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The dual relationship between truth commissions and reparations:
the reparative effect of truth-telling and a comparative analysis of
truth commissions' approach to reparations

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ABSTRACT

One of the many challenges faced by a newly-peaceful or a recently-democratic State is the one that consists in repairing the harm it has caused to its own population. As will be demonstrated in this paper, reparations can take various forms and be the product of the work undertaken by different entities.

Indeed, in its pursuit for a better future, a country confronted with its shameful past will usually initiate actions in four areas: truth-telling, reparations, justice and institutional reforms. While these four pillars pursue different aims, they are not as hermetic as one might think: an action undertaken in one of these pillars will usually be felt across other pillars. In this way, the reparations area of transitional justice frequently interacts with other areas. This paper will demonstrate this as it will be dedicated to an examination of how truth-telling can be a form of reparation for victims and how truth commissions, usually most active in the truth-seeking dimension of transitional justice, can recommend reparations for victims.

Part 1 of this paper will address the role that transitional justice can play in reshaping a country. In Part 2, the reparative effect that truth-telling can have on victims will be addressed. Finally, Part 3 will be dedicated to a comparative analysis of how various truth commissions have dealt with their reparative mandate.

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INTRODUCTION

While no one can rejoice in the conflicts, genocides, periods of repression... that have beset modern humanity in the last century, the silver lining of these plagues has taken the form of a growing concern with establishing apparatuses aimed at preventing such occurrences or, when preventive or dissuasive measures did not succeed, recovering from them. Transitional justice figures among these recovery-aimed mechanisms and has emerged to address the challenge that responding appropriately to past evils may represent for a new democracy.¹

One of the many challenges faced by a newly-peaceful or a recently-democratic State is the one that consists in repairing the harm it has caused to its own population. If a country's past has been ridden with repression, senseless deaths, wanton cruelty and/or horrific abuses, the harm that lingers way after the immediate pain or loss has been suffered will need to be addressed. Indeed, "*where there was torture, there are walking, wounded victims. Where there were killings, or wholesale massacres, there are often witnesses to the carnage, and family members too terrified to grieve fully. Where there were persons disappeared, there are loved ones desperate for information*".² The survivors, be it the victims, their families, but also communities and society as a whole, will understandably want reparations for the harm that was unjustly inflicted upon them.

As will be demonstrated in this paper, these reparations can take various forms and be the product of the work undertaken by different entities. Indeed, in its pursuit for a better future, a country confronted with its shameful past will usually initiate actions in four areas: truth-telling, reparations, justice and institutional reforms. While these four pillars pursue different aims, they are not as hermetic as one might think: an action undertaken in one of these pillars will usually be felt across other pillars. In this way, the reparations area of transitional justice frequently interacts with other areas. This paper will demonstrate this as it will be dedicated to an examination of how truth-telling can be a form of reparation for victims and how truth commissions, usually most active in the truth-seeking dimension of transitional justice, can recommend reparations for victims.

¹ D. A. CROCKER, "Truth Commissions, Transitional Justice, and Civil Society" in *Truth v. Justice: The Morality of Truth Commissions* (ed. by R. I. ROTBERG and D. THOMPSON), Princeton University Press, New Jersey, 2000, pp. 99-121

² P. B. HAYNER, *Unspeakable Truths – Transitional Justice and the Challenge of Truth Commissions*, Routledge, New York, 2011, 2nd ed., p. 3

Part 1 of this paper will address the role that transitional justice can play in reshaping a country. The four areas in which transitional justice is most active will be examined, and the importance of combining measures in all four pillars and adopting a comprehensive approach to transitional justice will be emphasized. The special significance that reparations have for victims as the only victim-focused transitional justice measure will also be discussed, as well as the phenomenon of truth commissions. Establishing truth commissions has indeed been a common choice of States wishing to transition from a context of conflict or repression to a situation of peace.

In Part 2, the reparative effect that truth-telling can have on victims will be addressed. The benefits that flow from a truth commission's truth-seeking assignment may indeed take on a reparative function for victims. Overlaps between a commission's truth-seeking mission and its reparative mandate are therefore frequent. After having defined how the term 'truth' is to be understood for the purpose of this article, Part 2 will explain how shedding light on the truth can be a form of reparation for victims and how recounting their experience, their 'individual truth' to a truth commission can prove to be cathartic for victims as well.

The contribution of truth commissions in the field of reparations goes further than the reparative effect that truth-telling can have: commissions have increasingly been tasked with recommending reparations to States. Indeed, the popularity that truth commissions experienced over the last two decades came with a growing faith in their capacities and potential to contribute to a smooth transition. As a result, while truth commissions were first mostly entrusted with truth-seeking missions, their responsibilities are now more numerous and varied.

Though a State *may* establish a reparations programme irrespective of, or in the absence of a truth commission, HAYNER argues that such a situation is rather unlikely:³ recommending reparations now regularly figures among the expanding number of tasks assigned to truth commissions. Part 3 will therefore be dedicated to a comparative analysis of how various truth commissions have dealt with their reparative mandate.

³ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

This comparative analysis will be conducted as follows: a number of questions will be raised with respect to how truth commissions fulfil their task of recommending reparations for victims. For each of these questions, we will provide the necessary information to understand the various examples taken from the practice of numerous truth commissions. We will then give our personal opinion on how each question was answered and on how we believe truth commissions could improve their way of dealing with their reparative mandate.

The truth commissions set up in Argentina, Chile, El Salvador, Guatemala, Kenya, Morocco, Sierra Leone, South Africa and Timor-Leste are mostly those whose practices have been compared. However, the experiences of a few other commissions in the area of reparations have also been examined.

The question of the beneficiaries of reparations will be addressed in the first chapter of Part 3. We will see how various truth commissions have decided who was to be considered a victim and who was not. We will see, *inter alia*, how their respective mandate has impacted the size of the victims' class, how important reaching out to victims proved to be, but also whether or not victimized perpetrators were included in their definition of victimhood.

In the second chapter, the goals that these truth commissions hoped would be achieved through reparations will be addressed.

Thirdly, parts of the recommendations made by some of these commissions will be analysed. We will see, among other questions, how – or whether – civil society has played a role during the drafting of the commissions' recommendations, as well as how commissions assessed the needs of victims and the best way to address them.

Finally, the fourth chapter will deal with the issue of implementing and following-up on truth commissions' recommendations. We will discuss the various mechanisms that have been put in place to assume these functions.

PART 1 – THE ROLE OF TRANSITIONAL JUSTICE IN RESHAPING COUNTRIES

Over the last 40 years, a number of countries have transitioned from dictatorships and military regimes to democracies or from domestic armed conflicts to situations of peace. With these drastic changes came an important question to which all transitioning States were confronted with: “*what should be done with a recent history full of victims, perpetrators, secretly buried bodies, pervasive fear, and official death*”?⁴ The different ways these countries answered this question and dealt with their past are commonly referred to as transitional justice.⁵

The presence of military regimes and dictatorships across Latin America throughout the second half of the 20th century, the civil wars and armed conflicts that plagued – and continue to plague – the African continent, but also the genocides that decimated millions of Rwandans and Cambodians, as well as the atrocities committed during the Balkan wars, account for the increased attention that the field of transitional justice has received over the years.⁶

Defined as a “*set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law*”,⁷ transitional justice has been referred to as a four-legged chair⁸ for the work it usually undertakes in four key areas: truth-telling, justice, reparations and institutional reforms.

In this paper’s Part 1, the first chapter will be dedicated to an overview of these four pillars of transitional justice. After having explained what these pillars are and how they can contribute to a smooth transition, we will insist on the importance of transitional programmes adopting a comprehensive approach and combining all four pillars. In the second chapter, we

⁴ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 3

⁵ J. GARCÍA-GODOS, “Victim Reparations in Transitional Justice – What is at Stake and Why”, *Nordisk Tidsskrift for Menneskerettigheter*, 2008, vol. 26, n°2, p. 111

⁶ J. GARCÍA-GODOS, *op. cit.*, p. 111

⁷ N. ROHT-ARRIAZA and J. MARIEZCURRENA, *Transitional Justice in the Twenty-First Century*, Cambridge University Press, Cambridge, 2006

⁸ T. ABE, “Perceptions of the Khmer Rouge tribunal among Cambodians: Implications of the proceedings of public forums held by a local NGO”, *South East Asia Research*, 2013, vol. 21, n°1, pp. 5-26

will then address the phenomenon of truth commissions. Finally, the third chapter will be about the special importance of reparations as the only victim-centred transitional measure.

CHAPTER 1. TRANSITIONAL JUSTICE AS A FOUR-LEGGED CHAIR

Section 1. Four pillars

The transitional justice measures that are generally implemented in order to address the grim legacy of serious crimes under international law usually include truth-telling exercises, reparations to victims, prosecutions of those responsible and institutional reforms to guard against recurrence of abuses.⁹

Subsection 1. Truth-telling

Judging by the truth-seeking initiatives that have been established in numerous countries confronted with their dark past, desire for the truth is powerful.¹⁰ In response to this trend, courts in various countries and international judicial bodies have recognized the right to truth as the right of victims of abuses and their families, but also communities and society at large, to know the truth about the circumstances in which human rights violations took place.¹¹

The call for truth about what happened during a country's darkest time has been at the forefront of transitional programmes. Indeed, for most transitioning governments, distancing themselves from what was done by their predecessor requires a bright line to be drawn between the past and the present.¹² *“As with many flings, part of the appeal [of telling the truth] is precisely how different it is from what came before – in the case of political transitions, a regime that used lies and secrecy to oppress and maintain control”*¹³ and, in the case of armed conflicts, a situation of violence shrouded in uncertainty and incomprehension.

⁹ P. DE GREIFF, “Transitional Justice and Development”, 2013, available at: http://www.developmentideas.info/website/wp-content/uploads/Ch24_TransitionalJustice_PablodeGreiff_2013.pdf (accessed on 14 June 2017)

¹⁰ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 6

¹¹ E. GONZÁLEZ and H. VARNEY, *Truth Seeking – Elements of Creating an Effective Truth Commission*, Amnesty Commission of the Ministry of Justice of Brazil, Brasilia; International Center for Transitional Justice, New York, 2013, p. 3

¹² E. DALY, “Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition”, *The International Journal of Transitional Justice*, 2008, vol. 2, p. 23

¹³ E. DALY, *op. cit.*, p. 23

It should be noted that the rationale for setting up truth-seeking initiatives is not to write the story of every individual but rather to create a historical record, “*a common narrative or a ‘communal truth’, in the context of which individual truths can be framed*”.¹⁴ However, as will be further explained in Part 2 of this paper, both the ‘communal truth’ that emerges from the truth commission’s work and the various ‘individual truths’ that are told can have a reparative effect.

The benefits that flow from shedding light on the truth are numerous. Just to name a few, various studies have shown that the search for truth can be cathartic for victims, in that it helps them “*find closure by learning more about the events they suffered*”.¹⁵ In addition, truth-telling can initiate a process of reconciliation, whereas “*denial and silence can increase mistrust and social polarization*”.¹⁶ Furthermore, because the work of truth-seeking initiatives usually culminates in the adoption of an authoritative account of the past, the attempts of ex-repressive regimes to deliberately rewrite history can be thwarted more easily.¹⁷

Subsection 2. Reparations

The issue of reparations has always been a sensitive one. Following a conflict or in the aftermath of massive or systematic violations, the task of redressing human rights abuses – or attempting to do so – can prove to be daunting. Indeed, the size of the victimized population may be huge, the harm that has been caused may be irreversible and felt both individually and collectively,¹⁸ and the institutions normally tasked with the issue of reparations may have been weakened or destroyed, rendering them unable to address victims’ claims.

¹⁴ M. LAWRY-WHITE, “The Reparative Effect of Truth Seeking in Transitional Justice”, *International and Comparative Law Quarterly*, 2015, vol. 64, p. 143

¹⁵ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “Truth and Memory”, available at: <https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (accessed on 14 June 2017)

¹⁶ E. GONZÁLEZ and H. VARNEY, *op. cit.*, p. 4

¹⁷ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “Truth and Memory”, *op. cit.*, (accessed on 14 June 2017)

¹⁸ C. CORREA, J. GUILLEROT and L. MAGARRELL, “Reparations and Victim Participation: A Look at the Truth Commission Experience” in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (ed. by C. FERSTMAN, M. GOETZ and A. STEPHENS), Brill Academic Publishers, New York, 2009, p. 387

These difficulties may account for the fact that, despite the crucial role that reparations play in recognizing victims as citizens and restoring their dignity,¹⁹ reparations are “*the last-implemented and the least-funded measure of transitional justice*”.²⁰ It goes without saying that this is unfortunate considering the hardships victims have suffered, either at the hands of their own State or because of its unwillingness or inability to assist them. Reparations measures, “*as they belong to the few efforts undertaken directly on behalf of the victims*”²¹ and constitute a message of acknowledgment and solidarity from the rest of the society,²² should be given more attention.

Reparations programmes will vary greatly from one country to another considering the role that each country’s socio-political context will play in shaping the framework upon which the programme will be based.²³ Transitioning States should however keep in mind that “*the way victim reparations are conceptualized in a given society [... will have] important implications for the interpretation and construction of the past*”.²⁴ Designing a comprehensive and satisfactory reparations scheme is therefore necessary to enable victims and society to leave the past behind.

Subsection 3. Justice

Investigating and prosecuting international crimes is a fundamental element of transitional justice. Impunity and lack of accountability often figure at the heart of human rights violations,²⁵ making trials a key demand of victims once order has been restored.²⁶ Many victims indeed argue that in addition to being a moral obligation, bringing perpetrators of human rights violations to justice is also a legal requirement under international law. They further claim that by not punishing perpetrators, there is nothing to deter others from carrying

¹⁹ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “What is Transitional Justice?”, available at: <https://www.ictj.org/about/transitional-justice> (accessed on 14 June 2017)

²⁰ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “Reparations”, available at: <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (accessed on 14 June 2017)

²¹ M. FISCHER, “Transitional Justice and Reconciliation: Theory and Practice” in *Advancing Conflict Transformation: The Berghof Handbook II* (ed. by B. AUSTIN, M. FISCHER, H. J. GIESSMANN), Barbara Budrich Publishers, Opladen/Framington Hills, 2011, p. 411

²² C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 388

²³ J. GARCÍA-GODOS, *op. cit.*, p. 112

²⁴ J. GARCÍA-GODOS, *op. cit.*, p. 113

²⁵ M. KAYE, “The Role of Truth Commissions in the Search for Justice, Reconciliation and Democratisation: the Salvadorean and Honduran Cases”, *J. Lat. Amer. Stud.*, 1997, vol. 29, pp. 694-695

²⁶ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “Criminal Justice”, available at: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> (accessed on 14 June 2017)

out the same violations in the future.²⁷ Moreover, as an essential requirement for a successful democratic transition, accountability must be insisted upon:²⁸ if such is not the case, the rule of law and the new democratic institutions run the risk of being severely undermined.²⁹

However, on the other side of the spectrum, the victims' cries for justice are often met with resistance by those who fear prosecutions and by those who would rather focus on national reconciliation than pursue the castigation of perpetrators, which brings with it the risk of a renewal of hostilities and the further polarization of an already divided society.³⁰ Reaching a balance between justice and accountability on one hand and peace and prospect of reconciliation on the other is a complicated task. Indeed, while "*it would be irrational to impose a punishment when the consequences of doing so, far from preventing future crimes, might cause greater social harm than that caused by the crime itself or by the absence of punishment*",³¹ the victims' dismay and despair at seeing their offenders go unpunished is easily understandable.

Depending on the balance of powers that prevails in a country, the harrowing situation from which it has emerged and its politico-social environment, the area of justice must therefore be dealt with carefully.

Subsection 4. Institutional reforms

Considering that transitions can take place after months, years, sometimes even decades of violence and instability, it is easy to see why ensuring that such violence does not repeat itself is perhaps the most important aim of transitional justice mechanisms. However, it is also the most difficult to reach: in order to achieve such an ambitious and crucial goal, reforms in the military, police, judiciary and political systems are strongly encouraged³² in transitional programmes.

²⁷ M. KAYE, *op. cit.*, p. 695

²⁸ M. KAYE, *op. cit.*, p. 696

²⁹ M. KAYE, *op. cit.*, p. 696

³⁰ M. KAYE, *op. cit.*, p. 696

³¹ R. ALFONSÍN, "Never Again' in Argentina", *Journal of Democracy*, 1993, vol. 4, n°1, p. 18

³² P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 182

The ‘institutional reforms’ pillar of transitional justice has, over the years, been expanded to include ‘reconciliation’ in many transitional programmes. Indeed, in various countries, attempts to “*enforce change at institutional or structural levels [were] subsumed under new political motives of reconciliation and societal harmony*”.³³ South Africa offers a perfect example of this trend: even before it began its work, the aptly-named Truth and Reconciliation Commission was presented as a means to pave the way towards the reconciliation of the fractured South African nation.³⁴

However, while transitional programmes have increasingly been concerned with promoting and enabling reconciliation, it is important to keep in mind that “*reconciliation is a long-term process [... which] cannot be enforced nor taken for granted, and takes place on a variety of levels, ranging from the individual, to the community and the national level*”.³⁵

If transitional justice can undoubtedly create the impetus needed for State reforms³⁶ and reconciliation, the success of such massive transformations depends on a variety of factors, including initiatives taken by the legislative or by the executive, the will of the political leadership and/or the armed forces, as well as societal and individual willingness to change.³⁷ Civil society and human rights NGOs therefore play a crucial role in making sure the momentum for change does not falter and is not hindered or repressed by State officials.

