

THE REPARATIVE EFFECT OF TRUTH SEEKING IN TRANSITIONAL JUSTICE

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Abstract The benefits of a ‘holistic’ approach to transitional justice are enhanced by considering how synergies between different transitional mechanisms may be optimized. Drawing upon multiple examples, this article explores the potential contribution of truth seeking to reparation efforts at a normative, institutional and operational level. The article emphasizes the importance of an awareness of the reparative potential of truth seeking on the part of those implicated in its design and implementation, as well as an appreciation of the influence of contextual factors on a delicate process. It cannot be conceived of simply as a technocratic exercise, but as an inherent part of empowering victims.

Keywords: basic principles, empowerment, humanitarian law, human rights, reparations, satisfaction, reparations, schemes, transitional justice, truth commissions, truth seeking.

I. INTRODUCTION

A. *A Holistic Approach*

The legacy of a transitional period can be profoundly influenced by the societal and individual experience of transitional justice mechanisms.¹ There is a growing consensus that it is preferable for transitional societies to tap into a ‘rich repertoire of institutional innovations’ rather than relying upon a single mechanism.² Adopting a holistic approach to transitional justice is logical. The multiplicity of justice goals, challenges and constituencies present in a transitional setting are unlikely to be satisfied by a single initiative. However, different transitional mechanisms may strengthen or compensate for the limited mandates of and contextual constraints placed upon others. A truth commission, for example, could bring a degree of clarity and accountability where it is institutionally and politically impossible to prosecute more than a small proportion of the alleged perpetrators of crime.

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¹ M Williams and R Nagy (eds), *Transitional Justice* (NYU Press 2012) 2.

² P de Greiff, ‘Theorizing Transitional Justice’ *ibid* 32–3.

The rationale behind adopting a holistic approach highlights the potential dangers of expecting too much from one mechanism. Truth commissions often have to grapple with multiple and expansive objectives and concomitant expectations.³ The findings of certain analysts suggest that implementing only one type of transitional justice mechanism does not strengthen human rights protections, and, in some cases—including establishing a truth commission in isolation—has a reverse correlation.⁴

The advice of the United Nations (UN) Secretary-General—that transitional justice strategies afford ‘integrated attention’ to prosecutions, truth seeking, reparations, institutional reform and vetting or dismissals—is therefore strategically sound.⁵ A holistic approach does not imply simply ‘many’, but that the many are part of a whole, or a single plan. A coherent conception and design will provide structures to address overlapping priorities and powers,⁶ save resources and mitigate against mixed and confusing messages that can undermine the appearance of utility and efficacy.

This article focuses on specific aspects of the overlap between truth commissions and reparations schemes. Examining these aspects in isolation is necessarily artificial. But the discussion demonstrates that the nature of the structural relationship and the communication channels between transitional institutions can either enhance or detract from their relative ‘success’.⁷ In politically-constrained or

³ See eg art 3.1 of UN Regulation 2001/10 (13 July 2001) which sets out the objectives of the Commission for Reception, Truth and Reconciliation in East Timor: ‘The objectives of the Commission shall include: (a) inquiring into human rights violations that have taken place in the context of the political conflicts in East Timor; (b) establishing the truth regarding past human rights violations; (c) reporting the nature of the human rights violations that have occurred and identifying the factors that may have led to such violations; (d) identifying practices and policies, whether of State or non-State actors which need to be addressed to prevent future recurrences of human rights violations; (e) the referral of human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of offences where appropriate; (f) assisting in restoring the human dignity of victims; (g) promoting reconciliation; (h) supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation; and (i) the promotion of human rights.’ See also UNCHR, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’ (28 August 2013) UN Doc A/HRC/24/42, para 32.

⁴ T Olsen, L Payne, A Reiter and E Wiebelhaus-Brahm, ‘When Truth Commissions Improve Human Rights’ (2010) 4(3) *IJTJ* 457, 463.

⁵ UNGA, ‘Report of the Secretary-General to the Security Council on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (23 August 2004) UN Doc S/2004/616, para 26. Or, in the words of Pablo de Greiff that measures be ‘externally coherent’—see De Greiff (n 2) 39.

⁶ See discussion of the need for courts and truth commissions to ‘develop a detailed understanding of how they will relate to each other’ in AS Bassin and P van Zyl, ‘The Story of Samuel Hinga Norman in Sierra Leone: Can Truth Commissions and Criminal Prosecutions Coexist after Conflict?’ in DR Hurwitz and ML Satterthwaite (eds) (with D Ford), *Human Rights Advocacy Stories* (Foundation Press 2008) 265.

⁷ Olsen, Payne, Reiter and Wiebelhaus-Brahm (n 4) 476. ‘The findings ... demonstrate the value of isolating transitional justice mechanisms and studying their interactions to determine when, how and why they achieve important social justice goals.’

resource-scarce environments, the ideal is to optimize the extent to which different mechanisms can contribute or reinforce different justice goals.

Truth seeking has the potential, through *inter alia* institutional design and individual attitudes, to contextual contribute to the reparation of victims in various ways. However, due to the contextual constraints, nuance and individual variation, this is not a foregone conclusion and furthering this potential requires thought and determination by those involved in their design, execution and follow-up.

B. Definitions and Caveats

This article is concerned with truth seeking by truth commissions and administrative reparations schemes instituted to respond to claims *en masse*, rather than reparations awarded on an individual basis as a result of court cases. The ‘reparative effect’ of truth commissions, as analysed in this article, refers to the contribution of truth commissions to affording victims reparation as conceptualized under international law (and discussed below).⁸

Truth commissions are defined by the Office of the High Commissioner for Human Rights (OHCHR) as ‘officially sanctioned, temporary, non-judicial investigative bodies’⁹ (sometimes known as truth and reconciliation commissions or TRCs), and are generally given a fixed time period to investigate the context, causes and consequences of a specific set of violations that were perpetrated during a particular phase in a nation’s history. Commissions tailor their investigations and fact-finding methodologies to their mandated objectives. They are increasingly tasked with promoting reconciliation and recommending reparations programmes and institutional reforms to ensure such abuses do not happen again.¹⁰ Truth commissions come in different shapes and sizes, but almost always rely heavily on victim testimony in producing a historical narrative. Their *raison d’être*, however, is not to write the story of every individual, but to establish a common narrative or a ‘communal truth’, in the context of which individual truths can be framed.

Reparations schemes are designed to acknowledge not only the violation of victims’ legal rights, but also to respond to their memory and the suffering and

⁸ Hence, the aim of the article is not to analyse the contours of reparative justice, which is sometimes conflated with ‘restorative justice’, and denotes a focus on compensating the victim rather than punishing the criminal. Nor is it to advocate for a particular type of justice. The ‘victim-focused’ nature of the mechanisms as compared to traditional criminal justice mechanisms is a prior assumption of the analysis. For one discussion of ‘reparative justice’, see E Weitekamp, ‘Reparative Justice: Towards a Victim Orientated System’ (1993) 1 *EurJCrPolRes* 70–93.

⁹ UNHCR, ‘Rule-of-Law Tools for Post-Conflict States: Truth Commissions’ (2006) UN Doc HR/PUB/06/1. <<http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>> 1.

¹⁰ Art 6(1) of the Sierra Leone Truth and Reconciliation Commission Act 2000, for example, reads: ‘The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.’

needs that result. Pablo de Greiff recommends that such schemes be ‘complex’, ie, comprising a mix of different measures, including pecuniary, symbolic, collective and individualized reparations, social services, medical services, etc.¹¹ Most reparations schemes include a variety of initiatives, including community and individualized components.¹² ‘Complex’-ity is likely to enhance a scheme’s responsiveness to the often multiple and diverse needs of victims. Reparations are often distributed through an administrative scheme or body that gathers and processes applications. This body may be part of an existing government institution or a body that is constituted especially for the purpose. In Chile, for example, the Ministry of Health was tasked with distributing medical services to victims, while the National Corporation for Reparations and Rehabilitation was established to administer many other forms of reparations, including the archive programme.¹³

When assessing the potential of truth commissions to contribute to various justice goals, the constitutional and contextual constraints placed upon them is a prominent part of the formula. The importance of context illustrates that there is no ‘one-size-fits-all’ approach.¹⁴ While seeking to highlight some of the considerations and characteristics of a ‘reparative-minded’ truth seeking process, this article also acknowledges that other factors will help determine the appropriate way to set about this goal in each particular set of circumstances. As a result, none of the following sections purports to be comprehensive and the discussion has to be at a certain level of generality. Further, examples are drawn from a wide range of commissions rather than based on a few in-depth case studies. The intention is to consider some of the key factors that illustrate the issues and tensions raised by each perspective from which the reparative potential of truth seeking is considered.

C. Paradigm and Structure

The right to reparation is firmly established under international law. Section II of this article takes a brief look at the international legal framework that surrounds reparations in transitional contexts, including the broad conception of repair and the multiple modalities in which reparation is envisaged. It discusses the normative conception that truth is a form of reparation, the limits of this

¹¹ P de Greiff (ed), ‘Introduction’ in *The Handbook of Reparations* (OUP 2008) 11.

¹² The Comprehensive Plan for Reparations (PIR) in Peru, for example, proposes six programmes including symbolic reparations, health-related reparations, education-related reparations, restoration of civil rights, economic reparations and collective reparations. See J Garcias-Godos, ‘Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation’ (2008) 2(1) *IJTJ* 63–82.

¹³ E Lira, ‘The Reparations Program for Human Rights Violations in Chile’ in De Greiff (n 11) 55–101.

¹⁴ Report of the Secretary-General (n 5) 1: ‘[w]e must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations’.

assertion and also highlights the value of adopting a broad conception of reparation in this context.

Truth in itself is considered a form of satisfaction. A truth seeking process therefore has an instrumental reparative value. Section III examines truth seeking as a tool in influencing the scope, type and legitimacy of the truth that is produced. A more credible truth is more likely to have a greater 'satisfactory' effect, on the basis that the narrative that encapsulates victims' stories is easier to trust and harder to challenge. It is therefore more likely to be followed up. Where the truth about violations suffered (and often suffered in silence) is officially endorsed and widely acknowledged, the satisfactory and reparative effect of the historical record is greater.

The truth elicited and the recommendations accompanying that truth may also exercise an operational influence on any subsequent reparative policy and mechanism(s). This is more conspicuous where a truth commission has been tasked with recommending or designing the outline of a reparations scheme, but can occur in any case. A forward-thinking truth seeking process can therefore enhance the effectiveness of the reparation mechanisms and modalities that follow. Section IV discusses the ways in which truth seeking can influence subsequent reparations mechanisms and the impact on the success of the latter.

Undertaking institutional design with a purely instrumental focus may obscure the reparative potential inherent in the truth seeking process itself. A broad conception of 'repair' focuses on empowering or re-empowering victims: acknowledging their suffering, recognizing their dignity and opening a space within the national discourse for victims to assert their rights. The operation of a well-designed, empathetic truth seeking process may have intrinsic reparative potential through providing a platform to acknowledge and recognize victims that have long felt ignored. A commission provides an institutional space in which these processes play out and through which a sense of dignity may be restored. Some observers and participants have focused more narrowly on the healing effect of 'opening up'. Section V assesses some of these claims. This section also highlights the importance of conducting the assessment at both an individual and a collective level, rather than conflating the two.

