very specific set of information, governed by (not-very-transparent) rules of evidence”.³⁰² In the case of international criminal trials, scholar Fergal Gaynor contends that this is due to their very purpose, which is to establish culpability,³⁰³ rather than reconstructing the broader truth, or “structural truth” as Szoke-Burke defines it, meaning the truth “about the systemic or structural causes and circumstances of the events in question and any patterns of abuse”.³⁰⁴

Going back to the Mechanism, this initial expectation indeed, to great extents, holds true. The fact that the IIIM departs from standard fact-finding mechanisms and performs a quasi-prosecutorial function, thus fitting into the sphere of accountability, means that it focuses on collecting crime-based evidence that links crimes to individuals, including evidence relating to *mens rea* and modes of criminal liability.³⁰⁵ Due to this seemingly “narrow approach” to documentation and data collection, the truth-seeking potential of the IIIM would be in this sense rather limited.³⁰⁶ Accordingly, one initial conclusion would be that its ability to contribute to the right to truth of victims in light of this first criterion can only go as far as that of any other investigative mechanism within the criminal framework.

However, as advised in the IIIM 2018 Report, the Mechanism takes a “broad approach to the construction of its evidence collection”.³⁰⁷ The identifies three justifications for this: first, a broad approach to evidence collection allows for a deeper understanding of the context of the facts, though such information may not be included in the case; second, it maximizes the opportunities for justice and satisfies the wide

³⁰¹ Ibid 555-557.

³⁰² Megan Price and Patrick Ball, ‘Data Collection and Documentation for Truth-Seeking and Accountability’ 4.

³⁰³ See Gaynor.

³⁰⁴ Szoke-Burke 533.

³⁰⁵ IIIM 2018 Report, para. 9.

³⁰⁶ Szoke-Burke 555.

³⁰⁷ IIIM 2018 Report, para 34.

range of evidentiary issues that can arise in diverse jurisdictional settings; lastly, “a comprehensive evidence collection can facilitate broader transitional justice objectives in the future”. Among these objectives, the report indicates truth-seeking processes, reparations, and institutional reforms.³⁰⁸ In other words, it seemingly places itself somewhere between a documentation mechanism and one for broader purposes.

Because –recalling the first chapter- the right to truth of victims requires the establishment of a “full and complete” truth,³⁰⁹ which encompasses the “totality of the circumstances surrounding their harms suffered”³¹⁰ (as per Criterion 3) and not only to those relating to the criminal responsibility of an individual, then the ability of the IIIM to collect such “comprehensive and well-structured”³¹¹ information with broader transitional justice objectives in mind, leaves some doors open to the realization of the right to truth. In particular, it would be useful if the Mechanism gathered data on the identification of the missing, including, as suggested by Elliott, by collecting DNA comparative samples from their relatives. Getting to know the fate of the disappeared and the dead, is –to recall Chapter II- within the entitlements conferred by this right, particularly so to satisfy the individual dimension.

Ultimately, however, its contribution to the right to truth in terms of evidence collection will also largely depend on what kind of truth-seeking activities, drawing on the evidence collected by the Mechanism, will be put in place (if any), to complement the potential prosecutions. Having said this, one should bear in mind that despite the IIIM may adopt a broad evidence collection approach which can allow for collection of more contextual information, it is still unlikely that it will depart majorly from crime-based evidence. The IIIM 2018 Report in this regard does not offer much clarification.

³⁰⁸ Ibid, para 27.

³⁰⁹ 2006 OHCHR ‘Study on the right to the truth’, para 59.

³¹⁰ McGonigle, ‘The right to truth in international criminal proceedings: an indeterminate concept from human right law’2.

³¹¹ IIIM 2018 Report, para 27.

5.2 The IIIM and the Preservation of Evidence

Criterion 2 of the Framework Criteria evaluates investigative mechanisms against their ability to appropriately preserve the evidence collected, including by setting up secured archives where the information can get stored for subsequent use. As discussed, this is a main guarantee for the right to truth (see section 3.2).

Flowing from its primary task to collect and preserve evidence, the IIIM is mandated to organize files and data into “archives and digital archives”.³¹² Because the Mechanism is quasi-prosecutorial, evidently, data protection and information security will be operationalized at criminal law standards, including by ensuring uninterrupted chain of custody.³¹³ On one hand this positively satisfies Criterion 2, on the other one must keep in mind that the nature of the evidence collected and preserved, and hence, archived, by the mechanism is strictly confidential.³¹⁴ Consequently, access to it will be granted only to certain actors (particularly courts and tribunals) and only under certain conditions (respect for human rights). Confidentiality restriction will also apply if providers do not wish the information to be shared.³¹⁵ In this sense, the Mechanism falls short of Criterion 4 (public disclosure of information) as the information will most likely remain confidential for longer periods.

