

# A HUMAN RIGHTS-BASED APPROACH TO TRUTH AND RECONCILIATION <sup>1</sup>

Nekane Lavin

## Introduction

This paper focuses on the work and experience of the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) in promoting and assisting truth-seeking and reconciliation processes from a human rights perspective, in the context of transitional justice processes. It maps the normative and operational framework to engage in such processes from a human rights perspective, describes the development of an internationally recognized right to the truth for victims of gross violations of human rights, and presents examples of participation and truth-seeking mechanisms for the realization of the right to the truth, namely national consultations and truth commissions. Finally, it addresses the issue of how human-rights-based truth and reconciliation processes can complement justice processes and result in improvements in access to justice for Indigenous Peoples.

Since 2002, OHCHR has promoted, supported and assisted truth and reconciliation processes in conflict and post-conflict contexts, as part of transitional justice processes. For OHCHR and the UN generally, the notion of transitional justice is concerned with how societies emerging from conflict or from repressive rule address the legacy of past violations of human rights and international humanitarian law. In this context, transitional justice mechanisms should be understood

<sup>1</sup> This paper emanates from a presentation made at the International Expert Seminar on Access to Justice for Indigenous Peoples, including Truth and Reconciliation Processes, organized in New York by the Institute for the Study of Human Rights (ISHR) - Columbia University, the Office of the High Commissioner for Human Rights (OHCHR) and International Center for Transitional Justice, on 27 February–1 March 2013. The author participated at the expert seminar in her capacity as Human Rights Officer working on transitional justice issues at OHCHR. This article is submitted in a personal capacity and the views presented therein do not necessarily reflect those of the United Nations.

as exceptional measures, which can only be justified by the needs of particular transitional situations.

The UN has acquired long experience in assisting societies devastated by conflict or emerging from repressive rule to deal with their past, ensuring accountability, justice and reconciliation, as priorities in a transitional environment. The work that OHCHR performs in supporting transitional justice programmes encompasses the development of international standards and good practices; identifying gaps and responding to needs through targeted operational guidance and materials;<sup>2</sup> providing technical advice and assistance to member States, civil society and UN partners in the design and implementation of transitional justice mechanisms; providing capacity building and training to national stakeholders; and engaging in global and national advocacy to ensure that human rights and transitional justice considerations are reflected in peace agreements and missions.

In its activities, OHCHR has placed particular importance upon the centrality of those who have experienced human rights violations in shaping transitional justice responses. This has led to an increased respect for and concrete implementation of victims' rights to an effective remedy.

## **I. Normative and operational framework**

OHCHR's comprehensive approach to transitional justice is underpinned by international legal obligations with regard to the so-called four pillars of transitional justice, namely the right to the truth, the right to justice, the right to reparations, and the duty of States to prevent the recurrence of violations. At its heart, transitional justice seeks to do two things: first, to restore and protect the dignity of individuals as bearers of fundamental human rights and freedoms, and second, to help recreate the bonds of trust between citizens and

<sup>2</sup> OHCHR has published nine manuals under the series of Rule of Law Tools for Post-Conflict States. These tools cover the following topics: Prosecution initiatives (2006), Truth commissions (2006), Vetting and institutional reform (2006), Mapping the justice sector in post-conflict states (2006), Legal systems monitoring (2006), Reparations programmes (2008), Legacy of hybrid tribunals (2008), Amnesties (2009), and National consultations on transitional justice (2009).

States, especially through the respect of the rule of law, essential for the functioning of a rights-respecting society.

The normative and operational guidance for OHCHR's work in transitional justice is found in two UN documents which, taken together, form the basis for much of OHCHR's work in this area, namely: the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Set of Principles"), endorsed by the UN Commission on Human Rights in 2005,<sup>3</sup> and 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 ("Basic Principles and Guidelines"), adopted by the UN General Assembly in 2006.<sup>4</sup>

The principal elements of OHCHR's approach to strengthening rule of law and addressing impunity are further informed by the Secretary-General's 2004 report to the Security Council on "The rule of law and transitional justice in conflict and post-conflict societies,"<sup>5</sup> which defines transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."<sup>6</sup> For the UN, transitional justice consists of both judicial and non-judicial processes and mechanisms, including truth-seeking initiatives, prosecutions, reparations programmes, institutional reform or a combination of these measures.

