

The missing and transitional justice: the right to know and the fight against impunity

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Abstract

Any body or institution dealing with the missing persons issue will interact in one way or another with transitional justice proceedings, if only to examine the possibility of sharing relevant information gathered. The question becomes even more acute when international tribunals intervene in the national context where transitional justice mechanisms are operating. The authors look at the ways in which transitional justice mechanisms may support the right of families to know the fate of their relatives, and how work to resolve the missing persons issue can be reconciled with an effective fight against impunity.



Definition and link with transitional justice

The missing, as referred to in this article, are all people unaccounted for as a result of an international or non-international armed conflict or internal violence.¹ In almost every one of these situations people disappear and their fate or whereabouts become unknown for a variety of reasons. They may have been arrested, abducted, or killed on capture or during massacres. They could be held

* The article reflects the views of the authors alone and not necessarily those of the ICRC.

incommunicado or in a secret location for a long period of time, or they could be isolated inadvertently by fighting or intentionally by the warring parties. They may be members of armed forces or armed groups whose fate is unknown (missing in action); refugees or displaced persons without means of communication; children separated from their families while fleeing fighting or through forced recruitment, detention or even adoption; or people who have died and whose identities were not recorded.

Left without any knowledge of their whereabouts or fate, tens of thousands of families face the agony of uncertainty for years after the fighting subsides. In practice, they will desperately search for information until they know for sure whether their relatives are alive or dead. This uncertainty prevents them from achieving closure until they find an answer. Furthermore, the painful effects of their loved ones' absence are often accentuated by the psychological, economic, social and legal problems with which they have to contend and which are frequently disregarded or denied. For instance, many of the missing persons are male, often the sole breadwinners and account or property holders. Their families are thus left without their source of income, a situation that is hardly conducive to appeasement. Not only missing persons should be considered as victims but also all the members of their families understood in their broadest possible sense.²

Such a situation is bound to have a direct impact on others as well. It will affect the entire community and its capacity to cope with its past, to end the war or violence in which it stagnates and ensure sustainable peace. As outlined in the South African Truth and Reconciliation Commission's objectives, "establishing and making known the fate and whereabouts of victims" is one of the means of achieving national unity and reconciliation.³

A multi-dimensional process of transitional justice aimed at taking stock of a violent past to open the way towards peace, democracy and respect for human rights should appropriately address the issue of missing persons with the community concerned, because violations of international humanitarian law and human rights account for most of such cases. During hostilities and transitional phases, parties unfortunately often exploit that issue. Sometimes information about the missing is withheld or manipulated to exert pressure on the enemy, to leave the enemy population in ignorance and distress, to avoid criticism from the party's own population for losses suffered or to maintain hatred of the other party and its national or ethnic exclusion. Leaders whose power is based on hatred of another community have an incentive to withhold answers indefinitely. Moreover, after the close of hostilities, the very leaders who played a major part in perpetuating the conflict often remain prominent figures in the subsequent

1 A whole issue of the *International Review of the Red Cross* was dedicated to the theme of missing persons. See *International Review of the Red Cross*, Vol. 84, No. 848, December 2002, particularly p. 823.

2 ICRC report: "The missing and their families: Summary of the conclusions arising from the events held prior to the International Conference of Governmental and Non-Governmental Experts (19 – 21 February 2003)", p. 11, available at <<http://www.icrc.org>>.

3 See the South African Promotion of National Unity and Reconciliation Act No. 34 of 1995, s. 3(1)(c).

peace process, a situation that does not facilitate the resolution of missing persons cases.

When societies in transition realize the importance of the missing persons issue, the need to consider how it can best be addressed becomes very clear. In all cases, finding out whether a missing person is dead or alive requires that procedures for gathering relevant information be put in place. Various types of bodies can be set up for that purpose. In some cases, national authorities have preferred to establish mechanisms whose competence is centred on clarifying the fate of missing persons. In recent years, for example, two specific multilateral working groups on missing persons were established to trace such persons connected with the conflicts in Kosovo and Bosnia, and to inform their families accordingly. Those working groups may also address the families' legal and administrative needs. Both mechanisms were set up within the framework of the peace process and include representatives of all parties, which must, in compliance with the relevant provisions of international humanitarian law, take all necessary steps to enable families to exercise their right to know the fate of missing relatives. In particular, they must take all feasible measures to account for missing persons, to identify the dead before their bodies are disposed of, and to notify the appropriate authorities or the families of the identity of deceased persons and the location of their remains. To this end, the departments and services concerned (police, armed forces, etc.) should be instructed to provide all relevant information to the working groups and cooperate with them. The ICRC chairs both working groups in accordance with its mandate and in its capacity as a neutral intermediary accepted by all the parties. It is not part of the working groups' mandate to identify the parties or individuals responsible for the capture, death or disappearance of missing persons or to gather evidence relating thereto. The question of any judicial proceedings must be dealt with entirely separately from the working groups. In Bosnia, the adoption of the Law on Missing Persons⁴ was evidence of the authorities' commitment to tackle the various aspects of that issue, including the rights of the families of missing persons. This law, together with other legislation, provides for the establishment of a Missing Persons Institute to oversee the process of clarifying the fate of missing persons.

