

CHAPTER IV. SEARCHING FOR THE TRUTH

1052. Establishing the truth with regard to serious violations of human rights is now acknowledged as a right for victims on both an individual¹⁷⁶⁷ and collective basis: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”¹⁷⁶⁸ The United Nations High Commission on Human Rights has devoted two reports to the study of the scope and substance of the right to truth, which conclude, amongst other things that: “The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.”¹⁷⁶⁹

1053. The people of the DRC have a right to the truth on all the serious violations of human rights committed on its soil. According to a recent study, the vast majority of the population in the east believes it is important to know the truth about what happened in its region.¹⁷⁷⁰ At the Goma conference in January 2008, clear recommendations were adopted in support of the creation of truth-seeking mechanisms by the working groups on North Kivu and South Kivu.¹⁷⁷¹ During their interviews with the Mapping Team, victims and witnesses highlighted the importance of shedding light on past crimes. Some believe, for example, that the various actors involved in the conflicts should be obliged to describe the atrocities they committed in order to free the community from the weight of resentment between different groups of people. During its work in the field, the Mapping Team also noted how certain communities remained polarised, years after the violence, and had never had the opportunity to express themselves openly about the acts directed against them.

¹⁷⁶⁷ See *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1); Principles on reparations (A/Res/60/147); Declaration on the fundamental principles of justice in relation to victims of criminality and victims of abuse of power, 1985; European and inter-American declarations on human rights. See the large amount of case law in the inter-American and European courts of human rights in this area.

¹⁷⁶⁸ See *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Principle 2, (E/CN.4/2005/102/Add.1).

¹⁷⁶⁹ See *Study on the Right to the Truth* (E/CN.4/2006/91), para. 59. See also *The right to the truth*, (A/HRC/5/7).

¹⁷⁷⁰ “Living with Fear”, a population-based survey on peace, justice and social reconstruction in the eastern DRC in August 2008 calculates this proportion at 88% (p. 54). Available at: www.ictj.org.

¹⁷⁷¹ See Final Reports from the workshop at the Conference on peace, security and development in the provinces of North and South Kivu, held in January 2008, which recommend that: a joint independent commission of inquiry (national and international) should be set up for the purpose of identifying the crimes committed in Kivu since 1996, and identifying and proposing sanctions against the perpetrators; the ICC should accelerate investigations of war crimes, genocide and crimes against humanity throughout Congolese territory; a Commission to identify and compensate victims of conflicts and war should be created, charged with ... defining the appropriate kind of compensation, and compensating the victims; the Stabilisation and Reconstruction Fund for Kivu should include a budget for compensating the victims of the conflicts and wars that have ravaged the region since 1996; a new law should be adopted, creating a new TRC; the independence of the judiciary should be respected; public order and security services should be cleaned up.

1054. Establishing the truth about the atrocities committed goes far beyond drawing up lists of cases and victims and some of the presumed perpetrators. The report of the Mapping Team has shed light on certain obscure areas about the atrocities committed in the DRC between 1993 and 2003, supplementing numerous other detailed reports. The official reports and documents, however, have never offered the victims and populations affected a forum where they could express their personal stories and grievances, question leaders directly as fellow citizens and discuss amongst themselves and with others the best way of healing past wounds and exorcising some extremely painful memories. Establishing the truth also involves discussing and putting into perspective the causes and consequences of human rights violations and the structures that allowed or facilitated them. "The questions of *why* certain events were allowed to happen can be as important as explaining precisely *what* happened."¹⁷⁷² These discussions are the only way a consensus on the past will be reached between communities.

1055. Criminal proceedings will evidently not be sufficient to satisfy this strong desire for the truth.¹⁷⁷³ They will only affect a proportion of the crimes committed and will naturally focus on the facts related to the charges against the defendants. The information that emerges from these proceedings, although it will have the authority of a final court decision, will not necessarily be representative of the conflicts, their scale and complexity. Additional mechanisms will be required to complete the exercise of establishing the truth in full. Parliamentary commissions and archive conservation may have a part to play but, like the courts, these mechanisms leave little or no room for victims' accounts.