Nevertheless, because the Mechanism has left some doors open for broader objectives, particularly future transitional justice policies, it can be expected that once and if prosecutions will take place, the IIIM will be more flexible with regards to granting access to its archival capacity.

³¹² 2017 Secretary-General Report, para 47(e).

³¹³ IIIM 2018 Report, para 39; IIIM Terms of Reference, para 10.

³¹⁴ IIIM Terms of Reference, para 11.

³¹⁵ IIIM 2018 Report, paras 41-42.

5.3 The IIIM as a Prosecution-Oriented Mechanism: Advantages and Limits for the Right to Truth

Chapter III extensively highlighted the extents to which criminal proceedings, and international prosecutions, can contribute to establish the truth and, thereby, participate to the realization of the right to truth of victims of mass atrocities. Understanding this is fundamental because, as mentioned in the introduction, the IIIM is a prosecution-oriented mechanism, whose very nature and purpose relies mainly on this one factor. Recalling Chapter IV, the second main function of the Mechanism is in fact that of creating files to assist the criminal justice system in the prosecution of the most responsible for the most serious crimes committed in Syria since March 2011. Accordingly, its contribution to the right to truth, cannot be assessed irrespective of its close relation to criminal law. The evaluation, therefore, needs to be conducted on two levels: i) the contribution to the right to truth in light of its ultimate purpose: criminal prosecutions; ii) the contribution to the right to truth in light of its quasi-prosecutorial methodology of work.

Concerning the first level of analysis, overall it was established that trials can ascertain a factually accurate truth, tested against rigorous evidentiary standards. Prosecutions can also contribute to lay down historical records of the facts, though limitedly. This is because while at times the criminal process leads to the necessary verification of broader stances, there are still obstacles in these regards, including discretion over the selection of crimes by the Prosecution, jurisdictional considerations as well as other practices like plea bargains that have an impact on the ascertainment of truth (see section 3.3). In this sense, should criminal proceedings take place, the IIIM would indirectly assist in the truth-seeking process.

However, with the first expectation comes the first obstacle: as of the current situation, the prospects for prosecutions to take place after the conflict will be over are very few. So far, as it was also mentioned in Chapter II of this paper, the Security

Council has time after time failed to report the situation to the ICC.³¹⁶ Drawing on the experiences of neighbouring Iraq, scholar Alex Schank warns for instance, that international prosecutions would not even be a desirable route for Syria.³¹⁷ Other scholars advise that most possibly justice will be served by foreign prosecutions on the basis of the principle of universal jurisdiction or passive personality.³¹⁸ Anyhow, as discussed earlier, the IIIM functions (particularly evidence collection) have been intentionally crafted to live the doors open to broader transitional justice purposes, including truth-seeking. This means that the information collected will be possibly used also for other initiatives beyond justice, that, combined, can help satisfying the right to truth of victims.

Passing to the second level of analysis, by adopting prosecutorial standards, including standards of proof “beyond reasonable doubt”, the Mechanism is itself a quasi-prosecutorial body. Consequently, it is to be expected that the advantages of the criminal law system in establishing a truth which is indeed accurate, but also credible to the public, can similarly be said to apply to the Mechanism. In other words, since facts and evidence will be carefully tested against rigorous criminal law standards, their truthfulness will most likely be guaranteed.

However, some of the limitations intrinsic to the criminal justice system, in the same way, hinder the Mechanism’s truth-seeking function. One first limitation concerns its subject-matter. The IIIM is in fact mandated to prosecute only the “most serious” crimes. In spite of the vast number of human rights violations in Syria, for a mere question of limited capacity and funding (which is voluntary), only a few selected

³¹⁶ Peter Nadin, ‘United Nations. How the UN Security Council failed Syria’ (*Lowy Institute*, 30 August 2017) <<https://www.lowyinstitute.org/the-interpreter/how-un-security-council-failed-syria>> accessed 12 July 2018.

³¹⁷ Alex Schank, ‘Secretarianism and Transitional Justice in Syria: Resisting International Trials’ (2014) 45 *Georgetown Journal of International Law* 557.