Section 2. The need for a holistic approach

While the early days of transitional justice saw the questions of truth, justice, reforms and reparations addressed separately, modern transitional justice practice has left that segmented approach behind.³⁸ This is fortunate considering that the quasi-inextricability of transitional justice dimensions has been proven over time, as it has been shown that a single measure often produces an impact across more than one dimension.³⁹

³³ E. STANLEY, “What Next? The Aftermath of Organised Truth-Telling”, *Race Class*, 2002, vol. 44, n°1, p. 6

³⁴ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 183

³⁵ M. PARLEVLIET, “Considering Truth. Dealing with a Legacy of Gross Human Rights Violations”, *Netherlands Quarterly of Human Rights*, 1998, vol. 16, n°2, p. 172

³⁶ E. STANLEY, *op. cit.*, p. 2

³⁷ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, pp. 182-190

³⁸ C. COLLINS, “Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the ‘Valech Commission’ in Chile”, *J. Lat. Amer. Stud.*, 2016, vol. 49, p. 56

³⁹ C. COLLINS, *op. cit.*, p. 57

The UN Human Rights Council has emphasized the importance of a comprehensive approach to transitional justice. It has stated that restoring “*justice and the rule of law in conflict and post-conflict situations and, where relevant, in the context of transitional processes*”⁴⁰ requires such a comprehensive approach, which must incorporate “*the full range of judicial and non-judicial measures, including, among others, individual prosecutions, reparations, truth-seeking, institutional reform, vetting of public employees and officials, or an appropriately conceived combination thereof*”.⁴¹

Indeed, over the years, it has been deemed preferable for transitional societies to combine various initiatives and mechanisms than to rely on a single transitional tool.⁴² The logic behind favouring such a comprehensive approach can be explained by the risks that come with expecting too much from one mechanism.⁴³

One should keep in mind that “*a holistic approach does not imply simply ‘many’, but that the many are part of a whole, or a single plan*”.⁴⁴ In other words, an ideal transitional programme must tap into a varied repertoire of mechanisms and innovations⁴⁵ but must remain consistent and coherent in its structure and execution.

It should also be noted that transitional justice initiatives will relate differently to each other depending on the context in which they are set up. While a holistic approach to transitional justice has been favoured over the years and while ‘holistic’ does imply combining different initiatives and mechanisms, NESIAH suggests that the situation that needs transitioning from should be appreciated strategically and contextually:⁴⁶ an equal focus on all four pillars is perhaps not needed just like one pillar may not be relevant at all to the situation.

⁴⁰ Human Rights Council, *Resolution 9/10 on Human Rights and Transitional Justice*, A/HRC/9/10, available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_10.pdf (accessed on 15 June 2017), p. 1

⁴¹ Human Rights Council, *Resolution 9/10 ...*, *op. cit.*, p. 2

⁴² M. LAWRY-WHITE, *op. cit.*, pp. 32-33

⁴³ M. LAWRY-WHITE, *op. cit.*, p. 142

⁴⁴ M. LAWRY-WHITE, *op. cit.*, p. 142

⁴⁵ P. DE GREIFF, “Theorizing Transitional Justice”, *Nomos*, 2012, vol. 51, pp. 32-33; M. LAWRY-WHITE, *op. cit.*, p. 141

⁴⁶ V. NESIAH, “Transitional Justice Practice: Looking Back, Moving Forward”, *Research Report for Impunity Watch*, May 2016, p. 27

CHAPTER 2. TRUTH COMMISSIONS AS A MAJOR INSTRUMENT OF TRANSITIONAL JUSTICE

Among the transitional justice mechanisms that have been put in place to facilitate the shift from dictatorship to democracy or from violence to peace, the establishment of a truth commission has been relied upon by many States. Indeed, in the words of GIBSON, “*out of the limited list of mechanisms for dealing with historical injustices and preparing a pathway toward a more secure and democratic future, truth commissions stand out as a very common choice of states haunted by their own histories*”.⁴⁷

Dozens of truth commissions have been created all over the world. While the South African Truth and Reconciliation Commission and the Argentine National Commission on the Disappearance of Persons figure among the most famous ones, truth commissions have also been put in place in Sierra Leone, Chile, El Salvador, Guatemala, Morocco and Timor-Leste just to name a few.

Defined as officially sanctioned, non-judicial and temporary bodies that focus on the past in order to determine the facts, root causes, and societal consequences of human rights violations that took place over a certain period of time,⁴⁸ truth commissions are often established at times of political transition, to accentuate a break with the past.⁴⁹

According to GRAY, their popularity is due to the fact that, in addition to offering a procedure and a structure for examining and detailing past violence, truth commissions also provide a forum, imbued with official status, for victims, perpetrators and witnesses to recount their stories.⁵⁰ The sum of these personal experiences and testimonies then allows truth commissions to paint a picture of what happened and why, thereby fulfilling their truth-telling mission, which requires of them to provide “*an authoritative account of abuses and to acknowledge the experience of victims*”.⁵¹

⁴⁷ J. L. GIBSON, “On legitimacy theory and the effectiveness of truth commissions”, *Law and Contemporary Problems*, 2009, vol. 72, p. 123

⁴⁸ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, pp. 10-12; INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, “Truth Commissions”, available at: <https://www.ictj.org/gallery-items/truth-commissions> (accessed on 15 June 2017)

⁴⁹ M. KAYE, *op. cit.*, p. 698

⁵⁰ D. C. GRAY, “A No-Excuse Approach to Transitional Justice: Reparations As Tools of Extraordinary Justice”, *Washington University Law Review*, 2010, vol. 87, n°5, p. 1052

⁵¹ B. IVANISEVIC, “Comparative study on the impact of truth commissions”, 2009, available at: <http://www.recom.link/wp-content/uploads/2014/12/Comparative-Study-on-the-Impact-of-Truth-Commissions.pdf> (accessed on 35 February 2017), p. 3

While the truth-telling dimension of transitional justice is the one in which truth commissions are most active, HAMBER suggests that a shift has recently occurred when it comes to the tasks usually assigned to such commissions:⁵² in addition to holding public hearings, making the societal and individual healing a priority and moving towards reconciliation, truth commissions have also increasingly been tasked with recommending reparations.⁵³

Thanks to the testimonies they have heard and the knowledge they have gathered through their truth-seeking mission, truth commissions are indeed well-placed to make recommendations on reparations. Over the years, commissions have perfected their recommending skills, making an effort to be “*realistic and policy-relevant, grappling with the economic realities and the true numbers of deserving victims and survivors*”.⁵⁴ However, one should keep in mind that recommendations are, by definition, not enforceable: even with the best will in the world, truth commissions cannot solve all of victims’ urgent demands and believing the contrary can “*create frustration and mistrust, compounding an already difficult situation*”.⁵⁵ Nevertheless, the mere fact that more and more truth commissions recommend reparations is positive, considering the special significance they have for victims as the only victim-centred transitional measure.

CHAPTER 3. THE SPECIAL IMPORTANCE OF REPARATIONS AS THE ONLY VICTIM-FOCUSED TRANSITIONAL MEASURE

The adoption in 2005 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter ‘UN Basic Principles’) established the obligation of States to “*provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or*

⁵² B. HAMBER, “Rights and reasons: challenges for truth recovery in South Africa and Northern Ireland”, *Fordham International Law Journal*, 2002-2003, vol. 26, p. 1074

⁵³ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 252

⁵⁴ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

⁵⁵ E. GONZÁLEZ, E. NAUGHTON and F. REÁTEGUI, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?*, International Centre for Transitional Justice and the Kofi Annan Foundation, 2014, p. ix

serious violations of international humanitarian law”.⁵⁶ While this obligation obviously applies to States fresh out of conflict or repressive regimes, bearing in mind the specificities of transition offers valuable context for understanding the importance of reparations.⁵⁷

Reparations are often perceived by victims as the most tangible manifestation of their State’s efforts to remedy the suffering they have endured.⁵⁸ Indeed, criminal justice is, in the end, frequently seen as a “*struggle against perpetrators rather than an effort on behalf of victims*”.⁵⁹ As for truth-telling, if shedding light on what happened and why is undoubtedly important, establishing the truth just for the sake of it is pretty futile in the absence of social transformation to go with it.⁶⁰ Finally, concerning institutional reforms, their benefits will, fortunately, be enjoyed by all but therefore do not specifically address the harm that those who were personally victimized have suffered.⁶¹ Hence, because reparations measures can directly contribute to restoring the victims’ dignity and helping them rebuild their lives, it makes sense that they occupy a special place among transitional measures.⁶²

The importance of reparations further lies in the fact that they send to victims a message of acknowledgment of the harm they suffered and are a reflection of the intent to do justice.⁶³ Moreover, they offer assurances “*that standards defining the wrong are indeed shared and that responsibility and obligations of repair are accepted*”.⁶⁴

⁵⁶ UN General Assembly, *Resolution 60/147 on 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*, UN Doc. A/RES/60/147, 16 December 2005, §15

⁵⁷ D. C. GRAY, *op. cit.*, p. 1094

⁵⁸ P. DE GREIFF, “Introduction – Repairing the Past: Compensation for Victims of Human Rights Violations” in *The Handbook of Reparations* (ed. by P. DE GREIFF), Oxford University Press, New York, 2006, p. 2

⁵⁹ P. DE GREIFF, “Introduction – Repairing the Past: ...”, *op. cit.*, p. 2

⁶⁰ M. SMYTH, “Remembering in Northern Ireland: victims, perpetrators and hierarchies of pain and responsibility” in *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (ed. by B. HAMBER), Incore, Londonderry, 1998, p. 98

⁶¹ P. DE GREIFF, “Introduction – Repairing the Past: ...”, *op. cit.*, p. 2

⁶² P. DE GREIFF, “Introduction – Repairing the Past: ...”, *op. cit.*, p. 2

⁶³ M. URBAN WALKER, “Truth telling as reparations”, *Metaphilosophy*, 2010, vol. 41, n°4, p. 532

⁶⁴ M. URBAN WALKER, *op. cit.*, p. 532

PART 2 – THE REPARATIVE EFFECT OF TRUTH-TELLING

Victims of gross violations of human rights and serious violations of international humanitarian law, and their families, have been recognized the right to an effective remedy, which comprises the right to know the truth about the abuses they have suffered.⁶⁵ Today, this right to truth is understood as imposing on States the obligation to take the necessary measures “to facilitate efforts by victims or their next of kin to determine the truth about gross violations of human rights”.⁶⁶ Following a period of conflict or repression, the right to truth implies that States should put in place institutions, mechanisms and procedures that will allow for the truth to be revealed.⁶⁷

As mentioned earlier, truth-seeking initiatives are not designed to write the story of every witness or victim that comes before them. Rather, their aim is to provide a ‘communal truth’ or an authoritative description of what happened, in the context of which individuals’ experiential accounts can be framed.⁶⁸ As will be further explained, while this communal truth will almost inevitably benefit the society in which the truth commission has been established, the process through which one recounts his/her own experience, his/her individual and personal truth, can also prove to be beneficial and cathartic.

In the first chapter, we will try to explain what the notion of ‘truth’ entails. Then, Chapter 2 will address how the truth that emerges from a commission’s work can be reparative or, put simply, why shedding light on the past can be recognized as a form of reparation.⁶⁹ Finally, the third and last chapter will be dedicated to explaining why the process of telling the truth can prove to be cathartic for victims or, in other words, how storytelling can contribute to victim healing.

⁶⁵ E. GONZÁLEZ and H. VARNEY, *op. cit.*, p. 3

⁶⁶ D. GROOME, “The Right to Truth in the Fight against Impunity”, *Berkeley Journal of International Law*, 2011, vol. 29, n°1, p. 176

⁶⁷ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/24/42, 28 August 2013, p. 6, §20

⁶⁸ M. LAWRY-WHITE, *op. cit.*, p. 143; E. STANLEY, *op. cit.*, p. 2

⁶⁹ M. LAWRY-WHITE, *op. cit.*, p. 146; Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, pp. 5-6, §§18-20

CHAPTER 1. DEFINING ‘THE TRUTH’

Over the years, many transitional governments have developed an infatuation with the truth by ascribing to its revelation a number of positive consequences and curative powers.⁷⁰ In this quest for disclosure, truth commissions are often relied upon “*to deliver the truth – a single unit of truth – for the purpose of helping a wounded nation to heal*”.⁷¹ But what is this truth? Using expressions such as ‘bringing truth to light’ or ‘ascertaining the facts’ gives rise to the assumption that the truth referred to is one, absolute, objective and that the facts are undoubtable.⁷² In the words of PARLEVLIEET, “*truth seems something which simply needs to be uncovered and made public*”.⁷³

As will be explained in this paper’s Part 3, a truth commission’s powers and investigative reach are limited by its mandate, which therefore defines the truth it will produce. Indeed, a commission’s mandate will offer “*guidance about the acts or violations to be investigated, [...] set the timeline, subject matter, and geographic scope of a commission’s investigation*”.⁷⁴ The truth that will emerge from the commission’s limited investigative reach will further be shaped by the many decisions it will have to take, pertaining to what is to be recorded and what is to be ultimately reported.⁷⁵ In other words, because a truth commission is limited in its investigations and because absolute exhaustiveness is unreachable, the truth it will produce is not and cannot be ‘the’ truth. In the words of HUNT, believing that the truth produced by a commission constitutes the undisputable story of the past is “*both intellectually circumspect and historically dangerous*”.⁷⁶

While it is impossible for a short-term mechanism, such as a truth commission, to provide a fully extensive account of the systematic abuses that were perpetrated in a region during a certain period of time, “*it can [nevertheless] reveal a global truth of the broad patterns of events, and demonstrate without question the atrocities that took place and what forces were*

⁷⁰ E. DALY, *op. cit.*, p. 23

⁷¹ E. DALY, *op. cit.*, p. 24

⁷² M. PARLEVLIEET, *op. cit.*, p. 144

⁷³ M. PARLEVLIEET, *op. cit.*, p. 144

⁷⁴ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 75

⁷⁵ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 75

⁷⁶ T. HUNT, “Whose Truth? Objective Truth and a Challenge for History”, *Criminal Law Forum*, 2004, vol. 15, p. 193

responsible”.⁷⁷ For the purpose of this paper, this ‘global truth’ is what we refer to when talking about ‘the truth’.

It should also be noted that if the commission exercises creativity and carefulness, in addition to outlining the facts of the abuses, a broader understanding of the harm suffered by the people and the country as a whole may also emerge from its work.⁷⁸

CHAPTER 2. REPARATION THROUGH THE PRODUCT OF A TRUTH COMMISSION’S WORK

The UN Basic Principles recognize the “*verification of the facts and full and public disclosure of the truth*”⁷⁹ as a form of satisfaction.

Indeed, with the truth comes the acknowledgment of the harms suffered by the victims, putting an end to the moral insignificance they might have felt following their being targeted.⁸⁰ Adopting the opposite attitude and ignoring the evils inflicted upon them would, by contrast, reduce their suffering “*to a clandestine experience – overlooked and forgotten*”.⁸¹ This blatant indifference towards the victims’ suffering would add insult to injury⁸² and produce devastating effects, best described by GOVIER as “*the wounds of silence*”.⁸³ Recognizing the occurrence and the wrongfulness of the violations is thus a prerequisite for *de*-victimization.⁸⁴

However, shedding light on the abuses that were perpetrated is also crucial to avoid the *re*-victimization of those who suffered said abuses. Indeed, as long as an authoritative account of events does not exist, partial or complete denial, defensive reinterpretations and double discourses that deny facts and/or justify or minimize them can become common occurrences.⁸⁵ Such incidents are likely to have destructive effects on victims and communities, by disregarding and rubbing salt in the original wound.

⁷⁷ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 84

⁷⁸ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 84

⁷⁹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §18

⁸⁰ F. HALDEMANN, “Another Kind of Justice: Transitional Justice as Recognition”, *Cornell International Law Journal*, 2008, vol. 41, n°3, p. 693

⁸¹ F. HALDEMANN, *op. cit.*, p. 693

⁸² F. HALDEMANN, *op. cit.*, p. 693

⁸³ T. GOVIER, “What is Acknowledgment and Why is it Important?” in *Dilemmas of Reconciliation: Cases and Concepts* (ed. by C. A. L. PRAGER & T. GOVIER), Wilfrid Laurier University Press, Waterloo, 2003, p. 65

⁸⁴ M. LAWRY-WHITE, *op. cit.*, p. 151

⁸⁵ M. URBAN WALKER, *op. cit.*, p. 536

CHAPTER 3. REPARATION THROUGH THE PROCESS OF A TRUTH COMMISSION'S WORK

If the truth as a *product* of the truth commission's work can have reparative effects, some authors argue that the *process* of telling the truth can have similar positive consequences. Indeed, many scholars share the opinion that storytelling can facilitate victim healing,⁸⁶ understood here as implying “*effort on the part of the victim rather than something provided to a victim to compensate for a wrongful act*”.⁸⁷ Various studies have observed that putting a distressing experience into words and turning it into a narrative was found to be therapeutic and cathartic by a number of victims.⁸⁸

In this way, a member of the Chilean Truth and Reconciliation Commission stated that even though the commission didn't realize it at first, “*the very process of seeking the truth was [... later perceived as] a patient process of cleansing wounds, one by one*”.⁸⁹ Similarly, Mr SIKWEPERE, who came before the South African commission to recount how being shot in the face left him permanently blind, said the following: “*I felt that what has been making me sick all the time is the fact that I couldn't tell my story. But now it feels like I got my sight back by coming here and telling you the story*”.⁹⁰ Likewise, after interviewing twenty victims who testified before the Peruvian Truth and Reconciliation Commission, LAPLANTE did not find one person who described the experience as negative; on the contrary, the experience was deemed positive by all of the participants and most of them felt relief after recounting their stories in public.⁹¹

⁸⁶ H. GUTHREY, *How does Truth-Telling Heal? An Exploration of Voice and Pathways toward Victim Healing in Solomon Islands and Timor-Leste*, Thesis submitted for the degree of Doctor of Philosophy, University of Otago, New Zealand, August 2013, p. 42

⁸⁷ M. LAWRY-WHITE, *op. cit.*, p. 165

⁸⁸ A. ALLAN and M. M. ALLAN, “The South African truth and reconciliation commission as a therapeutic tool”, *Behavioral Sciences & The Law*, 2000, vol. 18, n°4, p. 465; J. A. VAN DIJK, M. SCHOUTROP and P. SPINHOVEN, “Testimony therapy: Treatment method for traumatized victims of organized violence”, *American Journal of Psychotherapy*, 2003, vol. 57, n°3, p. 369; K. MCKINNEY, “Breaking the conspiracy of silence: Testimony, traumatic memory, and psychotherapy with survivors of political violence”, *Ethos*, 2008, vol. 35, n°3, p. 270

⁸⁹ J. ZALAQUETT, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations”, *Hastings Law Journal*, 1992, vol. 43, n°6 p. 1437

⁹⁰ B. HAMBER, “Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence” in *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (ed. by N. BIGGAR), Georgetown University Press, Washington, 2001, p. 158

⁹¹ L. J. LAPLANTE and K. S. THEIDON, “Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru”, *Human Rights Quarterly*, 2007, vol. 29, n°1, p. 239

However, the assumption that revealing necessarily leads to healing is overly simplistic.⁹² Other studies have indeed drawn attention to the risk of re-traumatization that victims may suffer when asked to share their stories. The time that has elapsed between the traumatic incident and the victim's testimony,⁹³ the public nature of truth commissions,⁹⁴ the lack of confidentiality⁹⁵ and the fact that truth commissions often meet only once with victims⁹⁶ can be factors that contribute to victims' distress or anxiety when remembering and relating their experiences.⁹⁷ HERMAN, a Harvard psychologist, has warned that for some victims, relating their stories to truth commissions "*opens them up and leaves them with nowhere to go*".⁹⁸

In other words, while storytelling *can* prove to be cathartic for *some* victims, the postulation that it will necessarily facilitate healing "*ignores the variety and nuance of human experience and reactions and the frequent need for long-term assistance*".⁹⁹

Thinking beyond the individual level, LAWRY-WHITE argues that opening-up with the aim of healing wounds at the societal level can also be cited as a benefit of establishing a truth commission.¹⁰⁰ Indeed, in the transitional justice discourse, looking back on the past is seen as the way to move forward.¹⁰¹ It is therefore thought that by hearing tales of suffering on the part of victims and contrition-filled speeches on the part of perpetrators, previously antagonistic individuals and groups may find it easier to rise above their differences and leave their grievances behind.¹⁰² The truth commission established in Guatemala recognized that "*despite the shock that a nation might suffer when it looks at the mirror of its past*",¹⁰³ the truth will benefit both the victims and the perpetrators.