1056. A new Truth Commission for the DRC, with more of a central focus on the victims than the previous one, would seem to be one of the most appropriate solutions given the scale of the challenge of establishing the facts.¹⁷⁷⁴ Numerous countries have set up truth commissions, defined as "official, temporary, non-judicial factfinding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years."¹⁷⁷⁵ The primary objective of the Truth Commissions is to establish the truth and formulate recommendations on a range of subjects such as a policy on prosecuting the crimes identified, the reparation to be given, the institutional reforms to be implemented, particularly in the security and justice sector, an expression of repentance or the issuing of a public apology by the Head of State or by senior representatives of the State, etc. Over 30 commissions of this kind have already been set up, in particular in Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador,

¹⁷⁷² *Rule-of-law tools for post-conflict States. Truth Commissions*. United Nations High Commissioner for Human Rights, New York and Geneva, 2006, p. 2. (hereafter Truth commissions, HCHR).

¹⁷⁷³ See "FIDH and its Congolese member organisations disappointed by the limited scope of the International Criminal Court's investigations" (cited above), which states: "Nevertheless, FIDH and its three member organisations in DRC deeply deplore that, as Lubanga, Ntaganda is prosecuted only for enlistment, conscription and use of child soldiers. Our organisations have repeatedly called upon the ICC Prosecutor to extend his investigations, in order to ensure that ICC investigations and prosecutions are representative of crimes committed in Ituri", available at: www.fidh.org.

¹⁷⁷⁴ As a general rule, the role of a truth commission should be considered supplementary, and certainly not as an alternative, to action through the courts. See Truth commissions, HCHR, p. 27.

¹⁷⁷⁵ See the *Report of the Secretary-General on the re-establishment of the rule of law and the administration of justice during the period of transition in conflict and post-conflict societies (S/2004/616)*, para. 50 (hereafter Report on the rule of law).

Guatemala, East Timor and Sierra Leone.¹⁷⁷⁶ The commissions set up in El Salvador, Guatemala, East Timor and Sierra Leone have benefited from a significant level of support and assistance from the United Nations.

1057. These commissions can help to determine institutional responsibilities, both political and military, to preserve evidence, to identify the perpetrators of atrocities and to recommend reparation measures and institutional reforms. They can also offer victims a platform where they can express themselves, which is more appropriate to their needs than a judicial procedure. In spite of their non-judicial nature, truth commissions sometimes have investigative prerogatives and powers in order to obtain official documents and to oblige witnesses, the perpetrators of crimes and other people with knowledge of the facts to appear before them.

1058. A Truth and Reconciliation Commission (TRC) operated in the DRC during the transition. Before proceeding to the creation of a new institution, which is already being discussed in institutional circles, this would be an opportune moment to review the experience of the Congolese TRC, which was not particularly conclusive according to the participants who talked to the Mapping Team during the round-table discussions on transitional justice.

A. Brief assessment of the TRC during the transition

1059. The signatories to the Global and Inclusive Agreement decided that a TRC would be established, and that this commission would examine all political, economic and social crimes committed between 1960 and 2003, in order to establish the truth and help individuals and communities to be reconciled.¹⁷⁷⁷ The TRC was one of five institutions designed to support democracy that were created during the political transition period.¹⁷⁷⁸ The aim of these institutions was to guarantee neutrality and impartiality when organising free, democratic and transparent elections, to ensure media neutrality, to consolidate national unity by providing true reconciliation among the Congolese people, to promote and protect human rights and to promote ethical and republican values. Article 4 of the TRC organic law exclusively gave this body the specific mission to "re-establish the truth,¹⁷⁷⁹ promote peace, justice, reparation, forgiveness and reconciliation,¹⁷⁸⁰ with a view

¹⁷⁷⁶ For a detailed, comparative analysis of truth commissions, refer in particular to: Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York, Routledge, 2001.

¹⁷⁷⁷ Resolution DIC/CPR/04.

