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THE HUMAN RIGHT TO THE TRUTH IN INTERNATIONAL LAW: ON SOME 'UNTIMELY MEDITATIONS'

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ABSTRACT

In the second part of his *Untimely Meditations*, Nietzsche asserts that the motto of History raised to the status of a science in the nineteenth century is *fiat veritas, pereat vita*. Nietzsche draws a line between the right uses of History that serve life, and the wrong uses that jeopardise life. This text seems to capture or encompass if not all at least many of the criticisms now levelled at the right to the truth. Starting from this critical discourse, the paper tries to answer the following question: might not this ambition to establish the truth and to make truth a 'human right' – that is, a universal right deemed to be inherent in human nature – lead to blockages and dead-ends, or even completely jam the social machinery so preventing its renewal and reproduction, in other words preventing it from living?

To try answering this question, the paper presents the right to the truth in context in the legal texts as an emerging human right in international law before trying to describe the main challenges that the right to the truth must take up. In conclusion, the paper looks at the role that international supervisory bodies must play in securing the right to the truth nationally.

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1. The opinions expressed here are the author's alone and do not reflect the positions of the Working Group on Enforced or Involuntary Disappearances or the United Nations.

¿Donde Están? This question, asked relentlessly of the Argentinian dictatorship by the mothers and grandmothers of the Plaza de Mayo, expresses an elementary, almost vital need for the truth. What has become of them? Their bodies cannot have vanished into thin air. We gave birth to them, we raised them, we loved them. All these physical sensations and feelings are not imaginary. Even Reason of State cannot decree a being be totally wiped out. There always remains a trace in the intimate history of hearts, or rather a void that cannot be filled and that sucks into it, as it were, all life around it; a void through which life ebbs away without end. This demand for individual truth brings to mind another image, the image of the Nuremberg Trials, the place where a collective history was written, where a historical judgment was handed down on war, on its atrocities and on 'German guilt'.[2] What was at issue there was less each victim's suffering than the political balance of the new Europe, the founding of a new international order, the historical 'never again', a sort of promise made after investigation in order to determine 'How did things come to that?'

These are two kinds of truth – individual and collective – that are the subject matter of a new – still emerging – human right to the truth. It is clearly understood that this is not about just any truth, including historical truth. The truth this right pertains to concerns serious crimes under international law, atrocities committed during periods of conflict or political crisis.[3] The question the right to the truth tries to answer is how to cope with mass crimes and 'administrative massacres' organised by the state apparatus.[4]

In the second part of his *Untimely Meditations*, Nietzsche asserts that the motto of History raised to the status of a science in the nineteenth century is *fiat veritas, pereat vita*.[5] For Nietzsche, History and the search for historical truth must serve life and is not for 'the weakening of the present or for depriving a vigorous future of its roots'.[6] Nietzsche draws a line between the right uses of History that serve life,[7] and the wrong uses that jeopardise life. This text seems to me to capture or encompass if not all at least many of the criticisms now levelled at the right to the truth. The question that guides my thought somewhat is precisely this: Might not this ambition to establish the truth and to make truth a 'human right' – that is, a universal right deemed to be inherent in human nature – lead to blockages and dead-