³¹⁸ Lee A Tucker, Shabnam Mojtahedi et al 5. The authors contend that foreign prosecutions on the basis of the ‘passive personality’ principle are more likely to happen. This principle entails that States may, in limited case, have jurisdiction to prosecute a foreign national for offenses committed abroad that affect its own citizens, for instance on national security grounds. See ‘International Law. Jurisdiction’ (*Encyclopaedia Britannica*) <<https://www.britannica.com/topic/international-law/Jurisdiction#ref795056>> accessed 12 July 2018.

“representative” crimes will be looked at. The IIIM will focus in particular on sexual and gender-based crimes, as well as violations against children.³¹⁹ Moreover, in relation to these crimes, the Mechanism will only focus on the elements useful to establish criminal responsibility, rather than looking into the broader causes that led to the violations, including systemic patterns of violence. Even there, as in criminal prosecutions, the discretion of the mechanism to investigate and prepare cases by its own initiative may result in an even further selection of only a small number of charges to expedite future trials and convictions.³²⁰

One last consideration within the framework of its quasi-prosecutorial nature must be made with regards to the public disclosure criterion. Indeed, unlike other fact-finding bodies and commissions of inquiry, the Mechanism does not disseminate the results of the investigations to the wider public. In contrast, in line with criminal standards, it has very strict policies on confidentiality. As a result, the information collected may be inaccessible for longer periods, thus falling short of the last Framework Criteria which allows for the satisfaction of a collective right to truth.

In conclusion, in light of its prosecutorial nature, the IIIM on one hand assists courts and tribunals in their truth-seeking function, on the other it itself plays a role in the ascertainment of truth by establishing accurate records of the fact. Nevertheless, just like courts and tribunals, the IIIM may not be suited to fulfil the third criterion on the broad truth, as prescribed by the Framework Criteria, nor the fourth on public disclosure on the information. One may argue, however, that these limitations are necessary for the ultimate functioning of such a mechanism.

³¹⁹ Stephanie Nebehay, ‘War crimes evidence in Syria ‘overwhelming’, not all can be pursued: U.N.’ (Reuters, 26 March 2018) < <https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes/war-crimes-evidence-in-syria-overwhelming-not-all-can-be-pursued-u-n-idUSKBN1H22GN> > accessed 12 July 2018.

³²⁰ Szoke-Burke 555.

5.4 The COI and IIM: Best Chances for the Right to Truth?

As examined in the previous Chapter, the COI and the IIM have similar but not identical mandates. The variances between the mandates and functions is expected to impact on the extent to which each of them can contribute towards the right to truth. This section will thus apply the Framework Criteria in a comparative manner to both, to understand which one is more suited to satisfy the right to truth.

Concerning Criterion 1, namely documentation evidence collection, the COI, as seen in Chapter IV, collects evidence about human rights and humanitarian law violations, including to establish patterns of crimes, using a wide range of sources (including first-hand information).³²¹ In contrast, the IIM relies on second-hand sources, mostly on the evidence previously collected, including by the Commission, in view to investigate into crimes and establish criminal responsibility.³²² In this sense, as both investigative bodies, the two mechanisms satisfy this first criterion of the right to truth in criminal contexts. However, the COI, because, as it will be seen later, is mandated to look at the situation in a broader sense and with lower standards of proof, expectedly also has a broader approach to evidence collection than that of the IIM.

For an effective implementation of the right to truth, Criterion 2 calls the calls for the evidence of human rights violations be appropriately preserved.³²³ While the COI secures copies of the evidence received in a database, as advised in its terms of reference, it does not retain the original documents, nor is it clear if it has so far organized any of such files in any systematic manner.³²⁴ On the other side, preservation of evidence, as mentioned previously, is indeed one of the tasks included in the mandate of Mechanism, according to its mandate. In this sense, it is expected that the IIM will be more equipped to organize and preserve all information received. According to the IIM

³²¹ A/HRC/RES/S-17/1 (Contained in the report of the HRC special session), para 14. See also A/HRC/S-17/2/Add.1, para 1.

³²² IIM Terms of Reference, para 1(a).

³²³ E/CN.4/Sub.2/1997/20, para 25.

³²⁴ Elliott 243.