¹⁷⁷⁸ See articles 154-160 of the transitional Constitution arising from the Global and Inclusive Agreement signed in Sun City (South Africa) in April 2002.

¹⁷⁷⁹ By "truth", the first paragraph of article 4 of law no. 04/17 dated 30 July 2004 concerning organisation, allocation of mission and functioning of the Truth and Reconciliation commission means the "clear and objective restating of the historical reality of events, crimes and human rights violations that, during the period in question, directly caused a person or a group of persons harm, whether psychological, physical, social or material".

¹⁷⁸⁰ Reconciliation is defined in paragraph 2 of article 4 of this law as "re-establishment of harmony, concord, true peace and positive spirit between Congolese individuals and groups, perpetrators and victims of various types of harm and crimes committed during the period in question, with a view to restoring national unity; reconciliation involves acknowledging that events occurred, asking for and granting forgiveness, fair reparation for harm and crimes and psychological and physical rehabilitation".

to consolidating national unity." In view of this, it had to ensure "assistance to citizens during the transition; prevention or management of conflicts using mediation; creation of a space in which Congolese people can express themselves; pursuit of a way to manage the healing of trauma and re-establishment of mutual trust between Congolese people" (article 5, TRC law).

1060. Unfortunately, the TRC was not able to carry out its mandate of establishing the truth, which led an international NGO specialized in transitional justice to call the TRC's work "a complete failure".¹⁷⁸¹ This harsh observation is shared by most members of civil society met by the Mapping Team. At the time of its *de jure* dissolution at the end of the transition period,¹⁷⁸² the TRC had not opened a single enquiry; nor had it collected any witness statements from victims of or witnesses to violations. Among the reasons for this failure, the following main reasons can be mentioned:

- **Nature of its composition:** The TRC's membership was based on the principle of inclusiveness, which was the basis for the Global and Inclusive Agreement. All transitional political and civic institutions were created using the same model of membership and management during the transition. Application of this principle, with no accompanying adherence to criteria for selection of members of the institutions designed to support democracy during the transition, has had particularly severe consequences for the workings of the TRC. It has meant that the TRC has lost credibility in the eyes of victims, because of the past histories of some commissioners, who were involved in crimes that they should have investigated, and their links with armed groups or forces. This feature of its membership undermined the independence of the commission and meant that the TRC was never able to gain the trust of victims, national or international NGOs or of the international community.¹⁷⁸³ In addition, once that legitimacy was lost, the TRC was not able to obtain support and help from several partners that had shown interest.
- **Lack of a consultation process:** no effort was made to consult the population about the aim, model, membership, powers and activities of the commission before the law was passed by Parliament. The law was drawn up by the President-designate of the TRC, inspired by the South African model and by the resolution arising from the Inter-Congolese Dialogue. This lack of consultation was one of the key reasons for the failure of the TRC, which never understood the needs and expectations of the population.

¹⁷⁸¹ For more information, read "Confronting Past Crimes at the National Level", ICTJ, January 2009, which contains the following: "The work of the Congolese Truth and Reconciliation Commission (TRC) is largely discredited." available at the following address: http://www.ictj.org/static/Factsheets/ICTJ_CAR_fs2009.pdf.

¹⁷⁸² Article 222 of the Constitution of the Third Republic states that "Institutions to support democracy shall be fully dissolved when the new parliament is created".

¹⁷⁸³ The following appears on page 26 of the report from the national TRC workshop, which was held at the Stade des Martyrs in Kinshasa between 25 and 28 February 2004: "... there is still great mistrust towards some members of the TRC, because of the procedures used to appoint them. In addition, the commission is the result of a political process. The fact that the commission is made up of persons nominated by those taking part in the Inter-Congolese Dialogue raises questions about the credibility and independence of this institution, as well as its objectivity and impartiality".