The end of an official truth seeking process is not the end of the story. Section VI considers the need for a long-term focus if truth seeking is to have any lasting reparative effect. If, for example, there are no resources or insufficient political will to act upon the findings and recommendations of a commission, the validity and utility of that particular truth is undermined. If a commission's report remains private, the truth embodied within it has no claim to universality, implicitly undermining its force and its ability to afford satisfaction. Participation in a truth seeking process may have raised victims' expectations of institutional reform, tangible benefits, etc. Frustrated expectations can cause victims further harm, while undermining any willingness to trust national institutions and therefore potential for reconciliation with State bodies. However, it would be too simplistic to claim that unsatisfactory ends

means that a truth seeking process has no value or reparative effect. Expectations are evidence of a sense of status and empowerment.

Official acceptance or rejection of a commission's findings illustrate that truth seeking does not play out in a vacuum. Nor is the relationship between truth seeking, reparation and the various actors involved linear or predetermined in the way that a sequential institutional analysis might suggest. The context places limitations on the reparative effect of a truth commission, but it can also provide the catalyst, advocacy platform or moral capital for other actors to pursue their own agenda towards a reparative end. Section VII highlights the importance of contextual factors by taking a brief look at some examples of this phenomenon.

As becomes clear when analysing the different angles from which truth seeking may impact on reparation, there are tensions between different parts of a commission's mandate. For example, initiatives that render the process more reparative may undermine the legitimacy and accuracy of the truth that results. Resolving these tensions requires a balancing act in light of what a commission is trying to achieve.

II. THE LEGAL FRAMEWORK

A. The Right to Reparation

International law establishes a right to reparation for victims of breaches of international humanitarian law, international human rights law and, more recently, international criminal law.¹⁵ The obligation of a violating State to provide reparation is an integral part of combating impunity.¹⁶ What constitutes reparation in this context is defined widely. International law generally adopts a broad and flexible approach towards the modality of reparation that may be deemed appropriate,¹⁷ and, as part of this, confirms the normative status of truth seeking as a form of reparation.¹⁸

In 2005, the United Nations General Assembly 'adopted and proclaimed' the 'United Nations Basic Principles and Guidelines on the Right to a Remedy and

¹⁵ See UNGA Resolution 60/147 (16 December 2005), which adopted and proclaimed the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (the Basic Principles), Preamble.

Violations of human rights law by non-state actors trigger an obligation on the part of the state to exercise due diligence to investigate, prosecute, punish and provide redress. Human Rights Committee, General Comment 31 (August 2004) para 8. Velásquez Rodríguez case, Judgment, Inter-American Court of Human Rights, Series C No 4 (29 July 1988) para 166.

¹⁶ UNCHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity', UN Doc E/CN.4/2005/102 (the Impunity Principles) art 1.

¹⁷ Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2) (ILC Articles Commentary) art 34, para 6. See also C Gray as quoted in J Crawford, *State Responsibility* (CUP 2013) 510

¹⁸ Report of the Special Rapporteur (n 3) paras 18–20.

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (the Basic Principles), which identify 'mechanisms, modalities, procedures, methods' to operationalize existing obligations in respect of redress and reparation.¹⁹ The Basic Principles were the result of 16 years of study and consultation with States, international organizations and NGOs. It is a 'soft law' instrument, not binding on States, which required *inter alia* 'compil[ing] and systematiz[ing] the extensive corpus of law regulating the right to a remedy and reparations'.²⁰ The Basic Principles 'seek to rationalize through a consistent approach the means and methods by which victim's rights can be addressed'.²¹

The Basic Principles draw upon human rights and humanitarian law jurisprudence, including those aspects that reflect systematic characteristics. A breach of international human rights law is conceived of as a violation of both individual rights and of the international human rights legal order.²² Reparation therefore addresses both aspects of violations. It is in this context that the Inter-American Court of Human Rights (IACtHR)—which has created 'perhaps the most comprehensive legal regime on reparations in the human rights field of international law'²³—has developed concepts such as transformative reparations.²⁴ Where violations occur in a situation of structural discrimination or marginalization, restoration of the *status quo ante* is not adequate reparation. Reparations should therefore aim to transform the pre-breach situation.²⁵ This may require the creation of institutions, or even the amendment of a State constitution,²⁶ as well as remedies targeting individual harm.²⁷ Reparation for a breach of the right to the truth reflects this dual focus.²⁸

¹⁹ The Basic Principles emphasize that they do not create any new international or domestic legal obligations. Basic Principles, Preamble and art 1.

²⁰ Redress, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (March 2006) 3.

²¹ MC Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 HRLR 203, 251.

²² SG Ramirez in C Grossman *et al*, 'Conference: Reparations in the Inter-American System: A Comparative Approach' (2007) 56(6) AmULRev 1375, 1433.

²³ Grossman *ibid* 1376.

²⁴ C Sandoval, 'The Inter-American System of Human Rights and Approach' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 439. A detailed survey of human rights jurisprudence is outside the scope of this paper.

²⁵ *ibid*.

²⁶ See eg *The Last Temptation of Christ v Chile*, Judgment, Inter-American Court of Human Rights Series C No 73 (5 February 2001) paras 97ff pursuant to which Chile modified its constitution to comply with the order of the Court that looked to guarantee freedom of expression to *all persons* subject to its jurisdiction. The ECtHR emphasized this point by noting that, where the focus is on structural questions of 'public order', and not individual harm, certain available remedies are inappropriate. *Cyprus v Turkey* (Just Satisfaction) (12 May 2014) ECtHR case no 25781/94, paras 43–44.

²⁷ See eg *Loayza Tamayo v Peru* Judgment (Reparations and Costs), Inter-American Court of Human Rights Series C No 42 (27 November 1998), in which the IACtHR first considered the possibility of awarding individual compensation based on a life plan (*proyecto de vida*).

²⁸ See eg *Case of the 'Mapiripán Massacre' v Colombia*, Judgment (Merits, Reparations, and Costs) Series C No 134 (15 September 2005) paras 197–198.

The Basic Principles confirm that victims are entitled to prompt, adequate and effective reparation for gross violations of international human rights law and serious violations of international humanitarian law, *proportional* to the gravity of the injury and violations suffered and as *appropriate* in the circumstances.²⁹ Reparation is categorized into five different forms, which are neither mandatory nor exclusive: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. No specific formula is prescribed and a degree of flexibility is therefore retained. The Basic Principles make clear that the identification, apprehension, prosecution or conviction of a perpetrator is not a prerequisite to a victim's right to reparation, therefore all victims should be incorporated in any reparations programme.³⁰ The definition of 'victim' incorporates those who have suffered a wide variety of injuries, but (unlike most human rights or humanitarian law instruments) only apply where that harm has been caused by gross or serious violations.

The Basic Principles draw upon customary international law, as codified in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).³¹ There are, however, some key differences. The Basic Principles do not prescribe a hierarchy in the modality of reparation as the ILC Articles do (restitution, compensation and satisfaction as an 'exceptional' remedy), but instead adopt a more flexible approach.³² Restitution may not be appropriate for victims of human rights or humanitarian law violations. Depending upon how a violation is defined in the course of transition, both temporally and substantively, restitution may return or condemn a victim to a situation of marginalization and poverty. Transformative reparations reflect this concern. The 2007 Nairobi Declaration on the Women and Girls' Right to Reparation and a Remedy also articulates this concern, as follows:

that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.³³

At times, the normative status and sociological effect of reparative measures diverge. The relative flexibility retained by the Basic Principles (reparation

²⁹ Basic Principles, arts 15 and 18.

³⁰ Basic Principles, art 9.

³¹ The ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2), (ILC Articles).

³² ILC arts 34–37 state that compensation is available where restitution is not possible or disproportionate, and satisfaction where restitution and compensation cannot reach the standard prescribed by international law to 'wipe out the consequences' of the illegal act.

³³ Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007, para 3 <http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf>. The full paragraph reads: 'that reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.'

that ‘is appropriate in the circumstances’) is an acknowledgement that different measures are not reparative in all circumstances. The Basic Principles recognize that the ‘truth’ may cause further harm³⁴ and the truth can have opposite effects at a societal and individual level. Many victims create their own narrative around events in order to make sense of the suffering. The truth can question or destroy this narrative. The South Africa Truth and Reconciliation Commission (South African TRC) was established in 1994 following the election of the African National Congress and Nelson Mandela. Its mandate was to investigate ‘gross human rights violations’ perpetrated during the apartheid regime between 1960 and 1994. It had the authority to grant amnesties to perpetrators of political crimes that fully confessed.³⁵ Hayner highlights the frequently reported story of Sylvia Dlomo-Jele, a South African woman and a co-founder of the prominent Khulumani victim support group, for whom it is believed that the truth proved fatal.³⁶ For many years, Ms Dlomo-Jele thought that her son had been killed by the police. However, his ANC colleagues subsequently confessed to the crime during an amnesty hearing of the South African TRC. Ms Dlomo-Jele died a few weeks later.³⁷ Yet the symbolic and material reparations that resulted from the TRC’s work assisted the local community and Ms Dlomo-Jele’s other children to deal with the tragedy.³⁸

The analysis is complicated by the fact that there was no prompt official investigation as required by international human rights law. Ms Dlomo-Jele had therefore built ten years of her life around this story. Would the result have been the same had investigations revealed the truth at the time of Siculo Dlomo’s death? In many situations where truth seeking takes place, the question is academic—part of the underlying rationale for the exercise is the absence of an official investigation. But for many victims, even where investigations are launched relatively promptly—for example, in relation to 9/11—creating their own narrative is a necessary step in making sense of the disruption of the way they understood the world.³⁹ A truth commission’s work can destabilize this understanding.

³⁴ ‘Satisfaction, should include, where applicable ... verification of the facts and full and public disclosure of the truth to the extent that *such disclosure does not cause further harm* or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.’ (Emphasis added.) Basic Principles, art 22(b).

³⁵ South Africa Promotion of National Unity and Reconciliation Act 34 of 1995, Preamble and arts 1, 3, 4.

³⁶ P Hayner, *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* (2nd edn, Routledge 2011) 150.

³⁷ Mail & Guardian Article, ‘Truth about Dlomo made his mother’s grief unbearable’ (19 March 1999) <<http://mg.co.za/article/1999-03-19-truth-about-dlomo-made-his-mothers-grief>> and <<http://allafrica.com/stories/199903190205.html>>.

³⁸ Discussion with Paul van Zyl, Director of the Transitional Justice Program Director at the Center of Human Rights and Global Justice, February 2013.

³⁹ Discussion with Eduardo Gonzáles, Director of the International Center for Transitional Justice (ICTJ)’s Truth and Memory Program, April 2013.

Further, the Basic Principles also require reparation to be ‘proportional’ to the violation and the harm, rather than relying on the classic international law standard of ‘wiping out the consequences’ (as per the Chorzów Factory Case).⁴⁰ The latter standard may be unsuitable, or even insulting, in a transitional setting. It is impossible to ‘wipe out’ the consequences of some violations. Further, many States in transition are dealing with numerous victims but have limited resources. Satisfaction, traditionally an ‘exceptional’ remedy, could therefore play an important role.

B. Truth Seeking As a Form of Reparation

The Basic Principles include ‘[v]erification of the facts and full and public disclosure of the truth’ (truth seeking) as an example of satisfaction.⁴¹ They also confirm that victims have a right to seek the truth regarding the violations that they have suffered, including the causes of the violations.⁴² The IACtHR in *Gelman v Uruguay*, confirmed this right when ordering a factual investigation and immediate ‘localization’ of the remains of a disappeared victim ‘*as a form of reparation of the victims [sic.] [in this case relatives’] right to the truth*’.⁴³ The updated set of principles for the protection and promotion of human rights through action to combat impunity (the Impunity Principles) echo this right, confirming *inter alia* victims’ right to know the circumstances in which violations took place and the role that a truth commission might play in fulfilling this right.⁴⁴ The Impunity Principles further state that fulfilling the right to the truth is a safeguard against reoccurrence,⁴⁵ and it is, therefore, not only a form of satisfaction, but also a guarantee of non-repetition.

