
Strengthening the Right to Know through Truth and Reconciliation Commissions

by Tracey B.C. Begley*

In recent decades, Truth and Reconciliation Commissions (TRCs) have been used throughout the world after an armed conflict, a specific act of violence, or sustained persecution by a State, and have served to try to help a society understand and come to terms with these actions by seeking information about what happened. Some TRCs have been able to ensure that events or individual memories of the violence are not forgotten by memorializing the work of the commission or setting up national monuments to honor all victims. TRCs are not needed for memorialization, which can take a variety of forms, including official archives of witness statements, a national monument, or experiential museums, but TRCs are often in a position to promote and ensure memorialization in an effort to promote reconciliation and provide a form of redress. Both the Inter-American Court of Human Rights (IACtHR) and Inter-American Commission on Human Rights (IACHR) have noted that TRCs are a way to “shed light on situations involving systematic human rights violations on a mass scale.”[1]

TRCs have served an important role in strengthening individual and community rights related to knowing and remembering what happened during times of violence. Although, both international humanitarian and human rights law contain some elements of the right to know, such as to know the fate of missing loved ones during armed conflict. Truth and Reconciliation Commissions have consistently materialized these rights through memorialization, bringing strength and elucidation to the contours of the right to know.

This paper will give the reader a short background on the use of Truth and Reconciliation Commissions, and the basis of the right to know, or right to truth, in international humanitarian and human rights law. It will then explore how the right to know has developed through human rights soft law partially due to

how TRCs have integrated memorialization into their efforts.

TRUTH AND RECONCILIATION COMMISSIONS AND MEMORIALIZATION

The idea behind a Truth and Reconciliation Commission is often simple: to find out what happened during a conflict so that people can understand these events, heal, and move forward together. Reconciliation is “. . . about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward,”[2] and memorializing those events can be essential to moving forward. Getting to “the truth,” however, and what that actually is, how it is “found,” and recorded, is much more complex. Typically, TRCs are distinct from courts in that they do not have a mandate to prosecute individuals, so they can find out information that may not be admissible in court, or that individuals would not share if they faced prosecution. This unique attribute comes with the ability to gather extensive information about what happened during a conflict, and presents the challenge of what to do with that information so it is memorialized and accessible. This paper will look specifically at how TRCs that are used in response to an armed conflict can serve an essential role in memorialization efforts.

Memorialization can take many forms, such as archiving of state records; archiving proceedings of a Truth and Reconciliation Commission; converting detention centers into museums, public memorials or monuments; establishing national days to honor victims; maintaining interpretive sites or experiential museums; integrating historical events into school curricula and online documentation; and many more means. Memorialization can serve to redress violations and to prevent future violations.[3] Memorialization

can be focused on the individual (e.g., specifically naming victims on a monument—or can be focused on the collective (e.g., dedicating a monument to “all victims” of a certain event). While transitional justice is often approached from a legal perspective, there is also an important role for arts and culture.[4]

RIGHT TO KNOW/RIGHT TO TRUTH AND THE DUTY TO REMEMBER

Truth and Reconciliation Commissions have made great headway in encouraging and implementing memorialization projects. Both international human rights law (IHRL) and international humanitarian law (IHL) speak to this innate desire to understand what happened to loved ones during an armed conflict or other acts of violence. When TRCs are set up in the aftermath of armed conflict, there are pertinent aspects of IHL that may come into play, and, arguably, even the human rights aspect of the right to know stem out of these explicit IHL obligations. While human rights treaties do not explicitly provide for a victims’ “right to know” or the “right to truth,” actors in the international community—including some UN bodies, the IACHR, and IACtHR—have extrapolated the right to know from other rights.[5] TRCs have relied on many sources for these inferences, including the Universal Declaration of Human Rights, the American Convention on Human Rights, and the American Declaration on the Rights and Duties of Man.[6] TRCs have played a pivotal role in further articulating and trying to implement these rights, as discussed below.