2. K. Jaspers, *Die Schuldfrage*, 1947, *The Question of German Guilt*, transl. E.B. Ashton (New York, Doubleday, 1948).
3. I shall not address here the related – but, to my mind, separate – question of a right to the truth and to reparation for 'crimes of history', that is, crimes that affected past generations and for which reparation is claimed by the descendants of the direct victims. My contribution concentrates on transitional periods, that is, periods when the generation of the victims is still alive. On the crimes of history see especially L. Boisson de Chazournes et al., *Crimes de l'histoire et réparations : les réponses du droit et de la justice* (Brussels, Editions de l'Université de Bruxelles, 2004); A. Garapon, *Peut-on réparer l'Histoire ? Colonisation, esclavage, shoah* (Paris, Odile Jacob, 2008); P. Hazan, *Juger la guerre, juger l'Histoire* (Paris, PUF, 2007).
4. H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (New York, Penguin, 1963). The expression was taken up by M. Osiel, *Juger les crimes de masse. La mémoire collective et le droit* (Paris, Seuil, 2006) p. 32: 'An administrative massacre … is a large-scale violation by central government of fundamental human rights concerning life and freedom in a systematic and organised manner, often against its own citizens and generally in a context of war, whether civil or international, real or imaginary'.
5. 'Let truth prevail though life perish.' F. Nietzsche, *Untimely Meditations*. Part Two: On the uses and disadvantages of history for life, edited D. Breazeale (Cambridge University Press, Cambridge, 1997), p. 78. This is plainly an ironic reference to the maxim *Fiat justicia, et pereat mundus* – 'let justice be done though the world perish'. Among other passages, see 'When the historical sense reigns without restraint, and all its consequences are realized, it uproots the future because it destroys illusions and robs the things that exist of the atmosphere in which alone they can live. Historical justice, even when it is genuine and practised with the purest of intentions, is therefore a dreadful virtue because it always undermines the living thing and brings it down: its judgment is always annihilating. If the historical drive does not also contain a drive to construct, if the purpose of destroying and clearing is not to allow a future already alive in anticipation to raise its house on the ground thus liberated, if justice alone prevails, then the instinct for creation will be enfeebled and discouraged.' p. 95.
6. *Ibid*., p. 77.
7. *Ibid*., p. 67. 'That life is in need of the services of history, however, must be grasped as firmly as must the proposition, which is to be demonstrated later, that an excess of history is harmful to the living man. History pertains to the living man in three respects: it pertains to him as a being who acts and strives, as a being who preserves and reveres, as a being who suffers and seeks deliverance.'

ends, or even completely jam the social machinery so preventing its renewal and reproduction, in other words preventing it from living?

To set about answering this question, I am first going to put the right to the truth in context in the legal texts as an emerging human right in international law (Part I) before trying to describe what I see as the main challenges that the right to the truth must take up (Part II). In conclusion, I shall say a few words about the role that international supervisory bodies must play in securing the right to the truth nationally.

I. WHAT RIGHT?

It would be pointless to look for a 'right to the truth' in the various early declarations or conventions on human rights, whether national or international. The 1948 Universal Declaration of Human Rights, in particular, contains no such right; indeed the very idea of it was absent at the time of drafting.[8] The right to the truth therefore stems from international humanitarian law, which itself at that time addressed concerns which had to do with compassion and were remote indeed from a rights-based approach. The Geneva Conventions of 12 August 1949 do, however, contain a number of provisions about the identification of persons, the search for persons or the re-uniting of families.[9] In this vein, the 22nd Red Cross and Red Crescent Conference in 1973 adopted a resolution on the question of the missing and dead in armed conflicts (Resolution V).[10] Further to that resolution, the UN General Assembly adopted resolution 3220 (XXIX) on 6 November 1974 'Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts' in which it recognised that 'one of the tragic results of armed conflicts is the lack of information on persons—civilians as well as combatants—who are missing or dead in armed conflicts' and considered that 'the desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible…'.

Three years later three provisions on missing persons were inserted in Protocol I to the four Conventions. Article 32 of Protocol I recognises in particular the *right* of families to know the fate of their relatives. Articles 33 and 34 organise the search, gathering and transmission of data and the provisions for inhumation and return of remains of persons reported missing. These provisions are a significant qualitative leap insofar as they make it possible to shift from the compassion approach – humanitarian in the narrow sense of the word – to a rights-based approach: we move from the 'fundamental human need' to the idea of a 'right' to the truth, not yet a human right but already a subjective right of victims that can potentially be upheld in a court of law.

