

# Overcoming tensions between family and judicial procedures

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This article looks at how judicial and non-judicial mechanisms can address the needs and priorities of families of the missing and makes some recommendations for State, non-State and international players.

When people go missing, their families are devastated. But the traumatic effects of the loved one's absence are often further exacerbated by the fact that the needs and priorities resulting from it are neglected or denied. The ICRC has identified three principal categories of family needs and priorities: information, accountability, and acknowledgement. This paper will focus only on these three categories. Each one involves a complex array of interests and claims as regards handling cases of the missing.

## Families and judicial mechanisms

Judicial mechanisms vary widely in different legal systems, socio-historical contexts and interpretative traditions, etc. In the present context, the generalizations necessitated by this broad overview should not be read as comprehensive claims describing all existing judicial mechanisms; rather, it is a more modest venture that employs generalizations for heuristic purposes of highlighting the specific characteristics of a certain "type" of routine criminal justice mechanism that we classify as judicial. A judicial system that does not perform its function according to human rights principles will function poorly in meeting the informational, accountability and acknowledgement needs of families of the missing. This article presents the discussion on how reasonably well-functioning judicial mechanisms address, or could address, family needs by focusing on each of the three categories of family

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needs and priorities. Indeed, the extent to which a judicial system addresses victim or family needs and priorities may itself cast light on an important aspect of the status of human rights principles in that judicial system.

### Information and judicial mechanisms

Depending on the specific legal system, the police, the prosecutor's office and/or the investigative judge or magistrate conducts investigations for trials. In subsequent stages of a trial process, from depositions to courtroom proceedings, information is also provided by lawyers and witnesses and is channelled through the authority of the substantive and procedural rules of law and judicial rulings. The role of State functionaries and court procedures in gathering and evaluating information may benefit families of the missing and their interest in the investigation and disclosure of information.

Investigations pursuant to court actions can marshal the resources and authority of the State in procuring information. They can effectively mobilize police powers of arrest, lawful detention, interrogation, plea-bargaining and related strategies to persuade reluctant witnesses to provide information. Similarly, they are able to procure warrants to access documents and other evidence that are hidden or in the possession of private parties or the State. Judicial investigations also ensure that the information gathered is focused on the crime and feeds into accountability processes. Moreover, because police and prosecutorial investigators have training and professional experience that has been honed precisely for the purpose of procuring information about crimes, they can be particularly effective in gathering sensitive information. Finally, since it is channelled through judicial mechanisms that test and evaluate it according to objective standards of proof, families of the missing may be assured of the reliability and authority of the information that emerges in this process.

Thus, insofar as they are conducted in good faith and an objective manner, the investigations entailed in judicial proceedings have the potential at least of making important advances in uncovering information with regard to the perpetrators of the crime and the immediate circumstances of the crime itself. Moreover, much of the information uncovered by the criminal investigative process may be valuable for any civil action that families of the missing might also undertake. To this extent, good faith criminal investigations are almost always welcomed by families of the missing.

At the same time, however, police and prosecutorial investigations for trial actions can also be unresponsive to the needs of families. In most cases,

the launching of a criminal investigation with a view to a trial may depend solely on the prosecutor's decision whether to pursue the matter with little or no input from victims. The victims' access to information in the hands of police and prosecutors is often curtailed by legal and due process requirements and other demands of the law that may require that investigators and prosecutorial authorities maintain confidences, do not prematurely release information still subject to testing by the trial process, and do not prejudice the defendant's right to a fair trial through premature publicity. Furthermore, prosecutorial tactical strategies, as well as the institutional and professional culture of police and prosecutorial investigations, almost always envelop such investigations in considerable secrecy. Thus, while families of the missing may be questioned and investigated, they may not have access to information about developments in the investigation process. This may cause them to feel further disempowered and excluded from the judicial process.

Investigations are designed to attain the prosecutorial goals of identifying those who can be proven to be legally culpable. Families of the missing may have broader goals. In the context of disappearances, for example, families of the disappeared may want information about the political authorities who intellectually instigated, rendered possible or legitimized such crimes, whereas the criminal investigation may prioritize channelling investigative energies into ascertaining the "trigger-puller", given that command responsibility is difficult to prove in a court of law (and particularly because disappearances typically occur through centralized sanction and decentralized planning and implementation).

In addressing these challenges, some civil law countries allow individual victims the right to initiate prosecutions and/or become a *partie civile*, or co-plaintiff, with the prosecutor. These provisions do enable victims' families to have greater access to and control over information gathered through judicial mechanism. Other facilities giving families of the missing greater access to information within the framework of judicial mechanisms include strengthened legal aid mechanisms that allow for greater consultation and coordination with the client.

To sum up, judicial investigations may up to a point match the goals of families; in other cases, however, the respective interests may diverge and judicial mechanisms may be torn between the victims' need for information and the prosecutor's need to ensure that such disclosure does not adversely prejudice the case against the defendant.

### Accountability and judicial mechanisms

Judicial mechanisms are, of course, seen as the standard model for providing victims' families with an effective means of holding the perpetrators accountable for their actions. In a well-functioning system, with respect for civil liberties and equal protection under the law, judicial mechanisms are a particularly effective avenue for ensuring accountability.