The ILC Articles envisage satisfaction as corresponding to injuries that are often of a symbolic character, constituting an affront to the State, irrespective of the material consequences involved,⁴⁶ and as taking many different forms, including official apologies and a declaration of wrongfulness of the act by a

⁴⁰ ILC Articles Commentary, art 31, para 1.

⁴¹ Basic Principles, arts 19–23.

⁴² *ibid*, art 24.

⁴³ *Case of Gelman v Uruguay*, Judgment (Merits and Reparations), Inter-American Court of Human Rights, Series C No 221 (24 February 2011) (*Gelman*) para 259. See also Report of the Special Rapporteur (n 3) paras 18–20. The use of the terms ‘reparata’ implies that violation of the Convention triggers a secondary obligation on the part of the State to provide ‘truth’, and that an investigation ‘repairs’ a failure to comply with this obligation.

⁴⁴ The Impunity Principles confirm victims’ right to know the circumstances in which violations took place, the right of ‘every people’ to know the truth regarding ‘heinous crimes’, and a State’s duty to preserve memory and facilitate knowledge of violations of human rights and humanitarian law. Truth commissions are often relied upon to fulfil this right: ‘societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence’. See Impunity Principles, Principles 2–5.

⁴⁵ Impunity Principles, Principle 2.

⁴⁶ ILC Articles Commentary, art 36, para 1 and art 37, paras 3–4.

competent court or tribunal.⁴⁷ The IACHR in *Gelman* similarly described the issuance of a judgment in the victim's favour as a form of satisfaction.⁴⁸ This makes clear that the *fact* of being the object of a wrongful act can constitute an injury and require reparation, regardless of other consequences. The Basic Principles emphasize that reparation should be proportional to the gravity of the violation as well as the harm and 'affirm' that the gross or serious violations constitute an 'affront' to dignity.⁴⁹ Violations directed at a victim send an implicit message about a victim's value, dignity and place in the community. When the violation is inflicted and/or ignored by the State, this further restricts the space in which rights may be enjoyed. Pablo de Greiff highlights that those who intentionally harm others pursue strategies of 'dehumanization', pointing to certain assumptions about the agency of those harmed.⁵⁰ The purposes of rape, for example, have been compared to those of torture, as including humiliation, degradation and destruction of the person (including sense of self).⁵¹

This illustrates a central element of reparation: restoring the dignity and agency of victims and empowering them to claim their rights themselves. Truth commissions and reparations schemes are not, ultimately, looking to benefit passive and subdued victims, but to open or reopen the space in which victims can assert their place, and in this sense, to 'de-victimize' the victims. Transitional justice measures seek to provide recognition to victims as individuals and as bearers of rights.⁵² In his work on 'justice as recognition', Haldemann draws on the work of political scientists to highlight the human need for recognition.⁵³ Self-identity and self-respect are dependent on the attitude of and interaction with others. He discusses how feelings of being ignored and a failure to recognize another's dignity or equal worth are internalized as a lack of respect.⁵⁴

Acknowledging the fact and wrongfulness of the violation(s) is therefore a precondition to 'de-victimization'. Albie Sachs recently commented: '[t]o me the huge shift that a good truth commission type process makes ... is to move from knowledge to acknowledgement. Knowledge is just knowing the facts, the details, but it's abstract ... acknowledgment means it enters into your emotional world, your world of responsibility'.⁵⁵

⁴⁷ *ibid*, art 37, paras 4–7

⁴⁸ *Gelman* (n 43) para 312(8).

⁴⁹ Basic Principles, Preamble.

⁵⁰ De Greiff (n 2) 42.

⁵¹ *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para 597.

⁵² De Greiff (n 2) 43.

⁵³ Haldemann draws particularly on the work of Honneth and Margalit. F Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' 41(2) *CornellIntlLJ* 675, 691.

⁵⁴ *ibid*.

⁵⁵ Interview with Albie Sachs (former Judge of the South African Constitutional Court) by Paul Seils, ICTJ, 17 April 2013, <<http://www.ictj.org/news/soft-vengeance-interview-south-africa-albie-sachs>>.

The *nature and medium* of the response to victims is therefore central to engendering this sense of recognition,⁵⁶ thus highlighting the importance of considering the process of truth seeking as well as the manner and context in which the truth is articulated. Ms Dlomo-Jele said of her experience testifying before the South African TRC: '[t]he way they listened to me, the interest they showed in my story, that was good for me'.⁵⁷

III. ENHANCING THE INSTRUMENTAL REPARATIVE VALUE

The truth in itself can therefore constitute a form of reparation. The satisfaction afforded by a truth commission's product depends in part upon the credibility of that truth. Not only does its credibility influence the direct reparative nature of the truth produced for victims, it also affects the broader reparative effect via its acceptance by a wider population. A well-received truth garners support for the implementation of a commission's recommendations, which often include reparations and institutional reform.

The credibility of the truth depends upon the legitimacy of the truth seeking mechanism. 'The legitimacy of the source ... influences considerably the effectiveness of the message in producing attitude change'.⁵⁸ Procedural fairness has been highlighted as a key criterion in assessing the institutional legitimacy of truth commissions, where perceptions of procedural fairness depend upon rationality (neutrality and factuality) and relevant parties being accorded the possibility to voice opinions and views.⁵⁹ Other studies on theories of public participation and institutional legitimacy of like institutions note the importance of similar factors: neutrality, listening to interested parties, quality of decision making, but also the experience of interacting with the commission.⁶⁰ The process and the way that victims are treated therefore feeds directly into the legitimacy of the truth produced.

Limited credibility can set in motion a vicious cycle. Commissions rely upon the participation of victims, perpetrators and cooperation of government etc to form their product. Limited credibility may make participation less appealing, thus inhibiting a commission's methodology and rendering the product less credible. The benefits of engaging with a truth commission are less likely to

⁵⁶ *ibid.*

⁵⁷ Interview with Sylvia Dlomo-Jele regarding her experience before the South African TRC, Hayner (n 36) 150.

⁵⁸ JL Gibson, 'On Legitimacy Theory and the Effectiveness of Truth Commissions' (2009) 72 *JContempLegallssues* 123, 138.

⁵⁹ *ibid* 137.

⁶⁰ In their studies on commissions of inquiry, Raanan Sulitzeanu-Kenan and Yifat Holzman-Gazit divide theories of institutional legitimacy between instrumental and procedural models. R Sulitzeanu-Kenan and Y Holzman-Gazit, 'Form and Content: Institutional Preferences and Public Opinion in a Crisis Inquiry' (2012) 20 *Administration and Society* 1, 4. MX Delli Carpini *et al*, 'Public Deliberations, Discursive Participation and Citizen Engagement: A Review of the Empirical Literature' (2004) 7(1) *Annual Review of Political Science* 315, 327.

be deemed to outweigh the costs —time, effort and potential trauma—if the report is liable to be questioned or dismissed on grounds of partiality, bias, faulty methodology, etc.

This section does not intend to provide a comprehensive survey of best practice in relation to establishing and running a truth commission. Rather, it seeks to illustrate how far the quality of the truth and the perceived quality of the truth are reliant upon institutional and political factors, as well as some of the challenges faced in seeking the requisite legitimacy.

A. Logistical and Contextual challenges

Commissions face administrative, operational and political challenges that frequently undermine their work. Infrastructure and communication is one example: commission staff members in Guatemala visited villages in the mountains that were so isolated that they were unaware that the war had ended, let alone of the existence of a truth commission.⁶¹ Due to a lack of office space, the Chad truth commission established itself in the headquarters of the security forces' former secret detention centre. This, in turn, deterred many victims from providing testimony.⁶² These challenges can also cause delay, which often undermines public confidence and interest. The 1986 truth commission in Uganda enjoyed wide public support for the first couple of years of its mandate, but due to an absence of political support, and thus insufficient resources, it did not deliver its report until 1994, by which time many Ugandans had lost interest: '[e]ight years and countless hold-ups later, the Commission released its report with a quiet whimper'.⁶³ Sometimes these factors prevent the release of any findings at all: the Bolivian truth commission did not complete or issue a report due to insufficient resources and lack of political support.⁶⁴

B. Independence and Impartiality

The identity of the commissioners can prove crucial to a commission's credibility. In her seminal book on truth commissions, Priscilla Hayner highlights the importance of strong leadership in determining the impact of a truth commission, particularly due to the managerial and political difficulties often faced.⁶⁵

⁶¹ Hayner (n 36) 33.

⁶² *ibid* 158–9.

⁶³ JR Quinn, 'Constraints: The Un-Doing of the Ugandan Truth Commission' (2004) 26(2) HRQ 415. For example, the Commissioners had to work other jobs at the same time to support themselves.

⁶⁴ Hayner (n 36) 240–1.

⁶⁵ *ibid* 211.

But leadership is not only an operational concern. The independence and impartiality of the commissioners, and the appearance of independence and impartiality, is central to the perceived quality of truth that is produced by the commission.⁶⁶ The 1986 Ugandan commission (discussed above) was further undermined by the belief, held by some Ugandans, that its role was to legitimize the position of the political leadership and that it had no real truth-telling function.⁶⁷

The official instruments pursuant to which commissions are established will usually require that commissioners are independent and impartial and provide for the removal and replacement of commissioners who do not fulfil these criteria. The Kenyan Truth, Justice and Reconciliation Act (TJR Act), establishing the Truth, Justice and Reconciliation Commission (TJRC), is one such example. The TJRC was one of several commissions envisaged by the agreements underlying the February 2008 power-sharing deal following the post-election violence. The violence lasted approximately two months, during which an estimated 1,133 people were killed and approximately 350,000, displaced from their homes.⁶⁸ The TJRC Report describes it as ‘the darkest episode in Kenya’s post-independence history’.⁶⁹ The TJR Act was passed in late 2008 and mandated the TJRC to investigate, record and make recommendations in respect of abuses committed between 12 December 1963 (independence) and 28 February 2008.⁷⁰ The TJR Act requires that commissioners be free from the ‘direction or control of any person or authority’ and shall be independent of any political or organizational interests. Tellingly, the commissioners ‘shall avoid taking any action, which could create an *appearance* of partiality or otherwise harm the *credibility or integrity* of the Commission’.⁷¹ (Emphasis added.)

Despite its statute, President Kibaki’s appointment of Bethwell Kiplagat as Chair of the TJRC provides a dramatic example of the link between a commissioner’s perceived partiality and the damage to the credibility of a commission’s work. Kiplagat was alleged to be implicated in human rights abuses and irregular land distribution practices.⁷² The fallout of the accusations and the official reaction resulted in delay and confusion, which was exacerbated

⁶⁶ Impunity Principles, Principle 7: ‘Commissions of inquiry, including truth commissions, must be established through procedures that ensure their independence, impartiality and competence ...’.

⁶⁷ Trial Report, ‘Truth Commission in Uganda’ (9 May 2012) <<http://www.trial-ch.org/index.php?id=962&L=5>>.

⁶⁸ Report of the Kenya Truth, Justice and Reconciliation Commission (3 May 2013) vol 1, para 38.