The Guidance Note of the Secretary-General on the UN Approach to Transitional Justice, of March 2010, provides a rights-based perspective on transitional justice, and offers various approaches for

3 Commission on Human Rights, Promotion and Protection of Human Rights Impunity: Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher Addendum. 71<sup>st</sup> Sess., UN doc. E/CN.4/2005/102/Add.1. (2005).

4 General Assembly, 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. GA Res. 60/147, 60<sup>th</sup> Sess., UN doc. A/RES/60/147(2005).

5 Security Council, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary General, UN doc. S/2004/616 (2004).

6 *Ibid.*, at para. 8.

further strengthening the UN's transitional justice activities, such as taking human rights and transitional justice considerations into account during peace processes, considering the root causes of conflict or repressive rule, and addressing the violations of all rights, including economic, social and cultural rights.

In addition, the Guidance Note contains a number of guiding principles for transitional justice activities, such as the need to incorporate a gender perspective, and to take into account the particular context of a country when designing and implementing transitional justice mechanisms. The Guidance Note also places emphasis on a victim-centered approach and on participation, including participation of victims and civil society organizations, in the design and implementation of transitional justice mechanisms. It further states that national consultations, conducted with the explicit inclusion of victims and other traditionally excluded groups, are particularly effective in allowing them to share their priorities for achieving sustainable peace and accountability.

The notion of a comprehensive and victim-centered approach has also been promoted by the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, for instance, in his initial reports to the UN Human Right Council and the UN General Assembly.<sup>7</sup> In this regard, it should be noted that the creation of a new mandate and the appointment of a special rapporteur has enabled increased visibility and further consideration of transitional justice issues from a human rights perspective.

## **II. The right to the truth and the concept of reconciliation**

In 2006, OHCHR presented a study on the right to the truth, which concluded that the right to the truth about gross human rights violations and serious violations of international humanitarian law is an inalienable and autonomous right, linked to the duty and obligation

<sup>7</sup> Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 21<sup>st</sup> Sess., UN doc. A/HRC/21/46 (2012) and General Assembly Promotion of truth, justice, reparation and guarantees of non-recurrence, Note by the Secretary General, 67<sup>th</sup> Sess., UN doc. A/67/368 (2012).

of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations.<sup>8</sup>

The study establishes that the right to the truth finds its roots in international humanitarian law, in particular, in relation to the right of families to know the fate of their relatives, together with the obligation of parties to armed conflict to search for missing persons.<sup>9</sup> With the proliferation of enforced disappearances in the 1970s, the concept of the right to the truth was further studied by international and regional human rights monitoring mechanisms, and extended to other serious human rights violations, such as extrajudicial executions and torture.<sup>10</sup>

In the past decade, the right to the truth has been explicitly recognized in several international instruments and by intergovernmental mechanisms.<sup>11</sup> More recently, the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 20 December 2006, in its article 24(2) states that: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”<sup>12</sup>

The OHCHR study also analyses the linkages of the right to the truth with other rights, such as the right to an effective investigation and to an effective remedy, and more importantly, its linkages with the State’s obligation, *inter alia*, to conduct an effective investigation and to provide an effective judicial remedy. The study concludes that amnesty laws and similar measures that prevent the investigation and prosecution of perpetrators of gross human rights violations may violate the right to the truth.<sup>13</sup> This conclusion is also reflected by developments in international law and UN policy, which consider

8 Commission on Human Rights, Promotion and Protection of Human Rights Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights, 62<sup>nd</sup> Sess., UN doc. E/CN.4/2006/91 (2006).

9 *Ibid.*, at para. 5.

10 *Ibid.*, at para. 8.

11 *Supra* note 4, see principles 1, 2, 3 and 4 of the Set of Principles and principles 11, 22(b) and 24 of the Basic Principles and Guidelines.

12 General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, GA res. 61/77, 61<sup>st</sup> Sess., UN doc. A/RES/61/177 (2007).