⁹² M. LAWRY-WHITE, *op. cit.*, pp. 166-167

⁹³ S. ROSE, J. BISSON, R. CHURCHILL and S. WESSELY, "Psychological debriefing for preventing post-traumatic stress disorder (PTSD)", *Cochrane Database of Systematic Reviews* (online), 2002

⁹⁴ K. BROUNÉUS, "Truth-telling as talking cure? Insecurity and re-traumatization in the Rwandan gacaca courts", *Security Dialogue*, 2008, vol. 39, n°1, p. 55; J. DOAK, "The therapeutic dimension of transitional justice: Emotional repair and victim satisfaction in international trials and truth commissions", *International Criminal Law Review*, 2011, vol. 11, n°2, pp. 263-298

⁹⁵ I. AGGER and S. B. JENSEN, "Testimony as ritual and evidence in psychotherapy for political refugees", *Journal of Traumatic Stress*, 1990, vol. 3, n°1, pp. 115-130

⁹⁶ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 147

⁹⁷ H. GUTHREY, *op. cit.*, pp. 44-45

⁹⁸ J. HERMAN, telephone interview, 2 August 1996 by P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 152

⁹⁹ M. LAWRY-WHITE, *op. cit.*, p. 166-167

¹⁰⁰ M. LAWRY-WHITE, *op. cit.*, p. 167

¹⁰¹ R. G. TEITEL, "Transitional justice genealogy", *Harvard Human Rights Journal*, 2003, vol. 16, p. 86

¹⁰² R. G. TEITEL, *op. cit.*, p. 69-94

¹⁰³ V. E. CUEVAS, M. L. ORTIZ ROJAS and P. ROJAS BAEZA, "Truth Commissions: An Uncertain Path? Comparative study of truth commissions in Argentina, Chile, El Salvador, Guatemala and South Africa from the

This position has been echoed by the chairmen of both the Sierra Leonean and South African truth commissions who insisted on the necessity to reopen wounds in order to heal them.¹⁰⁴ Truth commissions therefore have an important role to play considering that “*societal healing requires awareness, which, in turn, relies upon authoritative information*”.¹⁰⁵

In addition to their contribution to social catharsis,¹⁰⁶ truth commissions also assist transitioning societies by helping them avoid repeating the past. Indeed, in the famous words of SANTAYANA, “*those who cannot remember the past are condemned to repeat it*”.¹⁰⁷ Commissions, by satisfying the citizens’ right to know, provide them with “*a vital safeguard against the recurrence of violations*”.¹⁰⁸

perspective of victims, their relatives, human rights organisations and experts”, *Corporación de Promoción y Defensa de los Derechos del Pueblo and Association for the Prevention of Torture*, 2002, available at: http://www.apr.ch/content/files_res/Truth%20Comm_Executive%20Summary.pdf (accessed on 1 July 2017), p. 21

¹⁰⁴ M. LAWRY-WHITE, *op. cit.*, p. 167

¹⁰⁵ M. LAWRY-WHITE, *op. cit.*, p. 167

¹⁰⁶ V. PUPAVAC, “International Therapeutic Peace and Justice in Bosnia”, *Social & Legal Studies*, 2004, vol. 13, n°3, p. 150

¹⁰⁷ G. SANTAYANA, *The Life of Reason*, vol. 1, C. Scribner’s Sons, 1905, p. 284

¹⁰⁸ M. URBAN WALKER, *op. cit.*, p. 527

PART 3 – COMPARATIVE ANALYSIS OF TRUTH COMMISSIONS’ APPROACH TO REPARATIONS

As mentioned earlier, the principle according to which a State must provide reparations to victims for its acts or omissions which constitute gross violations of human rights or humanitarian law is now universally accepted.¹⁰⁹ While this obligation applies to States irrespective of whether or not a truth commission has been established, such commissions can prove to be of great help, both to the victims and to the State, in the field of reparations.

It is noteworthy that not all truth commissions have been mandated with recommending reparations and that, in a few countries, reparations programmes were devised independently from, or in the absence of, a truth commission. However, more often than not, a truth commission’s report will formulate recommendations to the State in the field of reparations. Over time, the measures recommended by truth commissions have become increasingly detailed and specific and are often the result of months of inquiry, debate and, in the best cases, of broad consultation with victim communities.¹¹⁰

This part of the paper will be dedicated to an overview of how various truth commissions have approached the issue of reparations. The recommendations, and the process that led to their adoption, that have been analysed are mostly those of the commissions set up in Argentina, Chile, El Salvador, Guatemala, Kenya, Morocco, Sierra Leone, South Africa and Timor-Leste. The work of a few other commissions in the field of reparations has also been mentioned.

The first chapter will be about the beneficiaries of reparations: who did the commissions consider as victims entitled to reparations? How did their mandate impact the size of the victims’ class? Were victimized perpetrators included in the commissions’ definition of victims? These questions, along with others, will be answered in the first chapter.

Second, we will address the aims of reparations: what were the goals that commissions hoped reparations would achieve? While redressing the harm suffered by victims obviously figures among those goals, other objectives have been invoked by truth commissions.

¹⁰⁹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §15

¹¹⁰ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

In the third chapter, we will analyse the content of the reparations measures that were recommended by truth commissions. The role that civil society can play during the drafting process of the recommendations will be addressed, as well as the types of reparations that were recommended by commissions. The issue of collective reparations will also be examined, along with the different ways in which truth commissions have assessed the needs of victims.

Finally, the last chapter will be about the thorny issue of implementation and follow-up. Indeed, a truth commission's recommendations will do no good if they are not implemented by the State. The ways in which truth commissions can increase the support for their recommendations will be addressed, as well as the different mechanisms that have been set up to follow-up on these recommendations.

CHAPTER 1. BENEFICIARIES OF REPARATIONS

When dealing with reparations, the identification of the victims is a crucial step, as they are the ones who will be entitled to whatever form of reparation is to be provided.¹¹¹ This chapter will be dedicated to an overview of who these victims are.

In the first section, we will see how the notion of 'victimhood' is commonly understood and what it means for truth commissions. The second section will be about the influence that a commission's mandate can have on the final list of victims. Third, we will address the evidentiary requirements that usually apply to assess the veracity of a victim's claim. In the fourth section, the importance of outreach will be underlined. Then, we will deal with the problems that the victim – perpetrator dichotomy may raise when identifying victims. Finally, in the last section, we will give our opinion on what was learned in this chapter and reflect on ways to improve how truth commissions usually identify the beneficiaries of their reparations.

Section 1. Truth commissions and victimhood

¹¹¹ J. GARCÍA-GODOS, *op. cit.*, p. 122

ELSTER articulates the issue of victims by asking what are the forms of suffering that constitute victimhood.¹¹² We can already affirm that the mere fact of having experienced a violation will not be enough to be recognized as a victim by a truth commission. Indeed, the commission's mandate, whether it is broad or narrow, will delineate who can and who cannot be considered a victim. The following subsection will be dedicated to the influence a commission's mandate can have on the victims' class.

The UN Basic Principles mentioned earlier also provide much needed guidance on the determination of victims. They have, for instance, underlined that victims “*are persons who individually or collectively suffered harm*”.¹¹³ As will be explained in Chapter 3, many truth commissions have recognized collectives and communities as victims.

Moreover, it should be noted that the UN Basic Principles consider that the term ‘victim’ “*also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*”.¹¹⁴

This position has been endorsed by all truth commissions and many of them have recommended that reparations be provided to these ‘indirect’ victims as well. The Equity and Reconciliation Commission in Morocco included, in its recommendations on reparations, the families of those that had been disappeared or arbitrarily detained for instance.¹¹⁵ Similarly, the National Reconciliation Commission of Ghana suggested that for every victim that had been killed, disappeared, rendered disabled or suffered any other human rights violation, one of their children was to receive a scholarship.¹¹⁶

Section 2. Influence of the commission's mandate on the victims' class

In order for a truth commission's work to be achievable and for its resources not to be spread too thin, the commission's investigative mandate will be limited materially, personally,

¹¹² J. ELSTER, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge, 2004, p. 127

¹¹³ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §8 (emphasis added)

¹¹⁴ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §8

¹¹⁵ AMNESTY INTERNATIONAL, “Truth, Justice and Reparation. Establishing an Effective Truth Commission”, June 2007, available at: <https://www.amnesty.org/en/documents/POL30/009/2007/en/> (accessed on 24 June 2017)

¹¹⁶ P. LIMÓN and J. VON NORMANN, “Prioritising Victims to Provide Reparations: Relevant Experiences”, *Essex Transitional Justice Network*, 2011, Briefing Paper n°3, available at: https://www.essex.ac.uk/tjn/documents/Paper_3_Prioritisation_Large.pdf, p. 9

temporally but also territorially. In other words, only certain types of violations committed by specific persons during a given time period and in a delimited region will be investigated.¹¹⁷

While circumscribing the commission's focus is a necessity, it unfortunately means that said commission will only consider a fraction of those who have suffered during the events that prompted its establishment to be victims. As for all the others, while they may perhaps rely on other tools to obtain justice and/or reparations, they will be excluded from the list of registered victims the commission will produce and, in turn, possibly from the subsequent reparations programme put in place by the State.

This is why consulting with victim groups and organizations prior to drafting the commission's mandate is important: by reaching out to victims and listening to what they have to say, the drafters of the commission's terms of reference will better understand what types of violations it should focus on. This, in turn, will allow the commission to paint a better picture of the country's past and tell a more comprehensive story, but it will also make it possible for the commission to understand victimhood in the most appropriate way, considering the context in which it was established.

As will be illustrated in this section, the influence a truth commission's mandate can have over the size of a victims' class and, thus, on the beneficiaries of a possible subsequent reparations programme, is particularly apparent where the commission has a limited mandate. In other words, the narrower the mandate, the fewer the victims.

As stated above, a truth commission's mandate is limited in four respects: materially, temporally, personally and territorially. Before we proceed to an examination of these four scopes and how they can limit the victims' class, we will underline the importance of consulting with victims prior to drafting the commission's mandate.

Subsection 1. Importance of victim consultation when defining the commission's mandate

Victim consultation is particularly important when defining the commission's mandate or, in the words of CORREA, GUILLEROT and MAGARRELL, "*when the scope of truth-seeking*

¹¹⁷ E. GONZÁLEZ, "Drafting a Truth Commission Mandate: A Practical Tool", June 2013, available at: https://www.ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf, p. 9

and crimes that would give rise to reparations are defined".¹¹⁸ Indeed, consultation and dialogue with women's rights activists, groups representative of marginalized victims or various victim organizations, can prove to have a crucial impact on how the commission's mandate will be framed and on the development of the commission's operational philosophy and practice.¹¹⁹

In South Africa for instance, women organizations did not prioritize working with the Truth and Reconciliation Commission in its setting-up stage.¹²⁰ As a result, they lacked the necessary influence to impact the legislation that established the commission, which ended up being gender-neutral.¹²¹ This translated into a lack of recognition of the gender-specific ways in which people experienced suffering under the apartheid regime and, consequently, of the victims' different needs depending on their sex.¹²²

Ghana offers a more positive example of the importance of mobilizing civil society when establishing a truth commission. Indeed, once the creation of the truth commission was announced, "*more than 20 organizations joined together to form the Civil Society Coalition, taking a leadership role in ensuring that the [National Reconciliation Commission] was as effective as possible*".¹²³ During the elaboration of the commission's framework, the Coalition was consulted at length which made the drafting process open, consultative and participatory.¹²⁴ Consequently, through its mandate, the commission demonstrated its willingness to investigate a broad array of crimes, including wrongful dismissals and mock executions, and to cover a wide range of victim experiences.¹²⁵

¹¹⁸ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 397

¹¹⁹ V. NESIAH and all, "Truth Commissions and Gender: Principles, Policies and Procedures", 2006, available at: https://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf (accessed on 27 June 2017), p. 13

¹²⁰ L. MAGARRELL, "Outreach to and engagement of victims on reparations – Lessons learned from truth and reconciliation processes", *Conference: Reparations for victims of genocide, crimes against humanity and war crimes: systems in place and systems in the making*, The Hague, 1 March 2007, available at: <http://www.redress.org/downloads/events/OutreachEngagementLM.pdf>

¹²¹ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 398

¹²² C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 398

¹²³ N. VALJI, "Ghana's National Reconciliation Commission: A Comparative Assessment", International Center for Transitional Justice, 2006, available at: https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English_0.pdf (accessed on 27 June 2017), p. 42

¹²⁴ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 399

¹²⁵ N. VALJI, *op. cit.*, p. 17

Similarly, in Timor-Leste, the consultation process that took place prior to the creation of the Commission for Reception, Truth and Reconciliation, allowed for the issue of widespread enforced famine, a matter which had not previously been up for discussion, to be included in the commission's investigative mandate.¹²⁶

Subsection 2. Material scope of inquiry

A truth commission will only have the authority to examine certain acts and crimes.¹²⁷ Its mandate will indeed typically restrict its investigative reach to a number of serious human rights violations. Most recently, many commissions have been mandated to scrutinize violations that targeted children, women and other vulnerable groups in order to prevent them from being overlooked.¹²⁸

The material scope of the commission's mandate can be broad or narrow, depending on the number of crimes identified for scrutiny. While some mandates provide for a degree of flexibility and give commissions some leeway by allowing them to examine other acts that are of similar gravity than those explicitly mentioned, it is more frequent for mandates to include a closed list of violations that must be considered.¹²⁹

The Chilean experience offers a perfect illustration of how the breadth – or lack thereof – of a truth commission's mandate can impact the size of a victims' class. In the new democracy that followed Pinochet's 17 years-long military dictatorship, the National Commission on Truth and Reconciliation, more commonly known as the Rettig Commission, was established in 1990. While the fact that such a commission was set up only a month after the dictatorship came to an end is worthy of praise, it should be noted that the political realities of the 'pacted' transition inferred important restrictions on the commission's mandate.¹³⁰ Indeed, it was limited to the investigation of human rights abuses that resulted in death or disappearance, therefore

¹²⁶ OHCHR, "Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice", 2009, available at: http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf, p. 6

¹²⁷ M. LAWRY-WHITE, *op. cit.*, p. 160

¹²⁸ E. GONZÁLEZ, *op. cit.*, p. 9

¹²⁹ E. GONZÁLEZ, *op. cit.*, p. 9

¹³⁰ M. ENSALACO, "Truth Commissions for Chile and El Salvador: A Report and Assessment", *Human Rights Quarterly*, 1994, vol. 16, n°4, p. 657

excluding allegations of arbitrary detention, rape, torture and other abuses that did not end in death.¹³¹

Following the Chilean society's clamour for investigations into the abuses that did not have death as an outcome, 2003 saw the creation of the National Commission on Political Imprisonment and Torture, also known as the Valech Commission,¹³² tasked with documenting civil rights abuses and cases of politically motivated torture.¹³³

Whereas the Rettig Commission, characterized by its narrow mandate, identified 'only' 3500 victims, the Valech Commission, thanks to its much broader mandate, recognized the status of victim to more than 28 000 persons.¹³⁴ In other words, by expanding the second commission's mandate to encompass types of violations that had been particularly plentiful during Pinochet's rule, the number of victims increased eightfold. This incredible enlargement of the victims' class, in addition to its consequences on the story that was ultimately told, drastically altered the scope of the subsequent reparations programme put in place by the Chilean government.¹³⁵

In the same vein, the example of the Commission for Peace in Uruguay can be mentioned. This truth commission was established in 2000 and mandated to investigate the fate of the disappeared in Uruguay from 1973 to 1985.¹³⁶ By ignoring cases of torture and illegal detention, which were heavily relied upon by State officials, the commission only identified 38 victims of the 12 years-long military dictatorship.