⁶⁹ *ibid.*

⁷⁰ United States Institute of Peace, ‘Truth Commission: Kenya, Truth Commissions Digital Collection’ <<http://www.usip.org/publications/truth-commission-kenya>>.

⁷¹ Kenya Truth, Justice and Reconciliation Act 2008, arts 7 and 21.

⁷² Kenyan Section of the International Commission of Jurists, ‘Complaint against Ambassador Bethwell Kiplagat (14 May 2010) <<http://www.icj-kenya.org/index.php/media-centre/press-releases/303-complaint-against-ambassador-bethwell-kiplagat>>.

by the consequent resignation of some other commissioners.⁷³ One resigning commissioner voiced concerns that the government's failure to investigate Kiplagat, along with a failure to provide sufficient resources, would make it impossible for the commission to complete its work. He added: '[the Commission's] report and recommendations, no matter how well supported and reasoned, will forever be tarnished by that failure'.⁷⁴ In short, a rigorous fact-finding methodology is not sufficient. The symbolic role of the truth commission, bound up in the reputation of its commissioners, has a significant impact on acceptance of the truth produced.

C. Methodological Challenges

Commissions generally have limited resources and very little time compared to the enormity of the task they are set. Their fact-finding methodologies need to balance competing goals. There is an inherent bias in a commission's mandate towards patterns and trends. Individual testimonies are often included as 'case studies' to illustrate widespread phenomena, but many victims' stories will form a statistic in the final report rather than an explicit part of the narrative. This may be another source of disappointment for victims who believe their story will finally be told: '[s]tatistics do not tell us how it felt to be there'.⁷⁵

Some commentators distinguish between commissions that concentrate on a 'historical truth' (for example, the Guatemala Commission for Historical Clarification) and others that prioritize a 'judicial truth'.⁷⁶ The 1990 Chilean TRC (the Rettig Commission) is an example of the latter. It was established following President Aylwin's victory over General Pinochet in the 1989 elections. The Rettig Commission was established to document the human rights abuses that resulted in death and disappearances during military rule from 1973 to 1989. It conducted a thorough investigation of most of the cases presented to it and published numerous individual stories in its over 1000 page report. Its ability to analyse each case in depth was linked to the limited subject matter of its mandate as compared to the time it was given to conduct investigations. Other commissions with a wider mandate have relied

⁷³ Deputy Chair of the TJRC, Betty Murungi, resigned on the basis that it was difficult to fulfil her duties when the Commission Chair faced such accusations. Bloomberg.com Article, 'Kenya's Truth Commission Vice Chairwoman Quits (Update 1)' (29 March 2010), <<http://www.bloomberg.com/apps/news?sid=aWoBbnkgP.2k&pid=newsarchive>>.

⁷⁴ Africa Review Article, 'Kenya's reconciliation agency member quits' (21 October 2010). The Christian Science Monitor Article, 'US professor quits Kenyan truth commission, citing lack of confidence', 22 October 2010, <<http://www.csmonitor.com/World/Africa/2010/1022/US-professor-quits-Kenyan-truth-commission-citing-lack-of-confidence>>.

⁷⁵ Comments of Patrick Ball in 'Truth Commissions: can countries heal after atrocities?' (2010) 4(1) CQ Global Research 10.

⁷⁶ J Ciurlizza and E González, 'Truth and Justice from the Perspective of the Truth and Reconciliation Commission' in L Magarell and L Filippini (eds), *The Legacy of Truth: Criminal Justice in the Peruvian Transition* (ICTJ New York 2006) 6.

to a greater extent on statistics and statistical analysis to underscore their findings. The Commission for Reception, Truth and Reconciliation of Timor-Leste (CAVR) was mandated *inter alia* to investigate human rights abuses in the context of political conflicts between 1974 and 1999 (a period incorporating Indonesian occupation and internal conflict). It estimated that between 102,800 and 183,000 people died due to conflict-related causes. This figure includes 18,600 people who were unlawfully killed or disappeared, and a minimum of 84,200 people that died from hunger and illness and who would not have been expected to die from these causes under peacetime conditions.⁷⁷

Competing priorities also have to be balanced in the choice of evidentiary standard, which is usually determined by the commission. Hayner has noted a general trend is towards commissions adopting a standard of 'preponderance of the evidence' or 'balance of probabilities'.⁷⁸ The South African TRC identified those involved in 'gross violations' based on the 'balance of probabilities'. Yet it chose not to consider victims' accounts of their experiences of human rights abuse as truthful until proven otherwise.⁷⁹ The El Salvador commission applied a three-tiered approach to the standard of proof, allocating to each finding one of the following degrees of certainty: overwhelming evidence; substantial evidence and sufficient evidence. When the evidence was less than 'sufficient', the commission refrained from making a particular finding.⁸⁰ Findings are more robust if supported by a higher standard of proof. This is particularly important if the commission intends or is mandated to identify perpetrators by name or to provide evidence to the criminal justice system to encourage criminal investigations and prosecutions.

However, a higher standard of proof is likely to require deeper and more rigorous questioning and investigation that can detract from the reparatory effect of the evidence-gathering process. Victims may find providing details or being questioned about their experiences difficult. The rigorous cross-examination adopted in certain adversarial systems is likely to be inappropriate, especially where risks of re-traumatization are high. Further, this may result in cases being excluded from the report or analysis if they cannot be corroborated. Providing sufficient corroborating documents to substantiate physical harm, for example, may be impossible where the victim had no access to medical services.

⁷⁷ The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR) (1 November 2006) 9.

⁷⁸ Hayner (n 36) 142.

⁷⁹ P van Zyl, 'Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa' in MC Bassiouni (ed), *Post Conflict Justice* (Transnational Publishers 2002) 748.

⁸⁰ United States Institute of Peace, 'Truth Commission: El Salvador, Truth Commissions Digital Collection' <<http://www.usip.org/publications/truth-commission-el-salvador>>.

D. Outreach, Consultation, Participation

As noted above, opportunities for participation enhance perceptions that the outcome is fair and legitimate. Consultation and participation can engender a sense of ownership. Communication and outreach, along with consultation and participation strategies, are therefore central to the perceived legitimacy of a commission.

Given the influence of the identity of the commissioners on the perceived neutrality of a truth commission, consultation and participation will ideally be sought with respect to both the appointment of commissioners and the work of the commission.⁸¹ The South African authorities sought an (at the time) unprecedented degree of civil society input into the TRC commissioner selection process. Nelson Mandela selected the commissioners from 25 candidates proposed by a selection committee composed of *inter alia* human rights NGOs and civil society representatives. With the exception of two candidates whom Mandela selected to maintain gender and regional balance, all of the commissioners had been nominated by the public and interviewed by the selection committee in public.⁸² In Ghana, the Attorney General consulted with the Civil Society Coalition (CSC) prior to passing the constituting legislation of the National Reconciliation Commission (NRC). Following various meetings, the CSC proposed guidelines regarding the selection process. The CSC believes that certain of its proposed guidelines formed the basis for the NRC's diversity (including ensuring a greater gender balance). This diversity is thought to have been instrumental in augmenting public support during the initial stages of the NRC's work.⁸³

The picture painted by a truth commission may obscure a significant part of a nation's history if it excludes potentially marginalized groups from the procedure and substance of its work. Consultation and participation is part of an inclusive approach: it facilitates access to necessary information and can build trust that may increase access and input. Truth commissions will normally need to employ specialist techniques in order to ensure, for example, gender-sensitive approaches to outreach, participation and testimony-taking.⁸⁴ In certain cultures, commissioners noted that women tell the

⁸¹ Basic Principles, art 6: 'To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality.'

⁸² Hayner (n 36) 216.

⁸³ N Valji, 'Ghana's National Reconciliation Commission: A Comparative Assessment' (September 2006), ICTJ and CSVR Occasional Article Series, <<http://www.csvr.org.za/wits/papers/papictj1.pdf>> 8.

⁸⁴ Initial consultations may be necessary to explore the various 'groups' that require specialist techniques and which approaches are acceptable. Some commissions have created internal 'gender units' to ensure a gender perspective is considered throughout their work. V Nesiiah, 'Truth Commissions and Gender: Principles, Policies, and Procedures' (July 2006) ICTJ Publication 6–7.

stories of their male relatives before their own.⁸⁵ Allocating insufficient time to the process could therefore mitigate against recording the full story. Women gave 55 per cent of all testimonies to the South African TRC, but the majority of these testimonies concerned what had happened to their husbands or sons.⁸⁶ Victims of sexual violence are another constituency that may choose not to engage with a commission unless certain protective procedures are put in place. They may only be willing to testify in private conditions on a confidential basis, and may prefer to talk to a statement taker of the same sex. The Sierra Leone TRC employed a cadre of female statement-takers, who were trained in taking statements from victims of sexual abuse. Testimony was taken on a one-to-one basis, although, if requested, counsellors were present to sit beside women and offer assistance.⁸⁷

An inclusive approach requires consideration of other barriers to access, including educational and linguistic. The Peruvian Comisión de la Verdad y Reconciliación (CVR) created a photography exhibit in the National Museum as well as publishing photographs at the same time as releasing the *informe final*. The CVR President's speech prior to handing over the *informe final* was translated into Quechua.⁸⁸

E. Dissemination of the 'Truth'

The official response (itself an expression of the political context) influences the legitimacy accorded to a commission's findings. A public and official apology is envisaged as a means to afford satisfaction,⁸⁹ and when motivated by the truth, it augments the 'satisfactory' effect and the force of that truth. It also makes it harder for the State not to take further action. When the truth is undermined, so is its potential reparative effect. Following the release of the Rettig Commission's report, President Aylwin apologized on behalf of the State on national television. Each victim listed in the report received an official letter of apology. Even though a series of bombings in the immediate aftermath of the report's release diverted attention from the report, the President's acknowledgement gave the TRC's findings a certain historical status.⁹⁰ In El Salvador, on the other hand, the President and the Defence Minister criticized the commission's findings upon their release.⁹¹

⁸⁵ Comments of Paul van Zyl regarding the South Africa TRC, November 2012.

⁸⁶ UN Women, 'Progress of the World's Women 2011–2012 Report: In Pursuit of Justice', <<http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>> 95.

⁸⁷ S Duquet, 'Gender Aspects of the Truth and Reconciliation Commission in Sierra Leone' (February 2010) <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=sander-ijn_duquet> 13.

⁸⁸ E Gonzales and H Varney (eds), 'Truth Seeking: Elements of Creating a Successful Truth Commission' (18 March 2013) ICTJ Publication 68.

⁸⁹ Basic Principles, art 22(e).

⁹⁰ Hayner (n 36) 48–9.

⁹¹ *ibid* 51.

The public lost interest in the commission's findings when an amnesty act was passed five days after the commission's report was published. Victims were left with no political representation.⁹²

Similar considerations apply to a refusal to publish a commission's report. Maintaining secrecy restricts the potential for acknowledgement of victims' stories as well as hampering attempts to achieve reform on the basis of the report. Despite pressure from NGOs and relatives of victims, the Zimbabwean government refused to publish the report of the Zimbabwe truth commission (1983–84) on the basis that it might encourage violence.⁹³ Contrast this with the report of the Argentinean commission (also operational between 1983 and 1984), which was published in its entirety, and as a book-length version. The book (*Nunca Más*) was an immediate bestseller and 150,000 copies were sold in the eight weeks following its release.⁹⁴

The way that a State treats a final report is likely to be of less importance where the population has had significant contact with the truth commission's proceedings, for example, via extensive media coverage. In South Africa, victim testimony and public confessions were broadcast live to the nation. Even prior to publication of the final report, certain truths had permeated the national consciousness. However, the way that the report, and particularly the commission's recommendations, were treated affected the legacy of the process. The lack of subsequent prosecutions,⁹⁵ for example, sent a message about the State's attitude to the stories revealed by the TRC.