2018 Report, the process of creation of capacity to “ensure appropriate storage and preservation” of evidence, for short and long-term purposes, is currently under way.³²⁵

When it comes to the reconstruction of the truth criterion, accuracy and broadness must be considered separately in this instance. With respect to accuracy, the Mechanism applies a more rigorous evidentiary framework to ascertain the occurrence of a particular crime as well as who responsible for it than those employed by its counterpart. Specifically, it uses the standard of proof of “beyond reasonable doubt” (so to make the file suitable for prosecution), while the Commission adopts a lower standard of “reasonable suspicion”, meaning it seeks to obtain “a reliable body of evidence, consistent with other information, indicating the occurrence of a particular incident or event”.³²⁶ However, in terms of broadness of the truth ascertained, as seen before, the IIIM has a narrower focus. Indeed, it concentrates on the criminal conduct on those allegedly responsible for specific crimes, despite its somewhat broader approach to evidence collection.³²⁷ Consequently, it is expected that it will produce a narrower truth. The COI, in contrast, as seen above investigates the “bigger picture” to establish pattern of violations. This, in turn, is useful for understanding the totality of circumstances behind the conflict, including its structural causes.³²⁸ As it follows, it can be beneficial to ascertain the broad truth to disclose to the society.

As for the fourth criterion, public disclosure of information, as earlier explained, the societal dimension of the right to truth requires that the truth about circumstances and facts behind gross human rights violations be publicly disclosed, not only to facilitate the non-recurrence of similar violations, but also to contribute to shape an historical truth and build a collective memory (see section 2.2.4.1). The 2005 updated Set of Principles, in this regard, clearly advises that, as part of the measures to fulfil the right to truth of victims, commissions of inquiry’s reports should be “publicized as widely as

³²⁵ IIIM 2018 Report, para 33.

³²⁶ For IIIM see IIIM Terms of Reference, para 17.; for COI, see A/HRC/S-17/2/Add.1, para 5.

³²⁷ IIIM Terms of Reference, para 12.

³²⁸ See eg. A/HRC/36/55. In its latest report, the COI found, *inter alia*, patterns of using chemical weapons against civilians in opposition-held areas by governmental forces. It also documented patterns of intentional attacks against civilians by terrorist and armed groups.

possible”, while preserving the confidentiality of sensitive information that could endanger the safety of witnesses.³²⁹ While indeed the sensitive information received by the Commission remains confidential in order to protect victims and witnesses,³³⁰ the results of the investigations conducted are released in the form of public reports and other update documents.³³¹ The Commission is also explicitly mandated “to publicly identify those who appear responsible for these atrocities” where possible.³³² In this sense, because the Mechanism is criminal law-oriented, the information in its possession, including with regards to the suspects, will be foreseeably kept confidential for longer periods.

Overall, after having compared the mechanisms on the basis of their respective mandates and functions against the Framework Criteria, the answer as to which is better equipped to satisfy the right to truth of victims is indeed a mixed one. In general, the COI tends to better satisfy the criterion of public disclosure of information and the establishment of a broad truth that highlight patterns of violence as well as the extent of the crimes committed by different parties. In contrast, the IIM, due to its prosecutorial standards, can certainly help establish a more factually accurate truth, whilst also having stricter and clearer standards of evidence preservation.

³²⁹ 2005 updated Set of Principles, principle 13.

³³⁰ A/HRC/S-17/2/Add.1, para 10.

³³¹ A/HRC/RES/S-17/1 (Contained in the report of the HRC special session), para 14 [“Requests that the report of the above-mentioned commission of inquiry be made public as soon as possible”].

³³² HRC Res S-19/1 (4 June 2012) UN Doc A/HRC/RES/S-19/1, para 8. However, one should notice that the COI so far has never publicly named perpetrators, likely for due process concerns.

VI. CONCLUSIONS

The past decades have marked the emergence of a right to truth in international law as a way for victims to lift the veil of secrecy behind some of the most appalling human rights violations, including torture, enforced disappearances and executions. Historically born in the Americas and embraced at different speeds and different extents in other jurisdictions, the promoters of this right have in fact conferred it far-reaching objectives. If rightly implemented, the right to truth is supposed to offer a great deal of redress to victims and assist in the fight against impunity. However, the legal standing of the right to truth remains, at present, indeterminate, nor it is clear what it practically means in particular contexts.

Because Syria is one of the most complex and bloodiest conflicts of current times, this research sought to examine whether the newly established investigative mechanism, the IIIM, could live up to the demands of a right to truth for Syrian victims and survivors. While this somehow seems to assume that in this sense, a right to truth could be highly beneficial for victims, this aspect was only touched upon briefly as in fact not much empirical evidence in these regards really exist. Besides, it would have fallen outside the scope of this paper to engage in a deeper analysis.

