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THE POSITION OF THE VICTIM IN TRUTH AND RECONCILIATION COMMISSIONS

The case of Peru

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ABSTRACT

The views and concerns of the victims of human rights violations have been traditionally neglected. In an effort to contribute to the shift of focus towards the victims and as a greater number of states in the midst of a democratic transition turn to truth commissions to reckon with a past of systematic human rights violations, we propose to take a deep look into these bodies from the perspective of those that suffered the violations: the victims. After giving an overview of the array of means of transitional justice in an attempt to gain a better understanding of truth commissions, in particular, in what concerns the victims, and based on the analysis of the protection of the victims' rights in the light of international documents, we will focus on one particular case, hoping to formulate guidelines to inform future truth commissions. The Peruvian TRC, who finished its mandate in August 2003, had a unique opportunity to bring improvements in the treatment of victims. Through an analysis of the choices taken by the TRC to ensure the participation and the protection of the rights of victims, we aim at establishing the lessons learned from this experience.

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INTRODUCTION

"A country which forgets its history is condemned to repeat it." On 9th of December 2000, under this motto, the Peruvian transitional government, headed by Valentín Paniagua, decided to create an inter-institutional commission to lay the legal and administrative foundations for the creation of a Truth Commission. By the Supreme Decree 065-2001-PCM the Truth and Reconciliation Commission was finally created and officially began its work on the 13th of November 2001. The country was then set to launch into a national process of democratic transition.

The challenges faced by Peru are not exclusive of one country, or even one continent for that matter. Many countries throughout the world have had to face, in the past decades, the passage from authoritarian or military regimes to democracy, or have engaged in a process of transition from a period of internal conflict to times of peace. While the roots of the conflicts or repressive rule differ greatly from case to case, as does the context in which the transition originates and takes place, the process of change raises similar and recurring concerns in all of those cases. The process of democratic transition in each country could not be more unique, and yet the challenges faced by each transitional state serve as examples for other states. Among such challenges is the question of how should new democratic regimes and societies reckon with their past of human rights violations which invariably characterises the rule of authoritarian or military regimes as well as continued periods of internal conflicts. Because this challenge is a recurring one in the processes of democratic transition, the problems and alternative solutions faced by the successor regimes have been generally studied and analysed as part of a new discipline, which has been referred to as transitional justice.

To the question of how to deal with the past atrocities committed in the course of politically motivated violence, different societies have responded with different means of transitional justice. As we will later see, the particular context of the country in which each transition takes place, is the great determining factor of how a given society will choose to come to terms with its past. The option that society makes for one or another mechanism of transitional justice implies the answer to an underlying question: should the past be buried and let bygones be bygones for the sake of stability and reconciliation or should the government and society stand firmly and face their common past in order to look into a shared future? In other words, should a society in the midst of a democratic transition forget or remember? Should it opt for denial or for the truth?

The Peruvian society and government, as we've seen, made their choice for truth, remembrance and acknowledgement when in 2001, still at the dawn of the democratic transition, the decision to create a Truth Commission, later renamed Truth and Reconciliation Commission, was taken by the government and welcomed by the majority of society.¹ The search for truth in order not to repeat the past was the option made.

After two decades of internal conflict and politically motivated violence which plunged the country into a history of constant and continued violations of human rights and humanitarian law, in a context of deep social divides and tensions, of economic depression and political instability, Peru decided to come to terms with its past, in search for the truth. With the downfall of the Fujimori regime and the end of the insurgent opposition movement, the conditions for a democratic transition were finally created. This was how the Peruvian government and society engaged in a crucial endeavour to critically face their shared past in order to achieve national reconciliation and to ensure that the past atrocities would not be repeated in the future. In other words, Peru engaged in a quest for justice, and this time, justice for all.

Truth Commissions² are, however, only one of the possible responses of transitional states to a past of mass violence. These commissions are quite recent phenomena that have become increasingly more popular and, as we will demonstrate, can now be regarded as the privileged means of transitional justice. They consist of public, non-judicial, officially sanctioned bodies created to investigate a pattern of human rights violations that occurred in the past in order to establish the truth about such abuses, determine responsibilities and recommend reforms as well as measures of reparation to the victims and prevention of future conflicts.

The concept of truth commissions mainly suggests three other notions: those of truth, justice and reconciliation. The work of truth commissions will allow the truth to come forward by establishing in a public report the facts of the past, including the

¹ See, for example, Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 3, Lima, CVR, p. 10. In a survey carried out in May-June 2002 to the Peruvian people, 63,2% of those polled approved the work of the Commission.

² Although recently the denomination used for these commissions has been more often that of Truth and Reconciliation Commissions, I will hereinafter use the short expression of truth commissions. In fact, as we will later see the expression Truth and Reconciliation Commissions should be abandoned as it departs from false assumptions and leads to unrealistic expectations. See page 18 ahead and P. B. Hayner, *Unspeakable Truths: confronting state terror and atrocity*, New York and London, Routledge, 2001, p. 23. The choice to use in the title of this thesis the expression Truth and Reconciliation Commissions is due to the fact that these bodies are currently more easily identified with this expression, and also because this was the denomination chosen in the case of Peru.

crimes committed, the circumstances in which they took place, the causes of the violence, the actors - both perpetrators and victims - and the individual and collective consequences of the atrocities. In an intertwined relation, the establishment of the truth will bring justice to society by determining responsibilities and vindicating the memory and dignity of the victims, and thus, overcoming long lasting tensions and still very present traumas in the path towards reconciliation.

Besides representing a turn towards the truth, truth commissions also represent a greater focus on the victims. They have appeared and developed within an increasing tendency at the national and international levels of a greater concern with the victims. The victims' movement has drawn attention not only to the sequels of the violence on the victims, but also to their right to a remedy and reparation. By collecting testimonies of the victims and finally giving them a chance to tell their story, by establishing the truth about the crimes committed, who were the perpetrators and who were the victims, and by proposing reparations to the victims and their families, truth commissions have become identified as a victim-centred means of justice. In opposition to the perpetrator-centred approach of the traditional criminal justice system, truth commissions represent a major breakthrough in giving back to the victims the attention and dignity they deserve and have long been neglected by the retributive justice system.

The victim, therefore, assumes a central role in the work of truth commissions. However, it is very surprising to discover that in academic and non-academic studies and analysis of truth commissions not as much as one would expect is said about the victims. There is not only a lack of studies specifically focusing on the participation of the victims in these commissions and on the impacts of their work on the victims, but also in the existing bibliography on truth commissions little attention, if any, is paid to the role of the victims in the whole process of fact-finding and truth-telling. It is not difficult to come across this gap in the study of truth commissions. And as it seems contradictory with their renowned concern with the victims, one is left to wonder what are the reasons of such gap. Could it be a mere lack of interest on the perspective of the victims? Or maybe a lack of easily accessible sources for this type of study, as research in this field may stumble on many obstacles (interviews with the victims, psychological studies of the impacts on the victims...)? Or would it be that victims are simply put again in a secondary, instrumental role due to the traditional tendency that still informs the academic minds of today?

In an ambitious and challenging attempt to contribute to fill in this gap, this thesis will focus on the role and involvement of the victim in truth commissions. The concept of victim⁴ is taken here in its broader scope, in order to include the direct victims of the violations of human rights as well as their relatives (or those dependent on the victims or who the victim depended on) and those who witnessed such violations.

As we have seen, although no transitional context is like any other and each truth commission will be unique and different from the rest, many of the challenges and concerns that arise are common to the several distinct experiences. We have, thus, chosen to focus on one particular case to carry out the analysis of the victim's standing on truth and reconciliation commissions. The Peruvian Truth and Reconciliation Commission, having just finished its work with the submission of its Final Report in August 2003, provides an excellent case study, not only because its existence is very recent, and therefore it's a very up-to-date example, but also because a significant amount of effort by national and international entities and individuals was put in giving this commission all the necessary tools to guarantee its success, including the knowledge acquired and gathered from previous experiences of truth commissions. The case of Peru does not, however, necessarily reflect the reality of most transitions in Latin America and in this sense it cannot be regarded as a paradigmatic case. In fact, there are many particularities in the Peruvian transition that make it unique in its continent. The transition in Peru, resulting simultaneously from the downfall of a repressive regime and the end of an internal conflict, faces a greater challenge than most other cases in Latin America and, at the same time, has more opportunities to be a stable and successful one. On the one hand, violations of human rights were perpetrated by both sides of the conflict (the insurgent groups and the state forces), which increases the number of victims and perpetrators and often causes an overlapping of these two categories. National reconciliation becomes more difficult as there is no clear-cut distinction of those to blame and those who were the victims. On the other hand, the transition did not result from any kind of agreement with the former regime, which makes the new government free from significant political constraints. Responding to a national claim for truth and justice, the Peruvian TRC seemed to have the favourable conditions to fulfil its mandate successfully. Now that the Final Report was submitted, it is time for analysis and reflection on whether the purposes of the Commission were achieved and whether the choices taken were the best possible.

We will analyse how this Commission dealt with the victims, how they were treated all throughout its process. We will focus on their participation in certain activities or events promoted by the TRC, such as interviews, public hearings and others, looking at the terms in which that participation took place, to what extent the victims took part in those initiatives, and to the methods used by the staff in dealing with the victims, namely when taking statements and generally in the process of fact-finding. A deeper insight on the ways and mechanisms through which victim support, security and privacy are ensured in these commissions, will also be provided. Furthermore, we will focus on the attention given by the TRC to a particularly vulnerable group in the process of violence: women. Finally, we will examine the contribution of the TRC to the implementation of two other rights of the victims: the right of access to justice and the right to reparation.

Our final aim in carrying out the present research is to draw conclusions on the choices made by the Peruvian TRC, trying to establish its main strengths and shortcomings regarding the treatment of the victims. Being aware of the fact that different contexts call for different solutions, we hope to be able to formulate some guidelines for future truth commissions based on the lessons learned from this research.

In order to achieve these goals we will start by giving an overview of the questions, challenges and concerns posed by the issue of transitional justice, reflecting upon the possibilities and obstacles of dealing with the past and showing how and why there has been an increasing turn to truth commissions as the privileged means to deal with past atrocities. We will, thus, analyse in greater depth these investigatory bodies giving a brief account of their definition, structure, and what are their purposes, mandate, methods, particularities, main problems and advantages.

As the cornerstone of this thesis is the focus on the victim, we will move on to analyse how the victim has been defined and protected in the realm of international law, in the light of the UN 1985 Declaration and the Van Boven/Bassiouni draft Principles and Guidelines, stressing the new trends of recognition of the victims' rights to fair treatment, assistance, privacy, security and reparation. A parallel comparison will be made between the treatment of the victim in the criminal justice system – which is traditionally centred on the perpetrator – and in means of restorative justice like truth commissions where a victim-centred approach has been adopted.

Based on these two initial overviews, we will then be ready to analyse in depth the case of the Peruvian TRC, and in particular, how the victims were dealt with. After

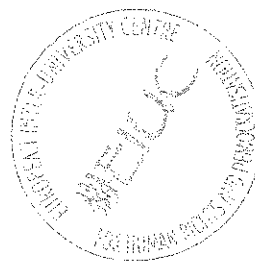
an introduction on the truth commission of Peru – including its historical setting, its structure, mandate and purposes – the treatment of the victims will, then, be studied in its different dimensions: their participation, the protection of their rights and the plan of reparations proposed by the Commission. A brief look at the possibilities and challenges of reconciliation in the Peruvian society will close this analysis.

The fact that the conclusion of the work of the Peruvian TRC is still very recent and the lack of bibliography on the treatment of victims of human rights violations as well as on the work of the commission itself, will certainly condition the reach of the proposed research and determine the need to rely on scattered sources that may, at first sight, not seem to be interconnected. In spite of the difficulties and hardships that can be anticipated, we believe that this is an interesting and challenging topic as well as a very relevant one.

To know how we can improve the treatment of the victims and make effective use of the potentialities of truth commissions as victim-centred mechanisms of justice, we, first and foremost, need to look to the past in order to draw lessons for the future. With this in mind we will analyse to what extent the Peruvian TRC met the challenge of improving the treatment of the victims in truth commissions and what lessons can be drawn from this experience in order to inform future commissions.

CHAPTER I

DEALING WITH THE PAST



States in the process of a democratic transition, in the aftermath of a civil war or after the downfall of a repressive regime, have to face several challenges and ultimately take important decisions. In an attempt to understand what these challenges are we will examine the context in which democratic transitions take place – the origins, the factors that shape the type of transition and the challenges that transitional states have to face, focusing on a particular one: transitional justice. After giving an account of the array of possible responses to past human rights violations, their advantages and disadvantages, we will focus on truth commissions, as they have been progressively gaining more attention and admiration, especially from a victim perspective. An overview of their definition, purposes, mandate, composition and relation with criminal justice system will allow us to better understand these bodies and provide us with the framework to analyse in greater depth the Peruvian TRC.

1. The process of democratic transition

The concept of change becomes a central notion when we think about transitions. The idea of something new arising and cutting the bonds with a past reality comes to our mind when reflecting upon the evolution from a repressive regime to a democratic one. What will be changed, how will such changes take place and which new realities will these changes bring about are questions to which answers will only be shaped throughout the process of transition itself and more importantly, will depend greatly on the specific circumstances of the state in which the transition is taking place.

This was the reality of many states throughout the world who, beginning in the 1970's, engaged in what Huntington called the "third wave" of democratisation³, and which is still the reality of many more states who are currently struggling with civil wars or dictatorial regimes. In all of them, transition means change, rebuilding, looking towards the future, but it also necessarily means looking at the past. In fact, in all these cases of transition there is the end of something and the beginning of something new.

³ See S. P. Huntington, *The Third Wave: democratization in the late twentieth century*, Norman, University of Oklahoma Press, 1991.

However, whatever it is that is now ending (may it be a civil war or a dictatorship), has left marks, consequences, that don't vanish together with the groups, parties or regimes that gave origin to them. Those marks will continue to be part of that society and shape the lives of its citizens. That is why such realities cannot simply be overlooked and instead need to be addressed during those crucial times of change.

Not only can these transitions have their origin in many different factors – such as a popular revolt, the resignation of a dictatorial regime due to the lack of popular support, or the handing in of arms by rebel groups who had been opposing the government – but the very process of transition may take several different shapes. There is no transition like another. Each case is unique. Many factors will determine the type and process of democratic transition that will take place in a given state. These include not only the specific context of that country – social, political, cultural and economical – but also the aims of the government in the process of transition. The type of transition and the surrounding circumstances will determine in each given state the choices made both concerning the future and the past. Huyse proposes the following three factors as the ones that influence the policy choices of the new governments: the legacy of the past regime, the international legal context at the time of the transition and the mode of transition, the last one having a major impact on the relation and the influence that the old regime may have on the new one.⁴

There are, in fact, many challenges that transitional states have to face in the process of transition. On the one hand, they are confronted with the need to create the institutional architecture of the new regime, i. e., choosing the form of government and reforming the institutions accordingly, and on the other hand, they have the difficult task of coping with the past, namely with the members of the former regime and all the effects of its rule that are still very present in society. The latter turns out to be a much greater challenge than the former due to the sensitive questions it raises and to the impact that the choices made may have on the process of transition itself, fostering, or instead, undermining the democratic process and consolidation.

2. *Transitional justice: memory v. amnesia*

⁴ L. Huyse, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, in «Law & Social Inquiry», vol. 20, no. 1, Winter 1995, pp. 51-78. Here p. 51.

One of the greater challenges of transitional states is precisely how to deal with gross human rights violations that occurred in the past, during the internal conflict or under the rule of a repressive regime. In fact, in all of these cases where a dictatorial regime was in power or state forces were confronting rebel groups in a long-lasting internal conflict, a greater part of the citizens, if not all, were deprived of some of their most fundamental rights. And the political violence left marks that need to be addressed by the new regime. This is when the problem of transitional justice comes to light. The successor regime has the task of coping with the past and this includes dealing with past atrocities. Dealing with the past becomes one of the most essential, but also controversial and difficult priorities of the new democratic regime. In the words of Huyse, "dealing with the past is an inescapable task for new democratic regimes."⁵

There are several different "societal responses to collective violence"⁶ and the choice made by the successor regime will vary according to a wide range of determining factors as well as according to the objectives of the new regime.

The primary question that states need to face in dealing with the past, is whether they want to forget or to remember, in other words, whether the past should be buried or instead if the state and the whole society should face their past. The tension between remembering or forgetting is indeed a question underlying the several dimensions of transitional justice. The choice is not an easy one. Some argue that victims and society in general will only be able to move on, former enemies will only be able to reconcile, if the past is left untouched, if they are given the chance to forget and overcome all the pain and suffering caused by past atrocities, in other words, if they can put the past behind their back. Such a position is based on the assumption that talking about the past will only reopen old wounds, bring instability, foster divisions in society by opposing again former enemies, and maybe jeopardise the whole process of democratic transition by enraging the members and supporters of the former regime. Others, however, fiercely refuse forgetting and defend the thesis that only on the basis of a clear knowledge and awareness of the past the victims and the whole society can heal from the past wounds. Whether accountability will come alongside with such

⁵ *Ibidem*, p. 64.

⁶ M. Minow, *Between Vengeance and Forgiveness: facing history after genocide and mass violence*, Massachusetts, Beacon Press, 1998, p. 9.

acknowledgement⁷ is another question, one step further. First and foremost, successor elites must decide whether or not to face the past.

It is only then, after this first choice is made, that the new regime will have to opt for one of the several possible ways of reckoning with the past. If the choice made is to forget, impunity will be the word of order. This is normally materialised in the famous and always controversial amnesty laws⁸, which can result from a self-amnesty carefully and strategically prepared by the outgoing regime or from a process of negotiation between the forces of the old and the new regimes. In both cases, the adoption of such laws demonstrates the influence that the old regime still has over the new one, many times due to the strong popular support that the first still enjoys and other times due to the military strength that the former elites still hold. In the "balance of power between the old and the new order"⁹, the scale tends very clearly to the old elites. The result of choosing to forget is both no acknowledgement and no accountability. The new regime will begin its life in a "state of denial".¹⁰ This may seem at first an easy way out, but if we look deeper we will see that it was not just out of a mere simplistic approach that the successor elites chose this path and that, eventually, its effects will reveal how difficult that choice was. In fact, the new leaders often find themselves forced to accept certain demands made by the outgoing regime as terms of the negotiated pact which allows for the transition or as a result of pressure by the former military elites in order to ensure that the transition takes place and that it is as peaceful and stable as possible.¹¹ In these cases, more than in any others, the political constraints curtail the margin of manoeuvre of successor elites in dealing with the past. And, as many authors have pointed out, impunity may then turn out to be the undermining factor in the process of democratic transition. After giving several personal accounts of victims, Hayner concludes that "remembering is not easy but forgetting may be impossible."¹² Forgetting may not only be impossible for the victims, but for the whole nation to move on. In fact, past wounds do not remain safely locked in the past, they are open wounds that need to be closed. "Past traumas do not simply

⁷ The expressions are used by Luc Huyse. L. Huyse, *loc. cit.* (note 4), p. 52.