The judicial system is geared to determining guilt and innocence under due process of law and established standards of proof-findings that unequivocally testify to the fact that identifiable individuals, not anonymous entities, commit violations. In holding perpetrators accountable for those violations, judicial systems may also impose sanctions on the perpetrators and order reparations for victims. For families of the missing, judicial mechanisms provide not only a reliable mechanism for establishing perpetrators' violations of the law, but also an official and public statement recognizing that a violation has occurred under the State's watch, and that victims have been harmed. In addition to the accountability of the individual, judicial mechanisms go some way towards holding the system accountable, either directly or indirectly. Most importantly, they give a strong signal that impunity is inadmissible and affirm the State's commitment to judicial redress and human rights.

Notwithstanding the great value of judicial systems in holding individual perpetrators accountable, judicial mechanisms may also hinder accountability. They have elaborate rules of procedure to ensure a fair and objective trial. However, implementing such safeguards can also be resource-intensive and time-consuming and requires an effective police and legal infrastructure. Where these ingredients are absent or in short supply, the judicial system will not have the institutional capacity to meet the accountability goals of victims' families. This problem is aggravated in those cases where the scale of human rights atrocities, including the numbers of missing persons, is so high that even a well-functioning system can deal with only a fraction of the perpetrators. The judicial quest for accountability has an overwhelming focus on individual accountability. Most cases may come before courts as individual matters rather than as class action suits. Yet many families may feel violated by fundamental aspects of the system that fostered, or at the very least allowed, such atrocities. They may consequently want accountability mechanisms to look beyond individual culpability to aspects such as the specific structure or organization of the State, the class structure, a military government, a militant group, an oppressive ethnic, racial or religious majority or

even an indifferent or complicit international community. In some cases, judicial mechanisms may also function primarily in closed sessions that deny victims the right to public accountability.

Hostile cross-examination can further exacerbate the injury suffered by victims even in the process of providing accountability. This is perhaps a symptom of a broader problem — the manner in which judicial systems are often alienated from victims and attuned to the needs of the law and legal victory rather than to the needs of victims and their families.

### Acknowledgement and judicial mechanisms

Judicial mechanisms provide an important basis for responding to the acknowledgement goals of families of the missing. They can be a symbol of the State's acknowledgement of the violation and its direct or indirect culpability. In providing a mode of official "truth-seeking", judicial mechanisms can help to expose and acknowledge the contexts within which violations occurred. They can also allow individual perpetrators, through their own testimony, to acknowledge their role in the crime and take responsibility for the injury caused. Particularly when they call for compensation, institutional reform, etc., they are furthermore a powerful means of acknowledging the injury victims and their families have suffered.

On the other hand, families of the missing may experience the procedural hurdles entailed in judicial findings as holding information and "acknowledgement" hostage to legal process. For instance, judicial truth may not be designed to hold accountable those individuals and institutions that may have command responsibility for the missing if they are not "legally" culpable in ways that can be proven in court. Typically, they address cases individually and, to that extent, State acknowledgement is also individualized. There is little capacity to directly acknowledge systematic or structural problems that led to the violation or enabled it to take place. Similarly, when classes of victims have been targeted as a group (because of factors such as ethnicity, religion, etc.), judicial mechanisms are particularly ill equipped to identify and track those systemic patterns and causes.

In this context we need to look also to non-judicial mechanisms (including provisions for special prosecutors and other non-routine processes) for their capacity to address the needs and priorities of families of the missing.

### **Families and non-judicial mechanisms**

As used in this article, “non-judicial mechanisms” is an open-ended category that covers a diverse array of initiatives ranging from truth commissions to human rights documentation projects to public monuments. Typically, non-judicial mechanisms are more informal and flexible than their judicial counterparts. Some worry that this very malleability may make such mechanisms weaker weapons in pressing the authorities for information and acknowledgement, and/or holding them accountable for their action and inaction. Yet the promise of such mechanisms may lie precisely in the fact that they are able to focus on victims, not just perpetrators, on civil society, not just the State. Their very informality and flexibility may make them better able to adapt to the needs of victims and their families.

### **Information and non-judicial mechanisms**

In a campaign to gather more information about the missing, investigative bodies with a mandate to inquire into their whereabouts can be empowered to use a combination of rewards, incentives and threats to encourage cooperation by reluctant witnesses and perpetrators. While the design of such provisions would depend on context-specific strategic planning as to who has information, and what set of rewards, incentives and threats would serve to elicit information from them, their use would also depend on the institutional capacity of the investigative body to offer fundamental due process protections to witnesses who come forward in response to those provisions. There should be consultation with victim support and advocacy groups to ensure that these methods do not jeopardize the security of witnesses, offers of amnesty or opportunities for victims to share their views and have those views taken into account in the decision-making process.