13 *Supra* note 9, at paras. 42 and 45.

amnesties as impermissible if they prevent prosecution of alleged perpetrators of war crimes, crimes against humanity, genocide, and gross violations of human rights, based on the need to combat impunity for these crimes and to ensure that victims and their relatives know the truth.<sup>14</sup>

As for the concept of reconciliation, OHCHR conceives it as one of the objectives of transitional justice. In this context, reconciliation would seek to overcome divisions and to build trust within societies recovering from conflict or repressive rule. Even though there is no single model of reconciliation, OHCHR considers that it cannot be understood as a call for impunity, nor as a burden placed on victims to forgive. Any efforts in this regard must respect the victims' rights to justice, to know the truth, reparations and guarantees of non-recurrence. Similarly, efforts towards reconciliation should seek to re-establish the confidence of citizens in public institutions, which have direct bearing on the protection of their rights. Therefore, transitional justice initiatives should aim at building trust among victims, society and the State through measures that provide an acknowledgement to victims and redress for the rights that have been violated.

### **III. Mechanisms to implement the right to the truth: the importance of national consultations**

OHCHR promotes and supports the organization of national consultations, which allow identifying the concerns, needs and grievances of rights holders, victims' organizations and marginalized groups. These participation mechanisms promote the involvement of rights-holders in the decision-making process about the measures that are most suited to address past abuses.

Comprehensive national consultations are a critical element of the human rights-based approach to transitional justice, and are founded on the principle that successful, legitimate and sustainable transitional justice strategies require inclusive and meaningful public participation. As stated by the Guidance Note of the UN Approach to Transitional

14 For an analysis of amnesties from a human rights perspective, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*. (OHCHR, 2009).

Justice, public participation reveals the needs of conflict-affected communities, allowing states to design appropriate context-specific transitional justice strategies, and endowing victims and other members of civil society with local ownership of the resulting strategy.

Consultations should extend to a broad range of stakeholders, to include individuals, groups and regions that have traditionally been marginalized. The participation of civil society, women's organizations, Indigenous Peoples and interest groups, particularly victims, is crucial. Those affected by oppression and conflict need to be listened to and have their experiences and needs adequately reflected.<sup>15</sup>

OHCHR supports national consultative processes in conformity with international norms and standards, by providing legal and technical advice, promoting civil society and victim participation, supporting capacity-building and mobilizing resources.<sup>16</sup>

- In Togo, national consultations took place in 2008 to raise public awareness on transitional justice issues and seek the views of national stakeholders on potential mechanisms. Consultations were conducted over a period of four months, and included organizing 167 meetings in 5 administrative regions of the country, attracting approximately 2,000 participants. In July 2008, OHCHR Togo produced a report summarizing the findings of the national consultations and outlining recommendations, including the establishment of a truth and reconciliation commission. OHCHR Togo was further instrumental in providing support to the Truth, Justice and Reconciliation Commission established in 2009.
- In Burundi, the UN Security Council requested the Secretary General to organize consultations with the Government of Burundi and Burundian stakeholders regarding the establishment of a truth commission and a special tribunal. In 2007, a tripartite steering committee composed of the Government, civil society and UN representatives was

15 For more information on national consultations, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice*. (OHCHR, 2009).

16 For additional examples of national consultations supported by OHCHR, see the OHCHR, *Report of the UN High Commissioner for Human Rights on human rights and transitional justice*, 18<sup>th</sup> Sess., UN doc. A/HRC/18/23 (2011).

established to organize the national consultations. These began in July 2009 and were completed in April 2010 with the publication of the report. In total, 3,887 Burundians participated in the national consultations through individual interviews, focal groups and community meetings. In October 2011, a technical committee appointed by the President submitted a draft law on the establishment of the Truth and Reconciliation Commission. A new draft law on a Truth and Reconciliation Commission was submitted for approval by the National Assembly in December 2012. The UN made recommendations to the Government to take into account the conclusions of the national consultations and to respect international norms and standards with regards to the creation of a truth and reconciliation commission.