⁸ In the words of Geoffrey Hartman, "Amnesty is lawful amnesia..." G. Hartman, *Darkness Visible*, in G. Hartman (Ed.), *Holocaust Remembrance: The Shapes of Memory*, Oxford, Blackwell, 1994, vol. I, p. 14.

⁹ L. Huyse, *loc. cit.* (note 4), p. 51.

¹⁰ S. Cohen, *States of Denial. Knowing About Atrocities and Suffering*, Cambridge, Polity, 2001.

¹¹ As Minow sums it, "Amnesty or pardon...institutionalises forgetfulness, and sacrifices justice in a foreshortened effort to move on." M. Minow, *op. cit.* (note 6), p. 15.

¹² P. B. Hayner, *op. cit.* (note 2), p. 2.

disappear with time..."¹³ Ignoring the tensions and suffering inherited from the political violence that occurred under the old order will only mean repressing a turbulence of feelings that will soon or later set off. "...Remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims."¹⁴ In addition to such claims, others argue that impunity in the form of amnesty laws ignores the fact that the right to justice is a human right and that the crimes of *lesa humanidad* are not subject to prescription and, thus, cannot be object of such laws.¹⁵

Victims' demands for truth and justice, the pressure from the international community and the controversy and dangers of amnesia have led many new democratic governments to choose to remember. Acknowledgement¹⁶ of what happened and its wrongfulness may, in practice, take a wide variety of forms. And it may, or may not¹⁷, as noted before, be accompanied by accountability, i.e., by bringing to justice the individuals responsible for the past atrocities. In fact, by choosing to remember, a state may carry out prosecutions against those of whom there is enough evidence of their participation in the past violence, and this may happen at the national level (domestic courts) or at the international level (foreign or international courts). Prosecution is at the opposite end from impunity and its advocates argue that it is crucial to reinstall the moral order, to strengthen a fragile democracy by strongly affirming the democratic values, as well as to ensure the following democratic consolidation, and to deter future abuses.¹⁸ However, prosecution raises several questions and gives way to many frustrations. Trials normally turn out to be quite limited in their reach. In situations of post-conflict or after a military or authoritarian regime, usually the number of perpetrators is overwhelming and the inevitable selectivity¹⁹, together with the usual incapability of a judiciary still recovering from the previous regime, determines that

¹³ This is the view of psychologists noted by Hayner. *Ibidem*, p. 134.

¹⁴ Judith Herman, as cited by Hayner. *Ibidem*, p. 135.

¹⁵ E. Cuya, *Las comisiones de la verdad en América Latina*, Nürnberg, 1996, p. 3.

¹⁶ See Huyse citing Thomas Nagel on the difference between knowledge and acknowledgement. The latter implies that the knowledge has been "officially sanctioned", "made part of the public cognitive scene." L. Huyse, *loc. cit.* (note 4), p. 53. Also, Aryeh Neier, as cited by Hayner, states, "Acknowledgement implies that the state has admitted its misdeeds and recognized that it was wrong." P. B. Hayner, *op. cit.* (note 2), p. 26.

¹⁷ The most famous example of acknowledgement and impunity (in the form of amnesty) was the South African TRC, where perpetrators of the Apartheid regime could be granted amnesty under the condition of disclosing the truth about the facts and their role in committing these politically motivated crimes.

¹⁸ L. Huyse, *loc. cit.* (note 4), pp. 55-57.

¹⁹ As Minow puts it, "Selectivity in prosecutions has undermined perceptions of fairness..." M. Minow, *op. cit.* (note 6), p. 44.

only a few of the responsible will actually be prosecuted which, naturally, leads to the disappointment of the victims. Moreover, the truth established in the courts is always a contestable one. * "Trials following mass atrocities can never establish a complete historical record, despite all hopes."²⁰ Doubts may remain and denial might still prevail. Besides, as P.B. Hayner notes "...there are a whole range of needs...that cannot be satisfied by action in the courts...The concrete needs of victims and communities that were damaged by the violence will not be addressed through such prosecutions..."²¹ In fact, many concerns that arise in the process of transitions, do not even begin to be addressed by trials. Among these are paying honour and respect to the victims, providing rehabilitation for victims and their families, promoting reconciliation, undertaking important institutional reforms and preventing future conflicts. In addition, concerns with the full respect of fundamental principles of the rule of law, such as due process, presumption of innocence, non retroactivity (*ex post facto* justice) and the right to a fair and impartial trial, also arise, as many of these trials take place in the midst of an unstable process of transition, where the politicisation of the judicial system is a very real risk.

Sometimes, alongside with prosecutions, the successor government also chooses to expel from the public institutions and authorities individuals who were direct or indirectly linked to the old regime (from political and military officials to civil servants). Such choice is commonly referred to as 'lustration'. However, these purges have not been so common, except in the transitions of former communist East-European countries. Their opponents argue that they not only raise concerns of fairness and legitimacy (due to the false presumptions and lack of evidence that the expulsion may rely upon),²² but also that such strategies turn out only to weaken a recently born democratic government which needs, more than anything, qualified personnel to work towards development and consolidation, some of whom could be precisely persons who happened to work for the previous state apparatus.²³

Besides these two mechanisms to ensure accountability of wrongdoers in the transitional period, the new government has at its reach other instruments and policies to reckon with the past and that answers some of the shortcomings that the analysed

²⁰ *Ibidem*, p. 47. The author adds, "If the goal to be served is establishing consensus and memorializing controversial, complex events, trials are not ideal."

²¹ P. B. Hayner, *op. cit.* (note 2), p. 11.

²² Hayner warns that the practice of lustration usually lacks "due process guarantees" and relies on the "sometimes faulty intelligence files of the prior regime". *Ibidem*, pp. 12-13.

²³ L. Huyse, *loc. cit.* (note 4), p. 63.

means entail. One of these is, for example, providing access of victims and their relatives to security files in order to come closer to the truth about what happened and who was responsible for their suffering. Also, transitional states usually engage, or at least intend to, in deep reforms at the political, legal, judiciary and military level. Such reforms, when implemented successfully, may prove to be a major step towards reconciliation, prevention of further conflict, and the development of the society in general. More recently, there has been a generalised tendency and a widespread movement towards a greater concern with the victims of the past regime, publicly acknowledging their suffering, paying tribute to their dignity and, most of all, ensuring that the past won't be forgotten. This has led transitional states to offer public apologies to the victims, grant them and their families reparations (including monetary compensations, restitutions and rehabilitation – legal and therapeutic services, for example), build memorials in their honour, promote educational programs which give count of the past collective history and, in some cases, naming the victims and the perpetrators of the past political violence.

3. *The turn to the truth: truth commissions*

Following this trend of a greater focus on the victims of the old regime, answering to the demands for truth from the victims, society at large and the international actors, and as a consequence of the recognition of the limited reach of the courts and of the fact that they do not address most of the needs and concerns of a democratic transition²⁴, a new mechanism of dealing with the past has developed to become, as I will demonstrate, the privileged means of transitional justice in our days. I am referring to the official investigatory or truth-seeking bodies, which have been widely known as Truth Commissions. Such commissions of inquiry have taken different shapes and denominations²⁵ since they first appeared and it was especially with the Truth Commission of El Salvador (1991) and the Truth and Reconciliation Commission in South Africa (1995), that these bodies became known to the public. They have also been assigned different mandates as well as given different purposes according to the transitional context in which they are created.

²⁴ P. B. Hayner, *op. cit.* (note 2), p. 14.

²⁵ See Hayner for a comprehensive account of the different shapes these bodies have taken. The author also describes in more detail the most significant five Truth Commissions to date, after giving a comparative perspective of twenty-one other Truth Commissions. P. B. Hayner, *op. cit.* (note 2).

Truth Commissions are public, non judicial, inquiry bodies created with the purpose of investigating the violations of human rights and humanitarian law that occurred during a certain period of political violence or internal conflict, and with the final aim of issuing a report where they will give an account of the causes, circumstances, actors and consequences of the violence, determine responsibilities, analyse the most relevant cases investigated and make recommendations. The aim of such work is to make the society face its past in a critical manner, in order to overcome crisis and deep traumas originated by the violence and prevent that such facts will be repeated in a near future.²⁶ According to the definition put forward by P. B. Hayner, the term "truth commissions" should be applied to inquiry bodies that investigate a "pattern of abuses over a period of time" in the past and whose temporary functions are "officially sanctioned, authorized, or empowered by the state", resulting in the draft of a final report.²⁷

The reasons of the choice for this means of alternative justice may vary according to the context of the transition and the most pressing needs of the government and society in each given country. They may come about as part of the new government's strategy to demonstrate its compliance with human rights and its disapproval of the actions of the old regime, as part of a joint effort to bring justice to society together with criminal prosecutions (to which the truth commission's investigations might even contribute), or as a major step towards reconciliation in a country shattered by deep divides and enduring tensions.²⁸

The characteristics of each truth commission will also depend greatly on several aspects of the particular reality of each country. Among these are the political context of that country, the type of transition and the balance of the several political forces.²⁹ They may be created at national or international initiatives, and in the first case, either by the executive or legislative power. As Julie Guillerot says, "It's a question of political opportunity."³⁰ The composition of these commissions will also vary (the nationality, number and amplitude of expertise of the commissioners), although it tends to be invariably made up of persons - preferably representatives from all sectors of society - whose personal prestige, moral integrity and ethical background are widely

²⁶ E. Cuya, *loc. cit.* (note 15), p. 4.

²⁷ P. B. Hayner, *op. cit.* (note 2), p. 14.

²⁸ *Ibidem*, p. 24.

²⁹ J. Guillerot, *Commissions de la Vérité: De l'expérience internationale à la Commission péruvienne*, Lima, APRODEH, 2002, p. 2.

³⁰ J. Guillerot, *op. cit.* (note 29), p. 2. Author's translation from the original French.

renowned, and this way, ensure the legitimacy and impartiality of the commission and help to guarantee the confidence of the population.³¹

The mandate of each given truth commission is another variable. Such mandate is delimited temporally and substantially. The differences in mandates *ratione temporis* include the time period in the past that each Commission is mandated to investigate and also the time that is made available to the Commission to carry out its work. While the first depends mostly on the history of the past abuses in that country and the political constraints that may still exist, the second has a lot more to do with resources constraints. The delimitation of a Commission's mandate *ratione materiae* will determine which facts and persons (or groups) will be under investigation, as well as other tasks that these commissions may carry out, such as putting forward recommendations concerning reparations to the victims and proposals of reforms in order to prevent the repetition of past abuses. Two concerns usually arise in this delimitation. First, concerning the facts to be investigated, determining that a Commission will only look into the most representative cases of the past atrocities (which is common due to time and resources constraints) raises questions of arbitrary selection of such cases and discrimination of victims.³² Second, a choice must be made whether to name the names of individual perpetrators when determining responsibilities. Many voices draw attention to the principle of the presumption of innocence and possibility of defence to oppose the inclusion of the names of presumed perpetrators in the final report.³³ The choices made will, once again, reflect the obstacles and needs faced by the new democratic government and society.

The final goal of truth commissions is to issue a public report in which, after having given an introduction to the situation of human rights abuses that developed and carried on for the time period which the commission was mandated to investigate, they present their findings, usually in a quite extensive manner, and in the end make recommendations to the new government. By making their findings public, these commissions aim at stopping the cycle of denial of the past abuses, raising awareness

³¹ *Ibidem*, p. 3.

³² P. Seils, *La Justicia Transicional*, in APRODEH, FIDH (Eds.), *La Judicialización de las violaciones a los Derechos Humanos en el Perú 1980-2000*, Lima, APRODEH, 2003, pp.15-24. Here pp. 22-24. The author draws attention to the risk of an "hierarchy of victims" and defends that in an "intelligent model of justice", one of its three elements must be a selection of cases which is loyal to history ("*históricamente fiel*"), i.e., the cases investigated shall be illustrative (those that demonstrate the nature of the pattern of violence) and not the ones whose victims are considered important. This, according to the author, is also part of the historical function of transitional justice. Author's translation from the original Spanish.

³³ J. Guillerot, *op. cit.* (note 29), pp. 3-6.

about their causes and about the tensions of the past and present, and fostering the active participation of all members of the society in public discussions about such issues. By submitting proposals to the new government, truth commissions aim at making their efforts and their work more tangible and long-lasting, in the form of concrete measures to overcome past tensions and prevent future conflicts, such as reforms of the political and judicial institutions, the armed forces, and reparations to the victims.

The main idea behind the creation of truth commissions is that in order to ensure an effective and enduring transition to democracy, more than anything, there has got to be a "process of investigating and acknowledging the full truth"³⁴ about the past. Finding out exactly what happened in the past, what crimes were committed, who were the perpetrators and who were their victims, and making these findings known to the public becomes the priority in the process of transition. A full disclosure of the facts is, then, the chosen mechanism by the new government to come to terms with the past. That is why many times these commissions are called "truth-seeking" or "fact-finding" bodies.

By investigating the facts and establishing the truth, and later making it known to the public in a complete and carefully written report, the main function of truth commissions is to remove doubts about the past and, most of all, to "remove the possibility of continued denial."³⁵ In fact, one of the major obstacles to a stable and inclusive transition and to reconciliation in a divided society is precisely the contradiction among different versions of what happened, why it happened and who were the players. Guilt and responsibility will constantly be thrown around as bouncing balls. No acknowledgement of the truth or of responsibility will take place when society is haunted by an unclarified past. This cycle of denial, especially sponsored by certain groups who know only too well their own responsibilities in the past abuses, will continue to undermine the possibility of moving forward, towards a democratic, rights-respecting, inclusive and reconciled society. Victims may be left with the following questions: 'how can we forgive if we don't know who to forgive?', 'how can we forget if we don't know exactly what happened?'³⁶ The truth appears as the only solid basis for a new democratic government and society to be built upon. On the contrary, denial

³⁴ P. B. Hayner, *op. cit.* (note 2), p.14.

³⁵ *Ibidem*, p. 25.

³⁶ *Ibidem*, p. 30.

will only perpetuate the control of the former elites over the rest of society and, to a certain extent, their abuses of the past. Tensions will, thus, remain and conflict is very likely to erupt again, because the cycle of violence (now more psychological than physical) was not yet broken. The main contribution of truth commissions to the transition is exactly to break that cycle, to reconstruct the facts of the past on the basis of their investigations and of the testimonies collected (given by the victims and, in certain cases, also by the perpetrators³⁷) and, in this way, making it "impossible for anyone to resist the truth."³⁸ The truth established by truth commissions is, most of the times, already widely known (especially in cases when almost everyone has either been a victim or a perpetrator in the past), but only in the private and tacit sphere of those who were involved in each episode. There is not a common truth, a shared knowledge of the past and that is why denial continues to be possible. Thanks to the final report of a truth commission, individuals will finally face the past as a shared experience, they will be brought together in a public discussion on the atrocities and the circumstances surrounding them, the stories of each person will become known to others and no longer denied. The common history of that country will, thus, be rewritten.

Overcoming denial and deceit becomes the major contribution of truth commissions to the victims in particular. The acknowledgement of the truth has a central role in the victim's healing process. Especially for these, being denied their stories and their suffering results in continued re-victimisation. Truth commissions give them a chance to tell their stories and award them credibility; they give victims a voice to finally counter the denial that has long silenced them. By attentively and receptively listening to their stories, truth commissions allow victims to recover their dignity. Their past experiences will be made public and acknowledged, removing any doubts about claims of victimhood and any suspicion of the involvement in activities that allegedly justified victimisation. At a more personal level, this process will destroy the sense of culpability for the victimisation.

Establishing the truth is, therefore, the most relevant and immediate goal of truth commissions. However, it is also expected that through the process of truth-telling,

³⁷ In the case of the South African Truth and Reconciliation Commission the testimonies of perpetrators had an enormous significance, as they allowed victims and society at large to finally gain knowledge of the crimes committed, the circumstances in which they took place and who was responsible. However, this commission had the unique and controversial feature of 'trading truth for amnesty'. The perpetrators who confessed their crimes and gave information to the Commission, qualified to apply for amnesty before the Committee on Amnesty, one of the three committees that made up the Truth and Reconciliation Commission in South Africa. M. Minow, *op. cit.* (note 6), pp. 52-56.

³⁸ P. B. Hayner, *op. cit.* (note 2), p. 25.

these commissions may also promote reconciliation. This long-term goal has been many times assigned to truth commissions. It has indeed been argued that clarifying what happened in the past allows peace to return to society and possibly provides victims the serenity that they need to forgive. Through acknowledging the suffering of the victims and the responsibility of the perpetrators, by giving some sense of restoration to the victims, hatred is expected to fade away progressively and the likelihood of future confrontations to decrease. Reconciliation and the prevention of future conflicts can, in this sense, be seen as results of the work of truth commissions, having been laid down as main goals in certain commission's mandates.

However, including reconciliation among the goals set forth for truth commissions may not be the best choice. In fact, many of these commissions have been denominated "Truth and Reconciliation Commissions", sending the message that reconciliation is, alongside with the establishment of the truth, the purpose of their work and the reason of their creation. It also gives the idea that reconciliation is as feasible as establishing the truth. Reconciliation, nonetheless, will depend on many more factors besides the work of any of these commissions, while establishing the truth relies mainly on investigation tasks and collecting testimonies. Reconciliation is a long-term endeavour that one cannot predict whether it will ever be achieved. And certainly the work of truth commissions cannot be but a first step in that direction. Placing reconciliation among the main purposes of a truth commission means placing an overwhelming responsibility on that commission that may lead to frustration and disillusionment about its achievements. Creating unrealistic expectations and departing from false assumptions, this will turn out to be a counterproductive strategy. No commission, however successful the realisation of its work, will ever be able to ensure, on its own, individual or national reconciliation.³⁹

Reducing past and present tensions, and preventing future conflict is also regarded as a result of a long-term strategy that the new government must engage in and to which the work of truth commissions can only constitute an impetus. Such tensions result in most of the cases from structural inequalities and discriminatory practices that have long contributed to a fragmented and deeply divided society. Looking towards the

³⁹ See Hayner, when she suggests that "reconciliation...may be more affected by other factors...For example...a clear end to the threat of further violence; a reparations program for those injured; attention to structural inequalities and basic material needs of victimized communities; the existence of natural linkages in society that bring formerly opposing parties together; or...the simple passage of time." *Ibidem*, p. 8.

future, and on the basis of their comprehensive analysis of those structural social, cultural, political and legal problems, truth commissions usually include in their final reports recommendations to the government.⁴⁰ These comprise proposed reforms to restructure the police and the military, to adopt several legal and administrative measures, to change the political and judicial institutions and other public authorities. They may also include proposals of reparations to the victims, including monetary compensation, restitution, rehabilitation, public apologies, memorials, educational reforms and other measures to avoid forgetting the past and to restore peace and dignity to the victims.

The contribution of truth commissions to bring perpetrators to justice may be another of the functions assigned to these bodies. Following criminal prosecutions may be regarded as an essential parallel effort to bring justice, peace and reconciliation to society. The results of the investigations carried out and the collected testimonies can, indeed, be extremely valuable for the judicial proceedings of national or international courts. Such use, however, raises many concerns of legitimacy, namely in cases where perpetrators also testified before the commission, and knowing whether such testimonies may be used in the course of a criminal proceeding becomes a central question with ethical and legal implications. Anyhow, once these concerns are addressed, there is no reason why in principle truth commissions cannot coexist with criminal prosecutions. In other words, the choice for the creation of a truth commission does not entail the impunity of the perpetrators in the sense that they will not be brought to justice.