Investigative bodies could provide incentives for cooperation without dealing directly with criminal sanctions. For example, investigative bodies could offer witnesses the option of confidential testimony, which may be an incentive in contexts where ongoing security threats warrant witness protection mechanisms. Confidential testimony could also be an incentive for those who are reluctant to speak out in public for fear of social stigma or other social mores. For instance, in many contexts victims of sexual crimes have hesitated to come forward and disclose information because they fear

public shaming and/or feel that the violation is too intimate and personal for public discussion. Confidential testimony, combined with some limited immunity provision, could also be an incentive for those who want to disclose information that may help families to obtain further knowledge about the fate of their loved one without jeopardizing the perpetrators in terms of criminal prosecution.

Investigative bodies could also be empowered to elicit information by creating a penalty for non-cooperation such as withholding information about a human rights violation (assuming that there is an adequate witness protection programme if compliance with such an obligation creates a security risk). Thus, rather than reward cooperation with amnesties and/or lesser penalties, this approach suggests that there could be a provision to threaten penalties such as criminal or administrative sanctions for those who do not cooperate. This provision may be particularly useful where a prior amnesty for the original crime has left very little incentive for perpetrators to cooperate, and investigators have very little bargaining power to induce perpetrators and reluctant witnesses to disclose information. Even when the prior amnesty protects perpetrators from prosecution for their original crime, that amnesty is limited to the criminal responsibility for the crime itself and does not condone withholding information about the crime.

In this context, too, the right to refrain from self-incrimination and other due process safeguards should be built into the provision. In crafting and implementing such a law there should be specific care to ensure that this does not create a new offence *ex-post-facto*. The law should give adequate notice of a new obligation for disclosure, rather than retroactively create an obligation. It is particularly important to ensure that the victims of the crimes in question are not held guilty of the crime of non-disclosure. With this mechanism, as with others, it is important to take into account the complexities of distinguishing between victims and perpetrators in some situations; from Rwanda to Sierra Leone, there are many cases in which perpetrators are also victims.

In general, amnesties inhibit the disclosure of information and should be avoided if at all possible. In some cases, however, investigative bodies endowed with a carefully crafted amnesty-granting power may be able to prompt perpetrators to disclose information. The promise of a conditional pardon or lesser penalty for those who voluntarily disclose information can work as an incentive not unlike the plea-bargaining process used in some

criminal justice jurisdictions. Such a provision is also a key feature of the South African Truth and Rehabilitation Commission (TRC) that offers perpetrators who make a full disclosure regarding a particular crime an amnesty from any criminal or civil liability for that crime.<sup>1</sup> For such a provision to be effective, perpetrators have to feel genuinely threatened by prosecution and a severe sentence. If perpetrators determine that prosecution is unlikely, then a lesser sentence or an amnesty would be of little value in encouraging cooperation. Although a non-judicial investigative body such as a special task force on the disappeared or a truth commission may use the granting of amnesty, the effectiveness of this measure depends very largely on the simultaneous operation of an effective criminal justice system. Moreover, rather than being a blanket amnesty, it would be conditional on the full and good faith disclosure of relevant information to the satisfaction of the investigative body, and it would apply only to politically motivated crimes. Consideration should be given to whether even a limited and conditional amnesty compromises the struggle against impunity; to some extent this is a context-specific issue concerning the best strategy to address the victims' right to information *and* accountability in constrained circumstances.

Conditional amnesty processes should be designed to protect the right of the witness to refrain from self-incrimination, and the victim's right to redress through civil actions. Above all, the legitimacy of any amnesty depends on consultation with victim groups and the human rights community. Finally, consideration should be given to whether such an amnesty law interferes with the State's international legal obligations under international humanitarian law, human rights law or international criminal law.

In most cases, many of the mechanisms are used in combination; thus coordination and collaboration between different institutions can be crucial to the success of each mechanism. For instance, judicial mechanisms and non-judicial mechanisms can be designed to complement their respective jurisdictions, as is the current situation in East Timor (where the truth commission and special prosecutor's office are working simultaneously, with each having a distinct jurisdiction for different kinds of crimes). Ongoing consultation

<sup>1</sup> In South Africa, the Amnesty Committee of the TRC was given the power to grant amnesty to individual perpetrators if they made full disclosure. An amnesty applicant was required to appear before the Committee in a public hearing, unless the act in question did not involve a gross violation of human rights. See *Promotion of National Unity and Reconciliation Act*, 26 July, 1995, Article 19(3)(b)(iii).



between prosecutorial offices and institutions operating non-judicial accountability mechanisms can help to balance the complex priorities, jurisdictions and approaches of each institution and to manage information-sharing.

### Truth commissions and similar mechanisms

Varying widely in their mandate and powers, truth commissions and other commissions of inquiry specifically intended to address the problem of the missing can be flexibly designed to proactively seek out information that will otherwise be difficult to access through routine criminal action. For instance, the recently created Commission for the Right to Biological Identity in Argentina is tasked with registering information on the genetic data of missing children who were kidnapped or born in custody. These procedures may help those children and their biological parents to get more information about their cases, while easing the children's fears about whether they are making their adopted parents vulnerable to criminal action. To some extent this approach represents a deferring of the impulse to prosecute, in order to prioritize the informational needs of the child victims and their families. Similarly, the Argentinian truth trials used the prosecutor's office to obtain more information about the missing — these cases focused specifically on using judicial mechanisms to uncover information even though there was no possibility of judicial sanction.