- **Dual mandate - truth-seeking and mediation:** The TRC's mandate was not only to establish the truth, but also to prevent and manage conflict using mediation. TRCs, which are generally established after hostilities have ended, are not usually given the mandate to mediate in conflict resolution. This part of the TRC's mandate was enacted as a priority by the commissioners, who travelled to North and South Kivu several times in order to mediate between local military and political figures. These activities, which were begun in a context of persistent conflict during the transition, seem to have overtaken the central mandate of truth-seeking, and mediation took most of the commissioners' resources, to the detriment of the other aims devolved to the TRC. Without seeking to evaluate the success or failure of this mediation, it should nonetheless be noted that such tasks do not strictly speaking form part of transitional justice, and ought to have been devolved to an institution other than the TRC. In any case, TRC commissioners were mobilised in order to carry out this mission, to the detriment of the truth-seeking mission.
- **Unrealistic mandate:** Even if we disregard the mediation mandate, the truth-seeking mandate proves to be unrealistic and impossible to carry out, even for a fully functional TRC. According to article 8 of the law, the TRC was obliged to investigate political, socioeconomic and other events that disturbed the peace in the DRC, to identify the perpetrators and the victims and to determine the extent of harm caused, to suggest to the competent authority whether an individual or collective request for amnesty should be accepted or rejected, and other tasks in addition. The period covered by the TRC's mandate was to be "from 30 June 1960 to the end of the transition". Examining such a long period (over forty years) during which there was a long dictatorship, many internal conflicts and international wars, and for which there were no archives for reference, apart perhaps from those in the National Sovereign Conference (CNS), was an insurmountable challenge for the TRC.
- **Lack of human and material resources:** Application of the principle of inclusiveness had the effect that the majority of commissioners, who were chosen on the basis of political loyalties, had no professional competence to perform the tasks that were devolved to them. These facts made it very difficult for the TRC to obtain the material resources that it required in order to function, given that the Government expected that the international community would make a significant contribution; the international community proved reluctant to fund a commission that lacked credibility to such an extent.

B. Creation of a new TRC

1061. The demand for truth and for a new TRC remains strong in the DRC, despite the experience of the previous commission, which did not have the resources to carry out its mandate. In his closing speech at the Goma Conference in February 2008, President Kabila positively welcomed the demand for the creation of a new TRC¹⁷⁸⁴. The former President of the TRC, Monseigneur Kuye, presented a new bill to Parliament in March

¹⁷⁸⁴ Speech by His Excellency the President of the Republic closing the Peace, Security and Development Conference in North Kivu and South Kivu, Goma, 22 February 2008, p. 5.

2008, but this bill did not appear to take into account the criticisms that had been made of the first TRC and the reasons for its failure. No consultation process took place, and with a similar mandate and method for appointing commissioners as the previous TRC, all the necessary conditions for a further failure seemed to be in place.

1062. Nevertheless, the need for a new TRC remains, so that light may be shed on the conflicts that tore the country apart. There are multiple challenges to be met; the DRC is a vast country, several regions are difficult to access and practically no region has escaped the violence. The violations were innumerable, as were the victims and perpetrators, as noted in sections I and II of the report. Many individuals who are responsible for past acts of violence now occupy positions of power and have little interest in seeing the truth disclosed; in fact, the opposite is true. The international dimension to some conflicts that unfolded on DRC territory also pose particular difficulties in establishing the truth, while enabling some to obscure the role played by Congolese figures.

1063. In order to avoid the errors made in the past, a serious and wide-ranging consultation process must be carried out, in a non-politicised atmosphere, so that the work of the TRC will be based on a credible foundation and mandate that will be needed if it is to establish the truth. This broad consultative process should act to "seek especially the views of victims and survivors, and make clear the functions, strengths and limitations of truth commissions."¹⁷⁸⁵

1064. Civil society must be involved in the organisation of such a consultation process. Civil society organisations, particularly those involved in the defence of human rights, have played a very important role since the beginning of the 1990s and during the Inter-Congolese Dialogue period. Civil society continues to act as a counterbalance to State institutions, although it has been considerably weakened since the transition began, because of the fact that several of its influential members have been appointed to public positions. At the same time, internal leadership struggles have distracted some organisations from their stated mandates. Cases of intimidation of figures from civil society continue to be reported, some with tragic consequences. It is important that efforts be made to help victims to organise themselves so that they can be better prepared to contribute to the consultation process and the creation of a truth-seeking mechanism.