It is worth noting, however, that in many cases the creation of a truth commission diminished the sense of indispensability of criminal prosecutions of the perpetrators at a large scale, or at least, the stress put in the public discourse on judicial proceedings as part of the strategy of dealing with the past, which many times echoes more a desire for revenge than a demand for justice. In this sense, in cases where the political constraints of the new government and the caution it needs to have dictate that prosecutions may have to be put on hold, truth commissions may actually appear as the perfect solution⁴¹, managing to "strike the balance between the demands for justice and

⁴⁰ As Hayner notes, "Truth commissions are uniquely positioned to undertake this evaluative and prescriptive task, as they can base their conclusions and recommendations on a close study of the record, while standing as an independent institution separate from the systems under review." *Ibidem*, p. 29.

⁴¹ Minow makes the point that by not carrying out prosecutions, the other mechanisms chosen may be always regarded as a second-best alternative and says, "When political realities preclude prosecutions, the

political prudence or, in other words, to reconcile ethical imperatives and political constraints.”⁴² In fact, truth commissions “ensure that ‘the facts’ are not forgotten”, that they “remain alive in the memory of the collectivity”⁴³ without prosecuting (at least themselves) the perpetrators of the crimes investigated.⁴⁴

Truth commissions can coexist with criminal justice in dealing with the past and the truth established by the former may be complemented with judicial prosecutions. Nevertheless, truth commissions are very distinct from trials in many aspects. One of the most distinctive traits of truth commissions is their focus on the victims.⁴⁵ Whereas criminal prosecutions are founded on theories of retributive justice and adopt a perpetrator-centred approach, truth commissions follow policies of restorative justice and have a victim-centred approach. Truth commissions represent for the victims, as we have already seen, a chance to tell their story, without being aggressively cross-examined and without seeing their credibility and suffering questioned once again. While the testimonies of victims before these commissions are their main source of information (may it be during interviews with the victims or in public hearings in which victims speak out publicly about their traumas), for the victims telling their own stories to someone that is interested in listening and will not promptly deny them, may have a “cathartic effect” and help them in their process of psychological healing.⁴⁶ The methods of truth commissions - which fundamentally consist of collecting testimonies from a broad number of victims, relatives and witnesses - appear in contrast to the criminal proceedings in which the perpetrators take on the central role and most victims do not even actively participate in the whole process. The work of truth commissions, as has also been noticed, not only gives a voice to the victims and publicly

prosecutorial road not taken may haunt and diminish the remaining avenues.” In these cases, the choice of creating a truth commission “may seem a pale and inadequate substitute.” M. Minow, *op. cit.* (note 6), p. 58.

⁴² Huyse presents this as a “crucial challenge” in the debate between “pardon versus punish”. L. Huyse, *loc. cit.* (note 4), p. 65.

⁴³ *Ibidem*, p. 53.

⁴⁴ As Huyse states, “...if the balance of forces at the time of the transition makes a negotiated mildness inevitable, a truth-telling operation with full exposure of the crimes of the former regime is the least unsatisfactory solution.” *Ibidem*, p. 78.

⁴⁵ Minow states, “The most distinctive element of a truth commission, in comparison with prosecution, is the focus on the victims, including forgotten victims in forgotten places.” M. Minow, *op. cit.* (note 6), p. 60. In the same sense, Hayner affirms that “A fundamental difference between trials and truth commissions is the nature and extent of their attention to victims.” She goes on to say that “Most truth commissions, in contrast [to trials] are designed to focus primarily on victims.” P. B. Hayner, *op. cit.* (note 2), p. 28.

⁴⁶ *Idem*.

acknowledges their suffering in a report, but also contributes to restore the damage caused through proposals for reparations.

The focus of truth commissions on the truth and on the victims has placed these bodies in a prominent position, when issues of democratic transition and transitional justice are at stake. Incorporated in the wider stream that has been developing in international human rights of a greater concern with restoring the dignity of those who suffered human rights violations, and of preventing future violations by overcoming tensions and positively fostering a culture of respect for the fundamental rights of each human being, truth commissions have been increasingly adopted as the privileged means of transitional justice.

The decision to reckon with the past through the creation of a truth commission also always involves the question of accountability of the perpetrators. Those who confess greater doubts about the successful results of truth commissions, usually argue that, while acknowledgement will be ensured, accountability will be overlooked and impunity will still haunt the democratic transition and the search for justice. Criminal prosecutions are, for many, still regarded as the primary means to deal with past injustices, granting truth an important, and yet, secondary role. Martha Minow, while reflecting upon the opportunity of the several "societal responses to mass violence", formulated these concerns into the following question: "Should justice or truth take precedence?"⁴⁷ Perhaps by drawing on the wisdom of one of the most famous and brilliant human rights activists one can better respond to such concerns. In an interview given to Daan Bronkhorst, Zallaquett cleverly defended that "truth is at least as important as justice."⁴⁸

4. Conclusions

For states in the midst of a democratic transition, facing a past of mass violence, the decision of 'what to do about the guilty'⁴⁹ - of whether to remember or to forget and whether to punish or pardon - is determined by several factors and has many important implications. From the several possible responses, more and more states have been

⁴⁷ M. Minow, *op. cit.* (note 6), p. 9.

⁴⁸ As cited in D. Bronkhorst, *Truth and Reconciliation: Obstacles and Opportunities for human rights*, Amsterdam, Amnesty International, 1995, p. 17.

⁴⁹ The expression is used by Aryeh Neier. See A. Neier, *What Should Be Done About the Guilty?*, in «*New York Review of Books*», February, I, 1990.

turning to truth commissions. Their fundamental search for the truth and their focus on the victims contribute to breaking the cycle of denial, to award the victims an opportunity to be heard and obtain redress. In this sense they restore dignity to the victims and provide them with a sense of justice, at the same time as they constitute a first step towards reconciliation and prevention of future conflict. The coexistence and collaboration of truth commissions with criminal justice will allow truth and acknowledgement to exist side by side with justice and accountability, answering the most pressing requirements of transitional justice.

In any case, the decision to create a truth commission means fundamentally a choice for the truth. And this means both remembrance and retribution.⁵⁰ These two options together will mean for the victims, in one word, justice, for as Roger Errera once truthfully stated, "Memory is the ultimate form of justice."⁵¹



⁵⁰ The view of truth as a form of retribution is also defended by Huyse. "The truth is both retribution and deterrence." L. Huyse, *loc. cit.* (note 4), p. 78. This contradicts the defiant arguments that truth commissions do not afford any kind of retribution to perpetrators and indeed constitute in reality a disguise for impunity.

⁵¹ As cited by Huyse. *Ibidem.*

CHAPTER II

THE VICTIM

In international law, in particular in human rights law, as well as in domestic jurisdictions, there has been little concern with the victims of crime and, more in general, of human rights violations. The perspective and needs of the victims have been widely neglected and overlooked. Victims have been traditionally "the forgotten persons".⁵² However, there has recently been an increasing concern in ensuring and protecting the rights of victims and a concomitant need to find workable definitions of victim. In the present chapter, we analyse the overarching framework of the recognition and protection of the rights of the victims in which the experience of the Peruvian TRC emerges. In fact, in order to analyse the position of the victims in truth commissions and, in particular, in the Peruvian TRC, it seems important to have a deeper insight on how the victim of gross human rights violations has been regarded and dealt with in judicial and non-judicial systems, both at the national and international levels, and thus, gain a better understanding of where the victim stands today within the human rights system and discourse. With this purpose we will firstly reflect upon the main documents at the international level that laid the general and basic guidelines for the recognition of the status of victim and for the protection of the corresponding rights. We will then proceed to analyse the standing of the victim in truth commissions vis-à-vis the traditional retributive criminal justice system with a view to draw conclusions on the appropriateness of each mechanism to the implementation of the standards and guiding principles laid down in the texts previously analysed. A final reflection upon the guiding principles drawn from our analysis will allow us to infer in the coming chapters the degree of conformity of the options taken by the Peruvian TRC with the internationally established and recognised guidelines.

1. The neglect for the victims' views and concerns

As one reflects on human rights violations, one cannot but be surprised at the lack of attention that has been paid to its victims, to those who suffered the pain

⁵² UNODCCP, *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, New York, UNODCCP, 1999, p. 1.

(physical and moral) and the damages resulting from such violations, especially when central to the very concept of human rights and the mechanisms of their implementation and protection seems to be the notion of victim itself.⁵³ Whereas much has been rightfully discussed and implemented concerning the position of the defendant in criminal law and procedure and a great deal of preoccupation has been put on the safeguard of the rights of perpetrators of human rights violations, the victims constantly tend to occupy only a secondary role. The concern in ensuring guarantees of due process and other cornerstone principles of the rule of law such as the presumption of innocence and the right to defend oneself against an accusation in the framework of an institutionalised procedure in traditional criminal justice systems, seems to have placed the focus on the rights of the accused in detriment of the protection of the victims.⁵⁴

Several reasons may justify such disregard for the views of the victims. While it may seem that the position of the victim is easier to sympathise with, an apathetic attitude regarding the victims as merely unfortunate results of human action is still a generalised approach from many who are involved with victimisers and victims. By the same token, academics and professionals of the criminal justice area have traditionally placed the victim in a secondary stage without paying much reflection or any kind of justification to it. It is, thus, a matter of culture of the society in general. In the words of Van Boven, victims are perceived as a "marginal phenomenon."⁵⁵ There are, however, more complex reasons. The political and financial implications of a greater concern with the victims have turned it into a "complication", an "embarrassment" or a "political inconvenience".⁵⁶ The sensitivities it touches upon and the lack of agreement on whom to consider a victim and the kind of protection to afford have led this issue very simplistically to be regarded primarily as a domestic issue. However, also at the

⁵³ As Nowak affirms, "The very notion of human rights is based on a victim's perspective, i.e., on the rights of victims of human rights violations." M. Nowak, *The Right to Reparation of Victims of Gross Human Rights Violations*, in G. Ulrich, et al (Eds.), *Reparations: Redressing Past Wrongs*, The Hague, Kluwer Law International, 2003, pp. 277- 308.

⁵⁴ Dünkler, has, however, drawn attention to "the danger that the accused's legitimate rights to defend himself will be impaired" as a result of the improvement of "the victim's situation especially in criminal proceedings", affirming that "...the movement towards the perspective of the victim has partially been accompanied by a move away from the offender" and makes the case for an approach that takes into account "the implications of an intensified emphasis on the victim..." F. Dünkler, *The Victim in Criminal Law – on the way from an offender-related to a victim-related criminal justice?*, in E. Fattah, S. Parmentier (Eds.), *Victim Policies and criminal justice on the road to restorative justice – Essays in honour of Tony Peters*, Leuven, Leuven University Press, 2001, pp. 167 - 209. Here, pp. 167 and 201.

⁵⁵ According to Van Boven, "The victim's perspective may be perceived in many societies as a complication, an inconvenience and a marginal phenomenon." See T. van Boven et al. (Eds.), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht, SIM, 1992, p. 1.

⁵⁶ *Ibidem*, p. 4.

national level the political implications of how to deal with a past of gross human rights violations, as well as the financial concerns involved in reparations programs and victim assistance deem the issue of the rights of the victims to be left aside. This is reinforced, at times, by the total inability of the government to cope with the needs of the victimised population.

2. The shift towards a greater concern with the victim

The recent years have brought significant developments and improvements in the recognition of the status of victims and the protection of their rights. The so-called victims' movement that has developed mainly during the past decade has successfully placed the victim among the main concerns and priorities of states and international organisations. This shift of focus towards the victim has been accompanied by an increasing turn to means of restorative justice and to the search for the truth in dealing with human rights violations. And these trends have been mutually reinforcing, resulting in a victim-centred approach in current criminal and transitional justice. The perspective of the victim, indeed, has been increasingly gaining attention and progressively emphasised within the human rights arena, in particular by NGOs, human rights activists and victim support groups.

The development of victimology as an independent sub-discipline of criminology, the awareness that prevention of human rights violations depends greatly on due attention paid to the victimised and that reconciliation is better served if both victim and perpetrator are involved in a healing and restorative process, have contributed to this increasing concern with the victims of human rights violations. Above all, thanks to the persistence of the advocates of a greater focus on the victims, awareness was raised that there are certain rights under the international law of human rights that can no longer be overlooked and imperatively need to be guaranteed to the victims of human rights violations. Among these, the most important, as will later be developed, are the principle that the victim shall be treated with dignity and the right to an effective remedy, i.e., the right to access to justice and the right to seek redress for the harm and damage suffered. Such principles and rights have been progressively developed and recognised in international human rights instruments, humanitarian law norms and national criminal legislation, at the national, international and regional level.

The greater concern with the victim that we have been giving account of, has mainly focused and been translated into the recognition and implementation of the right of victims to reparation. This is demonstrated by the amount of literature on the foundations and implications of this right, and in particular by the provisions of the international texts that will later be analysed in greater depth. However, other developments demonstrate such concern. The participation and protection of certain rights of the victim such as treatment with dignity, security and privacy throughout criminal proceedings has been ensured in both the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.⁵⁷ More recently, the Statute of the International Criminal Court, that constitutes a major breakthrough in the protection of the rights of victims in international criminal law, includes several provisions on the participation of the victims in the proceedings, victim assistance programs and reparation.⁵⁸ Among the efforts made at the regional level regarding the protection of victims' rights, that will not be analysed in detail here, are the European Convention on the Compensation of Victims of Violent Crimes, adopted by the Council of Europe on 24 November 1983 and the Framework Decision on the Standing of Victims in Criminal Procedure, adopted by the Council of the European Union on 15 March 2001. In parallel, the increasing use of truth commissions to address past atrocities, relying mostly on the testimonies given by the victims themselves and drawing up reparation programs for the benefit of those victimised, thus placing them at the centre of both the fact-finding and the healing process, denotes this slow but steady evolution towards a victim-centred approach in responding to human rights violations.

The greatest contributions to the definition and protection of the rights of the victim have, however, come from two international law instruments that have been drafted within the United Nations system. These documents, generally referred to as the 1985 Declaration and the Van Boven/Bassiouni principles and guidelines, "define the current approach of international human rights and humanitarian law towards victims."⁵⁹ These guidelines are of paramount importance, as they lay down the principles and minimum standards that shall be implemented regardless of the context in which the violations take place, thus contributing to ensuring consistency in the treatment of victims world-wide.

⁵⁷ See Art. 22° of the ICTY Statute, Rule 69 of the ICTY Rules of Procedure and Evidence, and Art. 21° of the ICTR Statute.

⁵⁸ See Art. 68°, 75° and 79° of the Rome Statute.

⁵⁹ M. Nowak, *op. cit.* (note 53), p. 283.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985 (hereinafter the 1985 Declaration)⁶⁰, represents the first effort by the United Nations to lay the minimum standards of protection of the rights of victims. This Declaration was, in fact, "based on the conviction that victims should be treated with compassion and respect for their dignity and that they are entitled to prompt redress for the harm they have suffered, through access to the criminal justice system, reparation and services to assist their recovery."⁶¹

A few years later, in the early 1990's, the UN Sub-Commission on Human Rights, aware of the need to establish common basic principles on the right of victims to reparation, appointed as Special Rapporteur Theo van Boven to prepare draft guidelines on the right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms. M. Cherif Bassiouni was later appointed independent expert by the Commission on Human Rights to elaborate a revised version of the guidelines, taking into account the views expressed by States and intergovernmental and non-governmental organisations. This report was submitted in January 2000 and it includes the draft "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law."⁶² The Commission requested the Secretary-General to circulate this text to all Member States with a view to its adoption by the General Assembly.⁶³

These two important instruments together have at last materialised the principles and rights that should be recognised and implemented regarding the treatment of victims laying down fundamental guidelines that should be taken into account by governments, international organisations, truth commissions, national institutions and individuals dealing with victims of human rights violations. Enjoying the authority and legitimacy resulting from having been adopted or drafted under the auspices of the United Nations, the 1985 Declaration and the Van Boven/Bassiouni Principles should be held as the main references in drawing up programs and legislation concerning the treatment of the victims. For this reason, we will rely on these documents in our

⁶⁰ UNGA-Res. 40/34 of 29 November 1985.

⁶¹ UNODCCP, *Handbook on Justice for Victims: on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, New York, UNODCCP, 1999, p. iv.

⁶² UN-Doc E/CN.4/2000/62.

⁶³ For a background on the adoption of the draft Basic Principles and Guidelines, see G. Echeverria, *The Draft Basic Principles and Guidelines on the Right to Remedy and Reparation: An effort to develop a coherent theory and consistent practice of reparation for victims*, in «www.article2.org/mainfile.php/0106/60».

analysis of how the victim has been regarded and dealt with in the current human rights realm in order to establish the principles that should guide the treatment of the victims, namely by the Peruvian TRC.

3. *The notion of victim*

The mechanisms and instruments of protection of the rights of the victims now under analysis require, in order to be effectively implemented, the answer to an underlying question: *who are the victims?* The issue of the definition of 'victim', often overlooked in criminal and international law has, thus, become, an object of reflection of academics, lawyers, criminologists, sociologists, drafters, policymakers, truth commissions' staff and human rights activists throughout the world. As a consequence, several authors have carried out research studies on this subject, attempting to formulate workable definitions of victim. In parallel, many international and national organisations and institutions have tried to find the most appropriate way to define this group, taking into account the implications resulting therefrom.

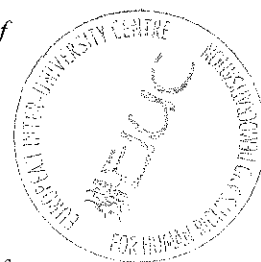
The two UN texts also provide each a definition of the term 'victim'. According to paragraph A, point 1 of the 1985 Declaration, victims are defined as:

"persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."

The same paragraph in its point 2 adds:

"The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

It must, however, be borne in mind that this declaration only refers to victims of crime and abuse of power, thus having a more limited scope. Moreover, this definition seems to divide the notion of victim into two according to the source of victimisation. This has been noted the major shortcoming of this declaration as making the source of victimisation an essential element of the notion of victim itself does not contribute to



the coherence that such concept should have. Nonetheless, this definition acquires great relevance as part of a declaration that was adopted on the basis of the political agreement by its signatory countries.⁶⁴

The definition of victim provided for in the draft Basic Principles and Guidelines is based on the one given by the 1985 declaration.⁶⁵ Paragraph 8 defines victims in the following way:

"A person is a 'victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm."

This definition, thus, went beyond the one given in the 1985 Declaration considering now the victims of violations of 'international human rights or humanitarian law norms', adopting a wider scope. Nonetheless, both UN texts adopt a broad definition of victim, taking into account the "many faces of victimhood."⁶⁶ They both include not only individual, but also collective⁶⁷ victims and encompass in the notion of victim, the next of kin, the relatives, dependants and those who assisted the victim, in other words, the indirect victims.⁶⁸ Moreover, it is also stressed in both definitions that the status of victim will not depend on the previous relationship between victim and perpetrator and on whether the latter has been identified, apprehended, convicted or prosecuted.⁶⁹

⁶⁴ For an analysis of the merits and shortcomings of the 1985 Declaration, see H. Rombouts and S. Vandeginste, *Reparation for Victims of Gross and Systematic Human Rights Violations: the notion of victim*, in «Third World Legal Studies», issue 2000-2003, pp. 89-114. Here pp. 94-95.