On the other side of the spectrum, the Peruvian truth commission gives us an example of what a broad and flexible mandate may look like. The Truth and Reconciliation Commission was tasked with the investigation of murders and kidnappings, enforced disappearances, torture

¹³¹ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Chile 90", available at: <https://www.usip.org/publications/1990/05/truth-commission-chile-90> (accessed on 23 June 2017); T. C. WRIGHT, *State Terrorism in Latin America: Chile, Argentina, and International Human Rights*, Rowman & Littlefield Publishers, New York, 2007, p. 189

¹³² M. LAWRY-WHITE, *op. cit.*, p. 160

¹³³ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Chile 03", available at: <https://www.usip.org/publications/2003/09/commission-inquiry-chile-03> (accessed on 23 June 2017)

¹³⁴ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Chile 90", *op. cit.*, (accessed on 23 June 2017); UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Chile 03", *op. cit.*, (accessed on 23 June 2017)

¹³⁵ M. LAWRY-WHITE, *op. cit.*, p. 160

¹³⁶ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Uruguay", available at: <https://www.usip.org/publications/2000/08/truth-commission-uruguay> (accessed on 24 June 2017)

and other serious injuries, violations of the Andean and native communities' collective rights, as well as "*other crimes and serious violations of the rights of individuals*".¹³⁷ The commission's broadly-formulated mandate therefore allowed it "*to include studies on violence against children, forced displacement, forced recruitment, the imposition of servitudes, and other violations*".¹³⁸

Similarly, the Salvadorian commission's mandate was formulated in relatively open terms: it only required that the Commission on the Truth for El Salvador investigate "*grave cases of violence that occurred from 1980 whose impact on society demands with the utmost urgency a public acknowledgement of the truth*".¹³⁹

Subsection 3. Temporal scope of inquiry

In order to get a better picture of what happened during a country's darkest time and to be able to recommend adequate and satisfactory reparations, a truth commission's mandate should have a broad temporal scope in addition to an extensive material scope. Indeed, a mandate that is too temporally limited could hamper the effectiveness of a commission's work¹⁴⁰ and unjustly reduce the number of those who might be recognized as victims.

In this way, the UN Human Rights Committee deplored that the mandate of the three Sri Lankan Presidential Commissions of Inquiry into Involuntary Removals and Disappearances did not allow them to investigate such human rights violations that took place between 1984 and 1988, in the midst of the civil war.¹⁴¹ This limitation undoubtedly squashed a number of persons' opportunity to be identified as victims and thus be entitled to reparations.

As for Paraguay and Ecuador, both countries established truth commissions whose mandates extended beyond the periods of dictatorship. The Truth and Justice Commission of

¹³⁷ Mandate of the Truth and Reconciliation Commission of Peru, created by Supreme Decree 065-2001-PCM in Lima, 2 June 2001, art. 3

¹³⁸ E. GONZÁLEZ, *op. cit.*, p. 9

¹³⁹ A. SEGOVIA, "The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Non-Compliance" in *The Handbook of Reparations* (ed. by P. DE GREIFF), Oxford University Press, New York, 2006, p. 156; M. DU PLESSIS, "Truth and Reconciliation Processes: Lessons for Zimbabwe?", *South African Institute of International Affairs*, 2002, Report n°44, p. 22

¹⁴⁰ AMNESTY INTERNATIONAL, *op. cit.*, p. 15

¹⁴¹ UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Sri Lanka*, CCPR/C/79/Add.56, 27 July 1995, §16; AMNESTY INTERNATIONAL, *op. cit.*, p. 15

Paraguay was allowed to investigate the violations committed under the Stroessner dictatorship (1954-1989) but also the violations that took place later on, between 1990 and 2003.¹⁴² Similarly, in Ecuador, the Truth Commission to Impede Impunity was tasked with the investigation of the violations perpetrated under Cordero's dictatorship (1984-1988) as well as those committed at 'other periods'.¹⁴³

Should these 'other periods' not have been taken into consideration by these two truth commissions, there is no doubt the number of reported victims would have been considerably lower than the 456 victims identified in Ecuador and 128 000 victims reported in Paraguay.¹⁴⁴

According to VALENCIA VILLA, the extension of the truth commissions' temporal mandate to periods beyond Stroessner and Cordero can be explained by the necessity to look into new forms of violence that occurred years later, as a result of the lingering effects of those repressive governments, and the need to identify the institutional changes and policies that were permitting such new human rights violations.¹⁴⁵

As for the truth commission set up in Kenya, it differed from most truth commissions in that its temporal scope covered a 45-year period of relative peace instead of focusing on human rights violations that occurred during a particular event.¹⁴⁶ However, it faced criticism for not including, in its temporal scope, the colonial period, thereby excluding about 3500 persons from the truth-telling process.¹⁴⁷ The Kenya National Liberation War Veterans Association protested this, claiming that "*being left out of this process leads to suffocation of Kenyan history and what haunt[s] us as a nation up to date*".¹⁴⁸

¹⁴² Ley n°2225, adopted by the Paraguayan Congress on 15 October 2003, available at: <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Paraguay-Charter.pdf> (accessed on 29 June 2017), Art. 1

¹⁴³ Presidential Decree n°305, adopted by President R. CORREA DELGADO on 3 May 2007, available at: <https://www.usip.org/sites/default/files/ROL/Mandato%20de%20Ecuador.pdf> (accessed on 29 June 2017), Art. 1

¹⁴⁴ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Ecuador 07", available at: <https://www.usip.org/publications/2007/05/truth-commission-ecuador-07> (accessed on 11 July 2017); UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Paraguay", available at: <https://www.usip.org/publications/2004/06/truth-commission-paraguay> (accessed on 11 July 2017)

¹⁴⁵ A. VALENCIA VILLA, "Shared Memories: The Truth Commissions of Paraguay and Ecuador" in *Contribution of Truth, Justice and Reparation Policies to Latin American Democracies* (ed. by the Inter-American Institute of Human Rights), 2011, p. 208

¹⁴⁶ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, 2013, Volume IV, available at: http://knchr.org/Portals/0/Reports/TJRC_Volume_4.pdf, p. 62, §78

¹⁴⁷ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, p. 60, §71

¹⁴⁸ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, p. 60, §71

Subsection 4. Personal scope of inquiry

Commissions' investigative reach, in addition to being limited materially and temporally, can also be limited personally: truth commissions will sometimes only be allowed to investigate the violations that have been committed by certain specific persons. While some commissions have focused their investigations on abuses perpetrated by public servants or on those committed by other groups, such as armed oppositions, guerrilla groups, international actors...,¹⁴⁹ other truth commissions' mandates have remained silent on the matter, giving them free range to decide what violations to focus on. Of course, the broader the mandate's personal scope, the more victims the commission will report.

In Timor-Leste for instance, the Commission for Reception, Truth and Reconciliation decided to look into violations committed by every possible actor,¹⁵⁰ whereas the Chilean Rettig Commission mostly focused its efforts on the atrocities committed by State agents. Its mandate indeed provided, *inter alia*, that it should investigate cases of disappearance, execution and torture leading to death “*in which the moral responsibility of the state is compromised as a result of actions by its agents or persons in its service*”.¹⁵¹

Subsection 5. Territorial scope of inquiry

The International Center on Transitional Justice recommends that the truth commission's mandate clearly states whether or not it will be allowed to investigate violations committed outside the State in which it was established.¹⁵²

While most mandates are silent on this issue, the mandate of the truth commission created in Chile allowed it to look into the most serious human rights violation committed on the Chilean territory but also those committed elsewhere “*if they were related to the Chilean*

¹⁴⁹ E. GONZÁLEZ, *op. cit.*, p. 10

¹⁵⁰ *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste*, 2005, available at: <https://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>, p. 19: it was indeed tasked with investigating violations perpetrated by “*the state, political groups, militia groups, liberation movements or other groups or individuals*”.

¹⁵¹ *Report of the Chilean National Commission on Truth and Reconciliation or Rettig Report*, 1991, available at: https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf, p. 25

¹⁵² E. GONZÁLEZ, *op. cit.*, p. 11

government or to national political life”.¹⁵³ This allowed the commission to include in its list of victims, in addition to the 2256 persons killed or disappeared within the Chilean territory, 23 victims killed or disappeared in other countries.¹⁵⁴

Section 3. Evidentiary requirements

The issue of the evidentiary requirements relied upon by truth commissions is an important one, given that these requirements can greatly impact the list of registered victims. Indeed, setting the standard of proof too high for instance will exclude many potential deserving beneficiaries who just happen to lack the means or necessary documents to corroborate their claims.¹⁵⁵

Considering the suffering that victims of transitioning States have experienced, the clandestinity of many practices relied upon by repressive regimes, the difficulty involved in proving violations that took place a long time ago, the absence or destruction of institutions and archives that could corroborate victims’ claims..., truth commissions should be liberal in their admission of evidence when assessing the veracity of a victim’s claim.

For example, some countries’ abusive security forces kept detailed records of the violations committed.¹⁵⁶ While it is safe to assume that the majority of them were destroyed, in instances where they were kept and found, they proved to be crucial in supporting victims’ claims. NGOs’ files and reports could also be of use. In Chile, *Vicaría de la Solidaridad*, an organism of the Catholic Church, began to compile information on the victims’ cases very early on during the dictatorship.¹⁵⁷ These files were subsequently heavily relied upon by the truth commission.

In any event, decisions taken on the legitimacy of victims’ claims must be sensitive to the type of violation alleged.¹⁵⁸ While some are easier to prove, others are frankly impossible to substantiate: “*it is one thing to prove illegal detention (which can already be difficult), quite*

¹⁵³ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 25

¹⁵⁴ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, pp. 1124-1125

¹⁵⁵ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, 2008, available at: <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>, p. 17

¹⁵⁶ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 17

¹⁵⁷ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 17

¹⁵⁸ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 17

*another to prove forms of torture or sexual abuse that leave no observable mark, especially in the long run”.*¹⁵⁹

In this way, the commission established in Côte d’Ivoire provides an example that it would be best not to follow. Indeed, the eligibility to reparations was made, in certain situations, contingent upon having undergone a medical examination, aimed at assessing the physical harm suffered.¹⁶⁰ This condition seems to ignore the fact that many Ivoirians either did not have access to medical care or did not foresee that proof of physical sequelae would be required by a truth commission, which, at the time the violation took place, was still an abstract concept.

Other commissions have proved more indulgent towards the claimant. As an illustration, the Kenyan truth commission relies on the ‘preponderance of evidence’ standard¹⁶¹ which is satisfied by “*evidence that indicates to the trier of fact that the event that must be established is more likely to have occurred than not*”.¹⁶²

Section 4. Importance of outreach

DE GREIFF refers to the notion of a reparations programme’s completeness as its “*ability to cover, at the limit, the whole universe of potential beneficiaries*”.¹⁶³ He identifies several factors that might undermine this completeness, two of which have been mentioned already: the narrow mandate of the entity charged with drafting the reparations programme and the evidentiary standard which, if set too high, will exclude many persons from receiving reparations.¹⁶⁴ The third factor identified by DE GREIFF has to do with structural issues, among which figures the need to reach out to victims and affected communities to publicize the existence of the programme.¹⁶⁵

Transposed to a truth commission context, this last factor sheds light on the importance of advertising the existence and the work of the truth commission. However, outreach,

¹⁵⁹ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 17

¹⁶⁰ République de Côte d’Ivoire, *Commission Dialogue, Réconciliation et Vérité: Rapport Final*, 2014, available at: http://www.lintelligentdabidjan.info/doc/CDVR_Rapport_final.pdf, p. 108 (free translation)

¹⁶¹ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, pp. 107, 110 and 121, §§23, 32 and 52

¹⁶² D. KAYE, “Naked Statistical Evidence”, *Yale Law Journal*, 1980, vol. 89, pp. 601-603

¹⁶³ P. DE GREIFF, “Introduction – Repairing the Past:...”, *op. cit.*, p. 6

¹⁶⁴ P. DE GREIFF, “Introduction – Repairing the Past:...”, *op. cit.*, p. 6

¹⁶⁵ P. DE GREIFF, “Introduction – Repairing the Past:...”, *op. cit.*, p. 6

understood in a victim-centred way, also means making the commission accessible to all victims.

The International Center for Transitional Justice, in its recommendations to Nepal's Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons, therefore advised them to “*make efforts to reach victims residing in remote areas, those who may not know about the commissions' mandate, and those that may be more vulnerable to undue pressure from perpetrators or their associates not to participate, in order to provide them with a safe opportunity to file a claim if they so wish*”.¹⁶⁶

Similarly, accessibility figured among the guiding principles for a reparations programme in Timor-Leste. The commission's report highlighted that the programme should be made accessible to “*victims who are disadvantaged not only as a consequence of their experience but also by their isolation, lack of information and means of transport, particularly those in remote rural areas*”.¹⁶⁷

In Argentina, the Commission on the Disappearance of Persons took into account the fact that many Argentines had fled the country during the dictatorship. To give them the opportunity of sharing their story as well, the commission asked its diplomatic representatives abroad to receive depositions.¹⁶⁸

Section 5. Problem with the victim-perpetrator dichotomy

In the transitional justice discourse, and more generally in the human rights discourse, it is frequent to depict human rights violations in terms of victim and perpetrator, clearly distinguishing between those who have been harmed and those who have inflicted harm upon others.¹⁶⁹ Following a country's violent or repressive past, the need of its people to construct a narrative and make sense of what happened can lead many of them to adopt a dichotomized

¹⁶⁶ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE and M. CHAUTARI, “We Cannot Forget? Truth and Memory in Post-Conflict Nepal”, 2017, available at: <https://www.ictj.org/sites/default/files/We%20Cannot%20Forget%20Book.pdf>, p. 2

¹⁶⁷ *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste*, op. cit., p. 204

¹⁶⁸ *Nunca Más (Never Again): Report of the National Commission on the Disappearance of Persons*, 1984, available at: http://www.desaparecidos.org/nuncamas/web/english/library/neveragain/neveragain_001.htm, Part IV

¹⁶⁹ J. GARCÍA-GODOS, op. cit., p. 123

understanding of people's roles in their country's history.¹⁷⁰ However, this distinction between victim and perpetrator ought to be problematized, as the victim of one violation may have been the author of another. In other words, if the identification of victims is undoubtedly the cornerstone of any reparations scheme,¹⁷¹ defining who qualifies as a victim and who does not is not as easy as it might seem: individual identities in armed conflicts or repressive States are usually more multifaceted than the binary identities of victim and perpetrator.¹⁷²

To illustrate the difficulties that the need for a clear-cut distinction between victim and perpetrator may bring, the situation in Northern Ireland can be mentioned. Since the end, in 1998, of the 'Troubles', a 30-years conflict due to opposite views of the area's status, discussions about reparations have been ongoing. However, they have not been fruitful yet, as the definitions of victims and perpetrators have been politically contested,¹⁷³ with many in favour of a differential treatment of victims, distinguishing between deserving and underserving victims.¹⁷⁴ The latter, according to ROLSTON, "*are presumed to be less than innocent, or worse, downright culpable, implicated in their own suffering*",¹⁷⁵ and thus, entitled to less – or no – reparations.¹⁷⁶ The population's different understandings of victimhood have, to this day, prevented an agreement from being reached on the issue of reparations.¹⁷⁷

Various truth commissions have been confronted with the problem that this dichotomy represents. In Peru, the Truth and Reconciliation Commission was tasked with investigating the atrocities committed during the country's two decades of internal armed conflict between the Peruvian armed forces and various guerrilla groups.¹⁷⁸ The crucial question of who was to be considered a victim deserving of reparations arose early on, with many wondering whether members of the brutal armed opposition could be considered as such. Arguing that victimhood

¹⁷⁰ M. HOURMAT, "Victim-Perpetrator Dichotomy in Transitional Justice: The Case of Post-Genocide Rwanda", *Narrative and Conflict: Explorations in Theory and Practice*, 2016, vol. 4, n°1, p. 44

¹⁷¹ J. GARCÍA-GODOS, *op. cit.*, p. 123

¹⁷² L. MOFFET, "Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms", *Queen's University Belfast Law Research Paper*, 2014, vol. 3, p. 1

¹⁷³ C. KNOX, "The 'Deserving' Victims of Political Violence: 'Punishment' Attacks in Northern Ireland", *Criminal Justice*, 2001, vol. 1, n°2, pp. 181-199

¹⁷⁴ B. ROLSTON, *Unfinished Business: State Killings and the Quest for Truth*, Beyond the Pale Publications, Belfast, 2000, p. XI

¹⁷⁵ B. ROLSTON, *op. cit.*, p. XI

¹⁷⁶ See L. MOFFET, *op. cit.*, p. 14

¹⁷⁷ L. MOFFET, *op. cit.*, p. 14; A. KELLY, "Establishing a Formal Reparations Programme for Victims of the Troubles in Northern Ireland", *QUB Student Law Journal*, 2017, n°3, available at: <https://blogs.qub.ac.uk/studentlawjournal/the-challenges-of-reparations-for-mass-atrocities-in-relation-to-relevant-case-studies/> (accessed on 11 July 2017)

¹⁷⁸ L. J. LAPLANTE and K. S. THEIDON, *op. cit.*, p. 232

is not contingent on one's affiliation with an armed insurgent group,¹⁷⁹ the commission recommended that “*victims of serious abuses by state forces were due reparations regardless of their association with an armed group*”.¹⁸⁰ However, the 2005 reparations law adopted by the Peruvian Congress rejected this recommendation: while members of subversive groups and their families could be identified as victims, they were not to be recognized as beneficiaries of reparations.¹⁸¹

Similarly, many Nepali victims affiliated with the Maoist Party, which opposed the Nepalese State, do not consider they satisfy the requirements to be recognized as victims and have therefore refrained from submitting complaints to the Truth and Reconciliation Commission or to the Commission on Investigation of Enforced Disappeared of Person.¹⁸² Indeed, many Nepali tend to see violations committed against them “*as being part of the price of fighting for the Maoist ideals*”.¹⁸³

With respect to Sierra Leone, its Truth and Reconciliation Commission considered that a reparations scheme should not be based on a person's past actions but rather on whether or not this person suffered a violation.¹⁸⁴ Consequently, the commission did not distinguish “*between civilians and ex-combatants for the purpose of their eligibility as beneficiaries of the reparations programme*”.¹⁸⁵

Section 6. Reflections

The issue of reparations has always been an important, albeit sensitive, one. Undertaking to redress gross human rights violations is understandably daunting: when the violation implies physical or mental harm to the person, no measure and no amount of money can turn back time and erase the scars. For a truth commission, the struggle that comes with recommending

¹⁷⁹ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE and M. CHAUTARI, *op. cit.*, p. 23

¹⁸⁰ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 174

¹⁸¹ M. MARTÍNEZ, “Peru's Painful Mirror”, available at: <https://www.ictj.org/sites/default/files/subsites/perus-painful-mirror/> (accessed on 25 June 2017); R. K. ROOT, *Transitional Justice in Peru*, Palgrave Macmillan, Basingstoke, 2012, p. 131

¹⁸² INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE and M. CHAUTARI, *op. cit.*, p. 23

¹⁸³ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE and M. CHAUTARI, *op. cit.*, p. 23

¹⁸⁴ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, 2004, Volume 2, available at: <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf>, p. 245, §69

¹⁸⁵ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 245, §69

appropriate reparations is compounded by the difficulty that characterizes the preliminary task of identifying the persons who should be recognized as victims entitled to such reparations.