IV. OPERATIONAL DETERMINISM

States that implement both a truth commission and reparations scheme often do so sequentially, with the former preceding the latter.⁹⁶ In such cases, and particularly where the truth commission is mandated to make recommendations regarding reparations, the design and conduct of the former can have a huge effect on the definition and contours of the latter.

⁹² M Popkin, 'The Salvadoran Truth Commission and the Search for Justice' (20 January 2004) Criminal Law Forum.

⁹³ United States Institute of Peace, 'Truth Commissions: Zimbabwe, Truth Commissions Digital Collection' <<http://www.usip.org/publications/commission-inquiry-zimbabwe>>.

⁹⁴ Hayner (n 36) 46.

⁹⁵ Paul van Zyl writes of South Africa: 'Nevertheless, given the volume of available evidence, the number of potential witnesses unearthed through the TRC's amnesty process and the paucity of prosecutions, it is hard to escape the conclusion that the current government is either ambivalent towards or opposed to prosecutions' (n 79) 754.

⁹⁶ However, it is important to note that this is not always the case: in some countries reparations schemes precede truth commissions (as occurred in Brazil) or reparations schemes are implemented in isolation (as was the case in Malawi).

A. Mandate

The operational influence of a truth commission over a subsequent reparations scheme is clearly illustrated where a truth commission has a limited mandate. A truth commission has the authority to investigate allegations of violations that fall within a defined time period and usually of a specific nature. The investigative mandate determines the scope of credible findings and recommendations that can be made. The mandate of the Rettig Commission notably excluded investigation of torture allegations not resulting in death.⁹⁷ The Rettig Commission documented 3,248 cases of disappearances, executions, kidnapping and torture that fell within its mandate and recommended a series of reparations programmes for those identified as victims of those crimes (including family members).⁹⁸ In 2003, following years of pressure, the then-President of Chile, President Lagos, set up the National Commission on Political Imprisonment and Torture (the Valech Commission) to investigate other abuses committed by the military regime, including torture that did not result in death.⁹⁹ The Valech Commission classified over 28,000 people as legitimate victims under its mandate.¹⁰⁰ Many of these victims are now included in programmes that formed part of the original reparations schemes, for example, pensions, educational benefits and an extensive State medical system.¹⁰¹ The expansion of the mandate drastically altered the story that was told and the scope of the reparations scheme that resulted.

B. Fact-Finding Methodology

The fact-finding and recording methodologies chosen by a truth commission can prove central to the design of a subsequent reparations scheme. Victims are a heterogeneous constituency who have suffered different violations and have different needs and expectations. The ability to meaningfully respond through reparations is therefore enhanced when information is categorized not only by violations suffered, but also objective and logistical information, for example, location, age, gender, dependants, health opportunities, etc.¹⁰² This information can then form the basis for recommendations regarding the design of a reparations scheme and/or be used by a subsequent administrative body charged with designing and rolling out that scheme. Designing a

⁹⁷ United States Institute for Peace, 'Truth Commission: Chile 90, 'Truth Commissions Digital Collection' <<http://www.usip.org/publications/truth-commission-chile-90>>.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ United States Institute for Peace, 'Truth Commission: Chile 03, Truth Commissions Digital Collection' <<http://www.usip.org/publications/commission-inquiry-chile-03>>.

¹⁰¹ Lira (n 13).

¹⁰² See, for example, UNCHR 'Rule-of-Law Tools for Post-Conflict States: Reparations Programs, 2008' UN Doc HR/PUB/08/1, 15.

‘complex’¹⁰³ scheme with multiple, specialized initiatives will require particular information sets on which to justify and construct the different programmes. If commissions are ‘reparations-minded’ in their fact-finding and recording exercises, they can reduce the time and resources required by a body charged with implementing reparations and help avoid unintentional exclusion of victims.

As countries ‘in transition’ often have limited resources to dedicate to reparations schemes, the data and findings of truth commissions may be used to make difficult choices. The Basic Principles envisage a degree of creativity and many commissions have adopted an innovative approach. The CVR and Moroccan L’Instance Equité et Reconciliation (IER), for example, defined, not only individuals, but also communities or regions as victims and therefore beneficiaries of reparations. On this basis, they recommended collective reparations as one of the measures to be implemented by a future reparations scheme. The Program of Collective Reparations in Peru awards communities investment projects as reparations.¹⁰⁴ The IER concluded that certain regions had deliberately been excluded from State funding and services and/or subject to mass repression. The Moroccan community reparations programme targets different regions, and includes both symbolic reparations and development projects.¹⁰⁵

However, although synergies between institutions involved in truth seeking and reparations should be optimized, there is a balance to be struck. Gathering information to facilitate implementation of a reparations scheme is not the primary goal of a truth commission. Commissions have been assigned varying degrees of responsibility vis-à-vis reparations programmes. But even where commissions are assigned an activist role, such as the CVR, which was mandated with ‘drawing up proposals for reparation and dignification of the victims and their family members’, this was one of five objectives and was predicated on its other functions.¹⁰⁶ Further, truth seeking functions may be undermined by an unbalanced focus on the design of a subsequent reparations scheme. There is, for example, a risk that statements will be tailored to bolster claims for reparations,¹⁰⁷ thus increasing the burden on commissions

¹⁰³ As noted above, Pablo de Greiff recommends that such schemes be ‘complex’, ie, comprising a mix of different measures, including pecuniary, symbolic, collective and individualized reparations, social services, medical services, etc. De Greiff (n 11) 11.

¹⁰⁴ ICTJ, ICRC and CCDH, ‘The Rabat Report: The Concept and Challenges of Community Reparations’ (12–14 February 2009) <<http://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>> 31.

¹⁰⁵ *ibid* 26–7. The Moroccan L’Instance Equité et Reconciliation (IER) concluded that such repression and exclusion was linked to regions being viewed as centres of political dissent or the locations of clandestine detention facilities set up to ‘deal’ with political dissenters.

¹⁰⁶ Final Report of the the Peruvian Comisión de la Verdad y Reconciliación (CVR) (28 August 2003), vol I, 26. Free translation from the Spanish: ‘elaborar propuestas de reparación y dignificación de las víctimas y de sus familiares’.

¹⁰⁷ In most transitional contexts, the total reparation awarded pales in comparison to the gravity of the violation and suffering, therefore exacting burdens of proof and testing the edges of the

to test and corroborate statements before affording them evidential weight. This potential conflict is one reason that commissions generally do not get involved in the implementation of reparations programmes. As discussed below, there are also risks of raising expectations that a truth commission does not have the power to fulfil.

Some commissions are empowered to award urgent, interim reparations during the truth seeking process, generally in order to assist those that have urgent (for example, medical) needs. Historically, the numbers of victims targeted, the amounts involved and the delays in implementation often mitigate concerns regarding conflicts of interest. As a result of World Bank funding, 700 of the most vulnerable individuals in Timor-Leste were provided with health, counselling and support services and a one-off payment of \$200.¹⁰⁸ This represented 0.38–0.62 per cent of the number of victims estimated to have died due to conflict-related causes.¹⁰⁹

In South Africa, many of the interim reparations payments were made after the initial volumes of the TRC's report had been presented in October 1998, and were dealt with by the Reparation and Rehabilitation Committee rather than the Human Rights Violations Committee.¹¹⁰ The delay was caused by hold-ups in promulgation of the necessary regulations and logistical difficulties faced by the Reparations and Rehabilitation Committee.¹¹¹ Of the 300 million rand that was initially allocated for urgent interim reparations, only (approximately) 50 million was distributed.¹¹² Delays in distributing any form of reparation can cause frustration and be interpreted as indifference to the degree of suffering. Whatever the underlying cause of complications with an interim reparations programme, the association of delay with the truth commission can detract from a commission's reparative legacy.

evidence are potentially less of a concern than in other judicial scenarios. However, a commission's legitimacy is affected by its consideration of evidential concerns.

¹⁰⁸ ICTJ Briefing, 'Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste' (1 January 2010) 6.

¹⁰⁹ The Final Report of CAVR (n 77) 9.

¹¹⁰ The South Africa TRC was divided into three committees: the Human Rights Violation Committee, the Amnesty Committee and the Reparation and Rehabilitation Committee.

¹¹¹ The Committee had to locate those who had completed statements in order to complete a separate reparations form. This often required assisting deponents with filling in the form and opening a bank account so that payments could be made. See L Fernandez, 'Reparations policy in South Africa for the victims of apartheid' (1999) 3(2) *Law, Democracy and Development* 215. See also Hayner (n 36) 176, 180.

¹¹² M Seeko, 'The TRC's Unfinished Business' in C Villa-Vicencio and F Du Toit (eds), *Truth and Reconciliation in South Africa: 10 years On* (New Africa Books 2006) 39. The government issued interim reparations prior to the publication of the final volumes of the TRC's report in 2003. BM Urbasaitis, *Wounded Healers & Reconciliation Fatigue* (2009) 77, which, based on a report by Amnesty International and Human Rights Watch, explains: '[t]he South African government announced in February 2001 that it would be setting aside R800 million (U.S. \$103 million at that date) for final reparations (i.e. R500 million in addition to the R300 million already set aside for interim reparations)—substantially less than a third of what the TRC had proposed'.

C. Outreach, Consultation, Participation

Consulting victims and encouraging participation prior to making reparations recommendations increases the quantity and (usually) quality of information available and therefore tends towards a more efficient and effective scheme.¹¹³ This can be particularly important where resources are limited and victims many and diverse in enhancing the effectiveness of reparations. The Moroccan IER organized consultations and invited input on its recommendations regarding reparations, and particularly community reparations. Following a series of meetings with victims in the region, the IER received a letter from the inhabitants of Douar Bou Khnan requesting a bridge building project. The IER incorporated this recommendation into its report.¹¹⁴ Following visits to Tagleft, the IER received a letter from the Anergui Association for Development, Environment and Communication, requesting a grant for development projects. The IER's final report recommended various different projects, including infrastructure projects, such as road paving and water and electricity provision.¹¹⁵ In 2011, the Anergui Association was one of six associations in the Azilal region to receive funding to facilitate implementation of collective reparations projects.¹¹⁶

Participation helps to ensure that the heterogeneity of victims is reflected in a commission's recommendations regarding reparations. The gendered nature of certain violations—both in terms of experience and consequences¹¹⁷—may only be appreciated, and an appropriate response formulated, as a result of facilitating broad participation. As emphasized by Albie Sachs: 'the crucial thing is for the voices of women to be heard. And it's not just one single voice'.¹¹⁸ The IER held a National Forum on Reparations in 2005, following which it announced it would prioritize gender considerations in its reparations recommendations. Its recommendations consciously bypassed inheritance laws that would reduce *de facto* the compensation received by widows of those killed or

¹¹³ Impunity Principles, Principle 32: 'Reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes'.

¹¹⁴ IER, Final Report, vol III: 'Justice and Reconciliation for Victims' (The Advisory Council on Human Rights Publications 2009) 100.

¹¹⁵ *ibid.*

¹¹⁶ Kingdom of Morocco National Human Rights Council Article, 'Green Light to Implement Final Phase of Community Reparations Projects' (January 2012).

¹¹⁷ Women experience certain types of violations disproportionately and are often rendered particularly vulnerable as a result of violations experienced by their husbands and children and/or unequal access to State resources. Interview with K Mudell, ICTJ (21 February 2013) <<http://ictj.org/news/ictj-program-report-gender-justice>>.