Unlike an overburdened criminal justice system juggling a range of priorities, the specialized institutions discussed in this section are centred on investigating past abuses, and in this context can be, and often are, specifically commissioned to investigate the fate of the missing.<sup>2</sup> The South African Truth and Reconciliation Commission's final report cites "establishing and making known the fate and whereabouts of victims" as one of the means of achieving

<sup>2</sup> Gathering information on the fate of the disappeared was the primary mandate of the truth commission in Argentina, the Argentine National Commission on Disappeared Persons (CONADEP). "The Commission took over 7,000 statements over nine months' time, documenting over 8,960 persons who had disappeared." Priscilla Hayner, *Unspeakable Truths*, Routledge, New York, 2001, p. 34. See also *Nunca Mas: Report of the Argentinian Commission on the Disappeared*, September 1984. Similarly, in Chile, the second volume of the Commission's report "lists the names of the victims and provides personal information, including any known circumstances related to their disappearance or death". Jo M. Pasqualucci, "The whole truth and nothing but the truth: Truth commissions, impunity and the inter-American human rights system", *Boston University International Law Journal*, Vol. 2, 1994, p. 339.

<sup>3</sup> The South African TRC was mandated to "facilitate, and initiate or co-ordinate, the gathering of information(...) [in order] to establish the identity of victims of [past] violations, their fate or present whereabouts." *South African Truth and Reconciliation Commission Final Report*, Vol. 1, Ch. 4, para. 31.

national unity and reconciliation.<sup>3</sup> When the missing are presumed dead, a truth commission's investigation can also entail exhumations of bodies and other action that may be desired by families of the missing to clarify the fate of their loved ones. Such investigations can result in the issuing of death certificates, which can be very important to help the families achieve closure, while also giving information necessary for life insurance purposes, pensions and the like.

The recovery of information for victims is at the heart of what all truth commissions do. This ranges from gathering details about specific cases and the fate of the missing to tracing patterns of command responsibility, researching the impact of human rights abuse on particular communities, looking into the complicity of diverse institutional players and developing a broader historical understanding of the conditions that enabled widespread human rights violations to occur. As many have urged, the end goal of a truth commission's work should not be to produce a new official canon of information, but rather to meet the victim's need for information in as transparent and participatory a fashion as possible. Rather than fixing a new "Truth" by recording the injury suffered by victims, a truth commission could, as Michael Ignatieff has noted, narrow the range of "permissible lies" regarding the history of human rights violations in that community.

Because truth commissions are not adversarial criminal proceedings, the information-gathering undertaken under the aegis of the commission's mandate can take place under due process rules that are less rigid than the regular criminal justice system. Thus the burden of proof required for a commission's findings may not have to be proof beyond reasonable doubt, but the balance of probabilities. In general, subpoena powers may allow truth commissions to compel perpetrator testimony under more relaxed due process constraints. The evidentiary constraints on witness and victim testimony may also be relaxed (e.g., no hearsay rule); this helps to enable truth commissions to rely on a wide variety of sources. Truth commissions may also have readier access to documentary information, and can incorporate material that may not be admitted into evidence in a criminal trial (such as unsworn testimony).

As they are not limited to information relevant for prosecutorial efforts to establish guilt or innocence in specific cases, truth commission investigations can also gather information relating to the different conditions and dynamics that served as enabling factors in incidents concerning missing persons. Looking at issues such as patterns of abus — issues that may be less

apparent with a narrower focus on individual cases — may also help clarify why particular individuals were targeted. All of these possibilities could help truth commissions to provide a quality and quantity of information to victims that will not generally be available in criminal trials.

Public hearings tend to make the truth-seeking process more social, more of a dialogue, contributing not only to the truth commission's findings but also to the broader conversation in the public sphere. This gives victims a platform to make known their experiences, interests and demands, helps to highlight information that has been marginalized in official narratives, and enables victims themselves to have more say in the truth commission's information-gathering process. In that regard, such hearings at least have the potential for better serving the interests of victims' families through a more comprehensive approach to information-gathering and analysis.

#### Investigation and reporting by national and international non-governmental organizations

Historically, both national and international non-governmental organizations have played a particularly constructive role not only in building institutional consciousness of the various States' human rights record, but also in developing a national database bringing together different sources of information on cases of missing persons and other human rights violations.<sup>4</sup> The reach and value of this information has been extended and expanded in cases where there has been coordination and collaboration between different players in the human rights and humanitarian relief community. For example, over the past year the ICRC and the Peruvian Truth Commission have formed a partnership to share files, with certain restrictions, and launch a public campaign to gather further information.<sup>5</sup> This is an extremely significant partnership and has the potential for substantially

<sup>4</sup> In South Africa, the NGO Coalition on the TRC coordinated information held by human rights organizations in South Africa and internationally even before the TRC began its proceedings; the Coalition then handed over their records of human rights violations to the TRC to be incorporated in a national database. See Hugo van der Merwe *et al.*, "Nongovernmental organizations and the Truth and Reconciliation Commission: An impact assessment," <http://www.csvr.org.za/papers/paphvp&b.htm>, p. 12 and footnote 23 on p. 30.