⁶⁵ United Nations Commission on Human Rights, *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Final Report submitted by Mr. Theo van Boven, Special Rapporteur*. UN-Doc E/CN.4/Sub.2/1993/8.

⁶⁶ L. Huyse, *Victims*, in Bloomfield, D., et al (Eds.), *Reconciliation after Violent Conflict – A Handbook*, Stockholm, IDEA, 2003, pp. 54-66. Here p. 54.

⁶⁷ Bassiouni describes 'collective victims' as "groups or groupings of individuals linked by special bonds, considerations, factors or circumstances which, for these very reasons, make them the target or object of victimization." See H. Rombouts and S. Vandeginste, *loc. cit.* (note 64), p. 94 and L. Huyse, *loc. cit.* (note 66), p. 54.

⁶⁸ *Idem*, footnote 19. The authors make an interesting remark drawing attention to the fact that, concerning the indirect victims, "one must realise though that the interpretation of immediate family and dependants might differ in each of the UN nations."

⁶⁹ See Paragraph 9 of the draft Basic Principles and Guidelines and A. 2. of the 1985 Declaration.

The only difficulty that may remain in the definitions provided is the notion of "harm". While in both cases the concept of harm is used with a broad scope to include different forms of injury, suffering and loss, thus covering many situations worth of protection, this concept is left undetermined, and in this sense it has the disadvantage of raising doubts and controversy on what it should imply.⁷⁰ The content, foundations and implications of the notion of harm have been widely discussed. The first question to be raised is whether harm is a necessary element of the notion of victim itself. As we have seen, in the case of the UN documents, the answer seems to be positive. However, the central question in the notion of harm is whether it shall be conceived as a subjective or objective concept, in other words, whether the harm considered is the injury, suffering or loss as perceived by the victim (understood as the concrete victim of a certain violation) or as established according to objective⁷¹ and abstract criteria such as legally defined standards. In parallel, the question of how should the harm suffered be quantified triggers dissenting opinions.

Rombouts and Vandeginste have developed their own notion of harm as an essentially objective concept but introducing some subjective elements. Adopting a dynamic approach, the authors define harm as "a negative outcome resulting of the comparison of two conditions [distinguished as a result of the causing event] of the integrated system of several dimensions of the individual or the group of individuals."⁷² Acknowledging the impossibility of objectively determining, for example, psychological suffering, the authors further explain that according to the given definition "each person whose psychological situation has deteriorated can be considered a victim."⁷³

In fact, it seems that determining whether harm has taken place shall not be only left up to the victims but should follow objective⁷⁴ criteria. For pragmatic reasons and of feasibility, it would be impossible to determine in each case whether a victim had subjectively suffered harm and to what extent. But most importantly, it would be hardly fair or justifiable that certain victims, organised and aware of the rules of 'victim

⁷⁰ See H. Rombouts, S. Vandeginste, *loc. cit.* (note 64), p. 95.

⁷¹ For some, these objective criteria will simply be the violation itself. D. Shelton, although defending a minority position, argues, "harm is implicitly contained in the illegal character of the act" and "the violation of a norm always disturbs the interest it protects as well as the right(s) of the person(s) having the interest." *Ibidem*, p. 112.

⁷² *Ibidem*, p. 99.

⁷³ *Ibidem*, p. 101.

⁷⁴ As it is not our aim in this work to go much further on the concept of 'objective criteria', we include here the interpretation given by Shelton as by other authors.

competition' would be more apt to demonstrate their subjective harm or that, victims could actually end up being discouraged to deal positively with their trauma as this might reveal that their harm has diminished. Furthermore, the self-perception of the victims could easily also determine that many actually victimised persons would not be given that status because they don't regard themselves as such.

4. *The impacts of the selected definition of victim*

Establishing a broad definition and, thus, ensuring a wide constituency of victims is of paramount importance. In the words of Huyse, "it extends the scope of victimhood, and consequently increases the number of people rightly claiming recognition and compensation for their suffering."⁷⁵ Moreover, the recognition of the status of victim may "in itself already constitute some sort of reparation."⁷⁶ On the contrary, a narrow and legalistic definition may exclude from the status of victimhood many persons who indeed suffered violations of human rights and the resulting damages. For these reasons, it is extremely important that in the notions provided in the UN documents both direct as indirect victims, as well as individual and collective victims are included. According to some authors, "culturally determined visions of community ties" should also be taken into account when delimiting the group of victims, since the effects of the violation suffered by members of the community to which the direct victim belongs may in certain situations be "sufficiently direct and proximate" to justify eligibility to protection of the whole community.⁷⁷

Although the greatest and most evident implication of falling within the scope of the notion of victim may be to be eligible for monetary compensation or other measures of reparation, the chosen definition of victim will also determine how certain historical events linked to a widespread pattern of human rights violations will be remembered.⁷⁸ In addition it will also have "serious consequences for the accountability of

⁷⁵ L. Huyse, *loc. cit.* (note 66), p.55.

⁷⁶ H. Rombouts and S. Vandeginste, *loc. cit.* (note 64), p. 112. The authors state, "the notion of victim should be defined as broadly as possible. Anyone who has been sufficiently directly affected by a human rights violation should be considered a victim."

⁷⁷ *Ibidem*, p. 107. The argument is made by the authors on the basis of a judgement of the Inter-American Court of Human Rights in the case *Aloeboetoe v. Suriname* (Judgement of 10 September 1993).

⁷⁸ Referring to the South African TRC, Mamdani criticises the "narrow legalistic definition employed by the TRC" for, as he argues, it has "serious implications for how the injustices of apartheid will be historically remembered as well as implications in the practical realm of reparations and restitution." As cited in T. A. Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, in «Human Rights Quarterly», vol. 25, 2003, pp. 1088-1116. Here p. 1111.

perpetrators.”⁷⁹ The options made for a broader or narrower scope of victimhood will, indeed, have many and important implications. In what concerns reconciliation, for example, it may be worth recalling Mamdani when he warns “Ignoring the vast majority of victims risks turning disappointment into frustration and outrage, and is likely to generate resentment among the excluded majority.”⁸⁰ In the same sense, Huyse affirms, “The recognition of victims is a crucial issue in the search for reconciliation.”

5. *Challenges to the definition of victim*

Besides all these factors that necessarily come under consideration when defining victim, other challenges are posed to such definition, particularly as it tends to assume strict boundaries, ignoring the complexity of reality. In fact, the definition of victim comes many times in touch with that of perpetrator, calling for a revision of the distinction between them and of the scope of each one. Some authors have challenged the “binary approach” in the human rights discourse in which “victims and perpetrators are usually referred to as two completely separate and homogeneous sets of people.”⁸¹ In fact, gross human rights violations usually take place in very complex contexts that don’t normally fit into simplistic and rigid frameworks. Reality overcomes the certainties and comfortable assumptions of the theoretic categories. Normally, a great majority of the population has taken part, in one way or another, in the dynamics of the past atrocities. And in many cases what we may find is that the distinction between victims and perpetrators is not as clear-cut as it may seem and, in fact, many victims may also have been perpetrators and vice-versa. In conflict situations, victims and perpetrators become “interchangeable roles”.⁸²

6. *The protection of the rights of the victim*

As the victim began to assume an increasing relevant role in the process of realisation of justice after gross human rights violations, the main focus was placed on

⁷⁹ *Ibidem*, p. 1112.

⁸⁰ *Idem*.

⁸¹ Borer proposes to rethink the concepts of victims and perpetrators “in such a way that highlights that the differences *between* the two groups are perhaps not as clear-cut as human rights activists, as well as journalists, governments, lawyers, and truth commissions themselves try to portray them, and that highlights that the homogeneity that is assumed about the individuals *within* each group is similarly overstated.” T. A. Borer, *loc. cit.* (note 78). Here pp. 1088, 1089 and 1091.

⁸² L. Huyse, *loc. cit.* (note 66), p. 64.

the protection of the rights of the victim. Awareness was raised that for justice to be done the victim was to obtain redress and reparation for the consequences of the wrongful acts, and measures of prevention and deterrence of new violations were to be adopted.⁸³ Securing redress and reparation to the victims was, then, regarded as "an imperative demand of justice and a pressing requirement under international law, in particular the law of human rights."⁸⁴ The right of victims to reparations, *latu sensu*, has been explicitly recognised in international law instruments (of human rights and humanitarian law) as well as in domestic texts of criminal justice. It has mainly been formulated on the basis of the obligation of States to respect and ensure respect for human rights and of the right of victims to an effective remedy. The former entails the duty to prevent violations, to investigate violations, to take appropriate action against the perpetrators (including prosecuting and punishing the wrongdoers) and to afford remedies and reparation to victims.⁸⁵ The right to an effective remedy, on the other hand, has been interpreted to encompass both a procedural right of access to justice and a subjective right to reparation. Redress of victims of human rights violations has, thus, been ensured in a two-fold manner, through the right to a remedy and the right to reparation. The right to a remedy entails the right to access to national and international mechanisms of justice, including effective disciplinary, administrative, civil and criminal procedures. The development of jurisprudence and legal texts have progressively guaranteed within the scope of this right the principles of fair treatment and assistance of victims during the proceedings as well as the protection of the victim's security and privacy. The right to reparation for the harm suffered has been formulated in an increasingly generous manner and it is now settled that it shall include restitution (e.g. restoration of liberty or property), compensation (e.g. monetary reparation for material and non-material damages, lost opportunities, harm to reputation and costs for legal assistance or medical service), rehabilitation (e.g., medical and psychological care, legal and social services), satisfaction (e.g. disclosure of the truth, apologies, commemorations, cessation of violations and judicial sanctions against perpetrators) and guarantees of non-repetition.

The above-mentioned UN 1985 Declaration and the draft Basic Principles and Guidelines assume a prominent role in the establishment and delimitation of these

⁸³ M. Nowak, *loc. cit.* (note 53), p. 286.

⁸⁴ T. van Boven et al. (Eds.), *op. cit.* (note 55), p. 1.

⁸⁵ M. Nowak, *loc. cit.* (note 53), p. 286.

rights. The 1985 Declaration still stands as a benchmark initiative in this field, although as a first step it was necessarily more restricted. It recognises the right of victims to effective access to judicial and administrative mechanisms of justice, during which proceedings they shall be treated with respect for their dignity. The Declaration further establishes the right of victims to restitution and compensation (as forms of reparation) and the principle of providing assistance to the victims.⁸⁶ Following the orientation of the 1985 Declaration, the draft Basic Principles and Guidelines prescribe as basic and overarching principles that victims should be treated “with compassion and respect for their dignity and human rights” and that “measures should be taken to ensure their safety and privacy as well as that of their families”, without any kind of discrimination. They then formulate the victims’ right to a remedy in a three-fold structure in order to encompass the right of access to justice, the right to reparation and the right to access the factual information concerning the violations. Under the right of access to justice, principles of making the existing mechanisms known and minimising the inconvenience of such proceedings to victims are laid down. Moreover, it is stated that groups of victims shall be allowed to present collective claims for reparation and receive reparation collectively. Concerning the right to reparation, keeping in mind that it “should be proportional to the gravity of the violations and the harm suffered”, the following forms of reparation shall be provided: “restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.” Reparation shall be provided by the party responsible for the violation or by the State for its own acts and omissions or when the responsible party (that is not the State) is unable or unwilling to meet its obligations. Finally, to ensure the effectiveness of these guidelines and principles it is established that States shall make known to the public the existing rights and remedies as well as assistance services available to victims.⁸⁷

7. Relevance and challenges of the right to reparation

Ensuring reparation to victims of gross human rights violations seems to be an inescapable demand of justice. It appears as a crucial element in the fight against impunity, in the quest for the effective realisation of justice and in the long-term effort of prevention of future violations. However, the implementation of this right meets in

⁸⁶ See UN 1985 Declaration A. 4 – 17. UNGA-Res. 40/34 of 29 November 1985.

⁸⁷ See Draft Basic Guidelines and Principles, point VI to XI. UN-Doc E/CN.4/2000/62.

practice many challenges, in particular when the violations committed have caused a great number of victims. In certain cases, the issue of reparation “might be viewed as illusory”⁸⁸ when material resources are lacking. In situations of past systematic violations of human rights, it is often practically and financially impossible for the state to meet the reparation needs of the victimised population.

However, some argue, socio-political considerations and financial constraints cannot deny the subjective right of victims to reparation. As Van Boven exhorted, this “does not diminish the intrinsic value of the principle itself...that everyone has the right to an effective remedy (art. 8). Justice has to be done to the victims of violations of human rights.”⁸⁹ In fact, if reparation is regarded as a subjective right of the victims, as the two UN texts seem to suggest, then it does not seem acceptable that concerns of a practical nature will determine that such right will not be implemented. Nonetheless, the challenges remain in practice. Most transitional States where systematic abuses have taken place, are faced with an extensive amount of individual claims for reparations as well as with the needs of the whole society for reparation. As warned by some authors, “society as a whole...may experience reparation needs that go beyond individual reparation claims.”⁹⁰ These are normally related to access to services of health care, education and housing.

States are then faced with questions of “financial constraints, logistical feasibility and political priority-setting.”⁹¹ To better meet these challenges, some authors have proposed that reparation should be conceived primarily as an obligation of the State. According to this view, conceiving reparation as an obligation of the State would mean to give the State the necessary discretion and a reasonable margin of appreciation to draw up the most appropriate reparations program to meet the needs of the victims also according to its limitations. Adopting a holistic approach to reparations, the State would then be allowed to establish priorities, to weigh individual and collective needs, and, attending to certain socio-political considerations, elaborate a plan of reparation that could best conciliate and serve the needs of each and all. Such programs would, then, normally include a combination of individual and collective.

⁸⁸ T. van Boven et al. (Eds.), *op. cit.* (note 55), p. 7.

⁸⁹ *Ibidem*, p. 8.

⁹⁰ H. Rombouts and S. Vandeginste, *loc. cit.* (note 64), p. 113.

⁹¹ The expressions are used in S. Vandeginste, *Reparation for gross and systematic human rights violations: the interaction between the national and international level, against the background of the Rwandan and South African experience*, in *Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions*, Leuven, Universiteit Antwerpen, Katholieke Universiteit Leuven, 2002, pp. 25-39. Here p. 33.

measures and would be backed up by a number of other initiatives with a view to full reconstruction of the social, economical and political systems.⁹²

Placing reparations among the obligations of the State would also ensure that victims obtain redress in first instance at the national level, may it be through domestic courts, national funds or other reparations mechanisms. This has been widely advocated⁹³ and is clearly the orientation adopted in both UN documents, which accord to "every State" the obligation of "making available adequate, effective and prompt reparation"⁹⁴ to the victims.

8. The responses to past human rights violations from the perspective of the victims: retributive justice and perpetrator-oriented systems v. restorative justice and victim-centred approaches

Post-conflict situations in which there is a need to deal with gross and systematic violations of human rights that took place in a recent or not so recent past, call for complex responses in which many and different aspects have to come under consideration. The cruelty, duration and scope of the atrocities in each given situation create a very particular setting that calls for a long-reflected and manifold approach. The victimised population assumes in these cases unique characteristics, which will also imply specific, targeted and carefully planned mechanisms of recovery. In most cases, large segments of the total population have been victimised, but certain groups deserve special attention, due to the specific intensity of the violations they suffered and to the structural difficulties they face in the recovering process.

In order to tackle these challenges following a victim-centred approach, and keeping in mind that these situations are most effectively dealt with at the national level, many transitional states facing a past of gross human rights violations have turned to truth commissions. The debate on whether truth commissions are indeed more effective

⁹² *Idem.* The author states, "Almost paradoxically the provision of purely individual reparation measures will, after gross and systematic violations, often be insufficient" and that "they should therefore, ideally, be supplemented by collective measures". The author adds that reparation will need to be "streamlined with other, more general development policies" and that "the development of an appropriate reparation policy requires the involvement of and sufficient ownership by civil society and victim representatives..."

⁹³ *Idem.* Vandeginste asserts, "Amongst others for reasons of effectiveness... this [ensuring reparation to the victims] is best done at national level." See also H. Rombouts and S. Vandeginste, *loc. cit.* (note 64), p. 114, when the authors acknowledge, "The preferential reparation forum may indeed be situated at the level of the responsible State, the international level operating as a back-stop..."

⁹⁴ See point I, 2(c) of the Draft Basic Principles and Guidelines.

in dealing with these situations than traditional criminal justice institutions is a recent and lively one to which only more time and concrete experiences can bring answers. It seems, however, already possible to draw some conclusions on the advantages of truth commissions vis-à-vis the criminal justice system from the perspective of the victims.

Truth commissions, due to their specific and contextual existence, enjoy in general terms a considerable degree of flexibility and freedom to carry out their tasks although always within the particular framework in which they function. As these commissions are given the primordial task of providing full disclosure of the truth about the past atrocities, they are expected to draw on as many sources of information as possible in order to give full account of those facts. In fulfilling their objectives, they are granted a wide margin of manoeuvre while respecting the limits of their mandates. And these limits will be closely related to the traits of the particular situation that will be looked into. On the contrary, the traditional mechanisms of criminal justice - the courts - see their action permanently delimited and constrained by the rigid legal parameters that lay the principles of an institutionalised and formal process. Demands of certainty and formal justice justify the strict and abstract terms of criminal legislation and procedure. But they may curtail the possibilities of the contribution of trials to justice.

While definitions of victim in criminal legislation tend to follow a fixed pattern of one-fits-all situations and depend mostly on what under the same legislation is considered a crime, truth commissions normally take under consideration other elements such as specific types of crimes which assumed a particular dimension in a given conflict or certain groups of victims also affected in a special way. For example, crimes of sexual abuse or forced displacement tend to assume a commonality in conflict situations not similar to normal times. Also, some individuals were victimised because of their link to a certain group, which makes the group itself a specific victim of the conflict. Notions of victims in truth commissions may also take into account those situations where wrongdoers are also, if not primarily, victims. In addition, truth commissions tend to pay more attention to the so-called 'indirect victims' especially with a view to include them in the group of beneficiaries of reparation programs. As a result, normally a broader scope is adopted in the notion of victim, while in criminal proceedings the next of kin of the victim may at the most be called upon to testify, but nothing else.