¹¹⁸ Interview with Albie Sachs (n 55).

disappeared.¹¹⁹ The CAVR was established under UN Regulation 2001/10, which mandated that a gender perspective be incorporated into its work.¹²⁰ As a result of its work with women's groups and female victims, the CAVR realized that women were underrepresented in its statement sample and, consequently, as beneficiaries of its urgent reparations scheme. The CAVR therefore ensured that more women than men were invited to the healing workshops (part of the urgent reparations programme) at which cash grants were distributed.¹²¹

Outreach and a participatory approach on the part of a commission may facilitate victims' engagement with a subsequent reparations body by encouraging victims groups and NGOs to organize politically, and building trust and communication channels. In Peru, the truth seeking process catalysed the formation of many new victims groups. The expertise and consensus developed by NGOs and victims groups during the CVR process was leveraged during the passing of legislation relevant to reparations.¹²² NGOs that had been engaged with reparations issues throughout the life of the CVR also facilitated communication between the reparations follow-up mechanism (CMAN) and victims groups.¹²³ However, a proliferation of groups may not always prove effective, particularly where they cannot coordinate. The Guatemalan government excluded victims groups from the reparations implementation process on the basis that the lack of consistent consensus between victims' representatives was an obstacle to cooperation and progress.¹²⁴

A truth commission's outreach and consultation strategy not only educates a commission. Participation is a two-way process that assists in managing the expectations of victims.¹²⁵ Debates between the CVR, NGOs and victims groups helped to educate victims regarding the constraints—political, legal, financial—faced by the CVR in formulating its recommendations and that would be faced by a subsequent scheme.¹²⁶

¹¹⁹ C Correa, J Guillerot and L Magarrell, 'Reparation and Victim Participation: A Look at the Truth Commission Experience' excerpted from C Ferstman, M Goetz and A Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill Academic Publishers 2009) 17.

¹²⁰ See eg UN Regulation 2001/10 (n 3) arts 3.4(c), 12.1(j), 36.1.

¹²¹ G Wandita, K Campbell-Nelson and M Leong Pereira, 'Gender and Reparations in Timor-Leste' (2006) ICTJ Publication 2, 4–6.

¹²² Correa, Guillerot and Magarrell (n 119) 17.

¹²³ *ibid* 21.

¹²⁴ L Magarrell, 'Outreach to and engagement of victims on reparations – Lessons learned from truth and reconciliation processes' Conference on Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making (The Hague, 1 March 2007) <<http://www.redress.org/downloads/events/OutreachEngagementLM.pdf>> 3.

¹²⁵ C Ramírez-Barat, 'Making an Impact: Guidelines on Designing and Implementing Outreach Programs for Transitional Justice' (January 2011) ICTJ Publication, 22 and 25.

¹²⁶ Correa, Guillerot and Magarrell (n 119) 15.

V. REPARATION THROUGH THE PROCESS

In producing a truth, and trying to ensure acceptance of that truth, truth commissions aim to obtain widespread acknowledgment for the narrative of victims' stories on which its findings are based.¹²⁷ This, in itself, can have a reparative effect, especially for those who have long felt ignored. However, acceptance of the final product is not the only goal. The truth seeking process in itself can have a powerful symbolic effect, empowering and opening a space for rights to be asserted.

A. Healing and Reconciliation

Some commentators claim that the process of engaging with and opening up to a truth commission can have a healing (rehabilitating or satisfactory, thus reparative) effect.¹²⁸ Read strictly, 'healing' implies effort on the part of the victim rather than something provided to a victim to compensate for a wrongful act. However, facilitating the healing process may be seen as the beginning of trying to make amends. Zalaquett offers his personal recollections as a member of the Rettig Commission: '[a]t first we did not realize the very process of seeking the truth was thus also a patient process of cleansing wounds, one by one'.¹²⁹ Hamber, a psychologist with the South Africa TRC, reported that individuals had described the public hearing process as cathartic and relieving.¹³⁰ 'Structured and facilitated story-telling can serve the cognitive function of re-shaping the event for the survivor and allowing for the essentially abnormal event to be integrated into the cognitive and emotional matrix of his or her life.'¹³¹

These claims are based on an assumption that opening up and talking assists the healing process and that a public, verbal account of the past may help to combat the isolating effects of a 'culture of silence'.¹³² Hayner devotes a chapter in her book about truth commissions to this topic¹³³ in which she discusses testimony from experts and victims themselves explaining that victims have a desire to tell their stories and that doing so assists in the process of healing emotionally.

¹²⁷ Impunity Principles, Principle 6 reads: 'In recognition of the dignity of victims and their families, investigations undertaken by truth commissions should be conducted with the object in particular of securing recognition of such parts of the truth as were formerly denied'.

¹²⁸ UNICEF/ICTJ Publication, 'Children and Truth Commissions' <http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf> 7.

¹²⁹ J Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *HastingsLJ* 1357.

¹³⁰ B Hamber, 'The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission' (1998) 55(1) *American Imago* 9, 18.

¹³¹ *ibid* 17.

¹³² *ibid*.

¹³³ Hayner (n 36) ch 11, 145ff.

But this is not the end of the story. Emotional healing is a long-term process; truth commissions meet and listen to victims a limited number of times and often only once.¹³⁴ A truth commission is usually working with limited resources and to tight deadlines. Its mandate is unlikely to prioritize the necessary long-term psycho-social assistance necessary to deal with trauma.¹³⁵ Even where commissions have recognized the need to provide long-term psychological support to the victims that testify before it, implementation has not always matched intentions. The South African TRC provided psychological support and pre- and post-public hearing briefing sessions and provided a referral service (although this was obviously dependent upon the availability of local services). However, the programme has been criticized for being inadequate in practice.¹³⁶ And, as noted by Hayner, this leaves open the possibility of re-traumatization.

Long-term psychological support is more likely understood as a form of rehabilitation, and predominantly as part of the reparations process. The Rettig Commission, for example, recommended that, as part of a subsequent reparations scheme, victims and their relatives be given specially-tailored and comprehensive physical and mental health care, over 'not too short' a period of time. It noted:

[Victims] have had traumatic experiences so intense and so strong that their psychic structure has not been able to process them. All their subsequent efforts at reorganizing their lives will be marked by the damage done unless they receive specialized help.¹³⁷

But what happens if that help is not provided? Or there is a long delay before it is? Judith Herman, a Harvard psychologist, has warned that for some victims testifying to a truth commission 'opens them up and leaves them with nowhere to go'.¹³⁸

Therefore, although the truth seeking process *can* have a healing effect, simply relying upon the idea that 'revealing is healing' ignores the variety

¹³⁴ Hayner concludes that even though truth commissions may begin to satisfy a victim's need to tell their story, the assumption that 'talking leads to healing' is premised on dialogue over a period of time that does not apply or is not satisfied by a truth commission experience. Hayner (n 36) 147.

¹³⁵ Even though, the Sierra Leone TRC was mandated 'to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators', the '*principal function of the Commission is to create an impartial historical record of events in question as the basis for the task of preventing their recurrence*'. (Emphasis added.) Sierra Leone Truth and Reconciliation Commission Act 2000, Memorandum of Objects and Reasons.

¹³⁶ Hamber (n 130) 21–3.

¹³⁷ Report of the Chilean National Commission on Truth and Reconciliation (University of Notre Dame Press 1993) vol I/II, 1066–8.

¹³⁸ Hayner (n 36) 152.

and nuance of human experience and reactions and the frequent need for long-term assistance.

The ‘therapeutic’ element of a truth seeking process is also dependent on that process being appropriate to the victim’s cultural perception of catharsis. Different nations, regions within each nation, and communities with regions, may have different approaches to healing. This again highlights the drawbacks of an overly simplistic approach. Studies have questioned whether a public, verbal process of remembering was appropriate throughout Sierra Leone, while acknowledging that ‘revealing’ was the preferred method amongst certain constituencies.¹³⁹

The concept of healing in transitional justice challenges us to think beyond the individual to healing at a family, community, regional and national level. The importance of ‘opening up’ in order to heal wounds at a societal level has also been cited as a benefit of establishing a truth commission. Both Bishop Joseph Humber and Archbishop Tutu, the Chairmen of the Sierra Leone and South Africa TRCs, respectively, spoke about the need to reopen wounds in order to heal them. ‘Superficial healing will allow the wounds to explode again’.¹⁴⁰

Societal healing requires awareness, which, in turn, relies upon authoritative information. This is what a truth commission is intended to produce. In February 2012, the Chairman of the Canada TRC noted that he was surprised at the lack of national awareness surrounding residential schools and stated: ‘healing requires education’.¹⁴¹ A public process can prove as (and sometimes more) important as the final report in building a consensus around a national history, particularly where the process is widely disseminated. It is harder to deny a story and to ignore victims when perpetrators admit to crimes and victims testify about their experiences live on the television, radio or internet, or at well-attended public hearings.

But, as noted earlier, there are drawbacks to collapsing a collective and individual analysis, which is a risk when focusing on a collective entity. Hamber and Wilson highlight their concern that commissions working on the basis of the ‘fiction’ that nations (with no psyche) can heal risks seeing ‘individual and national processes of dealing with the past [as] largely concurrent and equivalent’. Expecting individuals to heal at the same pace as national institutions may cause further trauma.¹⁴²

¹³⁹ R Shaw, ‘Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone’ (February 2005) United States Institute of Peace, Special Report 130, 8.

¹⁴⁰ Bishop Joseph Humber, opening ceremony of the Kambia district hearings, June 2003, as quoted in *ibid.*

¹⁴¹ CBC News Press Article, ‘Truth and Reconciliation Commission says healing requires information’ (24 February 2012) <<http://www.cbc.ca/news/canada/british-columbia/story/2012/02/24/bc-truth-reconciliation.html>>.

¹⁴² B Hamber and R Wilson, ‘Symbolic closure through memory, reparation and revenge in post-conflict societies’ (March 2002) 1(1) *Journal of Human Rights* 35–53.

Discussions of societal healing invoke notions of reconciliation. Reconciliation is often a mandated objective of the truth commission process. There is little consensus around the concept and practice of reconciliation ('the basic problem with reconciliation is that no-one agrees how to define or how to do it'),¹⁴³ but there are certain points on which many can agree. To the extent that a truth commission raises awareness of the violations in question or creates consensus around an historical narrative, it can contribute to reconciliation and, in turn, to 'guarantee[ing] non-repetition'. Albie Sachs notes that acknowledgment of the truth, in the sense of:

entering into that realm with their imaginations [and] with their consciences ... has a very powerful effect [and] impact in relation to [one's] moral citizenship, [one's] understanding ... this enables people to live in the same country. Not the same country physically, but the same country morally, emotionally...¹⁴⁴

The South Africa TRC Report states:

while truth may not always lead to reconciliation, there can be no genuine, lasting reconciliation without truth. Certainly lies, half-truths and denial are not a desirable foundation on which to build a new South Africa.¹⁴⁵

But reconciliation, however conceived, is a complex process that is dependent upon a myriad of factors, often outside of a truth commission's control. The Centre for the Study of Violence and Reconciliation in South Africa (CSV) found that many victims considered that the TRC had failed to achieve reconciliation between the black and white communities. Victims believed that the TRC had not rendered justice, which was a prerequisite for reconciliation. The perception of some victims was that perpetrators lived as normal, while they continued to live in a state of poverty, often exacerbated by the violations suffered.¹⁴⁶

As with psychological healing, a truth seeking process can contribute to reconciliation, but it is a process that will extend far beyond the mandate, resources and life of a truth commission.