<sup>5</sup> In accordance with the partnership, the ICRC will give the Peruvian Truth Commission generic information (not dossiers on individuals *per se*) on about 430 cases that do not figure in any database so far. There will then be a public campaign to verify this information and request more; ICRC delegates will work in local communities to urge people to come forward with further information. The project includes a systematic compilation of the ICRC's experience in the search for individuals and the creation of a single list of disappeared.

increasing the amount of information available to families. In a time of widespread human rights violations, it is often NGOs that document and store information; this information can be, and often has been, turned over to truth commissions, special prosecutors and other investigative teams.

NGOs can also play a role in a different type of information provision, namely information about victim advocacy and victim support services. In view of the traumatic nature of the testimony given by victims, various components of civil society often provide them with counselling and other support services, which can also form part of the acknowledgement victims seek. In situations where victims often come from marginalized and disenfranchised communities, NGOs can play a decisive role in organizing them as a group, mobilizing advocacy efforts and facilitating family networks, support groups and suchlike. Similarly, because families of missing persons often feel helpless and isolated for want of information about how to trace their loved ones, many organizations can provide legal and research services to help them follow up their cases and seek the necessary support. In this context NGOs can (and often do) act as a crucial intermediary between government and citizen in making the system more accessible to families and empowering victims to make use of government services to meet their needs.

International fact-finding missions by the United Nations or regional bodies could function as neutral intermediaries in gathering information confidentially from witnesses and perpetrators and transmitting it to victims' families. Where there is concern that such information-sharing may jeopardize future judicial action against those perpetrators, international players may, as outsiders, be well positioned to coordinate joint consultations with victim groups, human rights groups and prosecutorial authorities on agreeing to some shared principles and protocols for the handling of information in accordance with a balance of priorities between information and judicial accountability.

### Institutional reforms

Institutional reform is a forward-looking approach to meeting victims' needs for information. Two categories of institutional reform are relevant here: reforms that address the current informational needs of families of the missing, and reforms that provide future safeguards to ward against the kinds of situations that result in persons going missing and the accompanying barriers to families' access to information.

The State should put in place the laws and institutions that will enable citizens to have access to State records in ways that safeguard fundamental

rights and freedoms. In most cases we would recommend a strong default assumption regarding citizens' freedom to access official documents. Classification practices relating to secrecy and accountability should have a default assumption regarding public access, with the State having to meet a high standard of proof to classify a document as secret.

It is equally important to pass legislation and institutionalize procedures that require detailed record-keeping about those taken into custody and immediate notification of the detained persons' whereabouts to their families, as well as similar provisions ensuring a paper trail. Furthermore, when a citizen is taken into custody, information should be provided to the police department that has jurisdiction over the person's place of residence. Knowledge of the families' right to information should be disseminated among the general public.

Many countries with large numbers of missing persons have emergency regulations that allow State forces greater secrecy in their operations. In contexts where people are taken into custody under emergency regulations and other laws outside the routine human rights safeguards, there should be supervisory procedures ensuring that a record is kept of actions by State forces operating under such regulations. State forces should be required to submit periodic reports to supervisory agencies, such as the national human rights commission or Attorney General's department, regarding arrests, detentions, transfers and release of prisoners under emergency regulations. Such supervisory bodies could also be set up by impartial outsiders such as the ICRC.

### Indigenous forms of truth-seeking, justice and reconciliation

In some contexts, the most valuable methods of information-seeking may derive from sources that work outside mainstream criminal justice models. Some may classify these as indigenous forms of truth-seeking, but typically they are modern, hybrid models that draw from a range of traditions.

People are less likely to share information with institutions from which they feel alienated. The Gacaca process in Rwanda may be an example of an approach that has been consciously crafted from a variety of conflict resolution and criminal justice processes, some of which are perceived as particularly Rwandan and others as stemming from other African and European traditions. It is still too early to draw any conclusions as to whether this process is just to all concerned, and whether it elicits information that is accurate and fair. However, the creativity behind its conceptualization is instructive; in many situations there may need to be experiments with alternative procedures that have local legitimacy.

Institutions that sacrifice social reconstruction, reconciliation and other elements of a community's long-term priorities to a narrow focus on accountability alone may not succeed in eliciting participation and the disclosure of information. In many cases, communities place emphasis on both accountability and social reconstruction processes, and information may be most readily forthcoming when truth-seeking mechanisms address both those goals. In this context, the role of respected members of the community publicly urging witnesses to come forward, and doing so by making the link between information-seeking and social reconstruction, may go far in legitimizing information-seeking processes. For instance, the role of Archbishop Tutu in encouraging witnesses to come forward to the truth commission in South Africa is an example not only of the successful mobilization of his "indigenous" legitimacy, but also of his success in linking information disclosure to a broader set of social commitments and goals, namely the need for reconciliation and healing of the community as a whole.