1065. Participants in the round-table meetings about transitional justice organised by the Mapping Team were insistent that a truth-seeking mechanism should be on a national basis, which seemed to them to be a requirement if there were to be true national reconciliation around a common history for all Congolese people. However, they also emphasised the importance of a regional dimension for the mechanism, which would be essential given the size of the country, the need to ensure access for victims, and the specific regional characteristics of the conflicts. Such a mechanism would have to travel around, or have regional outposts, particularly in those regions that were worst affected by conflicts, and in which communities are more divided today. It would, however, remain necessary to hold sessions about these events in the capital, from the point of view of national unity, in order to examine the waves of violence that swept the country from

¹⁷⁸⁵ Truth Commissions, OHCHR, p. 5.

east to west and to prevent the regions in the west of the country from feeling denigrated or not concerned by the work and recommendations of the commission.

1066. Although there is no magic formula or ready-made template for a truth-seeking mechanism, it is possible, in the light of the experience of the first TRC in the DRC and in the Congolese context, to propose some basic principles which should enable some of the identified issues to be overcome.

- **Need for broad consultation:** This was absent from the first TRC and from the new plan lodged with Parliament; a consultative process involving victims and representatives from civil society appears to be indispensable if the basic parameters of a future mechanism are to be identified, and if the population are then to understand how this mechanism works and recognise that it is credible and legitimate¹⁷⁸⁶.
- **A realistic and precise mandate:** The primary mandate of the mechanism must be truth-seeking. Given the numerous conflicts that have plagued DRC, the mandate is already rather demanding in itself and should be limited to the periods in history that have produced the most serious violations of human rights and of international humanitarian law.
- Truth-seeking must shed light on the serious violations that have been committed, and must determine their characteristics, causes and effects, in order to contribute to reconciliation. Faced with the innumerable violations of rights of all kinds that were committed in the DRC, the mandate should be limited to serious violations of human rights and of international humanitarian law.
- Commissioners should pay particular attention to certain groups that have been particularly badly affected by violence in the DRC, particularly women, children and some minorities and ethnic, political and national communities.
- **Other mandates:** The variety of different mandates with which the first TRC in the DRC was entrusted contributed to its failure. A TRC cannot act as a substitute for a mediation facility or a reparation mechanism¹⁷⁸⁷. Of course, it can make relevant recommendations in this area, as it will have the opportunity to hear evidence from many victims and to evaluate the awful consequences of the violence they have suffered.
- It is generally thought that the TRC will contribute to reconciliation by carrying out its truth-seeking mandate, even though in some circumstances this contribution will be very modest. On the other hand, paying particular attention to the numerous ethnic conflicts in the DRC, and looking for the underlying causes of this type of violence, can certainly help to prevent such events and promote a greater openness in dialogue, which is a pre-requisite for reconciliation.

¹⁷⁸⁶ "Truth commissions are invariably compromised if appointed through a rushed or politicized process. They are best formed through consultative processes that incorporate public views on their mandates and on commissioner selection." *Report on the rule of law (S/2004/616)*, para. 51; "These consultative processes should have two equally important aims: increasing the understanding of a truth commission and strengthening its terms of reference through input about the most appropriate mandate." Truth Commissions, OHCHR, p. 7.

¹⁷⁸⁷ "... truth commissions are not well placed to implement an extensive reparations programme themselves", Truth commissions, OHCHR, p. 28.