INTERNATIONAL HUMANITARIAN LAW

Often, but not always, TRCs are set up in the wake of an armed conflict. International humanitarian law, which applies during armed conflict and may apply to certain issues in the aftermath of a conflict, includes provisions relating to both knowing what happened to loved ones and reparations for violations.[7] The Fourth Geneva Convention of 1949 and Additional Protocol I of 1977 require parties to an international armed conflict to account for those who are missing.[8] Additionally, the Third Geneva Convention provides for an Information Bureau that would actually centralize and transmit information between parties in regard to civilians and combatants who are missing.[9] These provisions were envisioned to be used during an armed conflict, but people often remain missing

long after a conflict has ended, and parties continue to be obligated to account for them.[10] Indeed, the Customary International Humanitarian Law Study conducted by the International Committee of the Red Cross (ICRC) provides that “each party to the conflict must take all feasible measure to account for persons reported missing as a result of an armed conflict and must provide their family members with information it has on their fate,” which applies in both international and non-international armed conflicts.[11]

Further, IHL rules on the prohibition of enforced disappearances, the requirement to respect family life, and the obligation to record all available information prior to the disposal of the dead further strengthen the obligation on parties to account for people during and after an armed conflict.[12] There may be different mechanisms capable of sharing information, such as the Information Bureau that is described for use in international armed conflicts. Although normally at the end of an armed conflict, TRCs are also a mechanism by which to determine where people may have perished, conduct investigations and gather witness testimonies to try to provide information about the fate of loved ones.

Many TRCs are able to recommend or provide reparations to those affected by violations, and those reparations may take the form of memorialization. IHL also provides obligations in regard to providing “compensation” to victims, which is a form of reparations. Article 91 of Additional Protocol I provides that “a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation.”[13] This provision existed in the 1907 Hague Convention before the 1977 Protocols were negotiated, and is intended to apply to all parties regardless of which side “wins” the conflict.[14] Sandoz, Swinarski, and Zimmerman discuss in their commentaries, that the term compensation could mean material goods, money, or other services.[15] The term “compensation” does not necessarily encompass as many forms as is understood in the use of “reparations,” but, nevertheless, it is clear that the drafters of AP I intended for some kind of amends when there were violations by the Armed Forces of one of the Parties to the conflict.[16] AP I applies only in international armed conflict, so there is a narrower scope of the application of Article 91. The ICRC Customary International Humanitarian Law

Study, however, provides that in both international and non-international armed conflict “a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.”[17]

INTERNATIONAL HUMAN RIGHTS LAW AND DEVELOPMENTS THROUGH TRCS

There are no human rights treaties that explicitly provide for a “right to know” or “right to truth,” but this right has developed through soft law, and particularly through case law, in the Inter-American Human Rights System. Arguably, the right to know has partially advanced through the inclusion of memorialization in recommendations by TRCs.

In 1983, Argentina set up a body to look into what happened to people who had been disappeared, known as the National Commission on the Disappeared.[18] Although it was not officially called a truth commission, it is the first widely known use of such a body. The term “truth commission” later came to be used with the setup of such commissions in Chile and El Salvador in the early 1990s.[19] A Truth and Reconciliation Commission (TRC) was famously set up in South Africa in 1995, and since then TRCs have become widely known as a transitional justice tool to move a society from armed conflict to peace and stability.[20]

These initial truth commissions began to pave the way for memorialization efforts. The report from the South African TRC report specifically recommended using memorialization efforts[21], as did the reports from Guatemala,[22] El Salvador,[23] and Argentina.[24] Recommendations included having a national day to remember the victims, naming public schools, highways and buildings after victims, and constructing national parks and monuments in commemoration of victims.

Coming out of this wave of foundational and inspirational TRCs, in 1997, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minority Rights requested a study on “the impunity of perpetrators of human rights violations.”[25] In the ensuing report, author Louis Joinet wrote that from the 1970s-1990s, the international community approached perpetrators of human rights

violations in a spectrum, beginning from granting amnesty and ending in the 1990s with an Inter-American Court decision that amnesty is incompatible with the right to a fair hearing before an impartial and independent court.[26]

Importantly, the Joinet report lays out 42 principles in regard to human rights violations. The principles fall into three categories, and clearly draw on the work of the TRCs in trying to help elucidate egregious events. The categories were: a. the victims’ right to know; b. the victims’ right to justice; and c. the victims’ right to reparations.[27] He wrote that the victims’ “right to know” is paralleled by States’ corollary “duty to remember.”[28] The “right to know,” draws “upon history to prevent violations from recurring in the future,” and the “duty to remember” guards “against the perversions of history that go under the names of revisionism and negationism.”[29] He argues that both the right and the duty serve to unearth information about violations so that they cannot be erased from society’s memory and may serve to prevent future violations. Joinet explains that one method to seek this truth is through extrajudicial commission of inquiry, and, indeed, this report was written just a few years after the first TRC was established in South Africa, which included recommendations to include “symbolic reparation(s)” such as “identifying a national day of remembrance and reconciliation, erection of memorials and monuments, and the development of museums.”[30]