- In Tunisia, in April 2012, OHCHR supported the launching of the National Dialogue on Transitional Justice aimed at informing the drafting of a consensus-driven law on a holistic transitional justice process. OHCHR provided training to the technical committee—composed of representatives of the Ministry on Human Rights and Transitional Justice as well as civil society—and sub-committees that were created to oversee the national consultations at regional and local levels. Between September and October 2012, twenty-four regional dialogues were organized across the country. The consultations reached out to about 2,500 participants who were asked to fill out a questionnaire about their attitudes and expectations regarding transitional justice. Subsequently, OHCHR provided comments on the draft law on transitional justice, which foresees the creation of a national “Truth and Dignity Commission.”

#### **IV. Truth commissions**

A key factor that contributed to the development of the right to the truth is the establishment of “truth commissions” or other similar truth-seeking mechanisms as a means to deal with past gross human



rights violations.<sup>17</sup> In general, truth commissions are conceived as a means to respond to the need of the victims, their relatives and society to know the truth about what has taken place, to contribute to the fight against impunity, to facilitate the reconciliation process, and to strengthen democracy and the rule of law.<sup>18</sup>

As concluded by the OHCHR study on the right to the truth, truth commissions have played an important role in promoting justice, uncovering truth, proposing reparations, and recommending reforms of abusive institutions.<sup>19</sup> Truth commissions or other similar truth-seeking mechanisms have varied greatly in terms of mandate, procedure, composition and purpose: most have sought to investigate events and to analyse the reasons for them, with a view to making a credible historical record and to preventing the recurrence of such events; some provide a cathartic forum for victims, perpetrators and the broader society to publicly discuss violations, often with the ultimate aim of reconciliation and sometimes to achieve a measure of justice.<sup>20</sup>

Each truth commission is a unique institution, designed within a specific societal context, and should be founded on national consultations inclusive of victims and civil society organizations.<sup>21</sup> OHCHR assists in the design and establishment of truth commissions, including by sharing applicable standards and best practices.<sup>22</sup>

- The Truth and Reconciliation Commission of Sierra Leone was established in 2002, completed its hearings in July 2003 and, with the assistance of OHCHR, prepared a report summarizing its findings and recommendations, which was presented to the President in October 2004. OHCHR and the UN assisted the Government with the implementation of the recommendations, including enactment of legislation protecting the rights of women and children. Through the

17 *Supra* note 9, at para. 13.

18 *Ibid.*, at para. 14.

19 *Ibid.*, at para. 50.

20 *Ibid.*, at para. 15.

21 *Supra* note 17, at para. 9.

22 For an analysis of truth commissions from a human rights perspective, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (OHCHR, 2006).

UN Peacebuilding Fund, the UN mission supported the establishment of reparations programmes, which conducted symbolic community reparations events and delivered partial benefits to 20,000 of the 32,000 registered victims. A National Trust Fund for Victims was also established in order to facilitate the sustainability of the programme. Following advocacy and technical advice by the UN, the Government established the National Human Rights Commission, which serves, *inter alia*, as the follow-up mechanism for the implementation of the recommendations.

- The Truth and Reconciliation Commission in Liberia was established by law in June 2005. The UN mission and OHCHR played a significant role in the consultation process leading up to the promulgation of the law, which provided for a selection procedure for truth commissioners and the appointment of an international technical advisory committee to support their work. The selection panel was composed of two representatives appointed by the Economic Community of West African States and the UN, and five representatives appointed by civil society. The selection panel was tasked with screening nominees and preparing a shortlist of candidates, from which the Government appointed nine commissioners from a variety of backgrounds. The UN mission supported the capacity-building of commissioners and staff through training programmes on investigatory procedures, case management, and human rights and international humanitarian law.

The Commission was established in February 2006. OHCHR and the UN Development Programme (UNDP) executed a conflict mapping project, collecting and compiling up to 13,000 witness statements, which were handed over to the Commission. In December 2009, the Truth and Reconciliation Commission released its final report. The UN mission advocated for the establishment of the Independent National Commission on Human Rights, which was officially established in October 2010, and was tasked, among others, with ensuring the implementation of the recommendations.

- The Truth, Justice and Reconciliation Commission of Togo was established by Presidential Decree in 2009. OHCHR supported

the commission in a variety of forms: having dedicated staff to provide technical assistance, holding workshops for commissioners and staff on transitional justice, arranging for dialogue between commissioners and members of truth and reconciliation commissions from other countries, providing training for staff on gathering information, investigation and analysis, and facilitating workshops on relevant topics, such as witness protection and reparations. In 2011, the Commission held over 400 hearings.