In other cases the issue of missing persons is addressed from a broader perspective, such as that of truth and reconciliation commissions or national human rights commissions, which also deal with other violations of human rights and international humanitarian law.

Irrespective of the extent of their responsibilities, any body or institution dealing with the missing persons issue will unavoidably interact with transitional justice proceedings, if only to examine the possibility of sharing relevant information each has gathered. The question of such interaction becomes even more acute when international tribunals intervene in the national context where missing persons/transitional justice mechanisms are operating. The next part of

4 Law on Missing Persons, *Official Gazette of Bosnia and Herzegovina*, 21 October 2004.

this short commentary takes a look at the ways in which transitional justice mechanisms may support expectations in terms of the right of families to know the fate of their relatives, and how work to resolve the missing persons issue can be reconciled with an effective fight against impunity.

International tribunals in support of the right to know

Victims' families can intervene at various stages of criminal proceedings and exercise their right to know the fate of relatives.⁵ For instance, the investigation stage could be an appropriate channel for families of the missing to obtain relevant information. Authorities in charge of investigations and inquiries usually benefit from extended powers, including the power of enforcement, with a view to obtaining the necessary information and evidence for the trial phase. Victims' relatives should try to take advantage of this capacity and ensure that their concerns are appropriately dealt with during investigations.⁶

In addition, when international tribunals investigate large-scale killings and initiate mass exhumations and forensic activities, efforts should be made to ensure that such work is conducted in a manner that serves the best interests of the families while also bringing the persons responsible for those crimes to justice. Exhumations can reveal what happened to victims of such killings and give families information about the fate of loved ones. They can also enable the next of kin to honour the dead in conformity with the precepts of their culture and religion.⁷ Unfortunately, international tribunals have often lacked the necessary resources to go beyond the identification of patterns to identify the dead. In a number of cases exhumations have led to unfortunate situations in which, although the cause of death was established for criminal purposes, the bodies were re-interred unidentified because the identification process is much more time-consuming and requires different technologies. The families concerned were thus prevented from learning the fate of their relatives or receiving their remains. The work of forensic teams responsible for trying to identify the remains has been made impossible at times.

At the trial stage, when the judicial system so permits, victims' families should seek either to initiate proceedings or intervene as separate parties (known in civil law countries as *parties civiles*), or both, or be co-plaintiffs with the prosecution. In this way they can have greater access to and control over information gathered through judicial mechanisms and be able to find some kind of solace. Even in judicial systems that do not recognize victims as having this active capacity, they should be encouraged to participate, even if merely as witnesses. When they are afraid to testify for reasons linked to their personal safety

5 Additional Protocol I, Art. 32.

6 See in this regard V. Nesiha, "Overcoming tensions between family and judicial procedures", *International Review of the Red Cross*, above note 1, pp. 824–826.

7 See M. Blaauw, "'Denial or silence' or 'acknowledgement and disclosure'", *ibid.*, p. 778.

or that of the rest of their family, or for fear of public shaming, measures should be taken for their protection.