These texts served as a basis for the claims by the families of the missing in Latin America.[11] This enabled them to put their claims in the form of a 'right to the truth' from the late 1970s. This discourse was very soon echoed by the international bodies for the protection of human rights.[12] A new stage was completed in the early 1990s when the individual claim for a right to the truth became mingled

8. Even before stating a right to the truth, some human rights in the 1948 Declaration and other instruments could be invoked in support of a claim to shed light on crimes of the past, such as the right to effective remedy (UDHR article 8), the right to a fair hearing (article 10) and the right to seek, receive and impart information freely (article 19).
9. Convention I, art. 16 and Convention II, art.18 on the identification of the wounded, sick and dead; Convention I, art. 17 and Convention II, art. 20 on prescriptions for burial of the dead in such a way as to allow their subsequent identification; Convention III, art. 17 on the identification of prisoners of war; Convention IV, art. 26 on reuniting dispersed families.
10. Available on the CICR website: https://www.icrc.org/customary-ihl/eng/docs/src_ixinco
11. See the report by Louis Joinet at the Paris Conference January/February 1981 in *Le Refus de l'oubli. La politique de disparition forcée de personnes* (Paris, Editions Berger-Levrault, coll. 'Mondes en devenir', 1982), p. 302.
12. See especially the first Working Group on Enforced or Involuntary Disappearances reports: doc. UN E/CN.4/1435 (1980), § 187; E/CN/4/1492 (1981), § 5.

with a collective claim on the scale of society and reflections on the norms applicable in post-conflict or post-dictatorship transition periods. Several experiences were highlighted at the time: Argentina, which from the beginning of the 1980s set up a 'truth' commission on the missing before passing several statutes putting an end to criminal prosecutions; but above all South Africa, which stands out as an 'exemplary' experience enabling the transition from apartheid to democracy. The transitions towards democracy or peace initiated at the time with the end of East–West confrontation multiplied this type of experience, all of them inspired to some degree by the South African 'example'. This was when the idea of 'transitional justice' was born, supported notably by the International Center for Transitional Justice, an NGO initially made up of persons involved in the South African process. Alongside this, Latin American NGOs promoted 'combating impunity' as a factor of development of human rights and launched a process that led to the adoption of the 'Joinet' principles (from the name of the special rapporteur who led the project, the French expert Louis Joinet) *for the protection and promotion of human rights through action to combat impunity*.[13] The principles are soft law, formally they are not mandatory in character, but even so they have exerted considerable influence on the evolution of state practice and subsequently on customary law in this area.

The Principles rest upon three pillars: the right to know, the right to justice and the right to reparation. The first two principles pertain to *the collective right to the truth*: principle 2 sets out the 'inalienable right' of 'every people' to 'know the truth', which is responded to, in principle 3, by 'the duty to preserve memory' of the state 'aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist or negationist arguments'. Principle 4 is about the right to the truth as an individual right, renamed the 'right to know'.[14] It is supplemented by the second paragraph of principle 34 which relates to the scope of the right to reparation in the event of forced disappearances and makes the right to the truth, under such circumstances, a component part of the reparation owed to the relatives of those who have disappeared.[15] Principle 5 sets out that states are under a duty to take appropriate measures 'to give effect to the right to know', that is, essentially the preservation of archives, criminal prosecutions and 'non-judicial processes' such as truth commissions, provided that they are to supplement the action of the judicial authorities and not supplant them.

Alongside this development in 'transitional justice' or 'combating impunity' normative advances have also been made on forced disappearances, under the impetus of families of the missing, echoed by United Nations bodies of independent experts. On 18 December 1992 the UN General Assembly adopted a Declaration on the protection of all persons from enforced disappearance, which does not contain any explicit reference to the right to the truth but requires the state to investigate cases of enforced disappearance until the fate of the person is clarified and specifies that 'the findings of such an investigation shall be made available upon request to all persons concerned, unless so doing would jeopardize an ongoing criminal investigation' (art. 13(4)).[16] Finally on 20 December 2006 the Convention for the

13. See Louis Joinet's final report, doc. UN E/CN.4/Sub.2/1997/20/Rev.1 and the updated version of the principles E/CN.4/2005/102/Add.1.

