

## A right to truth, victims and the International Criminal Court

Mass graves were the key topic of the Feb-April issue of this magazine. It was pointed out there, how important it is for families of victims to know what happened to their loved ones. This need to know the truth is mirrored in international law through the emergence of 'the right to truth'; this right is the focus of the following contribution. In particular the question is whether victims participating in the proceedings at the International Criminal Court in The Hague can argue for the realisation of this right. Originally based in the Geneva Conventions and relating specifically to the issue of missing persons during both international and internal armed conflict, the right to truth was developed in the 1970s through the case law of the Inter-American Commission on Human Rights and the work of intergovernmental bodies as a response to the problem of enforced disappearances, and in particular, to the need of the families of the missing to know the fate or whereabouts of relatives or loved ones.

The right of victims and their families within this context has been widely recognised by regional and international bodies, including the Inter-American Court of Human Rights, the UN Human Rights Committee, the UN Working Group on Enforced or Involuntary Disappearances and the Parliamentary Assembly of the Council of Europe. The International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in December 2010, affirms the right to truth in the specific context of forced disappearance.

While the right to truth was initially developed in relation to missing persons and those subjected to enforced disappearance, its application has since been broadened to encompass other serious violations of human rights law, including torture and extrajudicial killings.<sup>1</sup> In an attempt to clarify whether the right to truth has an effective place in the context of international criminal justice, specifically the International Criminal Court, an empirical study into stakeholder attitudes was conducted.<sup>2</sup> After outlining the nature of the right, the contribution here will summarise some of the findings from this study on the right to truth.

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<sup>1</sup> *Ignacio Ellacuría et al v. El Salvador*, IACHR, Report No. 136/99, 12 December 1999, para. 221.

<sup>2</sup> The research employed semi-structured, in depth, interviews with 23 individuals from the Office of the Prosecutor, judges, defence lawyers, court advisors, victim representatives and NGO representatives between

### *What is the material scope of the right to truth?*

The right to truth encompasses the right to seek and obtain information relating to the reasons and causes which lead to the victimisation of the individual(s) concerned, together with the prevailing conditions, circumstances and reasons which lead to or otherwise facilitated the gross violation of human rights more generally. The right also encompasses the acquisition of information concerning the particular circumstances in which specific violations took place, including the facts of those violations themselves and, in the event of death or enforced disappearance, the fate and whereabouts of those involved. Finally, the right encompasses knowledge as to the progress and results of the State investigation into the matter, together with the identity of the perpetrators.

### *Why does this right matter?*

The right to the truth about gross human rights violations reflects a fundamental need for victims and their families, and arises as a result of the State's positive duty to protect and guarantee their rights. At a societal level, the right to truth exists as a means of ensuring transparency, ending impunity and protecting human rights. In a recent decision of the European Court of Human Rights, the Court acknowledged the societal relevance of the right to truth, noting its significance in strengthening public confidence in the workings of State institutions and the rule of law more generally. In addition, the Court found that knowledge of the truth was instrumental in breaking down what it described as 'the wall of silence and the cloak of secrecy'<sup>3</sup> that prevented victims from understanding what had happened to them and hindered their recovery.

Normally it is the State who should enforce this right by providing a full and comprehensive investigation, for example. But according to an early decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY), '[i]nternational criminal justice...must pursue its mission of revealing the truth about the acts

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<sup>3</sup> *El-Masri v The former Yugoslav Republic of Macedonia*, ECtHR, Application no. 39630/09, 12 December 2012, Joint concurring opinion, para 6.

perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility'.<sup>4</sup> The truth-seeking function of the Court begins prior to the conduct of any trial, and includes a period of investigation, evidence-gathering and verification of charges. For the purpose of conducting its investigation into alleged offences, international criminal law mechanisms, unlike their human rights counterparts, operate within the territories of the abusing States, and as such, have first-hand access to evidential materials, including those which might assist in answering the many questions that victims and their families have in the aftermath of atrocities. Despite the truth-seeking function of the international criminal tribunals, however, their primary goal remains the determination of the guilt or innocence of the defendant. So the question is: to what extent can the right be realised as a secondary goal at the ICC?

### *The right to truth and the International Criminal Court (ICC)*

Operational since 2002, the ICC is the first permanent institution for trialling international crimes. Importantly, apart from being permanent and attempting to close the impunity gap across the world for crimes committed at the times that the court already existed, the ICC builds upon the respect for international human rights. Article 21 and 67 of the Rome Statute, for example, build upon accepted standards of human rights for the conduct of a trial. In addition the International Criminal Court has two innovative features: firstly it allows for victim participation during the proceedings and secondly it has a mandate to develop reparative principles.

The question as to whether the right to truth is of relevance to the ICC is justified for a number of reasons:

Firstly, the Rome Statute provides for victim participation. It is the victims in which the right is vested, although it should be noted that victims do not become a party to the proceedings. Furthermore, the rights and powers of victims and the modalities of their participation are not expressed with clarity and so are left to the judges to develop.

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<sup>4</sup> *Prosecutor v Karadžić and Mladić*, IT-95-5-R6, IT-95-18-R61 Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, 3.