B. Recognition

One way in which truth commissions can contribute to reparation is via acknowledgement, recognition and the restoration of dignity. By providing an official, institutional space that recognizes the presence and the suffering of victims, truth commissions send a message about the State's attitude

¹⁴³ D Bloomfield, 'On Good terms: Clarifying Reconciliation' (October 2006) Berghof Report No 14, 4.

¹⁴⁴ Interview with Albie Sachs (n 55).

¹⁴⁵ South Africa Truth and Reconciliation Commission Report (28 October 1998) vol 5, 306.

¹⁴⁶ PJ Campbell, 'The Truth and Reconciliation Commission: Human Rights and State Transitions—The South Africa Model' (2000) 4(3) *African Studies Quarterly* 41. R Picker, 'Victims' Perspectives about the Human Rights Violations Hearings' (February 2005) Centre for the Study of Violence and Reconciliation, 6.

towards the victims.¹⁴⁷ This is fundamental to any reparative process. A Chilean psychologist told Hayner that ‘the simple act of recognizing a victim’s traumatic experience could be extremely important’.¹⁴⁸ The majority of victims in South Africa ‘attached great importance to having the truthfulness of their testimony recognized and acknowledged’, including those who did not find the process of providing testimony cathartic.¹⁴⁹ Many victims have lived in a context where the violations that they have suffered have been denied for many years. As noted above, a successful truth seeking process moves a nation towards acknowledgement of a specific part of its history.¹⁵⁰

The reparative effect of truth seeking is linked, not only to the message sent by the provision of an institutional space in which victims can tell their story, but what plays out within that space—namely the victim’s contact with and experience of the truth commission. As noted above, the latter also forms an integral part of assessing its ‘legitimacy’. Interviewees of the CSVR study mentioned above emphasized the importance of sensitivity and integrity on the part of statement-takers.¹⁵¹ Interviewees in other research initiatives also commented on the significance of statement-takers adopting an empathetic and encouraging approach.¹⁵² The CVSR study notes that special emphasis should be placed on avoiding re-evoking memories of interrogations during public hearings.¹⁵³

The Ghanaian commission was criticized for its overly-legalistic format, which could prove intimidating and detracted from any sense of recognition of the violations recounted.¹⁵⁴ Deponents were often told to stick to time and the facts. Further, some victims perceived the commissioners as biased in their time allocation, affording more time to some victims than others. This undermined trust, the credibility of the commission and detracted further from any potentially reparative effect of being part of the truth seeking process.¹⁵⁵ A court-like set-up can also confuse deponents as to the

¹⁴⁷ The CVR put forward in its report that: ‘the establishment of the CVR itself is the proof of the political commitment of the state to restore the dignity and to address the suffering of those affected by violence, particularly the victims of the conflict’.

¹⁴⁸ Hayner (n 36) 148. Similar considerations apply to the recognition granted by other official transitional justice processes, for example, courts. In his discussion of Nuremberg, Richard Goldstone highlights the importance of recognition for victims, noting that victims already know what happened to them, but they seek the official acknowledgement inherent in the process and that for many victims is the beginning of their healing process. R Goldstone, ‘Do War Crime Trials Do More Harm Than Good?’ (3 May 2007) LSE Human Rights Centre for the Study of Human Rights Lecture, 3.

¹⁴⁹ Van Zyl (n 79) 748.

¹⁵⁰ Interview with Albie Sachs (n 55).

¹⁵¹ Picker (n 146) 7, 16.

¹⁵² Hayner interviewed a South African survivor of a shooting, who said the empathy of the statement-taker and the fact that he/she ‘went along with everything I said’, made it easier to talk. Hayner (n 36) 150.

¹⁵³ Picker (n 146) 16.

¹⁵⁴ Valji (n 83) 10–12.

¹⁵⁵ Correa, Guillerot and Magarrell (n 119) 8–9.

role of a commission. One child asked the Liberian TRC why the formal hearings seemed so much like a court, if this was not the case.¹⁵⁶

C. Outreach, Consultation, Participation

As already discussed, the experience of consultation and participation has a potentially empowering effect. But the manner in which consultation and participation is implemented determines its efficacy in affording recognition.

Participation that is respectful, knowledgeable, and transparent, and achieved through effective forms of representation, allows victims to feel that they are valued and recognized as rights-holders under the law and as relevant actors in their society.¹⁵⁷

On the other hand, consultation or participation that is pursued in an off-handed or disinterested manner can leave victims groups feeling isolated and ignored.

Outreach, consultation and participation strategies are often intricately linked to stakeholders' experience of a commission. This, in turn, determines the symbolic meaning attached to a commission as a public space to acknowledge and process past experiences, and thus a commission's impact.

VI. REINFORCING THE MESSAGE

The reparative effect of the truth seeking process, however legitimate or empathetic, can easily be undermined by what comes next. Providing testimony to a truth commission often raises expectations of an implicit bargain—that something will be provided in return—whether by the commission or the State. Expectations are, on one hand, evidence of an awareness of rights that a commission is trying to engender. However, any reparative effect of the 'commission experience' is likely to pale in the face of the message implicit in ignoring victims or recommendations after a report is published.

As noted above, delays in implementation of reparations recommendations can reinforce feelings of isolation and powerlessness. Saidu Conton Sesay, charged with implementing the Sierra Leone reparations programme, noted that the delays in the implementation of reparations following release of the TRC's report could 'insinuate a lot of things – neglect, lack of attention'.¹⁵⁸ Little has been done to implement the CAVR's recommendations regarding reparations since its report was issued in 2005. The government has refused to acknowledge any responsibility for violations and

¹⁵⁶ S Parmar, MJ Roseman, S Siegrist and T Sowa (eds), *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (Harvard University Press 2010) 218.

¹⁵⁷ Correa, Guillerot and Magarrell (n 119) 4.

¹⁵⁸ IOM Article, 'What Hope of Reparations for Sierra Leone's War Victims?' (18 November 2009) <<http://www.iom.int/cms/en/sites/iom/home/news-and-views/feature-stories/feature-story-listing/what-hope-of-reparations-for-sierra-leon.html>>.

has refused assistance to victims. Instead it has prioritized the needs of victims of the 2006 crisis.¹⁵⁹ A study of the International Center for Transitional Justice highlighted that, as a result of the official silence and limited progress in implementing the CAVR's recommendations, many victims continue to suffer as a result of the violations and feel 'forgotten and marginalized'.¹⁶⁰

The CSVSR study mentioned above found that, for all but one focus group, the most prominent grievance regarding the South Africa TRC experience was the failure to implement a reparations programme. This greatly impacted the perception of how 'just' the truth seeking process was.¹⁶¹ The South Africa TRC recommended a yearly grant of approximately \$2,700 for six years. The Government made one-off payments of less than \$4,000. The resulting sense of isolation was compounded when, in 1999, the government signed the largest ever arms deal in South African history and announced almost \$10 billion in tax breaks in the 2000/2001 budget, while failing to allocate further funds to reparations.¹⁶²

Dialogue and exchange to manage expectations therefore takes on a new level of importance. As mentioned above in the Peruvian context, participation may facilitate this dialogue. A sense of ownership engendered by involvement in the process may also act to temper frustrations. Further, expectations, needs and wishes are not static and will change over time. Where there is delay in implementation, consultation will ensure that subsequent mechanisms 'keep up' and respond to current needs. On the other hand, participants of the CSVSR study noted that the South Africa TRC did not communicate its limited power to follow up on reparations requests, and, at the same time, raised expectations of reparations by asking participants 'what can the commission do to help you?'¹⁶³

It is not only the existence and scale of, but also the design of subsequent mechanisms (which, as noted above, can be influenced by truth seeking), that determines whether expectations are fulfilled: for example, factors such as unrealistic deadlines for victims to register for reparations, an overly exacting standard of proof or documentary burden, etc. In Sierra Leone, potential beneficiaries of reparations under the 'Year One Program' in some rural areas did not receive sufficient information in time to register for reparations, resulting in their exclusion from the programme.¹⁶⁴

¹⁵⁹ ICTJ Briefing, 'Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste' (1 January 2010) 9.

¹⁶⁰ *ibid* 12.

¹⁶¹ Picker (n 146) 5–6.

¹⁶² UNHCR Rule of Law Tools: Reparations (n 102) 27 and footnote 26. African Business Article, 'SA's 50bn arms deal scandal' (June 2001); L Fernandez (n 111) 217.

¹⁶³ Picker (n 146) 6.

¹⁶⁴ C Correa and M Suma, 'Report and Proposals for the Implementation of Reparations in Sierra Leone' (December 2009) ICTJ Publication 5.

These considerations apply not only to reparations schemes, but also the effect that other mechanisms will have on the legacy of truth seeking. As noted above, a perceived failure to render ‘justice’—both in terms of economic reconstruction and criminal prosecutions—affected the legacy of the South African TRC.¹⁶⁵

VII. A MATTER OF CONTEXT?

A. *Contextual Constraints*

‘[C]ommissions can be very fragile institutions, undergoing risks and challenges from their inception to the culmination of their work’.¹⁶⁶ The ‘reparative effect’ of even the most flawless truth seeking exercise is dependent upon the context in which a truth commission is established, conducted and in which it delivers its recommendations. A truth commission may be staffed by independent, well-respected, impartial commissioners; it may hand over a comprehensive, well-supported and well-organized database of information to a subsequent reparations scheme; it may conduct extensive outreach activities and invite consistent participation from a cross section of victims; but its legacy will be profoundly affected by international and national political, economic and social movements.

For example, the strength and engagement of civil society is particularly important in ensuring the quality of a commission’s output (and sometimes its existence). The truth commission in Brazil was the direct result of civil society activities at the National Conference on Human Rights.¹⁶⁷ The CSC in Ghana worked on various iterations of the NRC Act (and, as noted above, was instrumental in ensuring diversity amongst the commissioners). It was also active in ensuring outreach and victim participation.¹⁶⁸ It has been attributed with ‘transform[ing] a political gesture into a national agenda by encouraging open and representative discussions about the truth commission’.¹⁶⁹

The avenues available to civil society actors often depend on institutional capacity and intra-institutional coordination, both of which constitute additional contextual factors that may shape a commission’s legacy. Although truth commissions are *ad hoc* institutions, and thus do not rely on existing institutional capacity to the same extent as, for example, criminal

¹⁶⁵ H van Merwe, ‘Reversing Accountability in South Africa: From Amnesty to Pardons and Non-Prosecutions’ (2009) 5(3) *Global Studies Review*. Picker (n 146) 5–6.

¹⁶⁶ D Tolbert, ‘Kenya’s truth commission must act now to salvage credibility’ (19 December 2012) ICTJ Briefing.

¹⁶⁷ Gonzales and Varney (n 88) 15, 52.

¹⁶⁸ Valji (n 83) 43. The Ghanaian government noted the role of CSC in assisting the commission with outreach, statement taking and counselling in rural regions, see Government of Ghana Official Website, ‘The National Reconciliation Commission Report’ <<http://www.ghana.gov.gh/index.php/information/reports/117-the-national-reconciliation-commission-report>> para 2.3.