While the State in which the truth commission has been established retains the final say regarding who is to be considered a beneficiary to reparations, there is no denying the moral weight that truth commissions' recommendations have. It is therefore quite likely for the State to rely on the foundation of information a truth commission might provide it with, such as lists of victims.¹⁸⁶ This is why we believe that the more victims a truth commission can identify, the better.

The importance of ensuring that as many victims as possible feel acknowledged and validated in a society that allowed their victimization in the first place cannot be emphasized enough. On an individual level, acknowledging the harm that victims have suffered and recommending that reparations be granted would prove immensely beneficial for them, as reparations “*are a powerful tool for helping victims to recover from conflict*”.¹⁸⁷ Moreover, on the societal level, the recognition of a wide number of victims could lead to a more reconciliation-prone setting and safeguard against the risk of sowing division among the population, should only a small fraction of the total number of victims be recognized as such.

Commissions have already taken a step in the right direction by including ‘indirect’ victims in their understanding of victimhood, therefore taking into account those whose suffering is a consequence of the suffering inflicted on others. This is fortunate given that many crimes are characterized by such cruelty and disdain for human dignity that their ramifications extend well beyond the victims themselves, to their loved-ones and the society they live in.

However, if identifying as many victims as possible is desirable, we understand that commissions operate under time constraints and have limited resources. It would therefore be unreasonable to assume they can include every single victim in their lists and in their recommendations for reparations. Consulting with victims when drafting the commission’s mandate is therefore crucial. Because the mandate will circumscribe “*the catalogue of rights*

¹⁸⁶ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

¹⁸⁷ UNITED STATES INSTITUTE OF PEACE, “Transitional Justice: Information Handbook”, September 2008, available at: https://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf (accessed on 11 July 2017)

whose violation should lead to reparations”¹⁸⁸, obtaining victims’ opinions on what violations they would like to see the commission investigate will allow it to allocate its limited resources accordingly.

In the absence of a consultation, we suggest the commission’s mandate should be framed in general and broad terms and provide the commission with some flexibility. Indeed, in the words of HAYNER, with whom we concur, using general language will allow the commission to “*shape its investigations and report around the facts and patterns revealed*”,¹⁸⁹ thereby permitting it to include, within its investigative reach, violations whose importance wasn’t foreshadowed. Assuming that the violations deemed most important are the ones that took the biggest toll on the country’s population, the number of victims identified by the commission should be significant.

The fact that a truth commission’s mandate has taken the victims’ needs and desires into consideration and/or the fact that its mandate is broad and flexible will not do victims any good if the evidentiary requirements set out by a truth commission are impossible to meet. Indeed, if the commission’s requirements are too high, a number of deserving victims run the risk of seeing their claims dismissed.

We therefore submit that commissions should be liberal in their admission of evidence: when direct evidence is not available, presumptions or circumstantial evidence should be taken into account. Furthermore, commissions should consider the testimony or declaration of alleged victims, witnesses or, similarly to what was done in Peru, community leaders.¹⁹⁰

In other words, the difficulties that come with attempting to prove a violation that took place a long time ago or that left no sequelae or no witness behind should be borne in mind by truth commissions. Commissioners should therefore exercise common sense and show a contextually-grounded sensitivity when assessing the credibility of a claim to victimhood.

¹⁸⁸ P. DE GREIFF, “Introduction – Repairing the Past:...” , *op. cit.*, p. 6

¹⁸⁹ P. B. HAYNER, “International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal”, *Law and Contemporary Problems*, 1996, vol. 59, n°4, p. 179

¹⁹⁰ C. CORREA, “Reparations in Peru: From Recommendations to Implementation”, 2013, available at: https://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf (accessed on 2 July 2017), p. 9

With regard to outreach, there is no denying that a strong commitment towards having as wide a pool of beneficiaries as possible is important. An effective outreach initiative should therefore take into account every factor that could lead to a victim being unjustly excluded from the commission's work, be it their remoteness, ignorance, vulnerability or their fear of stigmatization.

Finally, regarding the victim-perpetrator dichotomy, truth commissions may have to deal with groups that have not yet had the time or inclination to entirely put their differences and antagonistic feelings aside. This may result in some expressing their opposition or reluctance at seeing 'victimized perpetrators' be recognized as victims as well. However, considering that truth commissions are rooted in human rights law and that the UN Basic Principles stipulate that they should be applied "*without any discrimination of any kind or on any ground, without exception*",¹⁹¹ we share the opinion of SHELTON who argues that "*the character of the victim should not be considered because it is irrelevant to the wrong and to the remedy*".¹⁹²

Truth commissions should therefore follow the example set by the Peruvian and Sierra Leonean truth commissions when they claim that reparations should be granted to those who have suffered a violation, irrespective of their past actions or association to groups considered subversive. We also feel that if States are serious when they call for reconciliation and for leaving the past where it belongs, they should adopt this view as well and not make the eligibility to reparations contingent on one's past affiliation.¹⁹³

CHAPTER 2. AIMS OF REPARATIONS

As stated above, as the only transitional measure that directly benefits victims, reparations are particularly important, in that they show victims that "*their plight is taken seriously and that they are more than pawns on a chessboard on which others play strategic games*".¹⁹⁴ While redressing the harm that has been caused to victims is undoubtedly one of the aims of reparations, reparative measures can also contribute to bigger goals.

¹⁹¹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §25

¹⁹² D. SHELTON, *Remedies in International Human Rights Law*, Oxford University Press, 2006, p. 72

¹⁹³ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE and M. CHAUTARI, *op. cit.*, p. 23

¹⁹⁴ C. TOMUSCHAT, "Darfur—Compensation for Victims", *Journal of International Criminal Justice*; 2005, vol. 3, n°3, p. 581

DE GREIFF has argued that reparations “*are best thought as part of a political project*”¹⁹⁵ considering how they usually seek, like most transitional justice measures, to take part in the reconstitution or constitution of a new political order.¹⁹⁶ As for GRAY, he claims that one of the primary goals of reparations measures is to achieve “*new social and material conditions*”¹⁹⁷ for former victims and new relationships between members of former abuser and victim groups¹⁹⁸.¹⁹⁹ VALJI and the International Center for Transitional Justice, while recognizing that however comprehensive, a reparations programme cannot reverse the harm suffered, consider that it can nevertheless contribute extensively “*to healing wounds, encouraging reconciliation and asserting the value of citizens previously excluded from the national project*”.²⁰⁰ In turn, SUMA and CORREA have found that all truth commissions’ reports insist on the crucial role that their recommendations on reparations can play for reconciliation and the building of national trust.²⁰¹ These various positions have found an echo in many truth commissions’ reports.

For the Truth, Justice and Reconciliation Commission of Kenya for instance, reparations were seen as a “*means to contribute to a rebalancing of society and a healing process*”.²⁰²

In Guatemala, the Commission for Historical Clarification verbalized its reparations recommendations as aimed towards restoring victims’ dignity, guaranteeing that the human rights violations and acts of violence committed during the armed confrontation would not happen again, and ensuring respect for national and international standards of human rights.²⁰³

¹⁹⁵ J. E. MALAMUD-GOTI and L. S. GROSMAN, “Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies” in *The Handbook of Reparations* (ed. by P. DE GREIFF), Oxford University Press, New York, 2006, p. 555

¹⁹⁶ J. E. MALAMUD-GOTI and L. S. GROSMAN, *op. cit.*, p. 555

¹⁹⁷ N. FRASER, “Rethinking Recognition”, *New Left Review* 3, 2000, pp. 107-120

¹⁹⁸ N. FRASER, “Recognition without Ethics”, *Theory, Culture & Society*, 2001, vol. 18, n°2-3, pp. 21-42

¹⁹⁹ D. C. GRAY, *op. cit.*, pp. 1100-1101

²⁰⁰ N. VALJI, *op. cit.*, p. 22

²⁰¹ M. SUMA and C. CORREA, “Report and Proposals for the Implementation of Reparations in Sierra Leone”, 2009, available at: <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf> (accessed on 27 June 2017), p. 1

²⁰² Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, p. 98, §3

²⁰³ Guatemala: *Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations*, 1999, available at: https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf, pp. 49-50

As for the Chilean Rettig Commission, it saw moral and material reparations as “*utterly essential to the transition toward a fuller democracy*”.²⁰⁴ It therefore understood reparations as various actions that must express the State’s acknowledgment and acceptance of its responsibility but also the Chilean society’s acknowledgment of what happened.²⁰⁵ Reparations, in its view, should also attempt to restore the victims’ moral dignity and achieve a better quality of life for those who were the most directly affected.²⁰⁶

The Timorese commission considered that a reparations programme would ensure that justice was delivered in a form that directly benefitted the victim²⁰⁷ and that would “*contribute to healing, national reconciliation and a further reduction in the possibility of violence*”.²⁰⁸

As a last example, in Sierra Leone, the Truth and Reconciliation Commission insisted on reparations’ contribution to restoring civic trust, for a “*sincere commitment from the government to the execution of [its reparation programme] will give a clear sign to the victims that the State and their fellow citizens are serious in their efforts to help establish a relation of equality between citizens and the State*”.²⁰⁹

CHAPTER 3. CONTENT OF RECOMMENDATIONS ON REPARATIONS

After talking about the beneficiaries of reparations and the aims that truth commissions hoped would be achieved through reparations, we will now address the content of the commissions’ recommendations on reparations.

First of all, we will talk about the importance of including victims in the process of devising recommendations. Indeed, as the recipients of reparations, their insight into what constitutes an appropriate reparation is most welcome. The second section will deal with the complicated issue of how to assess victims’ needs: when there are hundreds or thousands of victims, personalizing reparations so that they exactly fit each victim’s needs is impossible. We will see how commissions attempt to struck a balance between the multitude of victims and

²⁰⁴ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1057

²⁰⁵ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1057

²⁰⁶ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1057

²⁰⁷ *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste, op. cit.*, p. 200

²⁰⁸ *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste, op. cit.*, p. 200

²⁰⁹ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, op. cit.*, p. 241, §49

their various needs on one hand and their own effectiveness and proper allocation of resources on the other. The third section will be dedicated to an overview of the various types of reparations that truth commissions have recommended. Then, the topic of collective reparations will be addressed: what are they and in what situations did commissions resort to them? In the final section, we will give our personal opinion on what was learned in this chapter.

Section 1. Importance of victim consultation when devising recommendations on reparations

While it is now firmly established that the obligation of a State to provide reparations must include a combination of material and symbolic measures, bolstered by steps to prevent repetition, the exact content of a reparations scheme for massive violations is not provided by law.²¹⁰

However, the UN Basic Principles do insist on the fact that reparations must be effective,²¹¹ meaning they must meet victims' needs and interests. To ensure that such is the case and that the reparations proposed are not condescending or undermining victims' self-respect,²¹² a truth commission will therefore strongly benefit from consulting with victims. Indeed, a meaningful participatory process cannot end with victims recounting their experience to a commission; participation also entails later consultation to make sure that the recommended reparations are not only reparative but also helpful to victims.²¹³ Victims, as the recipients of reparations measures, are indeed well-placed to offer the commission insight regarding "*their real needs, the extent of the harm suffered as a result of the crime, and the priorities of individual persons and communities in regard to reparations*".²¹⁴

As an illustration of the importance of consultation, the Ghanaian experience can be mentioned. The commission had been informed by victims that a market installation had been burned down by soldiers. Well-intentioned, it recommended that the market be rebuilt, years after the event took place. Had it consulted with victims when defining its reparations

²¹⁰ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 387

²¹¹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §11(b)

²¹² E. VERDEJA, "A Normative Theory of Reparations in Transitional Democracies", *Metaphilosophy*, 2006, vol. 37, n°3/4, p. 451

²¹³ M. SUCHKOVA, "The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation", *Essex Transitional Justice Network*, Reparations Unit, 2011, Briefing Paper n°5, p.11

²¹⁴ M. SUCHKOVA, *op. cit.*, p. 2

programme, the commission would have been made aware that the market's reconstruction was not relevant or meaningful anymore to victims in terms of reparations.²¹⁵

Consultation also proved to be important for the Sierra Leonean commission which did not limit itself to hearing victims' tales at the statement-taking stage of its work.²¹⁶ Indeed, throughout its existence, a number of meetings were convened between the Truth and Reconciliation Commission, victims' groups and civil society, to discuss its proposed reparations programme.²¹⁷ As a result of these reunions, the different actors came to the conclusion that the main goals the reparations programme should aim for were feasibility, sustainability and the importance of avoiding stigmatization.²¹⁸

In Morocco, the Equity and Reconciliation Commission invited victims to provide it with insight regarding its recommendations on reparations, and particularly its recommendations on community reparations.²¹⁹ After meeting with victims in various regions, the commission took their demands and requests, such as building a bridge or granting them money for development projects, into account.²²⁰ As a result, in its appendix on proposals relating to community reparations, "*the IER's final report recommended various different projects, including infrastructure projects, such as road paving and water and electricity provision*".²²¹

As for Peru, its Truth and Reconciliation Commission recommended what was deemed to be "*the most widely consulted and deeply considered*"²²² of reparations programmes. Under the joint leadership of the commission and human rights NGOs, workshops were organized with victims throughout the country, with the aim of "*learning about the harms suffered by victims, collecting information about their expectations of reparations, drafting joint proposals*

²¹⁵ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 401

²¹⁶ M. SUCHKOVA, *op. cit.*, p.12

²¹⁷ M. SUCHKOVA, *op. cit.*, p.12

²¹⁸ REDRESS, "Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court", 2006, available at: <http://www.redress.org/downloads/publications/childsoldiers.pdf> (accessed on 28 June 2017), p. 58

²¹⁹ M. LAWRY-WHITE, *op. cit.*, p. 163

²²⁰ M. LAWRY-WHITE, *op. cit.*, p. 160

²²¹ *Kingdom of Morocco, Equity and Reconciliation Commission. Final Report, Volume 3: Justice and Reparation for Victims*, 2009, available at: http://www.cndh.org.ma/sites/default/files/documents/IER_Volume_3-Eng.pdf, p. 100; M. LAWRY-WHITE, *op. cit.*, p. 160

²²² P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 173

for reparations and committing to work toward their implementation by the State”.²²³ The input of victims was welcomed and consequently taken into account at a national meeting which culminated in the approval, by NGOs and victim groups, of a document containing basic criteria for the design of a reparations programme in Peru.²²⁴ This document was, in turn, heavily relied upon by the *Comisión de la Verdad y Reconciliación* when it designed and drafted its reparations scheme.

As a last example, the Rettig Commission in Chile sought out various persons and organizations whose expertise could be relied upon when drafting its proposal on reparations. In total, “one hundred and nine organizations were consulted in this fashion, including those of the victims’ family members, human rights agencies, the main universities and centers of learning, the political parties, the churches, and other moral authorities”.²²⁵

Section 2. Assessment of victims’ needs

As we have seen in this paper’s previous section, victim consultation is particularly important for truth commissions to grasp what it is that victims want and need. However, considering the number of victims a truth commission usually has to deal with, expecting it to assess and respond to each individual’s particular needs would be unworkable.²²⁶ This is why most truth commissions identify certain categories of beneficiaries and then devise specific reparations for each of these categories.