Overall, there is an explicit greater concern with the victims in truth commissions. Although victims may never come to confront their perpetrators in these commissions (which in a way may favour their voluntary appearance before these bodies) ensuring the personal security of victims has been a major concern, especially as the risks involved in testifying increase in unstable, post-conflict situations. In the criminal system, this type of concern tends to be more neglected. The focus is placed on the rights, guarantees and conditions of the perpetrator. The whole process revolves around the decision 'guilty or not guilty'. There is not much more time or resources for other concerns. Similarly, services of psychological assistance to the victims during the proceedings or referral to follow-up mechanisms, although not consistently present in either system, are also an increasing concern especially of truth commissions.⁹⁵ There are, however, important differences in the treatment of victims throughout each process. Whereas in the criminal retributive system victims are used as mere 'instruments' to initiate the proceedings and, sometimes, to offer testimony, assuming a mere secondary role, in truth commissions they are not only the main source of information, but also the addressees of their main purposes: the realisation of justice, the finding of the truth as well as reconciliation initiatives. Coming before a court, like coming before a truth commission, may constitute a retraumatising experience, but it is much more likely to be so in the first case. During trials, mainly in common-law systems, victims are subject to cross-examination, their story and suffering are constantly questioned and, at times, aggressively challenged in an environment of pressure and intimidation. Truth commissions have tended to refuse such methodology and instead chose to create welcoming settings where staff (although not always sufficiently trained) listens attentively and respectfully to the stories told by the victims in an environment of trust and empathy. Moreover, truth commissions tend to provide the basis for broader and far-reaching reparation programs in which several different forms of reparation are foreseen, while in the traditional justice system, reparation is usually awarded in civil claims (even when attached to criminal proceedings) and is normally restricted to monetary compensation. Besides, another positive aspect of the reparation programs of truth commissions is that reparation does not depend directly on a conviction by the

⁹⁵ In this field even truth commissions have done little to recognise the "retraumatizing effect that their work might have." In fact, as Hayner points out, "No commission outside of South Africa has attempted to set up a system of referral or follow-up for traumatized witnesses." P. B. Hayner, *op. cit.* (note 2), p. 146.

criminal institution. Reparation is conceived more in terms of an obligation of the State.

These differences in treatment necessarily determine the outcome of each procedure. As the criminal system is conformed to function on the basis of dichotomies, taking under consideration nothing more than the information considered 'relevant' for the finding of this formal truth, it can only grasp part of the reality. The objective is simple: to establish the facts that can be supported by collected evidence, which may or may not contribute to the conviction of the accused. Truth commissions, on the other hand, can and try to look at the 'total picture'. They don't focus on the criminal responsibility of one person, but on the whole context in which the atrocities took place, including sociological, psychological, cultural and political aspects of the global situation. Not being constrained by formal certainties, truth commissions establish different degrees of accountability and are able to raise more questions. As Christie notes, truth commissions "can think in continuums."⁹⁶ For these reasons, their contribution to knowing the truth and understanding the context of the past violations is far greater than that of criminal proceedings. In the words of the cited author, "...when it comes to a more thorough exposure of what happened...Truth Commissions...probably are better instruments than penal courts."⁹⁷ Although acknowledging this fact, some voices have risen to draw attention to the accuracy of the truth established by truth commissions as, in spite of being backed up by investigations, it will always be mostly 'the truth of the victims'. P. B. Hayner warns, "Commissions should be prepared for the discrepancies that may result from collecting information from traumatized witnesses."⁹⁸

In the debate on the effectiveness of truth commissions and criminal justice in dealing with human rights violations one underlying aspect seems to be always forgotten, that is, in bringing justice to society one does not have to choose over the other. As we have demonstrated in the previous chapter, trials and truth commissions may easily coexist and according to many they should be used as complementary mechanisms to ensure accountability of the perpetrators and acknowledgement of the

⁹⁶ N. Christie, *Answers to Atrocities. Restorative Justice as an answer to extreme situations*, in E. Fattah, S. Parmentier, (Eds.), *Victim Policies and criminal justice on the road to restorative justice – Essays in honour of Tony Peters*, Leuven, Leuven University Press, 2001, pp. 379-392. Here, p. 382.

⁹⁷ *Ibidem*, p. 383.

⁹⁸ P. B. Hayner, *op. cit.* (note 2), p. 148. Quoting Judith Herman, the author adds, "People who have survived atrocities often tell their stories in a highly emotional, contradictory, and fragmented manner which undermines their credibility."

truth. Proving this assertion is the UN-drawn system to deal with the past violence in Sierra Leone in which an international court was set up to function in parallel with a truth commission. In order to ensure full and proper redress for suffered violations it may indeed be fundamental, from the perspective of the victims, to combine the disclosure of the truth, with prosecutions and measures of reparation. The Peruvian case is the perfect example of the coexistence and collaboration between the Truth and Reconciliation Commission and criminal proceedings in an effort to achieve durable peace and justice.⁹⁹

9. Conclusions

Awarding peace, justice and proper redress to the victims of gross human rights violations can easily seem an impossible and somewhat utopian task. It requires an overwhelming amount of effort, will, determination and resources. The dimension and complexity of such endeavour cannot, however, impede its achievement. Victims deserve the recognition of their suffering and the harm they endured. In other words, they deserve the recognition of their status of victimhood.

The recent developments brought by international instruments (of which the most relevant are the two UN Documents), academic reflection and world-wide practice, determined a shift of focus towards the victims and contributed to a better definition of the notion of victim and to the recognition of their rights. Together, they have laid down the fundamental guidelines for the treatment of the victim according to which experiences like the Peruvian TRC should be evaluated:

- The notion of victim must be broad, flexible, and inclusive, encompassing also collective and indirect victims. Harm seems to be a component of the notion of victim and should be determined according to essentially objective criteria. Specific situations when victims and perpetrators become interchangeable roles should also be taken into account.
- The rights of the victim recognised in the two UN Documents include: the principle of treatment with dignity, right to assistance during and after the proceedings, right to privacy, right to security and right to an effective remedy,

⁹⁹ Among the objectives of the Peruvian TRC is that of contributing to the establishment of the facts by the judicial organs related to crimes and human rights violations committed by terrorist organisations and state agents. See Art. 2° Presidential Decree no 065-2001-PCM.

which encompasses the right of access to justice, the right of access to factual information and the right to reparation.

- Reparation should be regarded in broad terms to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, and it should be awarded on a proportional basis, allowing also collective reparation.
- To better face the challenges of political and financial constraints common to post-transition states, reparation might be better conceived as an obligation of the state, ensuring redress to the victims firstly at national level and allowing the state to adopt an holistic approach on reparations and draw up a plan which takes into account both individual and collective needs, certain priorities and all its own limitations.
- Truth commissions seem to be a more adequate means of justice concerning the views and needs of the victims. They tend to depart from a broader notion of victim and to pay more attention to the well-being, dignity, security and assistance of the victims, taking into account specific violations and victimised groups, providing them a welcoming environment. Enjoying greater flexibility vis-à-vis the courts, truth commissions are able to design far-reaching reparation programs, not dependent on any kind of convictions.
- Truth commissions and trials are not mutually exclusive. They may coexist, and from the perspective of the victims it seems indeed fundamental that ones are complementary to the others. Justice and redress to the victims may be better ensured through a joint effort by the criminal justice institutions and truth commissions. Their co-operation in the recovery of the victimised population through truth, acknowledgement, accountability, recognition and reparation will give back to the victims their central place in the human rights realm.

CHAPTER III

THE STANDING OF THE VICTIM IN THE PERUVIAN TRUTH AND RECONCILIATION COMMISSION

A. The Peruvian Truth and Reconciliation Commission

1. Background: the conflict

Peru has been the stage of several conflicts since its independence. These have been mainly rooted in structural inequalities, discrimination, exclusion, fight for power and corruption. But none has been as intense, extensive and prolonged as the internal armed conflict that swept almost the entire country and involved almost the whole society from 1980 till 2000. With an estimated number of 69,280¹⁰⁰ dead and disappeared throughout two decades, this conflict assumed proportions never seen before, placing it side by side with the most aberrant authoritarian military regimes in Latin America.

The Peruvian conflict¹⁰¹ has, however, many particularities that distinguish it from other episodes of violence and massive human rights violations in the South American continent. As we will see, the internal armed conflict that struck Peru, begun and carried on for more than a decade under the rule of democratic elected governments. After becoming free of the repressive rule of a military regime, which had been in power from 1968 to 1980, Peru underwent a first democratic transition under the leadership of President Fernando Belaúnde Terry. However, his government, still in the process of democratic consolidation, had to face challenges that it was not ready to meet.

In May 1980, the insurgent leftist guerrilla group PCP-SL (Communist Party of Peru – *Sendero Luminoso*, or Shining Path) initiated an armed opposition against the recently elected government. Based upon a fundamentalist, revolutionary, Maoist philosophy, *Sendero Luminoso* proclaimed the destruction of the ‘old state’ and the fight against the oppressive forces that supported the market economy, allegedly in the

¹⁰⁰ Comisión de la Verdad y Reconciliación, Informe Final, Lima, CVR, 2003. Here p. 53. The Peruvian TRC received reports of 23,969 persons dead or disappeared, but it estimates that the real number rises up to 69,280. In this case and whenever the Final Report is cited it is the author’s translation.

¹⁰¹ For a deeper insight on the origins and characteristics of the Peruvian conflict and its actors, see Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), mostly vol. I, chapter 1; vol VIII, chapter 1 and General Conclusions.

name of the poor and traditionally excluded rural, Andean communities (*campesinos*) in whom it sought its main support. It wisely used the educational system to recruit a great part of its militants among the idealistic and disillusioned youth who had had access to higher education and who, in the search for the "myth of progress", but inevitably frustrated with the realisation of the lack of social mobility, longed for identity, ideologies and hopes, which *Sendero* preached to offer them.¹⁰²

Backed up by a fanatical militancy that it kept under control with a doctrine of the cult of personality for its charismatic leader, Abimael Guzmán Reinoso, *Sendero* developed a strategy of terror and extreme violence, to the point of being considered the principal perpetrator in this conflict.¹⁰³ Its terrorist character and potential for genocide were demonstrated not only through statements by the leaders of the group,¹⁰⁴ but most of all through actions of extraordinary cruelty. Among these are the typical 'ajusticiamientos' (killings to bring to account), prohibition of burials, public trials and car bombs, the latter mainly in urban areas. Its policy of spreading terror and distrust among the population in order to keep it under its control as well as the attacks carried out on the state forces, civilian authorities (mostly local authorities) and members of civil society that opposed its fight, reflected the disdain of *Sendero* for the value of human life and the fundamental rights of human beings, including those of its militants. In fact, due to its ideology of seeing classes instead of individuals¹⁰⁵, and attitudes of racism and superiority over indigenous peoples, *Sendero* caused the greatest number of victims among the communities that it was supposedly fighting for. Suspicion, together with fear, was used to render the members of these communities vulnerable and completely subject to the authority of the armed rebels.

Not looking at means to achieve its goals, *Sendero* succeeded in reviving long lasting tensions and divisions in Peruvian society and took advantage of structural failures in the government. It reproduced and accentuated old racist conceptions of superiority towards indigenous communities, causing an incredible amount of victims among them, while the rest of the society watched with indifference. Moreover, as part of its strategy and with a ruthless determination, it consciously provoked disproportionate responses from the state forces to its actions.

¹⁰² Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), General Conclusions, 22.

¹⁰³ *Idem*, 13.

¹⁰⁴ Some of the proclamations and announcements made by leaders of Sendero Luminoso include the following expressions: "paying the blood toll", "inducing genocide" and "the triumph of the revolution will cost a million deaths". *Idem*, 21.

¹⁰⁵ *Idem*, 19.

In fact, Sendero's wave of terror put in evidence the inability of the state to halt subversive movements and violations of human rights within a legal and rights-respecting framework,¹⁰⁶ thus revealing the precarious constitutional order and rule of law. It also provided an example of how the actions of a guerrilla group can put at risk a stable and effective transition to democracy. As the presence and influence of the military elites were still very alive in the political and social sphere, it became even more difficult for the new democratic government to break the link with the former regime when, in 1980, Sendero launched its insurgency campaign, later joined by the Revolutionary Movement Túpac Amaru (MRTA). As the two democratically elected governments of Presidents Belaúnde and García struggled to fight the subversive groups, more powers began to be transferred to the political-military commands that were in charge of the departments declared 'emergency zones'. These two governments progressively abdicated their civilian political, administrative and juridical authority over the military and its counter-insurgency campaign.¹⁰⁶ This campaign, adopting some key features of the 'national security' doctrine, recurrently yielded to strategic objectives.¹⁰⁷ The control exercised by the military, together with the failure of the judicial system to guarantee the fundamental rights of citizens and to ensure accountability of members of the armed forces, compromised the effective implementation of the constitutional safeguards for the protection of the fundamental rights of citizens.

This spiral of violence resulting from the subversive action and the state forces reaction guaranteed that almost everyone was, in one way or another, involved in the conflict, either as perpetrator, victim or bystander. In the end, all citizens took part, benefited from, or suffered the consequences of the process of violence. Moreover, in the midst of a conflict without rules, many of the victims were also perpetrators and vice-versa. Such was the case, for example, of many of the militants of Sendero, tortured and victims of extrajudicial executions.

Caught in the middle of the crossfire of the insurgency and counter-insurgency movements were thousands of Peruvian citizens, mostly members of indigenous communities, living in the Andean and jungle regions, the distant and forgotten rural areas of Peru, traditionally excluded and discriminated, with little access to education

¹⁰⁶ A. Cornell, K. Roberts, *Democracy, Counterinsurgency, and Human Rights: The case of Peru*, in «Human Rights Quarterly», vol. 12, 1990, pp. 529-553. Here p. 530.

¹⁰⁷ *Idem*, p. 551.

and victims of structural poverty.¹⁰⁸ As a result, the peasant population of Peru ended up being “the principal victim of the violence.”¹⁰⁹ Indeed, as pointed out by the TRC “the violence fell unequally on different geographical areas and on different social strata.”¹¹⁰ The indiscriminate attacks of the state forces on the populations believed to host members or sympathisers of *Sendero* on the one hand, and the rumours and manipulated hatred cultivated by *Sendero* at the bosom of such populations, deemed these individuals and communities to years of suffering and unrest. The ‘fragile national integration’¹¹¹ of Peruvian society and the comfortable attitudes of denial, neglect and disregard for their compatriots from the rest of the population ensured that this suffering went on for two decades without a significant mobilisation to stop the atrocities. The dangerous inaction of bystanders contributed to the dimension and duration of this conflict. In the words of the TRC, the suffering of the victimised population was “neither felt nor taken on as its own by the rest of the country.”¹¹²

There had, however, been some claims for truth and justice from certain civil society entities such as human rights organisations, the church, the media and other social, union and peasant organisations. However, most of such claims were unsuccessful, as the government repeatedly overlooked its obligation to investigate human rights violations, while violence remained the privileged means of affirming ideologies and positions. At the same time, some commissions of inquiry¹¹³ were set up with the purpose of investigating some episodes of violence, but in reality aimed at justifying the state counter-insurgency policies. Such demands, although insistently ignored and silenced for several years, gained an increased strength especially after the 1992 coup, which put the country under the rule of the authoritarian regime of Alberto Fujimori until 2000. By this time the influence of the subversive groups was already decreasing, in particular after the head and other important leaders of *Sendero* Luminoso were captured. In fact, *Sendero* ended up being a victim of its own strategy

¹⁰⁸ See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), General Conclusions, 4. The TRC established that there was a significant relationship between poverty and social exclusion and the probability of becoming victim of violence.

¹⁰⁹ *Ibidem*, 5.

¹¹⁰ *Ibidem*, 8.

¹¹¹ See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 57.

¹¹² See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), General Conclusions, 9. In the words of a Peruvian Sociologist Flores Galindo this was a result of the lack of “capacity of indignation” in the Peruvian society. See E. González-Cueva, *Perspectivas teóricas sobre la justicia transicional*, in *Perú 1980-2000: el reto de la verdad y la justicia. Jornadas internacionales sobre la Comisión de la Verdad*, Lima, 1-3 February 2001, p. 10. Author’s translation.

¹¹³ That is the case of the commission of inquiry on the death of 8 reporters in Uchuraccay. For further information on this commission see E. Cuya, *loc. cit.* (note 15).

and losing all popular support that it initially had enjoyed, as its implacable policy of terror soon only brought more misery and sorrow to the communities that initially believed in this project.

2. The transition – the creation of the Peruvian Truth and Reconciliation Commission

In spite of the decline in the activities of the subversive groups, the corrupt and repressive character of the Fujimori regime guaranteed that the record of human rights violations remained negative. The total loss of credibility and internal as well as external support by this regime finally led to its collapse and, together with the defeat of the subversive groups, to the formation of a transitional government headed by Valentín Paniagua in 2000. A second transition to democracy was under way, having the advantage of not being constrained by any type of consensual negotiations or agreements with former elites of the dictatorship or with the armed organisations.¹¹⁴

Faced with a legacy of two decades of violence and convinced that no stable and peaceful transition would be possible without acknowledgement of the past and accountability of the perpetrators, in other words, without truth and justice, the transitional government decided to create an inter-institutional commission with the purpose of studying the possibilities and laying the basis for the creation of a truth commission. Answering a national demand and a governmental conviction of the need to investigate the violations of the past, on the 4th of June 2001, the Presidential Decree nr 065-2001-PCM created the Peruvian Truth Commission, later renamed Truth and Reconciliation Commission by President Toledo's government (Presidential Decree nr 101-201-PCM), charged with the clarification of the process and the facts that occurred and the corresponding responsibilities (of those who executed, ordered or tolerated them), and the proposal of initiatives to strengthen peace and reconciliation in society. The generalised support for the creation of the TRC (both national and international), the internal and external assistance provided, and the fact that it had 'free hands', created a "unique opportunity" for this TRC to achieve its goals and to provide the most

¹¹⁴ E. Cuya, *El impacto de las Comisiones de la Verdad en América Latina*, Nüremberg, 2001, p. 2. Author's translation.

complete information about the violations of the past without fearing threats of interruption of the democratic government or of a return to the past.¹¹⁵

3. The Peruvian Truth and Reconciliation Commission: composition, mandate and structure

Created on the basis of the principle that “the protection of the human being and the respect of his/her dignity are the supreme objectives of society and the State”, the TRC was given the following objectives, according to the Presidential Decree which created it and established its mandate: to analyse the context, conditions and behaviours that contributed to the violence; to contribute with the administration of justice so it can clarify the crimes and violations committed; to try to determine the whereabouts, identification and situation of victims and determine the corresponding responsibilities; to make moral and material redress proposals for victims or their relatives; and finally, to recommend the convenient reforms as preventive measures and the necessary measures to ensure compliance with its recommendations. With this purpose, the TRC was given the possibility to interview whom it considered convenient, collect relevant information, access State information or documentation, request co-operation from public officials, visit or inspect places, develop public hearings and reserved procedures, request security measures when necessary, and establish communication channels and promote the participation of the population.

Composed initially by seven, later by twelve members¹¹⁶ named by the President among Peruvian citizens with a renowned ethical background, that enjoy legitimacy and prestige in the society, identified with the protection of democracy and representative of the composition of Peruvian society, the TRC was mandated to investigate the following crimes and human rights violations¹¹⁷, when committed by State agents or terrorist organisations during the period between May 1980 and November 2000: assassinations and kidnappings, forced disappearances, torture and other serious injuries, violations of the collective rights of the native and Andean communities, and

¹¹⁵ *Idem*. Many authors, like E. González-Cueva, have stressed the possibilities of the TRC's work: “The coincidence of three great opportunities – the one of consolidating the victory of democracy over the violent and the authoritarian, the one of bringing closer the gap with the Andean Peru, the main victim of the violence, and the one of strengthening in practice the independence of the judicial power – is a reason for a careful optimism and for a great responsibility.” E. González Cueva, *loc. cit.* (note 112), p. 23.