Joinet’s third set of principles is the victims’ right to reparations, which is deeply established in international law.[31] Reparations may include reinstatement, compensation, or rehabilitation.[32] While reparations are often determined on an individual level (e.g., providing monetary compensation for property loss, or medical treatment for injuries suffered during a conflict), they may also be provided in a collective manner. “Collective measures of reparation involve symbolic acts such as annual tributes of homage to the victims or public recognition by the State of its responsibility, which help to discharge the duty of remembrance and help restore victims’ dignity.”[33]

In 2005, Diane Orentlicher wrote an update to Joinet’s 1997 report. Writing eight years later, Orentlicher was able to draw on the practice of a number of Truth and Reconciliation Commissions and developments in in-



WOMAN LIGHTING BUTTER LAMPS ON KATHMANUD, NEPAL BY FLICKR USER BRYON LIPPINCOTT CC-BY

ternational law to provide further detail and revisions to the provisions Joinet articulated. In 2005, when Orentlicher's report was published, TRCs in Chile, Chad, Ghana, El Salvador, Guatemala and Sierra Leone had already included aspects of memorialization connected to the right to know in their final recommendations and reports. Some of these TRCs called for the erection of monuments that listed all victims, or the conversion of secret detention centers into museums and memorials.

- The 2004 Sierra Leone Truth and Reconciliation Commission stated: "The Commission recommends that at least one National War Memorial be established in memory of the victims of the war. The Commission also recommends the establishment of memorials in different parts of the country. The decision on the National War Memorial should be taken after consultation with the population. It is important to remember that memorials may take different forms. Examples include the establishment of monuments, the renaming of buildings or locations, the transformation of victim's sites into useful buildings for the community, etc." [34]
- The Guatemala Historical Clarification Commission wrote: "The government should promote

forms of remembering and honoring victims that can become a permanent fixture in the collective memory of present and future generations; for example, changing the names of plazas, streets or places in memory of people or events that have a collective significance and epitomize the struggle for human rights. Commemorations should redeem the values and struggles for human dignity that many victims were engaged in and that remain convictions that inspire much of society." [35]. [36]

The 2005 Updated Principles articulates that there is a specific principle of memorialization that was not included in the previous report. This principle is called "the duty to preserve memory." [37] This duty can be seen articulated and implemented in the reports from TRCs that include specific language about preserving archives and memories, such as the ones from Guatemala and Sierra Leone mentioned above. Joinet had included this as the "duty to remember," but Orentlicher's articulation is more explicit. She explains:

"A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments." [38]

Orentlicher's Updated Principles also include specific mention of the preservation of archives not only from a State's records (as a memorialization of what happened), but also of the Truth Commission itself. These archives may include witness statements, evidence, photographs, videos, and other information that would preserve the collective memory.

In the early 2010s, there were further developments of the right to know by the Inter-American Human Rights system, coming from events decades earlier. In the Inter-American Human Rights system, the right to know/the right to truth, stems from the frequent use of enforced disappearances in the region, particularly in the 1970s and 1980s, and from the commissions

created in Argentina, and later in El Salvador and Guatemala. Neither the Inter-American Declaration nor the Convention have specific provisions on the right to truth, but, the Inter-American Court has linked the right to know to IHL provisions as discussed above, as well as to the prohibition on enforced disappearances, deprivation of liberty and failure to provide information.[39] The Court has found that states do have an obligation to conduct an investigation to find the whereabouts of someone who has been disappeared so that the victim's family may know the truth of what happened.[40] The Inter-American Commission has reinforced this obligation, noting that victim's families have a right to know what happened, and States must provide a recourse for families.[41]

Additionally, in a 2012 report to the UN General Assembly, Pablo de Grieff, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, wrote that the measures of "truth, justice, reparations and guarantees of non-recurrence" while essential, may not be sufficient, and "other measures that have the potential to contribute are commemorations, the establishment of memorials and, very importantly, a reform of the educational systems".[42] These are all mechanisms to memorialize events of a conflict or mass human rights violations and ensure that they are not forgotten in the collective memory.[43]

RECENT EXAMPLES: CANADA AND NEPAL

Two of the most recent TRCs have been or are grappling themselves with these various rights and duties and how they should be implemented. In Canada, a Truth and Reconciliation Commission was created by a settlement agreement to address the legacy of the Indian Residential School program, which existed for decades.[44] "These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society . . ."[45] About 150,000 children went through the Indian Residential Schools.[46] This TRC was not created in the aftermath of a conflict or to address wrongs during a war, but the TRC recommendations were quite extensive in regards to memorialization.