The Commission handed over its final report in 2012, and OHCHR conducted extensive advocacy and awareness raising activities to ensure its wide dissemination. At the end of 2012, the President of the Republic announced the decision to create the Office of High-Commissioner for Reconciliation and the Strengthening of National Unity, which is responsible for the implementation of the recommendations, especially on reparations.<sup>23</sup>

Despite the opportunities and advantages offered by participation and truth-seeking mechanisms in transitional justice contexts, experience shows that they are often faced with major difficulties and challenges. In respect of national consultations, while there have been advances over the past years with regard to the participation of victims and civil society organizations, challenges remain with regard to: (i) ensuring adequate representation of victims, women and marginalized groups, including Indigenous Peoples and minorities; (ii) ensuring comprehensive outcomes of participatory mechanisms; and (iii) ensuring that consultations will not be a one-off event.

With regard to the work of truth commissions, major challenges include: (i) ensuring the independence and credibility of the commission; (ii) political interference and manipulation; (iii) ensuring continued participation of marginalized groups, civil society and victims' organizations; (iv) ensuring a gender perspective in the work of the commissions; (v) restrictions in the mandate regarding time periods under investigation, material scope and the lifespan of

23 For additional examples of experiences of truth commissions assisted by OHCHR, see *supra* note 17.

the commissions; (v) pardons and amnesties; (vi) effective victim and witness protection measures; (vii) raising unrealistic or undue expectations; and (viii) ensuring political support and resources to implement recommendations.

## **V. How can truth and reconciliation processes result in improvements in access to justice for Indigenous Peoples?**

In the context of truth and reconciliation processes, the link between the right to the truth and justice can be made through a number of measures, such as the participation of Indigenous Peoples in consultations processes on transitional justice mechanisms that should be established to address their grievances, and through final recommendations of truth and reconciliation mechanisms, which can include referrals of cases to the justice system, the establishment of reparations programmes, and the adoption of institutional reforms.

National consultations can offer the means to identify and take into account historic and contemporary grievances or violations suffered by Indigenous Peoples. Inclusive consultations can give a voice and a role to Indigenous Peoples to channel their specific concerns and needs, and to take part in the decision-making process concerning transitional justice mechanisms that are most suitable for them. For instance, Indigenous Peoples should be considered and involved in the design of the methodology that is used to conduct national consultations. In addition, Indigenous representatives should be appointed to ensure that their concerns and needs are appropriately defined and considered when determining the most suitable transitional justice mechanism to address them.

For OHCHR, the experience of national consultations in Burundi, and the role of the Batwa people therein, constitute a lesson learned. Even though the Batwa people were consulted during the process (e.g. they were invited to awareness-raising and training meetings; issues of their concern were included in the questionnaires used in the consultations), they were not given enough of a role, or a specific one, in the consultation process through, for instance, the appointment of a representative in the tripartite committee in charge of organizing

the national consultations, to ensure that the grievances of the Batwa would be taken into account. Consequently, there was a very weak reference to the concerns of the Batwa people in the final report of the national consultations.

Indigenous Peoples should also be involved in the creation of transitional justice mechanisms that result from national consultations, for instance, through the appointment of commissioners who will be able to gather and interpret their specific concerns, and ensure that they are properly addressed as part of the conclusions and recommendations of the final report. Truth-seeking mechanisms can issue recommendations to ensure access to justice of Indigenous Peoples, through referrals of specific cases to (national or international) justice mechanisms. Moreover, recommendations by truth commissions can include institutional reforms, such as the reform of the justice sector, to ensure that it is closer to those who most need it due to (historic or contemporary) exclusion or marginalization. Finally, truth-seeking mechanisms can also recommend the establishment of reparation programmes, which address the needs of victims.

In conclusion, a human-rights based approach to transitional justice allows for the consideration of grievances suffered by Indigenous Peoples, through their participation in consultations and truth-seeking processes that complement justice systems. OHCHR, together with other partners and stakeholders, can play a crucial role in ensuring the participation of Indigenous Peoples in these processes, and in promoting their rights to the truth, justice, reparations and guarantees of non-repetition.