¹¹⁶ See «<http://www.cverdad.org.pe/ingles/lacomision/nlabor/comisionado.php>» for information on the Commissioners.

¹¹⁷ See Presidential Decree no 065-2001-PCM.

other crimes and serious violations of human rights. To accomplish this task the TRC was given a period of eighteen months, which could and was effectively extended for five more months.

One of the objectives assigned to the Truth Commission was to foster national reconciliation. When the complementary Presidential Decree renamed it Truth and Reconciliation Commission, it reinforced that one of the essential purposes of the TRC was to lay down the basis for a process of national reconciliation and quite significantly made clear, based on the ruling of the Inter-American Court of Human Rights in the case of Barrios Altos¹¹⁸, that this would not imply impunity for the perpetrators in the form of amnesty laws.

The Peruvian TRC officially began its work on the 13th of November 2001. At the beginning of its mandate, it established its own methodology of investigation and its functional structure. One of its prior concerns was to establish regional offices covering all the areas affected by the violence and with staff members recruited among the inhabitants of the corresponding area. This served to collect the testimonies of the actors and witnesses of the conflict, thus allowing a more thorough and realistic knowledge of the process of violence in those areas, and as an act of justice and recognition for the communities of traditionally forgotten places. In order to efficiently use its resources, the TRC decided to divide its tasks over four working groups and one specialised unit¹¹⁹ which focused on the following themes: national process of violence (the study of the causes and processes of violence); clarification of the facts; consequences, reparations and reconciliation; communication and education; and public hearings.

With the aim of establishing the facts on the basis of firsthand knowledge, the TRC carried out its work through several lines of action.¹²⁰ It sought to hear and give voice to the victims through public hearings and interviews, but it also collected the testimonies of political leaders and members of the military institutions who were

¹¹⁸ Judgement of the Inter-American Court of Human Rights of 14 March 2001, CDH-11.528/035. In this paradigmatic case the Court decided that the Amnesty Laws previously approved in Peru by the regime of President Fujimori, affording impunity to the members of the state forces who committed crimes and human rights violations in their counter-subversive campaign, were not valid because they violated the American Convention on Human Rights to which Peru is a signatory. See J. E. Mendéz, *El caso de Barrios Altos*, in IDHUCA, Fundación para el Debido Proceso Legal, Centro Internacional para la Justicia Transicional (Eds.), *Justicia para las víctimas en el siglo XXI*, San Salvador, 2002, pp. 101-107.

¹¹⁹ For a comprehensive explanation of the TRC's work see [«http://www.cverdad.org.pe/ingles/lacomision/nlabor/atrabajo2.php»](http://www.cverdad.org.pe/ingles/lacomision/nlabor/atrabajo2.php), as a proof of the amazing effort of the TRC to provide information about its work to the public.

¹²⁰ See [«http://www.cverdad.org.pe/ingles/lacomision/balance/index.php»](http://www.cverdad.org.pe/ingles/lacomision/balance/index.php).

directly involved in the conflict, then processing this information through an up-to-date database system. Based on an analysis and conclusions drawn from such information, together with analyses of crimes and human rights violations, in-depth studies, regional stories, exhumations, and what has been called the national process of violence, the TRC was able to reconstruct the facts and understand the process and behaviours that led to the conflict. Moreover, in co-operation with the International Red Cross and the National Co-ordinator of Human Rights, the TRC set up an initiative on missing persons, by trying to clarify the whereabouts of the disappeared and drafting a list with the names of missing persons. Finally, the TRC also directed its work towards the drafting of a proposal for a policy of reparations, the preparation of institutional reforms, the perspective and experience of reconciliation, and a photography project.

The final purpose of the Commission was to publish a final report in which the results of its investigation as well as its recommendations were put together and made public in order to reach the Peruvian citizens in an effort to foster and broaden the public debate on the causes and the facts of the conflict as well as on the paths to reconciliation and the requirements for prevention. The report of the Peruvian TRC, composed of 9 volumes and over 300 pages of an accessible and extensive analysis of the past conflict, was presented to the President, the Chairman of Congress, the Chairman of the Supreme Court and the Ombudsman on the 28th of August 2003. It is now available to all Peruvians to reflect on their past with a view to construct their future.

B. The Position of the Victim

Based upon the experiences of previous truth and reconciliation commissions and making use of the powers and tools attributed to it, the Peruvian TRC had a unique opportunity to improve the participation and treatment of the victims in the accomplishment of its work. On the basis of the notion of victim selected by the TRC, an in-depth analysis of the position of the victim will be carried out mostly relying upon information and documents of the TRC itself such as guiding principles, bulletins, web pages, and mainly its Final Report. The views, interests and needs of the victims were taken into account, mainly through their participation in three types of initiatives. We will look at each one of those initiatives (Public Hearings, Public Assemblies and Interviews) and to the extent and terms in which the participation of the victims was

ensured, namely analysing the methods used by the TRC staff. We will, then, develop our study by analysing how the rights of the victims were protected, namely the principle of treatment with dignity, right to security, right to privacy and right to assistance. After giving special attention to an unprecedented effort of the Peruvian TRC in adopting a gender perspective, transversal to all its work areas, we will focus on two other fundamental rights of victims and on the contribution of the TRC to their effective exercise: the right of access to justice and the right to reparation. A final reflection on the possibilities and challenges of reconciliation in the Peruvian case through an analysis of the TRC's proposals will put in evidence the role assigned to the victims in such process.

1. The notion of victim

As we have seen in the previous chapter, the notion of victim has many implications on the process of truth telling, reparation and reconciliation in a post-conflict context. For the Peruvian TRC, victims are "all those persons or group of persons that as a result of the internal armed conflict that the country lived between May 1980 and November 2000, have suffered from acts or omissions that violate norms of the international human rights law."¹²¹

Following the orientation of the UN 1985 Declaration and draft Basic Principles, the TRC affirms that the status of victim does not depend on the previous conduct of the damaged person, i. e., on the legality or morality of such conduct. However, taking as a justification the particular nature of the violence in Peru, the TRC expressly stated that the persons who were hurt, injured or died in armed struggles and that belonged at that time to a terrorist subversive organisation, are not considered victims. Unlike the case of the members of the Armed Forces, the Police or the Self Defence Committees¹²², who may be considered victims, the militants of Sendero Luminoso or MRTA, in the words of the TRC, have chosen to take up arms "against the democratic regime and as such faced the legal and legitimate repression that the law allows to the State."¹²³

Another consideration resulting from the analysis of the provided definition is that, in spite of the recommendations of the two mentioned UN documents, it does not

¹²¹ See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 149.

¹²² These Committees were formed by groups of farmers from rural areas of Peru in order to defend their communities from the violence that they had been suffering.

¹²³ Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 150.

seem to include the so-called 'indirect victims'. Nonetheless, the relatives of the victims, as we will later see, are given the status of beneficiaries of the proposed plan for reparations. By the same token, these individuals, in the quality of witnesses and deponents in interviews or public hearings, were granted assistance and protection in similar terms as the direct victims. Therefore, although they are not included in the formal definition of victim, it seems that the practical effect is still ensured, i. e., the protection of their rights as 'indirect victims' is still guaranteed.

Finally, it is also noteworthy that in this notion there is no reference to the concept of 'harm' which broadens the scope of the notion of victim itself as no requirements of demonstration of objective or subjective harm are established.

2. The participation of the victims: giving voice to the victims

The Peruvian TRC ensured that the views and concerns of the victims were taken into consideration in its work through the participation of the victims in three different types of initiatives: public hearings, public assemblies and interviews.

▪ *Public Hearings*

In its effort to establish a common memory and interpretation of the past the TRC saw as its priority to collect the testimonies of those who suffered or witnessed the violations. Making use of the possibility it had been given by Art. 6° of the Decree that created it, the Peruvian TRC became the first of its kind in South America to hold public hearings. These became one of the crucial mechanisms of the TRC to gather information for its investigatory work as well as to ensure the involvement of the victims in such process.

Public hearings constituted solemn¹²⁴ sessions in which victims and witnesses gave their testimonies before the Commissioners, the present audience and the nation through the broadcasting of the media, about the facts, behaviours and processes of violence, and offered their views on measures of reparation, prevention and reconciliation. The TRC decided to hold public hearings on concrete cases and thematic

¹²⁴ After being welcomed by the commissioners, who formally opened these hearings giving a brief explanation of its purposes and an introduction to the work of the TRC, the deponents offered their testimony under oath. At the end, the commissioners showed once again their appreciation to the participants for giving their testimonies.

hearings. While the first focused on the personal stories of the deponents,¹²⁵ representative of the past violations, in the thematic hearings the focus was on specific violations or groups of people, which assumed special relevance in the process of violence. These thematic hearings involved not only the participation of the victims who presented their testimony, but also of experts who gave their views on these patterns of the past violence, thus fostering the national debate on such themes. There were six thematic hearings: on antiterrorist legislation and violation of due process, political violence and crimes against women, political violence and the university community, political violence and educational community, political violence and forced displacement, and political violence in the Andean communities.

Through the public hearings the TRC aimed at incorporating the truth of the victims in its work. The testimonies of the victims and witnesses, in which they presented their stories, their own interpretation of the facts, their suffering and losses, their views and hopes concerning what should be done in the future to prevent, reconcile and repair enriched the work of the Commission. The investigation and conclusions of the TRC must, in its own opinion, mainly be drawn from the voice of the victims.¹²⁶ The reconstruction of the history of the past abuses would, in this way, be much more realistic. At the same time, it ensured that the victims were finally given a voice. The public hearings were a privileged mechanism of access to the public sphere for the sectors of the population which were mainly affected by the violence, but who had been traditionally excluded from the circles of the public debate.¹²⁷ In this sense, these hearings served as a public pedagogic instrument by fostering the national debate on the causes of the conflict and the challenges of the future and by broadening the public sphere and the national agenda allowing the participation of the victimised population.¹²⁸ Giving voice to the victims before the population at large had other important effects. Mostly, it was a way of paying honour to the victims and of recognising their dignity by giving them back their credibility and erasing past stigmas. A relation of empathy and solidarity with the victims was created by raising awareness

¹²⁵ By 'deponents' we mean both victims and witnesses (that are not considered victims) who testified before the TRC either in Public Hearings and Assemblies or in Interviews.

¹²⁶ See Comisión de la Verdad y Reconciliación, *La Comisión de la Verdad y Reconciliación, La realización de audiencias públicas: Declaración de Principios*.

¹²⁷ E. González-Cueva, *Las versiones de la historia*, in S. Mateos, J. Baca D. (Eds.), *Verdad, Memoria, Justicia y Reconciliación: sociedades y comisiones de la verdad*, Lima, APRODEH, pp. 67-75. Here p. 67.

¹²⁸ See J. Guillerot, *loc. cit.* (note 29), p. 11 and Comisión de la Verdad y Reconciliación, *Reglamento de Audiencias Públicas de la Comisión de la Verdad y Reconciliación*, Art. 5º, e).

of their suffering and damage. For all these reasons, it afforded them a kind of symbolic reparation.¹²⁹

In total, the TRC held seven public hearings on concrete cases and the above mentioned six thematic hearings in a period of roughly ten months. The former were intentionally held in the capitals of the departments that were most intensely struck by the violence and the presented cases normally had a particular relation to that area. In each of them, an average of 20 cases were heard in a two-days sessions, and each case was heard for about one hour.

Although the impacts on the victims of their participation in public hearings have not been thoroughly studied, there is a widespread perception from the psychologists¹³⁰ that assisted the participants, that such participation had very positive impacts on the process of dealing with past traumas, corroborating the idea that these initiatives have for the victims a 'cathartic' effect.¹³¹ As a result of some criticism and with the purpose of informing future efforts of TRCs, the Peruvian TRC carried out some interviews with persons who had testified in a public hearing, in order to determine to what extent such participation contributed to their dignity, empowerment, to a change in their immediate relationships and in their self perception.¹³²

One of the results of these interviews confirmed the suspicion of many staff members that many of the victims and witnesses who voluntarily approached the TRC to offer their testimony, did so partially on the basis of unfounded expectations that it would lead to a judicial proceeding against the perpetrators or that they would be automatically afforded monetary compensation for their damages. These considerations stressed the relevance of providing complete and clear information about the purposes and possibilities of these commissions to all sectors of the population.

The public hearings were the most controversial mechanism used by the Peruvian TRC and the one that caused greater impact, essentially due to fact that the testimonies were made public through the media. To face the risks of public exposure and of turning a well intentioned instrument to dignify the victims into an object of

¹²⁹ E. González-Cueva, *Audiencias Públicas de la CVR: Definiciones y Principios Organizativos*, 30-01-02.

¹³⁰ As an example see the interview with Elsa León in Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 2, Lima, CVR, p. 9.

¹³¹ P. B. Hayner, *op. cit.* (note 2), p. 28. However, the author gives account of cases in which giving testimony to a commission had an effect of retraumatization on the victims and witnesses. *Ibidem*, pp. 141-144.

¹³² See the results of such interviews at «<http://www.cverdad.org.pe/ingles/apublicas/audiencias/index.php>».

voyeurism and sensationalism, and in order to guarantee the rights of the victims, the TRC adopted rules of procedure¹³³ for the public hearings. Through these, the Commission aimed at providing assistance and ensuring the dignity, security and privacy of the victims.

In any case, there seems to be no doubt that, as long as the risks of publicity of the testimonies through the media are weighed with due protection to the victims, these hearings have positively contributed to the most fundamental goals of the TRC: reconstruction of the history, breaking the cycle of denial, ensuring redress and promoting reconciliation.

▪ *Public Assemblies*

In the areas where it was not possible to hold public hearings and in order to respond to the large flows of citizens wanting to offer their testimony to the Commission, the TRC carried out through its regional offices, in co-operation with local civil society organisations, public assemblies.¹³⁴ In these assemblies, the victims presented their testimonies before their communities, local authorities and, at least, one Commissioner. They also had a character of solemnity and respect, and followed the rules of procedure of the public hearings.

There were seven public assemblies held in the period of five months. Following its decentralised approach, the TRC ensured in this way that a larger number of victims were incorporated in its work and that it reached some of the most remote and forgotten places in the country.

In the public hearings and public assemblies together, 422 testimonies were presented concerning 318 cases in a total of 15 Peruvian cities.

▪ *Interviews*

Collecting testimonies from victims in which they tell their personal stories in a private interview done by one of the TRC's statement-takers has been the most common means that TRCs in general have used to gather the experiences of those who suffered the violations.

In the case of the Peruvian TRC, an unprecedented effort to invest human and material resources in the deployment of TRC staff all around the country has ensured a

¹³³ Comisión de la Verdad y Reconciliación, *loc. cit.* (note 128).

¹³⁴ For more information, see [«http://www.cverdad.org.pe/ingles/apublicas/audiencias/apublicas.php»](http://www.cverdad.org.pe/ingles/apublicas/audiencias/apublicas.php).

wider group of victims interviewed, both in terms of number, and of background and experiences lived. By setting up five regional offices around the country with fix and mobile teams in charge of, among other tasks, collecting testimonies, the TRC was able to gather 15,220 testimonies in interviews in a total of 129 provinces and 509 districts, which clearly surpassed the initial goal of 12,000 testimonies. This avoided that those particularly affected by the violence, but usually neglected, were once again denied to be heard. In a decentralised and inclusive approach, the TRC was particularly concerned with reaching out to the populations in the Andean and Amazonian areas who normally already have difficulties in having access to means of support or redress. The mobile teams gave an invaluable contribution to the achievement of this purpose by lifting the burden of time and financial costs that it usually involves to approach one of the offices or headquarters.

Also following the multidisciplinary approach that guided the whole work of the TRC, these mobile teams were composed of sociologists, social workers, anthropologists and lawyers,¹³⁵ some of whom actually came from those areas and spoke the native languages of those communities, like Quechua or Ashaninka. All these aspects ensured a closer relationship between the statement-takers and the interviewees based on the support provided by the former and the trust gained by the latter.

One of the results of this widespread presence, and also one of the biggest challenges to the TRC, was the massive amount of persons who approached the TRC offices voluntarily offering their testimony. This was the case of around 17,000 Peruvians, of whom, some had unrealistic expectations of what such experience could provide them, as we have already noted. Mainly, some of them wrongly believed that not offering their testimony to the TRC would mean that they would later not be eligible for reparation.

Assuming a central role within the work of investigation of the Commission, the process of collecting testimonies followed a pre-delineated four-phase structure.¹³⁶ The first phase consisted of the interview itself, in which the statement-takers received the testimony of the victims or witnesses in an attentive and respectful attitude. On average, each testimony gave account of 1.8 persons dead or disappeared.¹³⁷

¹³⁵ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 2, Lima, CVR, p. 10.

¹³⁶ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 3, Lima, CVR, p. 3.

¹³⁷ See «<http://www.cverdad.org.pe/ingles/lacomision/balance/index.php>».

Afterwards, the staff at the regional offices organised the facts and all the information collected and sent it together with the data of the testifier to the headquarters. Here, a team of investigators in the Area of Systems of Information processed the information. For this purpose, the TRC relied upon an innovative and efficient database, working on the basis of different variables of information such as type of crime, place, date, victims, and alleged perpetrator. This system allowed the crossing of the information processed and an in-depth analysis of the same, thus, avoiding repetition of information and also the assessment of the credibility of the testimonies according to whether different testimonies about the same case corroborate each other or not, and providing a better knowledge of the characteristics of the victimised population: gender, age, background, level of education and type of violation suffered. This ensured a greater understanding of the complexity of the process of violence.

Given that one of the patterns of human rights abuses was the violation of due process, the TRC found it important to collect the testimonies of those who were still imprisoned for crimes of terrorism and treason, many of whom were falsely accused on the basis of the laws against terrorism adopted during the authoritarian regime as a tool in the counter-insurgency campaign. The TRC staff then went to various prisons where they collected the testimonies of around 450 detainees in these conditions.¹³⁸

3. Respect for the dignity of the victims

According to the Rules of Procedure of the public hearings adopted by the TRC, first of all, the participation of the deponents needed to occur on the basis of informed consent. Having been informed of such possibility and of the use and consequences of their testimony, the victims could ask, on their own initiative, to testify in a public hearing. The decision on which cases were heard was taken by the Commissioners according to criteria such as clarity and representational character of the case and the victims.¹³⁹ However, it was ensured that there was no hierarchy among the victims or the cases and no priority given to the ones presented in public hearings neither on the Final Report nor on the reparations plan.¹⁴⁰ Once accepted, the presentation of the testimony was prepared by the TRC staff, the deponent and support organisations in

¹³⁸ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 4, Lima, CVR, p. 9.

¹³⁹ E. González-Cueva, *loc. cit.* (note 127), p. 75.