#### Public information campaigns about the missing

Public information campaigns can be crucially important, not just in gathering information but also in making families feel less isolated in their victimization. They both convey and collect information. Information is often dispersed and disorganized, and a public information campaign can serve as a catalyst in centrally reconstructing all information that is already available and gathering additional information by reaching new sectors of society.

#### Accountability and non-judicial mechanisms

While truth commissions have the potential of being institutionally flexible and publicly accessible mechanisms to achieve the accountability desired by families of the missing, it is important to note that they are not necessarily substitutes for criminal justice mechanisms. In fact, truth commissions can often work in coordination with prosecution efforts, as in Argentina, Sierra Leone and East Timor, or strongly recommend prosecutions, as in South Africa, and/or perform investigations that could be of value to later prosecutorial efforts, as in Chile. In specific circumstances there may be tensions between the requirements of the law and meeting the needs of families through alternative mechanisms. Those tensions can, however, often be best reconciled through coordination, timing and working out common principles that guide the respective mechanisms' work.

Such consultations could lead to agreements on a division of jurisdiction or an order of priority with regard to different kinds of cases of missing persons, and on the diverse procedural implications that follow for the different case loads handled by judicial and non-judicial mechanisms. Similarly, such consultations could lead to agreements on certain protocols for information-sharing that balance the diverse imperatives of these different mechanisms. Judicial and non-judicial accountability mechanisms address family needs and priorities in different ways, and indeed may well address different but equally important needs. In brief, while the following paragraphs highlight the capacity of truth commissions to further accountability, we see truth commissions and judicial processes as complementary rather than competing accountability mechanisms.

Truth commissions could be particularly valuable in cases where an amnesty prohibits criminal prosecutions, or a fragile peace makes prosecutions too politically volatile and therefore undesirable, or the judiciary is perceived as biased, closely linked to a repressive order and therefore having little legitimacy. In such contexts, a truth commission could be the only avenue to ensuring that victims have access to some measure of accountability that addresses their needs. The work of truth commissions could be particularly valuable in advancing criminal accountability in the long term when, in a different political environment, it becomes possible to repeal amnesty laws and revisit prosecution options. In that context, the work of an earlier truth commission provides an invaluable archive of evidentiary resources gathered at a point in time that is closer to the original crime. Truth commissions can also serve as a valuable avenue for accountability in those cases where the sheer scale of violations makes prosecution of all perpetrators impossible. However, such a pattern may dissuade perpetrators of crimes from participating in the truth commission, in that the information they are providing may incriminate them in the future.

Some truth commissions are empowered to name names in making findings — this can be an important way to provide accountability if the circumstances allow. Such circumstances may include the possibility of impartiality and due process in making findings, prospects of either helping or hindering prosecutions, the political tensions surrounding the process, and so on. When prosecutions are unlikely, and to the extent that truth commissions are focused on collective acknowledgement and collective responsibility, calling individual perpetrators to account through the naming of individual names may be particularly important.

In those contexts where human rights violations such as disappearances reflect the structural divisions of the former system, truth commissions could also focus on accountability between those who benefited from the former system and those who were oppressed by it. Truth commissions could hear from and about the immediate “trigger-puller”, as it were, but because of their broader mandate they could also track the chain of command responsibility to address the intellectual instigators of the crime. Victims and their families often seek accountability on all these levels, and ideally truth commissions should conceive and address accountability on multiple fronts.

In general, truth commissions are also more accessible, are often centred on victim support, are less procedurally complex, and are staffed by legal professionals, social workers and others with human resource training and experience. Invariably, they are also creatures of human rights reform and therefore do not carry the taint of past regimes; in fact, they are often conceived and mandated in response to victim groups. Mechanisms such as public hearings also enable victims’ families and the public at large to follow and participate in the life and work of the truth commission. Thus there may often be a broader sense of ownership over the processes of accountability that the truth commission brings about.

### **Acknowledgement and non-judicial mechanisms**

If conceived and institutionalized in ways that accord with human rights and victim-centred principles, commissions of inquiry are vehicles for those in authority to acknowledge responsibility for human rights violations under their watch. For victims and their families, such commissions could offer a process for official recognition of the factual context in which people went missing, the normative principle that there has been a violation of trust between citizen and State, and the legal legitimation of their claims and complaints.

A truth commission’s use of a very public process in delving into the fate of the missing and the responsibility of those involved can also be an invaluable opportunity for various social players to acknowledge the secrets, lies and injustices of the past. Truth commissions could be particularly powerful instruments of official acknowledgement by State authorities, but they have the potential to be equally, if not even more, powerful avenues for acknowledgement by perpetrators, by those who benefited from a repressive regime, by those who were complicit by their inaction in failing to protest to prevent



repression, and even by society at large. For an engaged civil society, truth commissions could serve as an institutional avenue for the community as a whole to acknowledge and come to terms with its past.