Also relevant is the Prosecutor's investigative duty which comprises an obligation to seek to establish the truth, and in particular, to consider whether there might be criminal responsibility under the terms of the Statute. In addition, Art 69(3) includes a truth-finding provision for the judges.

Secondly, the law applicable to the ICC arguably includes the right to the truth in some sense. Article 21(1), through its hierarchical list of applicable law, does permit recourse to 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict' and through this take the right to truth into consideration.

Thirdly, Article 7(2)(i) of the Rome Statute defines enforced disappearances as a crime against humanity. The failure to provide information in the case of those missing is named as an element of the crime itself, rather than as an aspect of the remedy.

Fourthly, a decision concerning the procedural rights of victim participants, suggests that the topic of a victim's right to the truth is of relevance, with a single judge noting that 'the victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility' formed the basis of the right to truth in respect of serious human rights violations.<sup>5</sup>

And finally, the reparation mandate of the ICC leaves scope to contemplate whether the right to truth could influence reparations decisions: The first reparations decision confirmed the non-exhaustive nature of the possible reparations, noting that '[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.'<sup>6</sup>

There are, however barriers to the emergence and realisation of the right to truth at the Court. This includes the role of the Prosecutor: her selection of situations, cases and charging itself can be perceived from the victims' points of view as arbitrary. Some investigation decisions may limit the emergence of truth. And therefore consultation with victims has been suggested as important at this stage. Similar

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<sup>5</sup> Situation in the Democratic Republic of the Congo, *Prosecutor v. Katanga and Ngudjolo*, *Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case*, ICC-01/04-01/07-474, 13 May 2008, para. 32.

<sup>6</sup> *Prosecutor v. Lubanga Dyilo*, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06-2904, 7 August, 2012, para. 222.

concerns over charging decisions (the selection of offences and modes of offending) exist. The argument is that victims should have enhanced legal rights to seek control over charging. In essence, a lack of a possibility of challenging the prosecutor is what arguably hinders victims in their attempt to enhance the truth finding process; and more importantly, perhaps, when challenging a decision which resulted in a negative outcome, to receive an explanation as to why that decision has been taken. Fair trial concerns have been voiced: Any attempt to expand the breadth of truth-seeking activity and disclosure by the court is likely to result not only in practical and jurisprudential difficulties, but risks impinging upon the defendant's right to a fair and expeditious trial.

However, due to the second innovative feature at the ICC, namely the reparation phase, there might be scope there to argue for the realisation of the right to truth. Pursuant to Article 75, reparation may be awarded to victims with reparation including restitution, compensation and rehabilitation. In the final report of the focal point on stocktaking exercise of international criminal justice at the Review Conference in Kampala it was expressly recognized that with regards to victim participation and reparation a key challenge was

(ix) Developing mechanisms to address reparations at the national level and help to facilitate victims' rights to truth, justice and reparations, with a particular focus on ensuring access and benefits for women and children.<sup>7</sup>

Identifying the advancement of the right to truth as a challenge implies that it is linked to, if not forming part of, the Court's mandate, remit and objectives with regards to reparation. Numerous submissions to the Court with regards to reparation are in agreement with this suggestion. However, without a conviction there can be no reparation. To date the decision in the *Lubanga* case is the first regarding reparations. It is clear from this decision that during the reparations proceedings the Courts' primary concern are the victims, whilst prosecution and defence remain parties to the proceedings and that here the chamber is determined to read the statute in a flexible and broad manner to allow for the widest possible remedies.

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<sup>7</sup> RC/11, annex V(a) Stocktaking of international criminal justice, The impact of the Rome Statute system on victims and affected communities, Final report by the focal points (Chile and Finland), Appendix III Discussion Paper, at 101.

### *The current status quo*

Whilst neither the Rome Statute nor the accompanying documents include express reference to the right to truth, arguably there is enough flexibility within the Rome Statute to warrant an exploration of the relationship between the right to truth and the truth seeking obligations contained within the Rome Statute to increase our understanding of the extent to which this is theoretically possible.

Furthermore, it is worth stressing that one of the key findings is that the research question is far more than platitudinous: real dialogue as to what, how and to what extent victims' right should feature at the ICC is taking place with the content contested. Without doubt the importance of victims being able to ascertain the truth is recognised at the Court. But whether an international criminal justice mechanism is a good and viable means to achieve this aim is questionable. To some extent this can be linked to the fundamental question of what the point and purpose of a criminal trial is. These are conceptual and intellectual differences are also illustrated in dissenting judgments and in different approaches taken by the chambers. There is no reason to think these differences are negative factors. Rather, they appear as effective points of dialogue within the Court through which the most appropriate realisation of victims' rights to the truth can emerge through a criminal process; to complement, perhaps, its emergence in other forms through other processes such as human rights law.

For now, despite the fact that the right to truth is firmly embedded within human rights law and the transitional justice discourse, the Statute obligations may only lead to a limited realisation of this right at the ICC. Given the Prosecutor's current preliminary investigations in Honduras, Colombia and Guinea expressly referring, inter alia, to enforced disappearance, the issues surrounding the right to truth are likely to be subject to future judicial analysis and decision at the Court.