¹⁴⁰ Comisión de la Verdad y Reconciliación, *loc. cit.* (note 128), Art. 3º, c).

order to ensure the efficiency and solemnity of the hearings and the protection of the victims.¹⁴¹

During their testimony, the participants were also allowed to use their own narrative strategies and in their native language, for which cases the TRC resorted to translators,¹⁴² in a clear effort to respect cultural diversity. In fact, respect for the participants - from the audience, the staff, the commissioners and the media¹⁴³ - was one of the cornerstone principles of these hearings. A basic and constant concern was to provide the victims a comfortable and safe environment where they were friendly welcomed and listened to with respect and interest by the Commissioners.¹⁴⁴ For these reasons, they were not submitted to anything like cross-examination and they did not have to face the perpetrators. This was based on the belief that only when victims can relive their traumas in such a space, can they be expected to achieve some kind of relief.¹⁴⁵

4. Assistance to the victims

In Public Hearings and Assemblies, assistance to the victims was guaranteed through the right of the deponents to be accompanied by relatives, friends and support groups (such as victims' organisations), during the hearing, to ensure their emotional and social support.¹⁴⁶ Moreover, psychological, psychiatric, and medical assistance was granted to each participant of these hearings on an individual basis according to their specific needs, unless expressly refused¹⁴⁷ as well as during the process of individual interviews.¹⁴⁸

The TRC's Mental Health Team¹⁴⁹ developed a transversal, psychosocial approach in the work of the Commission in order to address the psychological and social impacts that the violence had in the lives of individuals and groups and to

¹⁴¹ E. González-Cueva, *loc. cit.* (note 129), p. 5.

¹⁴² Comisión de la Verdad y Reconciliación, *loc. cit.* (note 128), Art. 3º, b).

¹⁴³ See Comisión de la Verdad y Reconciliación, Unidad de Audiencias Públicas, *Nota al público y a los medios de prensa sobre el protocolo de las audiencias públicas de la Comisión de la Verdad y Reconciliación*.

¹⁴⁴ In Marta Minow's words the Commissioners are 'sympathetic witnesses' of the victims. M. Minow, *op. cit.* (note 6), p. 70.

¹⁴⁵ See P. B. Hayner, *op. cit.* (note 2), p. 134.

¹⁴⁶ Comisión de la Verdad y Reconciliación, *loc. cit.* (note 128), Art. 3º, d).

¹⁴⁷ See <http://www.cverdad.org.pe/ingles/apublicas/audiencias/index.php> and Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 5, Lima, CVR, p. 2.

¹⁴⁸ See above footnote 132.

¹⁴⁹ See <http://www.cverdad.org.pe/ingles/lacomision/nlabor/atrabajo2.php>.

elaborate strategies and proposals to create the conditions to deal with those impacts in a positive way, taking into account also the emotional impact of the TRC process in the victims.

5. The right of victims to security

The TRC was given the powers to request that security measures be provided to the victims or witnesses whenever it deemed necessary.¹⁵⁰ In order to ensure a safe environment, the TRC was committed to provide guarantees of security surrounding the public hearings and measures to ensure the protection of the life and integrity of each deponent.¹⁵¹ Because of the objective risks of testifying in a post-conflict situation and the subjective fear of reprisals demonstrated by the deponents, the Commissioners, who knew the presented cases in advance, conducted the testimony in a way that did not induce the participants in attitudes that could increase their risk of personal security, and whenever they chose to name perpetrators, there were additional concerns with their safety.¹⁵²

6. The right of victims to privacy

Finally, the testimonies and all the documents collected as a result of these interviews, as well as those collected in public hearings and public assemblies, and that the TRC used in its investigation were kept confidential and at the end of its mandate handed over to the Ombudsman Office, thus ensuring the privacy of those who contributed with their information to the work of the Commission.¹⁵³ To respect the privacy of the victims by keeping strict reserve concerning the information not subjected to publicity was one of the principles undertaken by the Commissioners in the framework of the Ethical Commitment¹⁵⁴ they adopted at the beginning of their mandate.

¹⁵⁰ Presidential Decree no. 065-2001-PCM, Art. 6°, e).

¹⁵¹ Comisión de la Verdad y Reconciliación, *loc. cit.* (note 128), Art. 3°, e).

¹⁵² See <<http://www.cverdad.org.pe/ingles/apublicas/audiencias/index.php>>.

¹⁵³ Art. 7° Presidential Decree no. 065-2001-PCM.

¹⁵⁴ Comisión de la Verdad y Reconciliación, *Ethical Commitment*, Lima, 2001. See <<http://www.cverdad.org.pe/ingles/lacomision/nlabor/pdfs/compromiso.pdf>>.

7. *The right of victims of access to justice*

The Commission had no jurisdictional power. This is the clarification made in Art. 3° of the Presidential Decree that created the Peruvian TRC. Thus, it continues, it does not substitute in its functions the Judiciary or the Public Ministry. As all other previous TRC's, the Peruvian TRC did not aim at prosecuting or absolving perpetrators. As a non-judicial body, it would be usurpation of powers otherwise. However, in other countries, the combination of TRC's and amnesty laws have, indeed, interfered with the administration of justice by impeding victims of bringing perpetrators to justice.

In the case of Peru, not only was the possibility of passing amnesty laws in the period of transition overruled by the sentencing of the Inter-American Court of Human Rights in the case of Barrios Altos, but the Government decided to include among the objectives of the TRC that of "contributing with the administration of justice, when it corresponds, so that it can clarify the crimes and violations to human rights committed both by terrorist organisations and State agents."¹⁵⁵

The TRC, thus, not only guarantees the right of victims of access to justice as it even contributes to the exercise of such right. In fact, the TRC was given the task of indicating in its Final Report the cases in which it was possible to identify the alleged perpetrators and gather enough evidence of such responsibility. By making these cases known, it created the obligation for the Public Ministry to initiate the corresponding judicial proceedings.¹⁵⁶ The contribution made by the TRC had to do with its work of investigation and clarification of the facts, processes and responsibilities, and in this way, it assisted the victims in their pursuit of justice.

Moreover, the TRC added to its four main recommendations, others relating to the initiation of judicial proceedings by the competent authorities shortly after the publication of the Final Report. Having handed over to the Public Ministry the evidence it collected, the TRC expected the former to open the investigation procedures within 30 days and the Ombudsman to make public the names of those who, according to the TRC's conclusions, were responsible for crimes. Also, the TRC drew the attention of the Supreme Court to the criteria it used to determine responsibilities,

¹⁵⁵ Art. 2°, b), Presidential Decree no. 065-2001-PCM.

¹⁵⁶ J. C. Ruiz Molleda, *La Comisión de la Verdad y la Reconciliación: Algunas reflexiones jurídicas*, in «Allpanchis», vol. 35, no 61, 2003, pp. 165-198. Here, p. 185.

considering those who ordered or tolerated violations as responsible as those who executed them.¹⁵⁷

It should be noted, however, that concerning the right of victims to access to judicial mechanisms of redress, the TRC established that the fact of having been awarded reparation through their Comprehensive Plan of Reparations precluded the possibility of the victims of demanding from the State reparation for damages suffered before a Court in a civil claim.¹⁵⁸

These contributions and recommendations were of extreme importance in helping the victims to bring the perpetrators to justice, especially when the need of prosecuting the violators in order to achieve justice had been demonstrated by the victims on so many occasions. In representation of the victims, the National Association of Relatives of Detainees, Kidnapped and Disappeared of Peru, has indeed stated that it would 'exhaust every national and international legal measure until justice is achieved',¹⁵⁹ further asserting that 'Those responsible have to be judged. We cannot be at peace with what happened. We search for justice.'¹⁶⁰

8. The Gender Line

In situations of armed conflict and political violence, crimes against women are, unfortunately, common practice. Used as a war tactic, sexual violence and other abuses cause an incredible amount of victims among women. When these violations against women are directed specifically towards them just because they are women, they ought to be seen as 'gender violence'. And violence against women must be seen as a violation of their human rights, instead of a 'collateral harm' resulting from armed conflict.

However, in the Presidential Decree where the mandate of the Peruvian TRC was established, in the list of crimes to be investigated (Art. 3º), there is no specific provision concerning this type of crimes against women. Sure enough, they will fall within the scope of Art. 3º, e), which refers to 'other crimes and serious violations of human rights', and as a result, they have been included among the crimes investigated

¹⁵⁷ See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 106.

¹⁵⁸ *Ibidem*, p. 156.

¹⁵⁹ Asociación Nacional de Familiares de Detenidos, Secuestrados, *Desaparecidos del Perú, El camino a la verdad*, in <http://www.aprodeh.org.pe/sem_verdad/comision_verdad/cv06.htm>.

¹⁶⁰ *Piden sanción para los culpables*, in «La República», 26 October 2001.

by the TRC as expressly demonstrated in the Final Report.¹⁶¹ Julissa M. Falcón has, nonetheless, qualified the absence of a specific item on 'sexual crimes' as "a very serious omission" in the TRC's mandate.¹⁶² In fact, as pointed out by the author, sexual crimes against women have been regarded as crimes against humanity and war crimes by, for example, the ICTY and ICTR, and are condemned as such in many international human rights and humanitarian law instruments, among which, the Rome Statute.

Aware of this particular type of victimisation that mostly affects women, the Peruvian TRC became the first TRC to incorporate the gender perspective in its work since the beginning of its activity. To develop this perspective, it drew on the reports from the Guatemalan and South African TRCs.¹⁶³ The Gender Line of the Peruvian TRC was, thus, created on the basis of the recognition that the political violence affected men and women in a different and specific manner, not only in terms of the violations suffered, but also on the visibility they had.¹⁶⁴

In fact, not only does a certain type of violations affect women in particular, but they have also been victims of the discrimination in treatment and lack of visibility of such violations. One of the reasons for this is the generalised reluctance in denouncing sexual abuses, in part because of the feeling of guilt and shame they cause on the victims, but also because women who have been victims of violence, tend not to regard themselves as victims. Indeed, although it was possible to establish, drawing on many different sources, that during the conflict, violence against women was a constant, according to the TRC's database only 3% of the violations reported correspond to sexual abuses. Moreover, while 75% of the testimonies collected by the TRC were given by women, only 20% of the victims reported in such testimonies were female.¹⁶⁵ This is explained by the fact that when women approached the TRC to offer their testimony, they did so in their quality of wives, mothers, daughters or sisters, denouncing the violations suffered by their husbands, sons, fathers or brothers and seldom regarded themselves also as victims of human rights violations. On top of all this, it is also common that violations against women, even when reported to the authorities, are not given due attention. This happens in particular when the victims, besides being women, belong to indigenous communities or minorities, which often

¹⁶¹ See, for example, Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 149.

¹⁶² J. Mantilla Falcón, *La Comisión de la Verdad en el Perú: El inciso que faltaba*, Lima, 2001.

¹⁶³ See <http://www.cverdad.org.pe/ingles/lacomision/nlabor/atrabajo2.php>.

¹⁶⁴ See <http://www.cverdad.org.pe/ingles/lacomision/nlabor/documentos04.php>.

¹⁶⁵ See the interview with Commissioner Sofía Macher in Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 7, Lima, CVR, p. 4.

happens as sexual violence is many times closely linked to racial discrimination.¹⁶⁶ All this contributes to the stigmatisation and discrimination of women as victims and to their re-victimisation.

For these reasons, the TRC's Gender Line focused on the violations suffered specifically by women with the aim of designing strategies to incorporate what happened to them into the TRC's investigation. Ensuring that the reality of women was incorporated into the TRC's work required a transversal approach that guaranteed that in all areas of action there would be a constant concern with the problematic of women. This required a permanent co-ordination between the investigation teams and the Gender Line, intensive training, and most of all, awareness raising towards this issue.

The general strategies of this gender perspective were laid on a Commissioners' Agreement¹⁶⁷, which, based on the acknowledgement of the different way men and women experienced violence and that women have been traditionally ignored, included a permanent self critical analysis to avoid letting traditional gender roles direct the TRC's investigation and making wrong generalisations in its conclusions or scope, and to ensure always the differentiation in statistical studies between men and women. One last commitment was made to develop the mechanisms to hear the voice of women and make the violations they suffered more visible. One of the most important initiatives of the TRC was, indeed, the thematic public hearing it held on 'Political Violence and crimes against women' in which eight women from several different backgrounds and experts discussed this theme.¹⁶⁸

Following the suggestions¹⁶⁹ of the Gender Line, the TRC promoted training to statement takers on how to formulate questions in such a way that more facts could be gathered about this pattern of violations and to include in the reports detailed information, including references to gender roles, stereotypes, identities, etc.¹⁷⁰ Moreover, several workshops were held both for staff members – from voluntaries to analysts and data processing workers - and for society in general. Another effort was made by the TRC to increase its knowledge of cases of sexual violence by closely working with organisations and institutions for the support of women. Having signed

¹⁶⁶ See document *A Gender Prospective for Analyzing Human Rights Abuses: Sexual Violence against Women*, in «<http://www.cverdad.org.pe/ingles/lacomision/nlabor/documentos02.php>».

¹⁶⁷ Document available at «<http://www.cverdad.org.pe/ingles/lacomision/nlabor/documentos01.php>».

¹⁶⁸ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no 4, p. 2.

¹⁶⁹ See Equipo de Género de la CVR, *La perspectiva de género en la CVR*, Lima, CVR, 2002.

¹⁷⁰ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 5, Lima, CVR, p. 8.

agreements of co-operation with such entities, the TRC ensured a wider diffusion of the problem and it was able to collect a greater number of testimonies given by women. Concerning the efforts of spreading knowledge about this issue, the TRC paid particular attention to the importance of using both feminine and masculine forms of words, giving information specifically targeted to women and taking into account that the information provided would be received differently by men and women.

In sum, the Gender Line entailed incorporating this perspective in each step of the investigation process, in the definition of priorities and in the drawing of conclusions.¹⁷¹ As a result, the TRC included in its Final Report a separate chapter on 'Gender and Violence' in which it addressed specifically the problematic surrounding these violations against women. In addition, when drawing up its Comprehensive Reparations Program, the TRC has given special attention to women in different ways. Taking into consideration the cases of women whose husbands died as a result of the conflict and who were left alone with additional responsibilities to care for their families, for which many were not prepared, the TRC decided to consider widows as a particularly vulnerable group, and as such afford them a 'more comprehensive attention'.¹⁷² More importantly, it created as an independent category of beneficiaries of the reparations the 'Victims of sexual violation', affording them symbolic reparations as well as health, education, economical measures of redress and restitution of civil rights.¹⁷³ Finally, it is also worth noting that under the category of 'Other individual beneficiaries' the TRC proposed measures of symbolic, education and economic reparation for 'the sons and daughters resulting from sexual violations'.¹⁷⁴

9. The Comprehensive Reparations Program

The right of victims to reparation for the harm suffered, as formulated in the previous chapter, on the basis of the obligation of the State to ensure respect for fundamental rights and the right of victims to an effective remedy, has been guaranteed in many international human rights documents. Taking this right into account, no process of dealing with the past could be successful in Peru, if redress was not ensured to the victims.

¹⁷¹ *Idem.*

¹⁷² Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 156.

¹⁷³ *Ibidem*, p. 71.

¹⁷⁴ *Ibidem*, p. 77.

Although the Peruvian TRC did not have the purpose or powers to award reparations to the victims itself, its mandate included among its objectives that of “making moral and material redress proposals for victims or their relatives.”¹⁷⁵ As a result, the TRC drew up and included in its Final Report what came to be called the ‘Programa Integral de Reparaciones’ (or Comprehensive Reparations Program). This Program was designed on the basis of a Report done by the ICTJ (International Centre for Transitional Justice) and APRODEH (Association Pro Human Rights) on the parameters for a reparations program in Peru, of meetings held with several national victims’ organisations with the purpose of gathering the demands of reparation of the victims, and with the support of several other NGO’s.¹⁷⁶ In fact, there was a particular concern by the TRC to take into account the views and expectations of the victims relating to reparations. Besides the meetings with their representative organisations and other workshops on this subject, the TRC took every chance of direct contact with the victims to ask their opinions on this issue, in the interviews, public hearings and public assemblies. However, as Commissioner Sofia Macher pointed out, there needs to be research on what are the expectations toward reparations, but the recommendations made by the TRC also needed to be realistic.¹⁷⁷

The objective of this Program was “to repair and compensate to the extent possible the crimes, the human rights violations as well as the losses or social, moral or material damages suffered by the victims as a result of the political violence.”¹⁷⁸ Through this objective it aimed at being an effective instrument of justice and reconciliation.

The Reparations Program was conceived through the creation of several interconnected programs of reparation and different categories of beneficiaries. It allows, in this way, that different types of reparation would be awarded to different types of beneficiaries, attributing to each group of beneficiaries specific and complementary benefits, not necessarily belonging to all programs.

The factors taken into account by the TRC when determining which type and amount of benefits the beneficiaries would receive were the following: the different

¹⁷⁵ Art. 2º, c) Presidential Decree no. 065-2001-PCM.

¹⁷⁶ See Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), Annex 6, p. 83.

¹⁷⁷ S. Macher, *Audiencias Públicas en el Perú*, in S. Mateos and J. Baca D. (Eds.), *Verdad, Memoria, Justicia y Reconciliación: sociedades y comisiones de la verdad*, Lima, APRODEH, pp. 59-65. Here p. 65.

¹⁷⁸ Comisión de la Verdad y Reconciliación, *Boletín de la Comisión de la Verdad y Reconciliación*, no. 8, Lima, CVR, p. 3.

nature and consequences of each type of violation, the present situation of the victim, and the *de facto* scope of each measure.¹⁷⁹ At the basis of this program, thus, is the concept of beneficiary, which differs from that of victim. In the words of the TRC, “beneficiary is the victim who will receive any type of benefit, symbolic and/or material, individual and/or collective, of the Comprehensive Plan of Reparations (PIR).”¹⁸⁰ And as it pointed out, “in certain cases the concept of beneficiary may go beyond that of direct victims, and in others the specific measures only apply to some of the victims.”¹⁸¹ The universe of beneficiaries, as stated in the Final Report, was determined by the period investigated by the Commission and by the crimes that fell within its mandate.¹⁸²

Taking into account that the effects of the violence went beyond the individual damages to the victims and have indeed affected the social, economic and cultural surrounding, the TRC created two big categories of beneficiaries: individual and collective.¹⁸³ It included in the first one, the relatives of disappeared persons, the relatives of dead persons, displaced persons, the innocent persons who were imprisoned, the tortured, the victims of sexual violence, the kidnapped, the recruited, the civilians who were hurt or injured in armed struggles or attacks in violation of the international humanitarian law, and the members of the Armed Forces, the National Police and of the Self Defence Committees who were hurt or injured in armed struggles or attacks in violation of the international humanitarian law. Also within the category of individual beneficiaries were the sons and daughters that resulted from sexual violations, the minors who joined a Self Defence Committee, the persons wrongfully accused of terrorism and treason, and those who became undocumented as a result of the conflict. Moreover, the TRC chose to give particular attention to especially vulnerable groups within this category. These are: the elderly, the orphans, the widows and the disabled. Under the category of collective beneficiaries, the TRC included the peasant and native communities and other population centres affected by the internal armed conflict, as well as the organised groups of displaced people originally from the affected communities and that didn't return, in their place of integration.

¹⁷⁹ Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 148.

¹⁸⁰ *Ibidem*, p. 150.

¹⁸¹ *Ibidem*, p. 149.