In Sierra Leone, the truth commission divided the mass of victims into five categories: amputees, other war-wounded, victims of sexual violence, children and war widows.²²⁷ It focused its reparations efforts on certain areas, namely health care, pensions, education, skills-training and micro-credit/projects, community and symbolic reparations.²²⁸ The commission’s recommendations in each of these areas were then tailored to fit the specific needs of victims

²²³ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 402; J. GUILLEROT, H. ORTIZ and R. PÉREZ, “Hacia la reparación integral de las víctimas. Memoria del II Encuentro Internacional ‘Sociedad Civil y Comisiones de la Verdad’”, *Asociación Paz y Esperanza*, Lima, 2002, p. 2

²²⁴ C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 402; J. GUILLEROT, H. ORTIZ and R. PÉREZ, *op. cit.*, pp. 17-23

²²⁵ *Report of the Chilean National Commission on Truth and Reconciliation*, *op. cit.*, p. 39

²²⁶ C. CORREA and D. GBERY, “Recommendations for Victim Reparations in Côte d’Ivoire: Responding to the Rights and Needs of Victims of the Most Serious Violations”, *ICTJ Briefing*, August 2016, p. 6

²²⁷ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 242, §57

²²⁸ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 250, §100

in each of the five categories. In the area of healthcare for instance, while the commission recommended that victims of sexual violence be provided with free fistula surgery, it suggested that amputees be given free prosthetic and orthotic devices.²²⁹

Similarly, in Kenya, five categories of violations were considered: only those who had suffered from these violations were eligible for reparations.²³⁰ To determine the type and the extent of said reparations, the truth commission divided victims in three categories: victims considered to be ‘most vulnerable’, collectives whose members were bound by a common identity, experience or violation, and individuals who experienced violations falling in one of the first two categories.²³¹ In other words, reparations differed depending on the type of violation an individual suffered and on the category of victims s/he belonged to.

Section 3. Types of reparations

Over the last few years, the literature on reparations seems to have reached the position that reparations cannot just take the form of cash payments. Indeed, while the power of reparations and their helpfulness at relieving victims are greatly dependent on a number of factors, there is however certainty in the claim according to which money, while useful to help victims rebuild their lives, “*does not adequately address the effects [of the crime and] does not satisfy victims’ overriding concerns*”.²³² The UN Basic Principles have therefore recognized that full and effective reparation entails, in addition to financial compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.²³³

AMNESTY INTERNATIONAL, along with many other human rights organizations and authors, is of the opinion that truth commissions should recommend a broad repertoire of reparative measures for victims, ideally including all five of the measures provided for by the UN Basic Principles.²³⁴ Indeed, when dealing with flagrant violations of human rights or international humanitarian law, “*the nature of these crimes, their consequences, and their*

²²⁹ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, op. cit.*, pp. 253-256, §§113-140

²³⁰ Kenya: *Report of the Truth, Justice and Reconciliation Commission, op. cit.*, pp. 102-104

²³¹ Kenya: *Report of the Truth, Justice and Reconciliation Commission, op. cit.*, p. 104, §16

²³² S. FULTON, “Redress for Enforced Disappearance: Why Financial Compensation is not Enough”, *Journal of International Criminal Justice*, 2014, vol. 12, n°4, p. 769

²³³ UN General Assembly, *Resolution 60/147 ... , op. cit.*, §18

²³⁴ AMNESTY INTERNATIONAL, *op. cit.*, p. 38; C. COLLINS, *op. cit.*, p. 63; C. CORREA and D. GBERY, *op. cit.*, p. 4

commission on a large scale require going beyond our typical understanding of reparations for individual cases”:²³⁵ reparations can no longer consist solely of cash payments. Thankfully, reparations have “*increasingly [been] conceptualized as necessarily comprehensive*”.²³⁶

Subsection 1. Compensation

Compensation should be awarded to account for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of the case.²³⁷ Compensation measures were recommended by almost all truth commissions in their reparations programmes.

For instance, the most important recommendation on reparations that the Salvadorian truth commission made related to the creation of a fund to provide financial compensation to those who suffered human rights violations.²³⁸

In Chile, the Rettig Commission, which investigated violations that resulted in death, recommended that financial compensation be granted to family members of those killed or disappeared, as part of a “*lifetime monthly reparations pension plan*”.²³⁹ Indeed, the commission’s recommendation was that relatives of the dictatorship’s victims were to receive a cheque each month, whose amount depended on how many immediate family members of the victim were still alive.²⁴⁰

Similarly, in its famous *Nunca Más* report, the Argentine National Commission on the Disappearance of Persons recommended “*that the appropriate laws be passed to provide the children and/or relatives of the disappeared with economic assistance*”.²⁴¹

²³⁵ C. CORREA and D. GBERY, *op. cit.*, p. 4

²³⁶ C. COLLINS, *op. cit.*, p. 63

²³⁷ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §20

²³⁸ AMNESTY INTERNATIONAL, *op. cit.*, p. 39

²³⁹ INTERNATIONAL HUMAN RIGHTS LAW CLINIC, “Comparative Country Studies regarding Truth, Justice, and Reparations for Gross Human Rights Violations: Brazil, Chile and Guatemala”, *IHRLC*, 2014, Working Paper Series n°2, p. 31

²⁴⁰ AMNESTY INTERNATIONAL, *op. cit.*, p. 39

²⁴¹ *Nunca Más (Never Again): Report of the National Commission on the Disappearance of Persons*, *op. cit.*, Part VI

In its 1998 report, the Truth and Reconciliation Commission of South Africa also made extensive recommendations for reparations to victims, including monetary compensation. It considered that an individual reparation grant should be “*made available to each victim or equally divided amongst relatives and/or dependants who have applied for reparation if the victim is dead*”.²⁴² The rationale for granting victims this financial reparation was to restore their dignity.²⁴³

Subsection 2. Restitution

Restitution should, whenever possible, restore the situation in which the victim was before the violation took place.²⁴⁴ It includes, among other things, restoration of liberty, enjoyment of family life and citizenship, restoration of employment and return of property.²⁴⁵ Restitution measures are often requested by victims because such measures give them “*a sense that the people who did the damage are made to give something back, or to try to clean up the mess that they made*”.²⁴⁶

For the truth commission established in Paraguay for instance, restitution meant recommending that the lands which were illegally obtained by the dictatorship were to be returned to their rightful owner.²⁴⁷

Likewise, Morocco’s Equity and Reconciliation Commission recommended that a filing system should be put in place for the claims of those whose lands were taken away from them “*by the state or bodies attached to the state after they or their loved ones had been subject to grave violations*”.²⁴⁸

²⁴² L. FERNANDEZ, “Reparations policy in South Africa for the victims of apartheid”, *Law, Democracy and Development*, 1999, vol. 3, n°2, p. 216

²⁴³ L. FERNANDEZ, *op. cit.*, p. 216

²⁴⁴ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §19

²⁴⁵ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §19

²⁴⁶ J. HERMAN, telephone interview, 2 August 1996 by P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 157

²⁴⁷ C. M. BERISTEIN, “Truth, Justice and Reparation: Democracy and Human Rights in Latin America” in *Contribution of Truth, Justice and Reparation Policies to Latin American Democracies* (ed. by the Inter-American Institute of Human Rights), 2011, p. 30

²⁴⁸ *Kingdom of Morocco, Equity and Reconciliation Commission. Final Report*, *op. cit.*, p. 48

As for the Truth, Justice and Reconciliation Commission of Kenya, it recommended that those who had been wrongly convicted of crimes for political reasons should have their criminal records expunged.²⁴⁹

Subsection 3. Rehabilitation

Rehabilitation has been defined as the provision of medical and psychological care as well as legal and social services.²⁵⁰ This definition of rehabilitation is considered to be the holistic one, as opposed to the narrow one which only refers to physical and psychological care.²⁵¹ The holistic approach to rehabilitation “*encompasses all sets of processes and services states should have in place to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the harm that has been suffered*”.²⁵² The aim of such processes and services, which are to be decided on a case by case basis, is to enable victims to gain independence and make use of their freedom as they see fit.²⁵³

For the Sierra Leonean truth commission, measures of rehabilitation included, for instance, providing free lifetime health care to amputees.²⁵⁴ Recommendations also stipulated, *inter alia*, that the government should “*assist the organisations and bodies that provide scar removal surgery for those children who still have letters branded by the fighting forces on various parts of their body*”.²⁵⁵ Indeed, the engraving of negatively-connoted letters on children’s body parts psychologically affected the children and, in many cases, prevented them from being successfully reintegrated in their families and communities.²⁵⁶

In Chile, in addition to providing that specific health care should be made available to the victims of the dictatorship, the Rettig Commission also surprisingly pointed out the necessity to address the health needs of those who inflicted torture in detention sites and those who recognized their involvement in activities that fell within the commission’s mandate.²⁵⁷

²⁴⁹ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, p. 114, §41(i)

²⁵⁰ UN General Assembly, *Resolution 60/147*..., *op. cit.*, §21

²⁵¹ REDRESS, “Rehabilitation as a Form of Reparation under International Law”, December 2009, available at: <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf> (accessed on 11 July 2017), p. 10

²⁵² REDRESS, “Rehabilitation as a Form of Reparation under International Law”, *op. cit.*, p. 10

²⁵³ REDRESS, “Rehabilitation as a Form of Reparation under International Law”, *op. cit.*, p. 10

²⁵⁴ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 252, §109

²⁵⁵ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 258, §156

²⁵⁶ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 258, §156

²⁵⁷ *Report of the Chilean National Commission on Truth and Reconciliation*, *op. cit.*, p. 1067

The commission argued that furnishing this population with comprehensive health care was dictated by both humanitarian and technical reasons.²⁵⁸ In its own words, “*starting with their recovery and physical and mental rehabilitation, such care should go on to encompass levels of prevention and positive action that may extend to broader sectors of society*”.²⁵⁹

Subsection 4. Satisfaction

Measures of satisfaction are numerous and varied. The UN Basic Principles identify eight measures that must be put in place by the responsible State, either by themselves or in combination with others.²⁶⁰ The following lines will address in what ways some truth commissions have recommended satisfaction measures.

As an illustration, one of these measures requires the State to put in place training programmes in human rights law at all levels.²⁶¹ In Argentina, the Commission on the Disappearance of Persons therefore recommended that the teaching of the defence and diffusion of human rights be made mandatory in State educational establishments, whether they be civilian, military or police.²⁶²

Satisfaction can also be obtained through the restoration of the victims’ dignity.²⁶³ In line with the UN Basic Principles, the Chilean Rettig Commission suggested that the State “*solemnly and expressly restore the good name of the victims who were accused of crimes which were never proven and who were never given the opportunity or adequate means to defend themselves*”.²⁶⁴

Satisfaction can also take the form of a public apology from the State. This form of reparation was recommended by the National Commission for Reconciliation and Compensation for Victims of Côte d’Ivoire.²⁶⁵

²⁵⁸ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1067

²⁵⁹ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1067

²⁶⁰ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §22(a-h)

²⁶¹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §22(h)

²⁶² *Nunca Más (Never Again): Report of the National Commission on the Disappearance of Persons, op. cit.*, Part VI

²⁶³ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §22(d)

²⁶⁴ *Report of the Chilean National Commission on Truth and Reconciliation, op. cit.*, p. 1060

²⁶⁵ *République de Côte d’Ivoire, Commission Dialogue, Réconciliation et Vérité: Rapport Final, op. cit.*, p. 110 (free translation)

The search for the whereabouts of the disappeared and for the identities of the children abducted constitutes another form of satisfaction.²⁶⁶ Such a measure figured in the Guatemalan truth commission's report. Indeed, the Commission for Historical Clarification recommended that *“the government and the judiciary, in collaboration with civil society, initiate, as soon as possible, investigations regarding all known forced disappearances”*²⁶⁷ and *“urgently activate the search for children who have been disappeared”*.²⁶⁸

Subsection 5. Guarantees of non-repetition

Quite similarly to measures of satisfaction, guarantees of non-repetition can take various forms. A State, to provide for this kind of reparation, will have to put in place one or several of the measures mentioned in the UN Basic Principles.

Strengthening the independence of the judiciary and reviewing laws that allow gross human rights violations are both guarantees of non-repetition.²⁶⁹ The Argentine truth commission, to ensure the non-recurrence of the violations that took place during the successive military juntas, recommended that laws be passed to *“strengthen and provide ample support for the measures which the courts need to investigate human rights violations”*²⁷⁰ and *“repeal any repressive legislation still in force”*.²⁷¹

Guarantees of non-repetition also include ensuring effective civilian control of military and security forces as well as making sure that these forces and law enforcement officials are given a proper training in human rights.²⁷² Recommendations on these issues were made by the Salvadorian truth commission. Indeed, it recommended that *“special attention [...] be paid to*

²⁶⁶ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §22(c)

²⁶⁷ Guatemala: *Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations*, *op. cit.*, p. 52

²⁶⁸ Guatemala: *Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations*, *op. cit.*, p. 53

²⁶⁹ UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §23(c and h)

²⁷⁰ *Nunca Más (Never Again): Report of the National Commission on the Disappearance of Persons*, *op. cit.*, Part VI

²⁷¹ *Nunca Más (Never Again): Report of the National Commission on the Disappearance of Persons*, *op. cit.*, Part VI

²⁷² UN General Assembly, *Resolution 60/147 ...*, *op. cit.*, §23(a and e)

*the subordination of the military establishment to the civilian authorities*²⁷³ and that training in human rights be included in the military curricula.²⁷⁴

Section 4. Collective reparations

As stated above, the UN Basic Principles recognize that victims can be persons who have suffered collectively. When such is the case, collective reparations, defined as “*the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law*”,²⁷⁵ can be granted. Based on this definition, four elements must be examined when talking about collective reparations: benefits, a collective as a beneficiary, a collective harm and a violation of international law. However, before we analyse these elements, we will first examine the reasons commissions may have for resorting to collective reparations.

Subsection 1. Reasons for recommending collective reparations

When massive violations have been perpetrated throughout a country, the reliance on collective reparations can prove useful to efficiently address the quantity of claims from victims that follow such violence. However, truth commissions have often relied on collective reparatory measures for other reasons than their being efficient.

As an illustration, for the Timorese commission, collective measures were deemed important to ensure that the rehabilitation of those who had suffered human rights violations could take place in context and together with their communities.²⁷⁶

As for the Kenyan truth commission, because a considerable percentage of the grievances that had been brought to the commission’s attention were related to policies and practices that had negatively affected entire groups of people,²⁷⁷ its report suggested reliance

²⁷³ *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, 1993, available at: <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf>, Part V

²⁷⁴ *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, *op. cit.*, Part V

²⁷⁵ F. ROSENFELD, “Collective reparation for victims of armed conflict”, *International Review of the Red Cross*, 2010, vol. 92, n°879, p. 732

²⁷⁶ *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste*, *op. cit.*, p. 205

²⁷⁷ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, p. 107, §24

on collective reparations, considering how they “*maximize the efficient use of available resources for reparations*”.²⁷⁸

In Guatemala, the Commission for Historical Clarification saw collective reparations as a means to ease the reconciliation process between victims and perpetrators. It therefore suggested for the collective reparatory measures “*to be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favour the entire population, without distinction between victims and perpetrators*”.²⁷⁹

As a last example, the Côte d’Ivoire commission stated that a collective reparations programme should aim to create structures that could help victims become more autonomous and put in place conditions that would facilitate their access to development.²⁸⁰

Subsection 2. Four elements of collective reparations

§1. Benefits: the types of reparations

When a truth commission recommends collective reparations, the benefits it advises the State to grant victims are singular for two reasons. The first is that these benefits must be indivisible, meaning that those who are granted collective reparations cannot enjoy them on their own but have to share it with others.²⁸¹ The second is that these benefits are very varied and can take various forms.²⁸²

In Morocco for instance, the Equity and Reconciliation Commission recognized that because of the presence, in some regions, of illegal detention centres, the image and reputation of these regions had been tarnished.²⁸³ To repair this harm that had been collectively suffered,

²⁷⁸ Kenya: *Report of the Truth, Justice and Reconciliation Commission*, op. cit., p. 107, §24

²⁷⁹ Guatemala: *Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations*, op. cit., pp. 50-51

²⁸⁰ République de Côte d’Ivoire, *Commission Dialogue, Réconciliation et Vérité: Rapport Final*, op. cit., p. 110 (free translation)

²⁸¹ F. ROSENFELD, op. cit., p. 733

²⁸² F. ROSENFELD, op. cit., p. 733

²⁸³ Kingdom of Morocco, *Equity and Reconciliation Commission. Final Report*, op. cit., p. 48

the commission suggested that some of these detention centres be turned into “*development, economic and social projects*”.²⁸⁴

As for the truth commission created in Kenya, its collective reparations programme was a bit singular in that the commission recommended that funds be given to the community who would then “*have access to a process in which [... it could] collectively decide upon the use of the reparations fund for the community*”.²⁸⁵ While the Truth, Justice and Reconciliation commission suggested projects such as a library for the community, a child-care service for women at work..., it underlined the fact that its recommendations’ focus did not lie on the project which the community would agree to undertake but rather on the process that led to the decision being made.²⁸⁶

§2. Collectives recognized as beneficiaries

The collectives that truth commissions have dealt with have included various groups and communities.

As stated above, regions were identified as beneficiaries by the Moroccan Equity and Reconciliation Commission.²⁸⁷ In Peru, “*rural settlements, native communities, and other populated rural centres affected by the violence*”²⁸⁸ were recognized as victims. As for the Kenyan commission, it recommended that victims who, as a group, had suffered systematic marginalization, historical land injustices, environmental degradation or violations targeting populations of a specific area, be eligible for collective reparations.²⁸⁹

§3. Harm collectively suffered

For collective harm to occur, the victims must share certain bonds, which can be common roots (religious, cultural, tribal...) ²⁹⁰ but also ties to a place, a goal, an experience, a cause...

²⁸⁴ Kingdom of Morocco, Equity and Reconciliation Commission. Final Report, op. cit., p. 53

²⁸⁵ Kenya: Report of the Truth, Justice and Reconciliation Commission, op. cit., p. 110, §31

²⁸⁶ Kenya: Report of the Truth, Justice and Reconciliation Commission, op. cit., p. 110, §31

²⁸⁷ Kingdom of Morocco, Equity and Reconciliation Commission. Final Report, op. cit., p. 48

²⁸⁸ C. CORREA, op. cit., p. 11

²⁸⁹ Kenya: Report of the Truth, Justice and Reconciliation Commission, op. cit., p. 107, §25

²⁹⁰ F. ROSENFELD, op. cit., p. 734

As mentioned earlier, the status of victim was recognized to Peruvian communities. Because of the violence and the climate of mistrust that prevailed throughout the country, the degree of cooperation that was needed between communities to maintain a local economy deteriorated.²⁹¹ The truth commission considered this to amount to collectively suffered harm.