- **Powers of the Commission:** A truth-seeking mechanism must have all the powers it needs to carry out its mandate. Given the expected reluctance of some figures in the DRC to take part in a truth-seeking exercise, it is of primary importance that any mechanism has the power to question witnesses, to compel them to attend, to protect them if necessary, to guarantee that their testimony cannot be used against them in legal proceedings and to obtain the authorities' full co-operation. One of the most controversial aspects of the powers granted to some TRCs has been the power to grant amnesties to perpetrators who show repentance. Such prerogatives must be compatible with the principles of international law in this area, as reflected in the current amnesty laws in the DRC, and must not be applied to war crimes, crimes against humanity or crimes of genocide.¹⁷⁸⁸ Finally, given the numerous instances of interference by the political and military authorities in the judicial system in the DRC, as shown in section III of this report, it seems essential that this mechanism be granted the power to penalise "anyone who improperly interferes with... the commission".¹⁷⁸⁹
- **Composition of the TRC:** As previously shown, the choice of commissioners for the first TRC caused it to lose all credibility and led to its failure. The selection process and eligibility criteria for members of any new truth-seeking mechanism in DRC, their credibility, independence and competence will to a large extent determine the legitimacy of such a mechanism, the support it receives and, ultimately, whether it succeeds or fails.¹⁷⁹⁰ Several Congolese participants in the round-table meetings about transitional justice expressed their great distrust for various parties and political groups who share power among themselves in the DRC.¹⁷⁹¹ In such cases, the appointment of members of a truth-seeking mechanism must be done using a transparent process that is as consensual as possible. As for the members of the body, "ideally, these should be widely respected members of society (or international figures) who are accepted as neutral by all sides of a previous conflict (or the group as a whole should be seen to be representative of a fair range of views)".¹⁷⁹² Given the missed opportunity that was the first TRC, and the background of distrust between the various parties and from the population, the possibility of appointing international members to the commission should also be explored, following the example of the proposed Truth and Reconciliation Commission in Burundi and the commission in Sierra Leone.
- **Content of final report:** When establishing the truth about serious violations of human rights committed in the DRC, and the causes and consequences of these violations, a truth-seeking mechanism should be in a position at least to make recommendations on measures whereby victims can receive reparations and

¹⁷⁸⁸ See section III, chapter III.

¹⁷⁸⁹ "The commission should also be given sufficient power to ensure that penalties—perhaps fines, imprisonment, or both—can be imposed upon anyone who improperly interferes with or knowingly provides false information to the commission, or who violates its subpoena or witness protection powers, for example." Truth Commissions, OHCHR, p. 10-11.

¹⁷⁹⁰ "To be successful, they must enjoy meaningful independence and have credible commissioner selection criteria and processes." *Report on rule of law* (S/2004/616), para. 51.

¹⁷⁹¹ This distrust towards a mechanism that is responsible for seeking truth is entirely justified. In such cases "Any inclination to put political leaders or representatives of political parties, factions or former armed groups on the commission should be strongly resisted." Truth Commissions, OHCHR, p. 13.

¹⁷⁹² Truth Commissions, OHCHR, p. 13.

compensation, on institutional reforms, particularly in the security and justice sector, in order to prevent such violations in the future, and, if required, recommend punishments for these.

1067. The success of any new truth-seeking mechanism remains highly dependent on a strong commitment from the Government to confront the past and on a conviction that establishing the truth is essential if there is to be a peaceful transition to a country in which the rule of law is respected. Any efforts by civil society and the international community will be useless without such a commitment from the Government. It would be important that the Government make a series of commitments before establishing a new institution:

- Undertake to create as soon as possible an independent, neutral, credible, impartial and professional body, as soon as the results of consultations as to the nature of this body are received;
- Promote recruitment of leaders and of staff who have the necessary integrity, who are technically competent and who are willing to promote human rights widely;
- Equip the commission with a clear and realistic legal framework, and the material and financial resources required in order to ensure that it is independent and effective;
- Undertake to implement recommendations issued by the truth-seeking mechanism once the final report is received, and if necessary to create specific mechanisms with the mandate to implement the recommendations of the TRC.

1068. With a clear commitment from the Government, a real national dialogue and vigorous support from the international community, the Mapping Team is convinced that a truth-seeking mechanism could make an important contribution to consolidation of peace in the DRC.