¹⁸² *Ibidem*, p. 148.

¹⁸³ *Ibidem*, p. 152-153.

Following the guidelines set in the UN documents analysed in the previous chapter, the Peruvian TRC incorporated into this Plan different types of reparation, which it organised under six different programs: symbolic reparations, reparations in mental health, restitution of civil rights, reparations in education, economic reparations, and collective reparations. By doing so, it guaranteed the different measures that the concept of reparation entails: compensation, restitution, rehabilitation and satisfaction.

As we can see, indirect victims were given protection in this Plan. That is the case of the relatives of dead or disappeared persons, and the concept of 'relative' was also taken in its broader scope to include the spouse or partner, the sons and daughters, the parents, and in some cases others who had with the victim a link of dependency similar to the relatives according to the habits and customs or customary law recognised by the population to which the applicant belongs.¹⁸⁴

It is worth noting that the members of the subversive groups who were hurt, injured or died, while not considered victims in the terms seen above, were also excluded from the Plan of Reparations, "unless the injury was done in violation of their human rights",¹⁸⁵ which means they may eventually be eligible for reparations, for example, as victims of torture.

In its plan of reparations, the Peruvian TRC adopted, as we can see, a broad perspective, including several and different forms of reparation and reaching to a wider group of victimised people. By creating a broad concept of beneficiary, it ensured a possibility of redress to many who suffered harm but who would not normally be considered victims. Similarly, adopting a holistic approach to the problematic of reparations and taking into consideration the economic constraints of the State, it was able to address the needs of individual victims and of communities, combining individual measures that afford the necessary individual recognition to the victims, and collective measures that better address the needs of certain groups of people. This certainly contributed to the general goals of justice and reconciliation.

10. Towards reconciliation

¹⁸⁴ *Ibidem*, p. 151.

¹⁸⁵ *Ibidem*, p. 153. In an awkward written formulation the Spanish version reads as follows: "*están excluidos del PIR los miembros de organizaciones subversivas que resultaron heridos, lesionados o muertos como consecuencia directa de enfrentamientos armados, salvo que la afectación se haya realizado en violación de sus derechos humanos.*"

Having been assigned the task “to propose initiatives aimed at strengthening peace and harmony among Peruvians”¹⁸⁶ and the purpose of “laying the foundations for in-depth national reconciliation”¹⁸⁷, the Peruvian TRC had in hands an important mission. The path to reconciliation was founded in Peru on the disclosure of the truth. However, acknowledgement of the truth can only be, in the case of Peru as in any other, a first step towards reconciliation. As we have seen earlier, it is wrong to assume that reconciliation will come at the end of the TRC’s mandate.¹⁸⁸ Reconciliation must, thus, be seen as a process instead of as a goal.¹⁸⁹ And in this process, the work of the TRC will only be an initial, although extremely important, contribution.

Achieving reconciliation in Peru seems to be an even more complex process than in other cases. The challenges to reconciliation are deeply rooted in the Peruvian society. The inequalities and discriminatory attitudes among Peruvians were to a large extent responsible for the origin and duration of the conflict, and now remain the greatest obstacles to reconciliation. The Peruvian TRC represented a unique opportunity to bring the whole society together in the process of re-writing their common history and make Peruvians recognise each other as compatriot citizens. In order to ensure that this process is given continuation, the TRC formulated in its Final Report recommendations around four focal points: institutional reforms in order to enforce the rule of law and prevent violence; comprehensive reparations to the victims; the National Plan for burial sites; and the follow-up mechanisms to implement its recommendations.¹⁹⁰

One of the main challenges to the continuation of the TRC’s work towards reconciliation is precisely the fact that it relied mostly on the political will and resources of the Executive to implement the recommendations made. Knowing that in previous cases the record on implementation of commissions’ recommendations has not been encouraging,¹⁹¹ the Peruvian TRC gave a particular attention to designing follow-up mechanisms to monitor and support the implementation of its recommendations, in

¹⁸⁶ Presidential Decree no. 065-2001-PCM.

¹⁸⁷ Presidential Decree no. 101-2001-PCM.

¹⁸⁸ See p. 18 above.

¹⁸⁹ See D. Bloomfield, et al (Eds.), *Reconciliation after Violent Conflict – A Handbook*, Stockholm, IDEA, 2003, p. 167.

¹⁹⁰ Comisión de la Verdad y Reconciliación, *op. cit.* (note 100), p. 106.

¹⁹¹ See PowerPoint presentation by IDEA at the Seminar on Post Truth Commission Processes in the World, Truth and Reconciliation Commission, Peru, 2003 at <http://www.idea.int/conflict/reconciliation/Presentation_Peru_MS.PPT>.

compliance with the task that it had been assigned in its mandate.¹⁹² The most important of these mechanisms proposed by the TRC is the so-called National Reconciliation Council. In fact, the TRC drafted two legislative proposals¹⁹³ that are now on the agenda of discussion at the Congress for the creation of a public entity charged with all the long-term decisions concerning the implementation of the Commission's recommendations. The purposes of this Council would, then, be to implement and develop the TRC's recommendations (through actions, norms and policies); to formulate and implement specific policies to strengthen the process of national reconciliation; to co-ordinate and implement the comprehensive policy of reparations; and to propose the institutional reforms recommended by the TRC in parallel with the corresponding legislative proposals. It is worth noting that in carrying out its objectives the Council will have the contribution, among others, of the Consultative Committee of the Victims of Violence, composed by seven representatives of the victims.¹⁹⁴

In this process of reconciliation the views and needs of the victims must, then, continue to assume a central position in order to ensure the recognition, justice and redress to which the work of the TRC contributed.



¹⁹² Art. 2º, e) Presidential Decree no. 065-2001-PCM.

¹⁹³ Projects no. 7045 and 6857.

¹⁹⁴ Art. 5º of the law that establishes the National Reconciliation Council (as proposed by the TRC).

CHAPTER IV

LESSONS LEARNED

When referring to the mechanisms of dealing with past human rights violations, Reverend Bogani Finca affirmed the Peruvian TRC has “created a paradigm shift in the way the world thinks of these issues.”¹⁹⁵ As the world, and in particular, the recently created (or about to be created) truth commissions, turn to the Peruvian experience to withdraw guidelines and examples, an in-depth analysis and evaluation of the choices taken is needed in order to establish the lessons learned.

In post-conflict situations or after the downfall of authoritarian regimes, States are almost invariably faced with the challenges of dealing with a past of human rights violations. As different alternatives lie before them, there has been an increasing interest for, and use of truth commissions in an attempt to bring truth, justice, peace and reconciliation to society and to the victims.¹⁹⁶

In this work we proposed to look deeply into the work of the Peruvian TRC from one perspective in particular: that of the victims. Aiming to contribute to the recently increasing shift of focus towards the victims, the position of the victim was analysed in the current realm of international human rights, in truth commissions in general and specifically in the Peruvian TRC. Although it may still be too early to make an accurate and thorough assessment of the work of the Peruvian TRC, we hope that the lessons learned may be valuable to inform future efforts of truth commissions, keeping in mind that each transitional situation is unique and calls for specific answers.

By adopting a victim-centred approach, truth commissions have progressively become the privileged means of transitional justice from the perspective of the victims. Having been traditionally assigned a merely secondary role, victims have become one of the main concerns in dealing with the past through the offices of truth commissions. While relying mostly on their testimonies to reconstruct a common history of the past, truth commissions pay special attention to the needs and hopes of the victims in their process of truth telling and healing.

¹⁹⁵ Reverend B. Finca is a former Commissioner of the South African TRC. See ICTJ, *The Peruvian Truth and Reconciliation Commission Backgrounder*, in «http://www.wola.org/andes/Peru/truth_comm_background.htm».

¹⁹⁶ Truth commissions are, in the words of Hayner, “fast becoming a staple in the transitional justice menu of options.” P. B. Hayner, *op. cit.* (note 2), p. 251.

It seems, however, that the coexistence of truth commissions and trials is not only possible, but also seen, from the point of view of the victims, as fundamental in the process of recovering¹⁹⁷ from the past and in the prevention of future violations.¹⁹⁷ This joint effort ensures, furthermore, that justice and redress will be granted to the victims at the national level, allowing the states to comply with their obligation to respect the human rights of its citizens and to do so more effectively.

The Peruvian TRC had a unique opportunity, based on its human resources, the international assistance, the context in which it emerged and on the previous experiences world-wide, to bring significant improvements in the process of dealing with past human rights violations, namely in the treatment of victims, and in this way, to set a benchmark for future truth commissions. Indeed, the Peruvian TRC was not only successful in drawing on previous examples and international guidelines, but it was also quite innovative in many aspects, while taking into account the particularities of the Peruvian case.

With an impressive determination to give voice to the victims, the Peruvian TRC allocated a significant amount of resources to reach a wider group of communities and individuals in the most remote and affected areas, through its regional offices and the public hearings that took place in such areas. It was, in fact, the first TRC in Latin America to incorporate public hearings in its process, contributing to the humanisation of the victims and ensuring that the personal stories of the victims reached the society at large. Through the thematic hearings it also managed to broaden the public debate, while enriching it with the views of experts.

Giving back to the victims their dignity and treating them with respect was a constant concern of the TRC in all the activities in which the victims took part. Rejecting the idea that victims are powerless and passive subjects, the TRC provided them with a safe and friendly environment in which to share their stories, respecting their cultural identity and their individual options, first and foremost, on whether to offer testimony.

An important improvement of the Peruvian TRC was its concern with guaranteeing assistance to the victims, before, during and after their participation in the

¹⁹⁷ Sam Garkawe, when reflecting about the role and rights of victims in the South African TRC, already suggested, "it is highly likely that truth commissions will be used more in conjunction with criminal trials." S. Garkawe, *The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of the victims of gross violations of human rights?*, in «<http://www.law.unimelb.edu.au/mulr>».

activities of the TRC. Under the supervision of the Mental Health team, victims were granted medical - psychological and physical - assistance. Again, this effort was not restricted to the headquarters or certain hearings, but was a crosscutting approach whenever there was a contact with the victims. In addition, the emotional support of relatives, friends or victim organisations was not only allowed, but indeed fostered by the Commission. However, healing and reconciliation require long-term assistance mechanisms that follow-up the work of the Commission. From the analysis undertaken and as no reference is made specifically concerning this matter in the final recommendations, it seems that the Peruvian TRC may have fallen short of the expectations of improvement¹⁹⁸ in this respect.

Moreover, in the Peruvian case, the model of confronting victims with perpetrators in a mediation-like effort of restorative justice was positively rejected. Justice was afforded instead through the acknowledgement of the truth, the end of denial and the possibility of bringing perpetrators to justice.

Bearing in mind the guidelines of the UN documents, and in accordance with the mandate it was given, the Peruvian TRC was determined to ensure the privacy and security of victims as a commitment of the Commissioners and the whole staff. In order to protect the integrity of the victims, the testimonies and other documents obtained during the investigation were kept confidential and handed over, at the end of its mandate, to the Peruvian Ombudsman. In addition, security measures were devised whenever found appropriate on an individual basis in parallel with the general plan of security surrounding the public hearings. The fact that many victims and witnesses demonstrated nevertheless a fear of coming forward to testify¹⁹⁹ indicates the necessity of improving the security measures²⁰⁰ in order to guarantee a greater subjective sense of safety.

Perhaps the greatest innovation of the Peruvian TRC was the creation of the Gender Line, which ensured that a gender perspective was adopted, since the beginning, in every stage and area of the Commission's work. This pervasive approach guaranteed a gender-sensitive investigation - taking into account the specific way in which the violence affected women and ensuring that the violations they suffered were recognised

¹⁹⁸ See P. B. Hayner, *op. cit.* (note 2), p. 153. However, the reasons of this apparent neglect from the TRC are not known to us.

¹⁹⁹ See «<http://www.cverdad.org.pe/ingles/apublicas/audiencias/index.php>».

²⁰⁰ We acknowledge, however, that security measures might not be sufficient or even the most effective to achieve this aim. Measures of other nature, into which we will not go much deeper here, should also be taken.

- and that its results were reflected in the TRC's conclusions and recommendations. The training of the TRC staff, the information spread by the TRC on this thematic, the co-operation with women's rights organisations, the realisation of a thematic hearing on women and political violence, the inclusion of an independent chapter on gender and violence in the Final Report and the provision of reparation measures specifically for women victims of sexual abuses and for the children born as a result of such abuses, are the main features of this gender perspective that should be borne in mind as examples for future TRCs.

The Peruvian TRC constitutes also a major breakthrough in the general conception of coexistence and co-operation between truth commissions and the criminal justice system. Not only did the TRC give room to bring perpetrators into account (by not establishing any type of impunity agreement), but it was mandated to work in strict collaboration with the criminal justice system, providing it with all the relevant information collected during its investigations concerning the commitment of crimes and human rights violations, including the testimonies of perpetrators or leaders of the implicated institutions. In this sense, the TRC contributed to the process of prosecuting the perpetrators and bringing justice to the victims. However, whether the Peruvian judicial system will be effective and impartial enough to ensure the accountability of the perpetrators remains to be seen.

The international assistance and learned wisdom were cleverly used by the Peruvian TRC, especially, in drawing up a reparations plan. Conceiving reparation as a right of the victims and an obligation of the Peruvian State, this plan was drafted, from a holistic approach, taking into account individual and collective needs, the resources constraints and the necessity of prioritisation by the State. The major strengths of this plan seem to be the fact that it comprises both individual and collective measures and all forms of reparation recommended by the international documents, taking into account the special needs of certain vulnerable groups of persons, the needs of reparation in what concerns both civil and political rights and economic, social and cultural rights²⁰¹ (like health and education), and finally including as autonomous groups of beneficiaries women and children who were victims of the violence in very specific terms. The fact that this plan was elaborated taking into account the views and expectations expressed

²⁰¹ The neglect of the violations of ESC rights, and reparations concerning the same, had been one of the criticisms made in relation to other TRCs. See E. Cuya, *ibidem* (note 114), p. 11.

by victims and relatives,²⁰² but keeping in mind the need to be realistic, may very well determine its success and avoid frustration. However important the recommendations made may be, we must keep in mind that the ability and willingness of the government to comply with them will be the determinant factors for the final assessment of the degree of redress awarded to the victims.

As one of the main criticisms made to truth commissions has been the incapacity to control the implementation of their recommendations²⁰³ and being aware that peace, justice and reconciliation need more than the temporary work of a short-lived commission, the Peruvian TRC sought to bring improvements also in what concerns its follow-up mechanisms. Beside the proposals for institutional reforms, the TRC proposed the creation of an innovative mechanism of implementation of its recommendations, which it called the National Reconciliation Council. The bold character of this novelty introduced by the Peruvian TRC will have yet to be evaluated in the light of the future developments.

One of the most perplexing particularities of the Peruvian TRC is the notion of victim it selected, especially when analysed together with the notion of beneficiary of the reparations. On the one hand, the TRC opted for a broad, flexible and inclusive definition of victim. However, on the other hand, not only does it seem not to include the indirect victims - when it is quite common understanding that these should be encompassed in the notion of victim - but it also explicitly excludes from the status of victimhood the members of the subversive organisations, considering them, nevertheless, as potential beneficiaries of its reparation program. This inconsistency, besides being rather uncommon and surprising (as it is not normal that individuals or groups who are not given the status of victims, will then be considered beneficiaries of the reparations program), seems to be undesirable and prejudicial in what regards reconciliation. In fact, the denial that some of the members of these groups were both perpetrators and victims of the state forces (in particular the young militants who were mainly victims of the context of violence and discrimination) impedes their inclusion in the process of healing and reconciliation. Denial will once again hamper the path towards peace and true reconciliation. To be aware that the distinction between victim and perpetrator is not as clear-cut as it may seem and that situations where these

²⁰² S. Garwake, *ibidem* (note 197). Referring to the reparation measures recommended by TRCs, the author recommended "At all times, however, it is important for states to listen to victims and to ascertain what they want."

²⁰³ E. Cuya, *ibidem* (note 114), p. 11.

categories overlap should be taken into account in the work of a truth commission,²⁰⁴ ensuring a truthful reconstruction of the past - the causes, processes and actors of the violence - may be valuable lessons for future truth commissions.

Assessing the work of a truth commission may always risk being unfair, as far too great and unrealistic expectations towards truth commissions are incredibly common. These will in most cases lead to disillusionment and frustration. When analysing the treatment of the victims, this assessment becomes even more difficult due to the complexity of ascertaining the views of the victims and the different needs and hopes of each victim.

The Peruvian TRC, however, has managed to give creative and adequate responses to many of the criticisms that had been made of previous truth commissions and constituted a rather innovative and advanced model in many ways. Its multidisciplinary and self-critical approach and its openness to the international experiences and gathered knowledge have undoubtedly contributed to the improvements it brought to the field of truth commissions. The ethical and other commitments assumed by the Commissioners as well as the Rules of Procedure that the TRC imposed on itself, are important instruments to evaluate the adequacy of the choices taken and the conformity of its actions to the former, and important guidelines for future experiences. In parallel, the concern with guaranteeing the transparency of its work through sources of information (web site, bulletins) and meetings with the government and the population to give a better insight on the work and the progress of the TRC, were extremely relevant for the overall positive perception by the victims and the rest of the population towards the Commission. However, in the area of information, more has yet to be done by future truth commissions to ensure that the functions, purposes and powers of the commission are well understood by the whole society in order to avoid unfounded expectations and the consequent disappointment.

Although it is easily foreseeable that victims of gross and systematic human rights violations will never be restored to the life that they had prior to the atrocities, it seems that truth commissions have contributed greatly to offer them the basis to

²⁰⁴ The choice of the Peruvian TRC in not taking into account this grey area of overlapping is perhaps an intentional one in order not to raise or leave any doubts about the responsibilities finally established after a long period of denial. In fact, it may be a conscious option by a truth commission not to stress the fact that all sides were guilty, since in post conflict situations one of the main obstacles to a democratic transition and reconciliation is precisely the lack of acknowledgement of responsibility by those to whom it actually belongs. As T. A. Borer pointed out, "In the midst of conflict, it is easier and more satisfying for people to think in terms of absolutes." However, the process of reconciliation may be put at stake because once again reality was not grasped in its wholeness. See T. A. Borer, *loc. cit.* (note 78), p. 1116.

recover: truth, acknowledgement, dignity, respect, assistance, justice and hopes for reconciliation and non-repetition.

On the basis of our research and in view of forth-coming endeavours we personally believe that three essential lessons learned from the Peruvian experience shall not be overlooked: the adoption of a broad and inclusive definition of victim (with the remarks made above), an effective and multifaceted assistance to the victims during and after the work of the Commission, and the concern with the particular relation between gender and violence.

In its pursuit for truth, peace and reconciliation, the Peruvian Truth and Reconciliation Commission faced its past while looking into the future and offered new lessons for future truth commissions. And by doing so, another enormous step was taken in the path towards a better protection of the victims.

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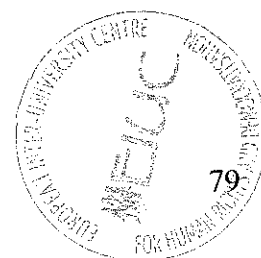
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