In order to evaluate the contribution of this unique, quasi-prosecutorial Mechanism, this research therefore first explored what a right to truth means in criminal contexts. What was found is that certain activities in the context of investigations pay a great deal of contribution to the right to truth. These activities comprise mainly documentation and evidence collection, evidence preservation and archiving practices as well as criminal proceedings. Indeed, there are certain limits as to the extent that each of these practices can effectively achieve the truth. In terms of evidence collection, not always data is accessible, at times evidence is just stolen, destroyed, or lost. Moreover, in contexts like Syria, it may be extremely dangerous to collect evidence connected to crimes and at the same time very challenging, due to the multiplicity of armed groups involved. Concerning evidence preservation, while this is fundamental for the ascertainment of

truth, but also for prosecution and for the protection of an historical record in view of non-recurrence, not all information can be widely disseminated due to confidentiality concerns. Moreover, States have proved reluctant to keep an account of all records of human rights violations for a series of reasons.

With respect to criminal proceedings, the research highlighted that, whilst they are essential for reconstructing an accurate truth, including identifying perpetrators (which arguably falls into the scope of the right to truth), the very goal of trials, is to determine the guilt of innocence of the accused. As a result, criminal procedures and rules of evidence need to be kept strict and focused, thus leaving not much space for the ascertainment of the whole truth about the times of violence, including the establishment of broader historical truths.

The above discussions ultimately allowed for the creation of an evaluative Framework Criteria to establish what are the requirements for investigative mechanisms wishing to support the right to truth. The framework thus comprised 1) documentation and evidence collection; 2) evidence preservation and archival practices; 3) the establishment of an accurate and broad truth; and 3) the public disclosure of the information.

The Framework Criteria was then applied to the IIIM and its contribution to the right to truth evaluated against its two main functions, namely evidence collection, preservation and consolidation and the preparation of criminal files to assist in the prosecution on the most responsible for the crimes committed. What emerged is that the Mechanism indeed pays a contribution to the truth-seeking process in Syria, mostly due to the fact that its early establishment allows for the collection and preservation of important evidence that may otherwise get lost in the conflict or intentionally destroyed, but also because, in light of its prosecutorial nature, it is apt to establish accurate and truthful accounts of the most heinous crimes committed in Syria, including determining the identity of the perpetrators. Nevertheless, this very criminal-law oriented nature hampers the ascertainment of a broad truth as well as the public dissemination of the

results of the investigation to some extents. In this sense, other mechanisms, like the COI, may be more suited to fulfil these requirements.

Overall, what emerged almost immediately from researching on the Mechanism, is that criminal accountability is undoubtedly its main *raison d'être*. This is obvious as nowhere in its founding documents nor in any of the discussions following its establishment, the right to truth of victims was even mentioned. This, however, does not diminish the legitimacy of the inquiry. As rightly pointed by Wenaweser and Cockayne, the UNGA has in fact elaborated its support from fact-finding to broader stances for the realization of the right to truth throughout the years,³³³ thus suggesting that even though this might not be the ultimate goal of the Mechanism, a right to truth was still possibly in the mind of the designers. Besides, the growing support for this right at the regional and international level, as suggested by Aguilera, arguably poses a duty upon the international community to confer a “truth-promoting profile” to investigative mechanisms.³³⁴ Anyhow, even if accountability is the goal of the IIIM, this does not mean that the contribution paid to the realization of a right to truth is of little remark.

All in all, the answer to the main research question, namely “To what extent does the IIIM contribute to the right to truth of Syrians in light of its unique mandate?”, is that the Mechanism can certainly facilitate the realization of the right to truth of victims in light of what has been said. However, while the IIIM is an avenue for the right to truth, it should not be the only one. Other mechanisms and truth-seeking initiatives should in fact complement the deficiencies of the IIIM in ascertaining the truth derived from its narrow prosecutorial nature, thus delivering a more comprehensive response to the -still indeterminate- demands of this right. At the same time, the IIIM should keep the flexible approach promised to its investigation methodologies so that it can widen its chances to contribute to future truth-seeking initiatives.

In conclusion, this research attempted to contribute to the debate on the right to truth by offering a new viewpoint on its implementation in the context of investigative

³³³ Wenaweser and Cockayne 225.

³³⁴ Aguilera 126.

mechanisms, which are neither simple fact-finding nor effective prosecutorial bodies. At the same time, it offered a fresh perspective on the (still scarce) discussions on the IIIM, which have so far largely concentrated on its contribution towards accountability. Because currently the Mechanism is only at the beginning of its work, it will be interesting for future research to evaluate whether the impact on the right to truth has concretized further down the line. As for now, it can only be speculation.

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