In Kenya, the commission's recommendations included granting collective reparations to victims of historical land injustices. Indeed, the commission considered that such injustices were partly to blame for ethnic conflicts and for the marginalization that certain groups experienced.²⁹²

§4. Types of violations

Finally, the collective harm must have been the consequence of a violation of international law.²⁹³ Violations of international human rights law or international humanitarian law, which often occur in pre-transitioning States, can therefore be the cause of a collective harm.

Section 5. Reflections

This chapter on the content of truth commissions' recommendations on reparations started by underlining the importance of victim consultation. This step is crucial. Indeed, there are no good or bad recommendations, only appropriate or inappropriate recommendations. Victims, as the recipients of reparations, will be the judge of this appropriateness, which will greatly depend on whether or not their views and needs were taken into consideration. In other words, without victim consultation, the reparations recommended by truth commissions run the risk of being both condescending and meaningless, thereby completely missing their objective.

To understand the importance of consulting victims, one can simply compare the results of the consultations carried out in different countries. In this way, while compensation was the most requested form of reparation in Kenya, it only came in fourth place in Sierra Leone, where

²⁹¹ C. CORREA, *op. cit.*, p. 11

²⁹² Kenya: *Report of the Truth, Justice and Reconciliation Commission*, *op. cit.*, pp. 108-109, §27

²⁹³ F. ROSENFELD, *op. cit.*, p. 734

needs pertaining to housing, education and medical care were deemed much more important. By assuming it knows best and ignoring victims' needs, a truth commission therefore risks recommending reparations that will be futile at best and harmful in the worst case scenario. This example also shows how context-specific reparations are and, thus, why relying on past commissions' experience isn't necessarily the way to go when it comes to reparations: what worked in one country may be completely inadequate in another.

On the issue of the assessment of victims' needs, there is little doubt that the individual assessment that usually takes place in individual criminal settings cannot be transposed to a transitional justice context. When the victims number in the hundreds or thousands, assessing each victim's needs is simply unworkable, not to mention that the monumental task of implementing individualized reparations would be enough to discourage any State from moving the reparations programme's implementation forward.

We believe that an appropriate way of responding to the needs of victims would be to adopt a similar approach than the one used in Kenya: regrouping victims according to the violation suffered, all while taking their specificities into consideration.

Dividing victims on the basis of the violation suffered allows for similar violations to be repaired through similar measures, thereby avoiding the tensions or divisions that could arise should two equally harmed victims be granted different reparations. However, to ensure that discrimination among victims does not occur *because* they were granted the same reparations, irrespective of their distinctiveness, we believe reparations measures should nevertheless take into account victims' specificities.

These specificities may relate to their age or gender. The same violation may indeed have different repercussions on men and women. As an illustration of this, both men and women may lose their spouse during a conflict. However, considering that in most families, men are the breadwinners, the economic repercussions of the death of a spouse may be felt more harshly by women than by men. While both genders should receive compensation for the loss of their partner, the fact that women lost their husband as well as their families' main source of income should be taken into account.

Similarly, both men and women may be subjected to rape during a conflict and both genders should be given access to healthcare as reparations. However, considering only women will suffer from unwanted pregnancies and/or loss of reproductive capability,²⁹⁴ the healthcare measures made available to raped women should address these gender-specific consequences of the violation.

Truth commissions should also be left some room for manoeuvre to factor other elements in their evaluation of what constitutes appropriate reparations measures. The victims' cultural background should not be ignored for instance. For many indigenous cultures, "*health treatment must be comprehensive, addressing the physical, but also affective, spiritual, and environmental elements*".²⁹⁵ Reparations measures in the area of healthcare should therefore take these elements into consideration.

After talking about the importance of victim consultation and how to respond to the victims' various needs, this chapter focused on the types of reparations that have been recommended by truth commissions across the world. As mentioned above, reparations are thankfully more and more thought of as being necessarily comprehensive, meaning that they usually include all five measures recommended by the UN Basic Principles. This is fortunate considering how each of these five measures addresses different aspects of the suffering victims experienced.

We would like to underline here how important it is to combine both symbolic and material measures. Indeed, while symbols show respect and recognition, victims might – rightfully – ask for concrete reparations measures²⁹⁶ as well. On the other hand, "*purely material measures can be perceived as a way of buying victims' acquiescence in a weak overall transitional justice policy*".²⁹⁷

²⁹⁴ C. PAZ and P. BAILEY, "Guatemala: Gender and Reparations for Human Rights Violations" in *What Happened to the Women? Gender and Reparations for Human Rights Violations* (ed. by R. RUBIO-MARÍN), International Center for Transitional Justice, New York, 2006, p. 96

²⁹⁵ G. DONOSO, "Unsilencing victims: the role of cross-cultural psychosocial interventions in reparation processes for victims of human rights violations. The Inter-American System Experience", *Les cahiers psychologie politique*, 2013, n°23, available at: <http://odel.irevues.inist.fr/cahierspsychologiepolitique/index.php?id=2474> (accessed on 11 July 2017)

²⁹⁶ UNITED STATES INSTITUTE OF PEACE, "Transitional Justice: Information Handbook", *op. cit.* (accessed on 11 July 2017)

²⁹⁷ UNITED STATES INSTITUTE OF PEACE, "Transitional Justice: Information Handbook", *op. cit.* (accessed on 11 July 2017)

In this way, while there is no doubt that financial compensation can be useful to victims, especially in countries where the poverty rate is very high, it remains that “*financial indemnification programs confront an implacable unease: managing death [...] as an economic event offends*”.²⁹⁸

This unease has been reflected in many countries by a refusal of victims to accept money as compensation. In Argentina for instance, some members of the *Madres de la Plaza de Mayo*, a group of women who, decades after the dictatorship ended, still meet every week to ask for answers as to the fate and whereabouts of their loved-ones, have refused the government’s money. For many of them, the idea of being paid for the loss of a loved-one is distasteful.²⁹⁹

Similarly, Morocco’s Equity and Reconciliation Commission was preceded by the Indemnity Commission, tasked, as its name indicates, with allocating cash payments to victims.³⁰⁰ Claims about the commission’s corrupted nature were numerous at the time and prompted many Moroccans to refuse the ‘tainted’ money it offered.³⁰¹ SLYOMOVICS saw in this refusal a clear link to be made between the source of the money proposed and its potential to have a reparative value.³⁰²

These two examples demonstrate the importance of devising reparations that provide for more than compensation, which can be seen as blood money but also as a too-easy way for the State to acquit itself of its reparations obligations. The importance of satisfaction shouldn’t be undermined for instance: because they truly show the State’s repentance and willingness to account for the harm it is responsible for, genuine satisfaction measures are heavily requested by victims and their high symbolic significance can provide them with much-needed catharsis.

Regarding collective reparations, they should be relied upon for a number of reasons. First of all, for considerations of scale and severe budgetary limitations, many authors are dubious as to the power of individual reparations to provide satisfactory redress to victims.

²⁹⁸ S. SLYOMOVICS, “Financial Reparations, Blood Money, and Human Rights Witness Testimony: Morocco and Algeria” in *Humanitarianism and Suffering: The Mobilization of Empathy* (ed. by R. ASHBY WILSON and R. D. BROWN), Cambridge University Press, New York, 2009, p. 274

²⁹⁹ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, pp. 170-171

³⁰⁰ S. SLYOMOVICS, “Reparations in Morocco: The Symbolic Dirham” in *Waging War, Making Peace: Reparations and Human Rights* (ed. by B. R. JOHNSTON and S. SLYOMOVICS), Routledge, New York, 2009, p. 104

³⁰¹ S. SLYOMOVICS, “Reparations in Morocco: The Symbolic Dirham”, *op. cit.*, p. 104

³⁰² S. SLYOMOVICS, “Financial Reparations, Blood Money, and Human Rights Witness Testimony: Morocco and Algeria”, *op. cit.*, p. 273

Implementing reparations through collective reparations programmes is therefore often seen as more feasible than implementing individualized reparations.³⁰³

Second, collective reparations avoid the stigmatization that may result from an individualized identification of victims. As an illustration of this, in the Lubanga case before the International Criminal Court, NGOs warned that child soldiers risked experiencing further stigmatization, should they be singled out for the purpose of receiving reparations.³⁰⁴ The organizations therefore suggested that the Court's collective reparations target all children together, not just those who had been enlisted and conscripted.³⁰⁵ Truth commissions could adopt this approach as well, when dealing with often-stigmatized victims of sexual violence for instance. Collective reparations would be a way to include them in the pool of beneficiaries, without requiring of them to come forwards and put themselves in situations they're not comfortable in.

In addition, collective reparations can more effectively address the interconnectedness of the human rights violations a population experienced, "*as well as the ripple effects [these] violations may have on a family or community throughout the generations*".³⁰⁶ Indeed, the harm suffered may be inter-generationally transmitted to the descendants of the primary victims, which is why the concept of reparations should not be taken as static in time.³⁰⁷ The needs of future generations will be better addressed through collective reparations.

It is however important that collective reparations do not take the form of development projects, which should be created outside of the reparations proceedings, as a manifestation of the State's pre-existing obligation to promote development.³⁰⁸ In Peru for instance, many victims felt that the only difference between the social programmes they were entitled to as

³⁰³ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *The Rabat Report: The Concept and Challenges of Collective Reparations*, February 12th-14th 2009, available at: <https://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf> (accessed on 12 July 2017), p. 40

³⁰⁴ Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo, Decision establishing the principles and procedures to be applied to reparations*, n°ICC-01/04-01/06, 7 August 2012

³⁰⁵ Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo, op. cit.*, §81

³⁰⁶ Kenya: *Report of the Truth, Justice and Reconciliation Commission, op. cit.*, pp. 104-105, §17

³⁰⁷ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *The Rabat Report: The Concept and Challenges of Collective Reparations, op. cit.*, p. 41

³⁰⁸ L. J. LAPLANTE, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development", *Yale Human Rights and Development Law Journal*, 2010, vol. 10, n°1, p. 145

citizens of their State and the collective reparations measures that were implemented were their label,³⁰⁹ without said label, “*it is difficult to think that victims would [have seen] those programmes as a measure of reparations*”.³¹⁰

Furthermore, despite the benefits that collective reparations can provide victims with, there is no denying that the State must be responsive to the individualized violations that have been suffered as well. Indeed, relying solely on collective reparations would risk negating or undermining the harms that were suffered on an individual basis, therefore allowing for victims’ re-victimization. In other words, collective reparations are not to be understood as a substitute for individual reparations;³¹¹ a combination of both collective and individual reparations measures is therefore necessary.

CHAPTER 4. IMPLEMENTATION AND FOLLOW-UP OF RECOMMENDATIONS ON REPARATIONS

This last chapter will address the importance of implementing and following-up on truth commissions’ recommendations. However, before addressing these two issues, the first section will be dedicated to an examination of the advantages that setting up a truth commission prior to devising a reparations programme may present.

Section 2 will deal with the issue of implementation: the reparations recommended by truth commissions are not enforceable and need to be implemented by the State in which the commission was established. Without a proper implementation, the time and resources of the commission will have been spent on nothing.

As for the matter of following-up, its importance lies in the fact that a truth commission is a temporary body whose dissolution is inevitable. But the fact that a truth commission will inevitably cease to exist does not mean that the work it has conducted and the reforms it has set in motion are to die with it. Establishing a successor body or assigning follow-up responsibilities to an existing body is therefore highly recommended.

³⁰⁹ D. CONTRERAS-GARDUÑO, “Defining Beneficiaries of Collective Reparations: the Experience of the IACtHR”, *Amsterdam Law Forum*, 2012, vol. 4, n°3, p. 48

³¹⁰ D. CONTRERAS-GARDUÑO, *op. cit.*, p. 48

³¹¹ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *The Rabat Report: The Concept and Challenges of Collective Reparations*, *op. cit.*, p. 40

Section 1. Advantages to establishing a truth commission prior to devising a reparations programme

As mentioned earlier in this paper, truth commissions have increasingly been tasked with the responsibility of coming up with recommendations on reparations. The conferral of such a mission upon them is particularly important, as HAYNER suggests that “*it seems unlikely that a reparations program would be created without the prior work of a truth commission*”.³¹²

One should however keep in mind that some commissions have not been given this mandate, while others’ recommendations on the matter were subsequently ignored. It nevertheless seems that the recourse to truth commissions is not waning and that we should therefore expect many reparations programmes to have, as a foundation, the recommendations that such commissions would have come up with.³¹³ This is quite fortunate for a series of reasons.

First of all, the process of the truth commission itself (consulting with victims, holding public hearings, reaching out to the population...) may help “*build the political and public support for the government to respond positively*”³¹⁴ to the commission’s report and the recommendations it contains.

Second, the work that a truth commission undertakes will inevitably lead it to compile information about the victims, such as a list or a categorization of them, on which the State will be able to rely when designing and implementing its own programme.³¹⁵

In the third place, the high degree of moral capital that a truth commission usually enjoys might positively affect how its recommendations on reparations will be perceived and received.³¹⁶ Indeed, the participatory nature of the commission, its purpose, the moral standing of its members, its support by the international community..., figure among the reasons why

³¹² P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

³¹³ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 11

³¹⁴ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

³¹⁵ P. B. HAYNER, *Unspeakable Truths...*, *op. cit.*, p. 163

³¹⁶ OHCHR, “Rule-of-Law Tools for Post-Conflict States: Reparations Programs”, *op. cit.*, p. 11

recommendations from a truth commission may be seen as more credible and appropriate than those proposed by State authorities.³¹⁷

And finally, creating both the reality and the impression of significant links between a reparations programme and other transitional justice initiatives is easier if the same entity is responsible for the design of the former and the conception of a comprehensive transitional justice strategy.³¹⁸

Section 2. Implementation of recommendations on reparations: three avenues

The fact that a truth commission recommended reparations that are comprehensive, detailed, contextually-grounded, appropriate and useful will be meaningless if the switch from recommended measures to implemented measures does not occur. In other words, while well-thought-out recommendations on reparations have the potential to make a crucial difference in the life of victims, for this potential to become reality, implementation is key. One can therefore distinguish between a commission's success, which will depend on whether or not it has fulfilled its duties, and a commission's impact, which will be contingent on the effect it has on the society in which it was established.³¹⁹

According to BRAHM, "*a promising way to bridge the gap between success and impact is to focus on truth commission recommendations*",³²⁰ as a truth commission whose recommendations are implemented will be seen as more impactful than one whose recommendations have been ignored. Thankfully, some avenues can be explored to facilitate and encourage the implementation of a commission's recommendations.

Subsection 1. Engaging early on with the government

DE GREIFF, as UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, is of the opinion that a truth commission needs to engage with

³¹⁷ OHCHR, "Rule-of-Law Tools for Post-Conflict States: Reparations Programs", *op. cit.*, p. 11

³¹⁸ OHCHR, "Rule-of-Law Tools for Post-Conflict States: Reparations Programs", *op. cit.*, p. 11

³¹⁹ E. BRAHM, "Getting to the Bottom of Truth: Examining Truth Commission Success and Impact", Paper prepared for presentation at the International Studies Association Annual Meeting, Honolulu, 1-5 March 2005, available at: <http://center.theparentscircle.org/images/25239151e8cf4a29a2f3046308307f4a.pdf> (accessed on 2 July 2017), pp. 3-8

³²⁰ E. BRAHM, "Getting to the Bottom of Truth: Examining Truth Commission Success and Impact", *op. cit.*, p. 8

different government agencies and development agents early on to make sure that its recommendations are articulated in ways that are actionable.³²¹ This will ensure that the commission's recommendations are not unrealistic or overly-optimistic. Moreover, by collaborating with government agencies and including them in its drafting process, a truth commission might also potentially form alliances within the government, alliances which may prove useful once the implementation phase rolls in.

Subsection 2. Establishing relationships with civil society and victim groups

We have mentioned already how important victim consultation is when designing a commission's reparations programme. Such a participatory process will indeed ensure that the reparations proposed are both appropriate and meaningful. However, considering the temporary nature of truth commissions, wide consultation on the issue of reparations offers an additional and non-negligible benefit: the efforts that a truth commission will have undertaken to consult and communicate with victim organizations and civil society will allow such actors to own the proposed reparations programme and, once the commission's mandate expires, to defend it and demand its implementation.³²²

In other words, because "*the fate of recommendations depends to a large extent on the leadership, advocacy and persistence of civil society organizations*",³²³ consulting with and establishing a close-knit relationship with these organizations should definitely figure on the list of priorities of truth commissions.

Subsection 3. Calling for support from the international community

The UN Special Rapporteur on the promotion of truth, justice, reconciliation and guarantees of non-recurrence also calls on the international community to give or reiterate its support – whether technical, financial or political – for the work undertaken by truth commissions.³²⁴ Indeed, should this support waver, the truth commission's recommendations

³²¹ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 21, §73

³²² C. CORREA, J. GUILLEROT and L. MAGARRELL, *op. cit.*, p. 397

³²³ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 21, §73

³²⁴ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 21, §74

might be shrugged off once the international attention turns elsewhere.³²⁵ Yet, “neither the cessation of conflict, nor the end of a truth commission’s duration, is reason for support to diminish, as the implementation of recommendations depends significantly on continued support”.³²⁶

Section 3. Follow-up mechanisms

As explained in the previous section, the joint influence of an attentive and involved civil society and of a supportive yet demanding international community can considerably strengthen the incentives governments have for implementation.³²⁷ However, to monitor the proper implementation of the commission’s recommendations, but also to continue its investigations or preserve its archives, the truth commission’s statute should provide for the creation of a successor body.³²⁸ This section will be dedicated to an overview of the different institutional solutions for follow-up that have been tried.