¹⁶⁹ Gonzales and Varney (n 88) 52.

prosecutions, the presence of relevant expertise is pertinent. In Argentina, Chile, Peru and, Guatemala, for example, the legacy of truth commissions in assisting the initiation or maintenance of criminal prosecutions was dependent upon the existence of the necessary judicial capacity. The activism of Chilean NGOs in challenging many disappearances before the national courts provided a ready source of evidence for the Rettig Commission.¹⁷⁰ Regional courts also play a role in mandating investigations (as, for example, in *Gelman*), which may push States towards establishing truth commissions. Additionally, coordination and mutual support enhances a truth commission's capital, which lies in perception as well as practice. Where institutions undermine each other it detracts from their legitimacy and thus their effectiveness.¹⁷¹

The infrastructure and engagement of other national institutions can also prove particularly important to the success of a TRC. A media strategy, for example, is an essential part of an outreach strategy.¹⁷² The media provides the means of raising awareness and promoting engagement, particularly where a TRC holds public hearings. In South Africa, the extensive media coverage formed the conduit through which most of the population engaged with the TRC's proceedings and product: '[h]earings were broadcast live on national radio, and a Sunday evening show summarizing the hearings became the country's most-watched news program'.¹⁷³

As touched upon above, the political context in which a truth commission is established circumscribes or facilitates its work and the work of other actors, both formally and informally. Power structures may be reflected in a mandate that excludes sensitive topics or periods and/or the acceptance of a commissions' findings after-the-fact. In Uganda, the 1986 truth commission's mandate was temporally limited to exclude investigation of events following Museveni's accession to power.¹⁷⁴ The final public hearing of the IER, which was scheduled to take place in Western Sahara, was cancelled at the last minute.¹⁷⁵ Ultimately, the IER's final report provided very little detail of the human rights violations suffered in Western Sahara, 'the area that was hardest hit by repression', thus increasing Sahrawis' perception of marginalization.¹⁷⁶

¹⁷⁰ Hayner (n36) 35.

¹⁷¹ As noted above (n 6), AS Bassin and P van Zyl discuss the need for courts and truth commissions to 'develop a detailed understanding of how they will relate to each other'.

¹⁷² Gonzales and Varney (n 89) 50.

¹⁷³ *ibid* 51.

¹⁷⁴ Hayner (n 36) 243.

¹⁷⁵ Freedom House Article, 'Western Sahara' (2006) <<http://www.freedomhouse.org/report/freedom-world/2006/western-sahara>>.

¹⁷⁶ Amnesty International Report, 'Broken Promises' (January 2010) <<http://www.amnesty.org/en/library/asset/MDE29/001/2010/en/63d99172-428d-4717-8c25-866c879c80e9/mde290012010en.pdf>> 5.

United States Institute for Peace, 'Truth Commission: Morocco, Truth Commissions Digital Collection' <<http://www.usip.org/publications/truth-commission-morocco>>.

In Chile, in contrast to Alywin's apology in response to the Rettig Commission's report, the military rejected the report. As noted above, attention was diverted from the report soon after its release. However, Pinochet's subsequent arrest in London shifted the political discourse, and refocused attention on the report's contents. The Pinochet trial is thus an example of the role of wider geopolitical trends and international legal and institutional developments in buffering the reparative legacy of truth commissions.

B. A Small Part of the Picture

Turning the paradigm around, the importance of contextual factors illustrates that an analysis of only design and implementation may underplay a commission's potential reparative effect. Other actors, forces and trends determine many of the consequences that flow from its existence, work, etc. The use of information uncovered by truth commissions in judicial prosecutions is one such example. The Spanish judge that requested Pinochet's extradition relied heavily on the report of the Rettig Commission in building and presenting his case.¹⁷⁷ In spite of the flaws identified in the Chad truth commission report, it has been used as an important source of information in attempts to bring Habré to justice.¹⁷⁸ Criminal trials may contribute to satisfaction via, for example, imposing judicial sanctions on the perpetrator.¹⁷⁹ A criminal or civil judgment may also constitute satisfaction per se.¹⁸⁰

Truth commissions will often recommend institutional reform as a guarantee of non-repetition. Even where this does not occur or where recommendations are ignored, the moral capital usually associated with truth commissions provides a basis on which groups can advocate for change in the future. In Argentina, the truth commission's detailed documentation of its findings formed crucial evidence in the truth trials that eventually led to the overturning of the laws that granted de facto immunity.¹⁸¹

In addition truth commissions may inspire other truth seeking efforts, including judicial efforts as described above. In Zimbabwe, in response to the government's refusal to publish the truth commission's report, two human rights organizations produced a report documenting the repression of the 1980s, based on interviews with victims.¹⁸²

Other forces can afford the findings of a truth commission unanticipated influence. For example, as mentioned above, the El Salvador commission's

¹⁷⁷ Hayner (n 36) 49.

¹⁷⁸ *ibid* 59, 66. See also Human Rights Watch Report, 'Chad: The Victims of Hissène Habré Still Awaiting Justice' (2005) <<http://www.hrw.org/reports/2005/chad0705/chad0705.pdf>>.

¹⁷⁹ Basic Principles, art 22(f).

¹⁸⁰ See eg *Gelman* (n 43) para 312(8).

¹⁸¹ Discussion with Paul van Zyl, Director of the Transitional Justice Program Director at the Center of Human Rights and Global Justice, February 2013.

¹⁸² Hayner (n 36) 55.

recommendations were initially largely ignored by the El Salvador government and an amnesty law passed soon after the report's release.¹⁸³ However, the United States' response to its alleged involvement in the war was more active than anticipated. The United States government established a panel to examine implications of the report's findings for foreign policy and Department of State operations. President Clinton ordered the review and release of classified documents regarding the US role in the war.¹⁸⁴

VIII. CONCLUSIONS

As with all histories, the 'truth' produced by a commission is one version of the truth. In the words of Michael Ignatieff: 'the past is an argument and the function of truth commissions ... is simply to purify the argument, to narrow the range of permissible lies'.¹⁸⁵ Ruti Teitel argues that the truth is 'constructed': '... a 'truth' is an overtly and explicitly political construction shaping the direction of the transition'.¹⁸⁶ It is framed through a particular lens and is dependent upon institutional design, victim participation, etc. Not all participants in the transition will identify with this truth.

And yet its value as a platform for a transition, in which the constituent victim testimonies are acknowledged as part of national history, rely upon its general acceptance. Much therefore depends on its credibility and subsequent dissemination, which, in turn, stems from the perceived legitimacy of the institution and its methodology. The CVR's report rewrote the history of the conflict in Peru and has been assimilated. Not only is it no longer possible to deny the marginalization of many rural communities, the CVR's findings challenged the prior assumption that the State was responsible for the majority of violations, determining that 'the principal perpetrator of crimes and violations of human rights' was *Sendero Luminoso*.¹⁸⁷

The institutional overlap between truth commissions and reparations schemes allows the former an opportunity to enhance the efficiency and responsiveness of the latter, especially in a sequential relationship. The information gathered and recorded by a truth commission can assist in crafting a comprehensive and complex scheme that addresses the needs of a

¹⁸³ O Bakiner, 'An Assessment of How Commissions Influence Politics and Society' (2011) Simons Papers in Security and Development 13, 16. Hayner (n 36) 51.

¹⁸⁴ Hayner (n 36) 51.

¹⁸⁵ Hayner, (n 36) 21.

¹⁸⁶ R Teitel, *Transitional Justice* (Oxford University Press 2000) 91.

¹⁸⁷ Final Report of the CVR: General Conclusions, August 2003, para 13. *Sendero Luminoso* (or Shining Path) is the Communist Party of Peru. The CVR defined it as 'a terrorist organization' that started an internal armed conflict against the State and Peruvian society in May 1980. Free translation from the Spanish: 'El Partido Comunista del Perú, conocido como Sendero Luminoso (PCP-SL), es una organización subversiva y terrorista, que en mayo de 1980 desencadenó un conflicto armado contra el Estado y la sociedad peruana.' See ch 1.1 of the CVR Report: El Partido Comunista del Peru Sendero Luminoso, August 2003, 13.

cosmopolitan (and often large) group of victims. It can also assist in identifying particular vulnerability or urgent needs, which can form a legal basis for prioritizing reparations awards.¹⁸⁸ As demonstrated, ignoring urgent need for necessities or medical assistance may undermine the exercise.

The relationship between the truth commissions and reparations schemes is not predetermined, however, and is usually more coterminous than this paradigm would suggest. The forces present in constructing truth are varied and multiple. The truth is buffered, used and adopted by different stakeholders. Assertive civil society and victims' groups can use a commission's conclusions to advocate a redress and reparations platform. Credible commission findings put an evidentiary basis and a degree of moral capital behind demands for reparation. Equally, experience shows that other forces, including a lack of resources or political will or cooperation, destabilize the potential for these transitional mechanisms to reinforce the work of the other.

The potential reparative effect of truth seeking also depends on the particular individual in question. The broad conception of reparation under international law incorporates societal and individual elements. Although a communal narrative cannot be divorced from individual experiences, a series of measures that are beneficial to victims as a class will not prove beneficial to every individual. This highlights the pitfalls of concentrating only on a normative conception of reparation without considering the sociological effects of implementing that norm.

In contexts where the truth itself does not provide reparation, or prove 'satisfactory', to the individual, the symbolism of the process by which the truth is elucidated takes on a new level of importance. Although the institutional focus of a truth commission is collective, testimonies show that there is something inherently personal in the experience. Individuals can feel recognized, dignified and empowered. The way that the commission, as an institution, and commission staff, on an individual basis, relate to victims affects this process of empowerment. Maximizing the reparative effect of the process therefore requires awareness of the manner in which the process plays out. A reformulation of identity depends upon a shift in dialogue and response. In his discussion of the South African TRC, Haldemann notes that by 'validat[ing] [victims] with official acknowledgment' and encouraging them to tell stories to someone who 'listened seriously', the TRC 'embodied a public commitment to the recognition of the moral agency of those previously excluded'.¹⁸⁹

In resource-scarce environments, maximizing reparative avenues is an important part of strategic planning. A widely-disseminated public truth-seeking process shines a spotlight on the plight of victims and may bring

¹⁸⁸ *Prosecutor v Lubanga*, ICC Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, para 238.

¹⁸⁹ Haldemann (n 53) 710.

attention to the marginalization of an entire group or community. Therefore, in a politically-compromised or resource-scarce environment, a truth commission's positive legacy may be furthered more through its process and procedures than the operationalization of its final report. Lisa Laplante and Kimberly Theidon's research in Peru:

confirm[ed] the temporary beneficial effect of truth commissions with their emphasis on listening empathetically to the formerly voiceless to reconstruct a common version of history and to reveal the practices and institutions that led to their victimization.¹⁹⁰

The temporality of these beneficial effects depends upon follow-up strategies.¹⁹¹ Where truth seeking is not followed by further action (reparations, prosecutions, etc), there is a danger that any reparative effect is undermined. Follow-up actions contain an implicit message regarding the validity of the truth, a State's priorities and whether there is true acknowledgment of the violations suffered, or if they are deemed worthy of only a cursory glance.

A truth commission is one part of a much larger transitional picture. Victims are more likely to 'endow an imperfect measure with the meaning of a justice initiative',¹⁹² when accompanied by other transitional justice mechanisms that reinforce each other's legitimacy and when stakeholders are asked to participate in designing and rolling out the process. Transitional mechanisms operate within the confines of their constitution and context. The potential reparative effect of truth seeking will only be realized when a consciousness of its importance, potential and its fragility forms part of the framework of a coherent, holistic transitional justice strategy.

¹⁹⁰ LJ Laplante and KS Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29(1) HRQ 238.

¹⁹¹ *ibid* 241.

¹⁹² De Grieff (n 2) 35.