At the international level, the two ad hoc International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) have adopted the second approach and offer victims, including relatives of missing persons, only very limited autonomous scope, except for those most likely to serve as witnesses for the prosecution. But a change of paradigm came with the foundation of the International Criminal Court (ICC). More precisely, it provides for victims to present their views and concerns directly at all stages of the proceedings⁸ and to seek reparation.⁹

When international tribunals have been involved for many years in a region or a country and intend to phase out their work, such as the ICTR and ICTY, people affected by the disappearance of their relatives should try to take advantage of the legacy of those mechanisms. With regard to the former Yugoslavia, the ICRC has gained access to the information gathered by the ICTY that is not being used for trial purposes or that concerns closed cases. The ICRC will analyse this information and select whatever is useful to clarify the fate of missing persons, in particular indications of the location of remains, lists of persons presumed dead and documentation on alleged grave sites, and will — subject to its rules of confidentiality — share it with the Working Group on Missing Persons in Kosovo and possibly with other mechanisms dealing with the missing in the Balkans. The millions of documents collected are an invaluable means of supporting efforts to clarify the fate of people reported missing in connection with the armed conflicts that have affected that region. Unfortunately, the systematic search through the ICTY's judicial files for additional information on the identity of victims is extremely time-consuming, because the files have been organized mainly for the purpose of criminal prosecution and not to clarify identification.

Yet there are serious limits to the ability of criminal proceedings to comprehensively address the issue of persons unaccounted for as a result of armed conflict and other situations of violence. They are designed to determine the guilt or innocence of the accused, and investigations are tailored to respond to the goals of the prosecution. People are also rarely willing at the national level to prosecute those responsible, owing to fear of reprisals or general distrust of the judiciary. Even in a system such as that devised for the ICC, intervention by the victims' families will have to be linked to a specific situation within the court's jurisdiction. In this respect the recent friction between the judges of the ICC and its prosecutor, with the former adhering to a much wider interpretation of the notion of victims, is informative.¹⁰ Only time will tell whether the "victims' transplant" could work in a system focusing primarily on criminal repression and whether the

8 ICC Statute, Art. 68(3).

9 Ibid., Art. 75.

10 See decision rendered by Pre-trial Chamber I on the request of six persons to be able to participate as victims in the proceedings concerning the Democratic Republic of Congo: *Décision sur les demandes de*

families of those unaccounted for could obtain relevant information in that environment.

It appears clear that information gathered through criminal proceedings, however open these may be to victims, is not enough to satisfy the right of families to know the fate of their loved ones and that something else is required to respond to their needs. Their right to know, however, often collides with measures adopted to ensure an effective fight against impunity.

Reconciliation of the work on missing persons with the fight against impunity

The progress in ending impunity for war crimes with the establishment of international tribunals and a somewhat more active role played by domestic courts should mean an increasing respect for international humanitarian law and, in turn, a reduction in the number of missing persons because many of them are the result of that law being violated. Conversely, because persons having relevant information fear criminal prosecution, the increase in the “threat of The Hague” or more generally the existence of a real judiciary risk has the negative side-effect of a proportional decrease in prospects of obtaining information about the fate of the missing through traditional channels.¹¹ Thus, a delicate balance needs to be struck between the general recognition of the importance of prosecuting war crimes and the putting into place of effective means to collect and assemble relevant information on missing persons. Such mechanisms would need, in other words, to generate greater incentives for those with information on the fate of the missing to speak out, rather than to remain silent and be an obstacle to the fight against impunity. This is not, however, an easy task. In October 2005, for instance, the ICRC chairperson of the Working Group on Missing Persons in Kosovo observed that the number of missing persons stood at 2,557 compared to 3,000 at the beginning of the year and noted that progress hitherto had come from forensic activities. For the Working Group to work efficiently he considered that “[i]nformation from other sources, notably the determination of the fate of the persons gone missing and the localisation of yet unidentified gravesites” should be provided to the group “to meet the growing expectations of the families.”¹²

participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, et VPRS 6, 17 January 2006 (only available in French). Authorization to appeal against the decision was denied to the prosecution on 31 March 2006.

11 Two authors have already mentioned this with regard to the role of the ICRC in the fight against impunity and the need to guarantee confidential handling of information it receives from belligerents if it wants to keep that source: M. Sassòli, M.-L. Tougas, “The ICRC and the missing”, *International Review of the Red Cross*, above note 1, p. 732.

12 See ICRC Press Releases, “Kosovo: Fourth meeting of Working Group on Missing Persons”, 6 October 2005, and “Kosovo: ICRC calls for greater commitment to resolve issues of missing persons”, 31 May 2006.