## Reparations

The issue of reparations has emerged as a matter of national significance in countries in transition after years of repression. Following a period of pervasive human right violations, victims and survivors, as well as their families, often suffer from a range of physical and psychological trauma. In addition, they may be living in extreme poverty owing to the loss of their breadwinners, their physical or emotional inability to work and/or additional costs incurred by the investigation to ascertain their missing relative's fate and related legal action. The principle of reparation is to provide some sort of justice by "removing or redressing the consequences of the wrongful acts and by preventing and deterring violations".<sup>6</sup> It includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Both judicial (e.g. judicial sanctions or a judicial decision) and non-judicial mechanisms (e.g. public disclosure of the truth or commemorations) form part of the reparations.<sup>7</sup>

The jurisprudence of the Inter-American Court of Human Rights as well as of specific national jurisdictions such as that of Argentina have increasingly recognized a right to truth.<sup>8</sup> Non-judicial bodies such as the Chilean Commission have also recognized that information is a crucial component of reparations and have classified the disclosure of the truth and the end of secrecy as one of three categories of reparation, the other two being acknowledgement and some measure of compensation.

<sup>6</sup> "Basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law", Annex, "Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law", prepared by Mr Theo van Boven pursuant to Sub-Commission decision, 1995/117, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, para. 7.

<sup>7</sup> *Ibid.*, para. 15.

<sup>8</sup> The Argentinian Courts have developed an interesting jurisprudence on the right to truth. Notwithstanding the 1987 laws (the "Full-stop law" and the "Due obedience law") seeking to curtail prosecutorial investigation into past human rights crimes, in the mid-1990s families of the disappeared successfully petitioned courts to recognize that victims had a right to truth which the State should take proactive measures to address. Courts recognized that victims needed closure and the ability to mourn their dead and that "the state had an unquestionable obligation to use legal means to reconstruct the past in order to discover facts and thereby give a response to family members and to society." Margaret Popkin *et al.*, "Latin American amnesties in comparative perspective", *Ethics and International Affairs*, Vol. 13, 1999, p. 109.

There are several reparatory measures that may be taken to enhance victims' access to information. In Guatemala, the Historical Clarification Commission has recommended the creation of a National Reparation Programme, comprising *inter alia* a special commission to "search for children who were disappeared, illegally adopted or separated from their families" and to pursue "an active policy of exhumation, as locating clandestine and hidden cemeteries" is "itself an act of justice and reparation".<sup>9</sup> Reparation programmes could involve family support services that give families the necessary investigative, research and legal resources to establish the fate of the missing.

Material reparation programmes could provide acknowledgement in different ways — monetary payments, access to welfare services, release from State obligations for military service, and the like. In some cases the package of reparation programmes could be designed to acknowledge the specific loss suffered by individual victims; thus, the nature and quantum of compensation is tied to the specific injury. In other cases, for pragmatic reasons and/or for reasons of principle, reparation programmes could opt for a more generalized and uniform compensation programme that acknowledges the State's responsibility to the entire class of victims without differentiation. While no amount of money or services can fully compensate for the harm suffered or for the loss of a loved one, even a relatively modest payment can provide critical assistance to victims living in poverty, and can offer important psychological support by acknowledging past violations and providing a tangible official apology. Moreover, such payments can be avenues for ongoing recognition of those injuries and trauma through reparations that extend over a period of time. In addition to recognizing the material plight of the victims, symbolic reparations mobilize the authority of the State to recognize the dignity and value of the missing person, the legal and normative injuries entailed by incidents concerning missing persons, and the emotional and psychological trauma victims have suffered.

Symbolically significant measures could include apologies, monuments, gravestones and a range of other measures. These provide an avenue for acknowledgement that may be particularly significant in meeting families' needs to memorialize their loved ones and the extent of the loss suffered by them and their communities. For society as a whole as well, monuments

9 *Ibid.*

embody the living memory of those who are missing — the aspiration for closure and the enormity of the trauma. Apologies and memorials can be exceptionally valuable in providing very *public* acknowledgement. Perpetrators often achieve impunity by violations, particularly disappearances, taking place in secret; concomitantly, victims often suffer their loss in isolation with little social recognition of the injury inflicted upon them. In this context, publicly memorializing the missing through official apologies and monuments can have enormous symbolic value in acknowledging the missing. Typically, such memorials are most likely to be sources of healing and closure for the families if the families of the missing are consulted in their design and implementation.

In some contexts, reparations programmes may be most useful in acknowledging and addressing the uncertainty that accompanies cases of missing persons. In Argentina, non-monetary reparations included the new legal category of the “forcibly disappeared”; this category is the legal equivalent to death for purposes of the law (allowing the processing of wills and the closing of estates) while preserving the possibility of a person’s reappearance, as well as a waiver of military service and the provision of housing credits for children of the disappeared.<sup>10</sup>

There are at least four different players that may be held accountable in theory: the government in power, society at large, those who benefited from a repressive system, and perpetrators of repression. The government funds most reparation programmes, and to that extent can be taken to hold the State accountable for failing to safeguard its citizens and/or for State officials and State institutions that were directly responsible for the missing. The principle of State accountability as implemented through reparation programmes offers victims some small measure of redress. As was the case in Chile when the reparation programme was inaugurated, redress through reparations is particularly important for those victims who are denied or are unable to access judicial redress through criminal trials or civil suits.