The TRC report provides extensive and holistic "calls to action," including one specifically for museums and archives. The report calls on museums and archives to ensure that information about the residential schools is available publicly, that there is compliance with the Universal Declaration on Indigenous Rights, and asks the federal government to ensure resources for reconciliation related events/activities/exhibits at museums and archives.[47] Perhaps most substantially is the creation of the National Centre for Truth and Reconciliation, which houses all of the statements from the Truth and Reconciliation Commission, documents, and archives.[48] This is a place where anyone can go to read and learn about the information found through the TRC. It was created to ensure that continued learning and preserve memories.

In Nepal, there are two active truth commissions, one is the Truth and Reconciliation Commission and the second is the Commission on Investigation of Enforced Disappearance. Following a ten year armed conflict in Nepal, the fighting parties, the Government of Nepal and the Communist Party of Nepal (Maoist party), negotiated a Comprehensive Peace Agreement in 2006, which provided for the creation of a truth commission.[49] The commissions were not actually created until February 2015 through a piece of domestic legislation, and since their creation, they have received about 60,000 complaints.[50] They had mandates until only 2017, which were extended by one year until 2018, and which were then extended again for another one year each.[51] Unfortunately, the commissions have only five members,[52] which make the work quite slow given the volume, but the commission has a mandate to investigate and publish information, and to recommend reparations or compensation. Memorialization has become an essential part of the work of a truth commission.

In 2017, the International Center for Transitional Justice published a report based on interviews with Nepalis who were victims of the armed conflict.[53] The report delves into the significance of memorialization in Nepali culture, and unofficial efforts to remember victims of the war from 1996-2006. Nepalis who participated in the study noted numerous reasons why public memorialization was important, including recoding the names of people who were victims of the conflict, and seeing family members publically recognized as victims.[54] The memorials could also

serve to share stories and educate younger generations about the conflict.[55] There are already a number of unofficial memorials that have been built, and participants discussed how the location of the memorial was important in regards to whether they were in an urban area like the capital, where many people who see it, or whether they were constructed locally, where violations happen, or perhaps both for different audiences and purposes.[56] However, many participants noted that the memorials do not reduce their own suffering, but provide a public recognition of it.[57]

CONCLUSION

The actual implementation of the right to know and the right to truth through TRCs has helped human rights systems clarify and strengthen these rights. Many TRCs have reinforced duties to memorialize events, and soft law instruments have also built on these findings to develop the practice of documenting TRCs and a much stronger foundation for the right to know. As observed in some of the original TRCs — such as in South Africa, Guatemala and El Salvador — these commissions upheld the idea of the right to truth simply through their existence and objective. Additionally, the commissions' recommendations to promote memorialization reinforced the idea of the right to know. Founded on IHL and IHRL, the Inter-American system has also provided clearer articulations of these rights. Similarly, additional human rights soft law created through UN reports have further clarified, synthesized, and strengthened the right to know and the duty to remember. The continual dialogue between national mechanisms, regional bodies, and the international UN system has solidified and articulated the rights of survivors, their families, and societies to know what happened during a period of violence and for their States to ensure that these episodes are remembered. These developments have created a strong foundation for current truth commissions, including the commissions in Canada and Nepal, to ensure that memorialization efforts are included in reparations.

* Tracey B.C. Begley is a Legal Advisor for the International Committee of the Red Cross in the Regional Delegation for the United States and Canada. She has worked in Geneva, South Asia and Guatemala, and as part of civil society efforts supporting the negotiations of the Convention on Cluster Munitions. She is a graduate of American University Washington College of Law and serves on the Executive Committee of the Lieber Society on the

Law on Armed Conflict. This article is written in the author's personal capacity and does not represent the views of her employer.

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4 *Id.* at 493 (discussing "memory museums" being built in Argentina, Chile and Peru).

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7 Jean-Marie Henckaerts & Louis Doswald-Beck, *Customary International Humanitarian Law* (2005), <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (Rule 116 (addressing accounting for the dead); Rule 117 (discussing accounting for missing persons); Rule 150 (discussing reparation)).

8 Geneva Convention relative to the Protection of Civilian Persons in Times of War, art. 26, Aug., 12 1949, 75 U.N.T.S 287; Protocol Additional (I) to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 33, Jun. 8, 1977, 1125 U.N.T.S. 3.

9 Geneva Convention relative to the Treatment of Prisoners of War art. 122 (Aug. 12, 1949), 75 U.N.T.S 135. 10 See Henckaerts & Doswald-Beck, *supra* note 7, at Rule 117 ("In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities", to provide information about those who are missing in action.").

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12 *Id.* at Rules 98, 105, 116.

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