Subsection 1. ‘Purpose-specific, stand-alone bodies’³²⁹

In Chile, the National Corporation for Reconciliation and Reparation was such a body. It was created in 1992, in the aftermath of the Rettig Commission publishing its report. It “helped to forward recommendations for two years”³³⁰ but also provided continued support to victims who had testified and pursued the investigations that the commission had been unable to complete.³³¹

Similarly, in Peru, although legislative initiatives had been promised, the *Comisión de la Verdad y Reconciliación* decided to take matters in its own hands and proposed the creation of a ‘National Reconciliation Council’. Among the tasks attributed to this body were the drafting and enforcing of specific policies designed to strengthen the process of national

³²⁵ E. BRAHM, “Getting to the Bottom of Truth: Examining Truth Commission Success and Impact”, *op. cit.*, p. 24

³²⁶ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 21, §74

³²⁷ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §78

³²⁸ AMNESTY INTERNATIONAL, *op. cit.*, p. 40

³²⁹ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 21, §76

³³⁰ E. BRAHM, “The Chilean Truth and Reconciliation Commission”, July 2005, available at: <http://www.beyondintractability.org/casestudy/brahm-chilean> (accessed on 2 July 2017)

³³¹ INTERNATIONAL HUMAN RIGHTS LAW CLINIC, *op. cit.*, p. 30

reconciliation as well as the development and implementation of the commission's recommendations.³³² Established in October 2006, it began to register victims in early 2008 with the view of providing them with individual reparations in line with the commission's recommendations.³³³

As for the Guatemalan commission, it recommended the establishment of a follow-up body, the Foundation for Peace and Harmony, "*in which both State and civil society are represented, to aid, promote and monitor the implementation of the recommendations*".³³⁴

In Haiti, a Proceedings and Follow-Up Office was set up to supervise the implementation of the reparative measures recommended by the Haitian National Commission of Truth and Justice.³³⁵ It administered the Haitian government's reparation funds for victims³³⁶ but also examined compensation claims and devised appropriate means of reparation.³³⁷

The resort to stand-alone bodies can be interesting for two reasons: "*they can play a useful convening and coordinating role among specialized agencies and ministries, and, as autonomous bodies, they enjoy a certain degree of political independence*".³³⁸ However, these advantages can be counteracted by the main downside of such bodies: their toothless nature if confronted with stubborn attitudes, as they lack authority over agencies and ministries.³³⁹

Subsection 2. Functional units within existing ministries

In Argentina, two days after the publication of the *Nunca Más* report, an Undersecretary for Human and Social Rights was created within the Ministry of the Interior.³⁴⁰ The name and

³³² Peru: *Final Report of the Truth and Reconciliation Commission*, 2003, Volume 9, available at: <https://www.usip.org/publications/2001/07/truth-commission-peru-01>, pp. 293-298 (free translation)

³³³ UNITED STATES INSTITUTE FOR PEACE, "Truth Commission: Peru 01", available at: <https://www.usip.org/publications/2001/07/truth-commission-peru-01> (accessed on 11 July 2017)

³³⁴ Guatemala: *Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations*, *op. cit.*, p. 67

³³⁵ AMNESTY INTERNATIONAL, *op. cit.*, p. 40

³³⁶ E. CAPLE JAMES, *Democratic Insecurities: Violence, Trauma, and Intervention in Haiti*, University of California Press, London, 2010, p. 310

³³⁷ AMNESTY INTERNATIONAL, *op. cit.*, p. 40

³³⁸ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §77

³³⁹ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §77

³⁴⁰ C. SMULOVITZ, "I can't get no satisfaction': Accountability and Justice for Past Human Rights Violations in Argentina", July 2008, *Paper prepared for the Project "Comparing the Effectiveness of the Accountability*

functions of this body changed over the years but ever since February 2002, it has been entrusted with the application of most of the laws pertaining to the redress of victims of State terrorism during the military juntas.³⁴¹

For DE GREIFF, contrary to stand-alone bodies, units included within existing ministries can effectively push for the implementation of recommendations.³⁴² However, they can only do so within their narrow area of competences and their effectiveness depends on whether or not political willingness exists.³⁴³

Subsection 3. Independent human rights institutions assigned with follow-up responsibilities

This was the approach chosen in Liberia. Indeed, the Independent National Human Rights Commission was created with the aim of ensuring that the recommendations put forward by the Truth and Reconciliation Commission be implemented.³⁴⁴ It was further tasked with ensuring that “*civil society organisations and moral guarantors of the [Comprehensive Peace Agreement] shall be seized of the responsibility to monitor, and campaign for the scrupulous implementation of all recommendations contained in the report*”.³⁴⁵

Likewise, in Sierra Leone, the Truth and Reconciliation Commission recommended that a Human Rights Commission be established and tasked with taking the necessary steps “*to secure appropriate redress where human rights have been violated*”.³⁴⁶

While such independent human rights organizations are more autonomous than stand-alone bodies and enjoy a moral authority that is absent in the first two ‘institutional fixes’

Mechanisms in Eastern Europe and Latin America” jointly organized by El Colegio de México and the United Nations University in association with Oxford University, available at: <http://www.derecho.uba.ar/academica/posgrados/smulovitz> (accessed on 2 July 2017), p. 9

³⁴¹ J. MARÍA GUEMBE, “Economic Reparations for Grave Human Rights Violations: The Argentinean Experience” in *The Handbook of Reparations* (ed. by P. DE GREIFF), Oxford University Press, New York, 2006, p. 23

³⁴² Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §77

³⁴³ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §77

³⁴⁴ P. JAMES-ALLEN, A. WEAH and L. GOODFRIEND, “Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia”, May 2010, available at: <https://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf> (accessed on 12 July 2017), p. 27

³⁴⁵ An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, Enacted by the National Transitional Legislative Assembly on May 12, 2005, Article X, Section 46

³⁴⁶ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, *op. cit.*, p. 136, §99

examined, it nevertheless remains that they tend to have a narrow field of competences and little power to give orders or directives.³⁴⁷

Section 4. Reflections

In this last chapter, we discussed the implementation and the follow-up of truth commissions' recommendations and why truth commissions are usually a good prologue to States' reparations programmes. Be it the information commissions compile or the support they garner from different actors, there are numerous reasons why the creation of a truth commission and the work it undertakes in the field of reparations will prove useful to a State ready to account for the harm it has inflicted.

While truth commissions can only make recommendations and cannot force States to move the implementation of said recommendations forward, there is no doubt States should take advantage of the work that has been cut out for them by truth commissions. As we have explained throughout this paper, the issue of reparations is a complex one and coming up with reparative measures that will satisfy the victimized population is a process fraught with challenges. A transitioning State, eager to improve the way it is perceived on the international scene and within its own borders, would do well to implement the recommendations on reparations which, hopefully, reflect the needs and expectations of its population.

We believe that by moving the implementation of the commission's recommendations forward, a State would prove that the decision to establish a truth commission was truly driven by the goal of achieving healing, both individual and societal, and, in turn, reconciliation. In contrast, ignoring the commission's recommendations could create the impression that the commission was merely established to humour both the international community and the State's population, and that the notion of reconciliation was only put forward "*to market unfavourable compromises made during political negotiations*".³⁴⁸

³⁴⁷ Report of the UN Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, *op. cit.*, p. 22, §77

³⁴⁸ B. HAMBER, "Rights and reasons: challenges for truth recovery in South Africa and Northern Ireland", *op. cit.*, p. 1075

Out of the three avenues that have been explored to encourage the implementation of recommendations, a common thread can be detected: the importance for the commission to network at the local (with civil society and victim organizations), national (with the government) and at the international level, to garner as much support as possible for its proposals. Indeed, while there are few ways to convince a State to do something it has set its mind against, there is no denying that the pressure felt from both national and international actors can wear down a State's headstrongness over time.

As for the issue of follow-up, interviews conducted in Argentina, Chile, South Africa, Guatemala and El Salvador showed that the 'institutional fixes' considered in this paper are not an ideal solution.³⁴⁹ Many indeed feel that a follow-up process should be put in place by, or even carried out by, the commission itself.³⁵⁰ Leaving the task of following-up on recommendations to the State, especially if it has already demonstrated its reluctance to implement the reparations recommendations, would risk rendering all the work undertaken by the commission moot.

³⁴⁹ V. E. CUEVAS, M. L. ORTIZ ROJAS and P. ROJAS BAEZA, *op. cit.*, p. 45

³⁵⁰ V. E. CUEVAS, M. L. ORTIZ ROJAS and P. ROJAS BAEZA, *op. cit.*, p. 45

CONCLUSION

The dual relationship that exists between truth commissions and reparations has been examined throughout this paper. Indeed, we saw the two main ways in which truth commissions contribute to the field of reparations for victims. We believe the link that exists between truth commissions and reparations is a fortunate one, considering how important reparations are to ensure a smooth and fair transition, and how well-placed and well-equipped truth commissions are for dealing with the touchy subject of reparations.

The first facet of the relationship that exists between truth commissions and reparations is the one that appears when the consequences of the truth-telling mission entrusted upon a commission spill over the truth-telling pillar of transitional justice, into the reparations pillar. Indeed, while providing an authoritative account of the events that unfolded in the country is a goal in itself, it can actually reach the broader objective of being a form of reparations for victims. As explained in Part 2, both the *product* of the truth commission, namely its report which authoritatively establishes what happened, and the *process* used by the truth commission, namely hearing victims' testimonies and statements, can prove to have reparative values.

The interconnectedness that exists between transitional justice pillars can further be illustrated by the comparative analysis that was conducted in Part 3. The reparative mandate entrusted upon truth commissions constitutes the second facet of the relationship that links them with the issue of reparations: most truth commissions have indeed been tasked with recommending reparations for victims to States, as the numerous contacts that commissions have with victims make the former well-placed to assess and address the needs of the latter.

While the comparative analysis conducted did reveal many similarities in the experience of various truth commissions with reparations, this analysis also exposed how the notions of victimhood and reparations are defined using a constructivist approach³⁵¹ grounded, by definition, in the political and social context of the country in which the issue of reparations arose. The balance of powers that prevails in the country, but also the needs expressed by

³⁵¹ S. PARMENTIER and H. ROMBOUTS, "The International criminal Court and Its Trust Fund are coming of Age: Towards a Process Approach for the Reparations of Victims", *International Review of Victimology*, 2009, vol. 16, pp. 50 et s.

victims and by society as a whole, will therefore play an important role in shaping the commission's mandate and, thus, its understanding of victimhood.

The already-mentioned example of the difference of mandates between the two successive Chilean commissions can be brought up once more for instance. Because the transition from dictatorship to democracy was very recent when the first commission came to be and because the power relationships did not allow for more, said commission's investigative powers were limited to the violations that had resulted in death, thereby ignoring the needs of the direct survivors of torture, arbitrary detention, rape, disappearance... It was only a decade later, following the demands of the Chilean society and a shift in power that a second commission was entrusted with the mission of investigating the violations that had been overlooked by its predecessor. The context in which this second commission was established and the broad mandate that resulted from it therefore allowed the original victims' class to be expanded and the inclusion of the tens of thousands of victims identified by this second commission in the list of beneficiaries entitled to reparations.

The creation of a commission, the drafting of its mandate and its understanding of the notions of victimhood and reparations are undoubtedly politically-charged and, hence, highly context-specific. However, we believe there are some 'guidelines' or 'governing principles' that should be respected by all truth commissions when they recommend reparations, irrespective of the context in which they came to be. The first is that truth commissions should always rely on the insight that victims might provide them with. Second, establishing a distinction between 'deserving' and 'undeserving' victims is unwarranted for the purpose of reparations. In the third place, we consider that a wide array of reparative measures should be recommended, which, fortunately, seems to be the case in a majority of truth commissions' reports.

Pertaining to the importance of victim consultation, we cannot insist enough on the fact that *"if healing of the social fabric and redress of human suffering are among the purposes of a truth commission, it seems highly advisable to start out with an understanding of what the community needs and expects"*.³⁵² As was mentioned in this paper, by ignoring victims' needs and assuming it knows best, a truth commission runs the risk of relying on a condescending,

³⁵² X., "Strategic Choices in the Design of Truth Commissions", 30 May 2012, available at: <http://truthcommission.org/proceedings.htm> (accessed on 13 July 2017)

context-oblivious and, possibly, offensive-to-victims approach to reparations. This unfortunate approach would, in turn, be reflected in the inappropriateness and inadequacy of reparations, thereby potentially allowing for victims' re-victimization.

As for the matter of the differential treatment of victims, we believe that, for the purpose of reparations, establishing a distinction between victims based on their past actions or affiliation is unjustified. Truth commissions should be careful to include all the persons who suffered a violation that falls within their mandate in their definition of victimhood. Distinguishing between 'innocent' victims and 'culpable' victims would risk sowing further division in a society in which previously antagonistic individuals are still learning to coexist peacefully. Furthermore, it would run counter to the objective of reconciliation often pursued by truth commissions.

Regarding the necessity for truth commissions to recommend a broad catalogue of reparative measures, ideally including all five of the measures provided for by the UN Basic Principles, we consider it to be particularly important for a number of reasons. The fact that each form that reparations can take (compensation, satisfaction...) addresses an aspect of the suffering of victims is noteworthy for instance. Furthermore, a combination of measures would ensure that, should one measure be perceived as inadequate, another might compensate this inadequateness. Indeed, we postulate that the appropriateness of a commission's recommendations lies in the fact that victims were consulted during the process leading to their adoption, but also in their variety. As an illustration of this, if a country's financial capacity prevents it from granting more-than-symbolic amounts of money to the victims, it might still be able to address victims' needs through other, non-financial measures.

As the comparative analysis conducted in Part 3 has shown, the process of recommending appropriate and meaningful reparations is fraught with challenges: the sheer number of victims, the difficult situation the country is transitioning from, the unimaginable harm that was inflicted, the tensions that might persist in the society... are all factors that may complicate the already-difficult task of devising reparations.

It is noteworthy that these factors also characterize most of the situations brought to the attention of the International Criminal Court. This Court, entrusted with prosecuting individuals accused of carrying out war crimes, crimes against humanity and/or genocides, faces the same

difficulties truth commissions do in the area of reparations. Considering the importance of the ICC on the international scene and the authority that its recent decisions on reparations are bound to enjoy, truth commissions could undoubtedly draw inspiration from the Court's way of addressing the issue of reparations.

As an example, as opposed to the vast majority of truth commissions, the ICC considers that legal persons can be victims. Truth commissions appear more reticent to do so, for the simple reason that victims are usually identified by reference to specific types of human rights violations. Because these violations generally consist in inflicting bodily or psychological harm to the person, legal persons do not often fall within the meaning of 'victim' as understood by truth commissions.

As an illustration of this, both the Sierra Leonean and the Timorese truth commission define a victim as "*a person who, individually or as part of a collective, has suffered harm*".³⁵³ As for the Kenyan truth commission, it only identifies "*individuals and groups*"³⁵⁴ as beneficiaries of reparations. Similarly, the Guatemalan Commission for Historical Clarification considers victims to be "*persons who have personally suffered human rights violations and acts of violence*".³⁵⁵ However, as a counter-example, the Moroccan Equity and Reconciliation Commission decided to understand the term 'victim' as including regions.³⁵⁶

Perhaps future truth commissions could adopt the ICC's extensive understanding of victimhood and, like Morocco's truth commission, include more than physical persons in their definition of victim. Indeed, harm is not exclusive to physical persons; a legal person may have suffered as well during a country's dark past, whether because its reputation was tarnished or because its material belongings were damaged.

Furthermore, the way in which the ICC has approached the thorny question of 'unworthy victims' should also be underlined. In its Lubanga case, the Court has taken the stance that child

³⁵³ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, op. cit.*, p. 234, §27; *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste, op. cit.*, p. 206

³⁵⁴ *Kenya: Report of the Truth, Justice and Reconciliation Commission, op. cit.*, p. 102, §13

³⁵⁵ *Guatemala: Memory of Silence. Report of the Commission for Historical Clarification: Conclusions and Recommendations, op. cit.*, p. 51

³⁵⁶ *Kingdom of Morocco, Equity and Reconciliation Commission. Final Report, op. cit.*, p. 34

soldiers are children first and foremost, not soldiers. Both the prosecution³⁵⁷ and the defence³⁵⁸ agreed that Lubanga's child soldiers were to be considered as victims, not perpetrators, and were therefore entitled to reparations. This should comfort commissions in their decision to include victimized perpetrators in their understanding of the notion of 'victim', as well as encourage States to adopt the same view. Endorsing the ICC's position would also allow the matter of reparations to finally move forward in Northern Ireland for instance.³⁵⁹

To conclude, we would like to acknowledge how daunting and difficult recommending appropriate reparations must be for truth commissions. They must indeed attempt to strike a balance between realism and feasibility on one hand and completeness and meaningfulness on the other. However, we feel that the moral standing they enjoy, the special relationships they build with victims throughout their existence, as well as the fact that they have a country's best interests at heart, make truth commissions truly well-placed to carry out this task.

We are confident that the tools truth commissions have at their disposal will also help them live up to the new challenge that transformative reparations represent, which requires of reparative measures to address the structural inequalities and deficiencies that allowed human rights violations to occur in the first place.³⁶⁰ As the emblematic mechanism of transitional justice, we can only hope truth commissions will therefore continue to improve the quality of their recommendations on reparations, by devising comprehensive, complete and widely-consulted reparations programmes. We further hope these programmes will be aimed at repairing the harm suffered, but will also address the victims' present needs, all while paving the way towards a future which, hopefully, won't allow the past to repeat itself.

³⁵⁷ Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo*, *op. cit.*, §76

³⁵⁸ Trial Chamber I, *Situation in the Democratic Republic of the Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo*, *op. cit.*, §77

³⁵⁹ L. MOFFET, *op. cit.*, p. 14; A. KELLY, *op. cit.* (accessed on 11 July 2017)

³⁶⁰ INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, "ICTJ Program Report: Gender Justice", February 2013, available at: <https://www.ictj.org/news/ictj-program-report-gender-justice> (accessed on 13 July 2017)

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