In taking a share of its budget, any reparation programme does hold the government in power responsible for the policy priorities that guide its

<sup>10</sup> Some groups representing victim families in Argentina, most notably Las Madres de la Plaza de Mayo, denounce State reparations and instead demand full disclosure of the fate of their loved ones. However, the majority of families of the disappeared and former political prisoners have accepted the reparations. Priscilla Hayner, *Unspeakable Truths*, Routledge, New York, 2001, pp. 177-178 and pp. 330-331.

budgetary allocation process. However, the government's particular method of financing the line item for reparations can also hold other players accountable. Typically such programmes are funded partly by international aid and partly by internal revenues, including public taxation. If partly financed through the government's routine public taxation process, the reparation programme could be a way of holding society as whole responsible. However, general public funds are not the only option for financing reparation programmes. Corporations or other players who may have benefited from the previous regime can also finance a reparation fund. For example, the reparation programme for victims of slave labour in Nazi Germany is partially funded by a conglomerate of corporations who used slave labour in their factories at the time. Similarly, the South African TRC recommended that a one-off tax on all whites be used for reparations to black victims; this was, in essence, holding the primary beneficiaries of apartheid accountable to its primary victims. Finally, reparation programmes can also be financed directly by perpetrators. While civil suits may be the traditional method of holding perpetrators financially accountable to their victims, there are also alternative methods of doing so. For example in some countries, such as the Philippines, the government has sought to freeze the assets of those responsible for human rights violations, while in Peru the assets recovered from those responsible for the Barrios Altos case will be used to finance reparations for their victims. In this way, the victims not only receive reparations, but those reparations are likely to have an added significance because they have extracted some measure of financial accountability from perpetrators.

### **Conclusion**

There should be recognition that victim families may have diverse and even divergent needs, and therefore are best served by a plurality of mechanisms rather than by any single path. Judicial mechanisms and non-judicial mechanisms are not necessarily two alternative paths; rather they need to find common protocols for sharing of information and other resources to address families' needs for information, accountability and acknowledgement. To maximize effectiveness, we need coordination of those diverse mechanisms, and collaboration between different institutions addressing different aspects of victim needs and priorities.

For instance, in most countries the informational needs of families would be better addressed by bringing together different mechanisms to pool all that is known about all cases of missing persons. To that end, NGOs and

bodies mandated by the State to investigate cases of the disappeared should seek to set up a comprehensive database by marshalling their various areas of expertise, resources and points of access to missing persons' families so as to collate and share information.

All mechanisms should seek to keep victims and victims' families informed and empowered. For example, both judicial and non-judicial mechanisms can develop protocols entitling families to express their views with regard to sentencing, bail, and release hearings in cases concerning their missing relatives. This could be done with family members physically present at such hearings and/or the submission of victim impact statements. Without including families in the conceptualization, design and implementation of mechanisms to deal with cases of missing persons, we risk newly victimizing families in the very processes that were intended to address their injury.

Furthermore, it is crucial that such processes take into account and proactively address issues of language, rural location, gender, poverty, illiteracy and other factors that may inhibit access by victims' families to information, participation in and ownership of the initiatives sponsored by human rights organizations, truth commissions, special prosecutor's offices, government departments and others. This is to some extent also a recognition that in order to ensure a process that has local legitimacy and addresses the priorities and needs of those most affected, a strengthening of civil society is indispensable.

Flexibility and creativity in investigative techniques and procedures are the key to balancing diverse priorities through context-specific approaches. From East Timor to Rwanda to South Africa, a transitional environment has proved fertile ground for institutional innovation, where necessity — be it scarcity of resources, the scale of abuse or the compromises of a negotiated transition — has engendered great creativity and experimentation in the mechanisms that address mass atrocity.

## Résumé

### ***Surmonter les tensions entre les familles et les procédures judiciaires***

*Vasuki Nesiah*

*Les disparitions ont des effets dévastateurs sur les familles des victimes. Le traumatisme est exacerbé lorsque les besoins qu'engendre la situation sont négligés ou niés. Le CICR recense trois catégories de besoins : information, responsabilité et reconnaissance. Cet article examine les mécanismes qui couvrent ces trois catégories en détail, et formule des recommandations à l'intention des acteurs étatiques, non étatiques et internationaux.*

*Les familles des victimes ont des besoins divers, que des mécanismes différents sont plus à même de satisfaire. Ceux-ci devraient prendre en compte les besoins des communautés socialement vulnérables en matière d'accès à l'information, de participation aux initiatives et d'« appartenance ». De plus, si nous négligeons d'associer les familles à la conceptualisation, la mise au point et la création des mécanismes, nous risquons de leur infliger de nouvelles souffrances à travers les processus qui visaient à panser leurs plaies. Pour garantir la légitimité et la pertinence des mécanismes, il est indispensable d'y associer la société civile. Enfin, la flexibilité du mandat, la créativité institutionnelle et des approches adaptées au contexte sont essentielles pour réaliser les diverses priorités.*