Practical experience shows that national authorities may adopt various strategies in this regard. In some cases, they have not hesitated to launch public information campaigns about the missing, thus demonstrating their political will to resolve the issue.¹³ On a number of occasions the ICRC has published names of missing persons on its website or in catalogues, or books with photographs of personal belongings found with mortal remains, which were subsequently used by authorities in their efforts to clarify the fate of those unaccounted for.¹⁴ In one instance, with the consent of the families concerned, the ICRC gave a truth and reconciliation commission basic information on more than four hundred cases that did not appear in any database.¹⁵

In other instances, various means of communicating information about missing persons have been provided for, such as telephone lines, web-based applications or walk-in centres. In some situations, anonymous information was accepted so as not to link the person supplying it to any investigation or leave them open to any criminal charges. Even though the accuracy of the information gathered in this way could be questioned, it was estimated in the Croatian national context that 10% of the anonymous information received could be considered relevant and useful in the search for missing persons. In order to promote an environment conducive to information-sharing, the ICRC has on certain occasions agreed, with the parties' consent, to act as the entity receiving the information from the persons concerned. This information was then handled on a confidential basis, which meant that all identifying data was expunged before being transmitted to the authorities.

Authorities may also be inclined to link their efforts to trace the missing with criminal prosecution by considering as a mitigating factor the transmission of relevant information helping to clarify their fate, or by providing for penalties in cases of non-cooperation. The same link could be made with vetting procedures instituted at the national level in which the provision of relevant information on the missing would be considered a positive factor in the assessment process. Finally, some have applied or envisaged granting limited amnesty¹⁶ or prosecutorial immunity, accompanied by alternative forms of justice, even though this approach raises many questions as to its compatibility with the requirements of international humanitarian law. Measures which would be construed in such a way as to enable war criminals to evade punishment would obviously fall short of the necessary threshold. Nor would they be in conformity with the rule obliging states to investigate, prosecute and punish persons suspected of having committed

13 Peru, Chile and Morocco may be cited in this regard.

14 Republic of Serbia, Bosnia and Angola. Liberia, Sierra Leone and Côte d'Ivoire may be mentioned with regard to the search for children separated from their parents/relatives in connection with the respective armed conflict.

15 Peru. The partnership provided for the systematic compilation of the ICRC's experience in the search for individuals and the creation of a single list of disappeared.

16 An amnesty cancels the crimes. More precisely, amnesty law has the effect that a) prosecutors forfeit the right or power to initiate investigations or criminal proceedings, and b) any sentence passed for the crime is obliterated.

war crimes.¹⁷ Furthermore, a national amnesty would not protect the person concerned from the threat of international prosecution. If amnesty is granted in violation of international obligations, it will probably not be accorded international legal recognition and will be ignored by international tribunals.¹⁸ In all of these cases, family associations, if they exist, should be consulted. Not only are they the beneficiaries of the measures taken to clarify the fate of their relatives, but they also have a role to play in ensuring that the responsible entity as a whole and each of its components fulfil their mandate and their respective commitments.

Conclusion

Clarification of the fate of persons unaccounted for as a result of an armed conflict or other situations of violence is an important issue that needs to be considered in any multi-dimensional and multi-stakeholder efforts to address societies in transition. When peace or other settlements are negotiated, they should receive at least as much attention as other issues, such as refugees and displaced persons, land and property, or human rights and conflict resolution, in the parties' efforts to repair their past. The opening of mass graves, the identification of bodies, establishment of the circumstances that led to their deaths and clarification of the facts are all necessary steps for families to complete their mourning process, for victims to obtain reparation and, in the long term, for peoples and communities to come to terms with their past and move forward in peace.

In order to deal properly with the missing persons issue, the various bodies and institutions involved in transitional justice should endeavour to cooperate in that regard. Ad hoc international tribunals or truth and reconciliation commissions, both with a limited life-span, should give thought from the outset to means and methods of gathering and classifying information and evidence that could make it readily exploitable both for judicial proceedings and for attempts to trace the missing. They should allow for effective and practical means of passing on their legacy once their work has ended, and in particular give families and their representatives access to their archives. Similarly, forensic activities deployed by international tribunals should be carried out with not only the collection of evidence for criminal prosecution in mind, but also the finding of answers for the families of missing persons. Finally, national authorities should be encouraged and supported, through capacity-building initiatives, in their resolve to genuinely address the issue of missing persons and thus comply with the requirements of international humanitarian law. Only then can there be hope that families will finally fulfil their right to know the fate of missing relatives and receive appropriate reparation.

17 Even Art. 6(5) of Additional Protocol II, which refers to amnesty, excludes amnesty for war crimes.

18 ICTY, *Furunzija*, Case No. IT-95-17/1 Judgment, 10 December 1998, para. 155.