14. 'Principle 4. The victims' right to know. Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.'

15. Principle 34. Scope of the right to reparation. … In the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.

16. In its general observation on the right to truth, the Working Group on enforced or involuntary disappearances made the following clarifications: 'In light of the developments that happened since 1992, the Working Group deems that the restriction

Protection of All Persons from Enforced Disappearance was adopted. Its article 24 this time explicitly states the right to the truth:

> 2. 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. Each State Party shall take appropriate measures in this regard.
>
> 3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

This first consecration in a treaty of the right to the truth seems to confirm the emergence of a new human right.[17] As things stand, the Convention has forty-six States Parties, and so its universality is far from established. But a parallel customary process seems to be crystallising the right to the truth as a non-treaty norm, particularly under the impetus of the regional courts for human rights.[18]

II. WHAT TRUTH?

To proclaim a human right to 'the truth' may seem ambitious indeed. Is there such a thing as the truth? Can it be secured through the courts in the same way as compensation for damages or the trial and sentencing of the presumed perpetrator of a crime? In other words, is the truth about *untimely* crimes even *possible*? Can there be certainties about acts that are by their nature hidden and concealed and the very existence of which is often denied by propaganda campaigns? Negationism is inherent in mass crime; at the same time as the crime is committed, it is denied. Therein resides, among other things, the paradigmatic character of enforced disappearance; it is a crime that, in the same stroke, denies that it has been committed and the existence of its victim. After the disappearance, there is literally *nothing* left: neither victim nor crime.

Another question is whether the truth is *desirable*? This is Nietzsche's argument which, as said, seems to capture if not all at least many of the criticisms levelled at 'transitional justice' or the right to the truth. Just as Nietzsche denounces the 'excess of History', highlights the virtues of forgetting and calls for the advent of a first generation that might manage to find the antidote to the 'malady of history',[19] people nowadays denounce the 'abuses of memory',[20] the surfeit of memory that supposedly divides society, causes 'competition among victims' and provides a ready excuse for doing nothing in the face of the injustice and crimes of the present day. Does not a society risk being overcome by its memory or rather its competing memories[21] that endlessly rekindle past conflicts until new conflicts break out, with the par-

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in the last part of this paragraph should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. … a blanket refusal … is a violation of the right to the truth.' The Working Group's general comments are available on the website of the Office of the High Commissioner for Human Rights: http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf

17. See especially the studies of the Office of the UN High Commissioner for Human Rights: E/CN.4/2006/91; A/HRC/5/7 (2007); A/HRC/12/19 (2009); A/HRC/15/33 (2010).
18. See especially in the Interamerican Court of Human Rights, *Anzualdo Castro v. Peru*, 22 September 2009, § 118-119. And see the summary of the Court's case law (from *Bamaca Velasquez v. Guatemala*) in L. Burgorgue-Larsen and Amaya Ubeda de Torres, *Les grandes décisions de la Cour interaméricaine des droits de l'Homme* (Brussels, Bruylant, 2008), p. 737-763. In the European Court of Human Rights, the first recognition of the right to the truth came in the Grand Chamber decision, *Al-Masri v. Former Yugoslavian Republic of Macedonia*, 13 December 2012, § 191 and 192 and the separate opinions.
19. Nietzsche, *Untimely Meditations*, p. 120 ff.
20. See T. Todorov, *Les abus de la mémoire* (Paris, Arléa, 1995).
21. This is the theme in J.-M. Chaumont, *La concurrence des victimes. Génocide, identité, reconnaissance* (Paris, La Décou-

ties believing they are playing the roles of yesteryear when ultimately they are merely taking the pretext of the past and 'their' truths to express their present-day frustrations. Another pressing question is that of the role the state should or should not play in seeking out the truth. Is the state the guarantor of truth about the crimes of the past? What truth? And what crimes? It obviously seems impossible, in the limits of this contribution, to answer these questions; but if I evoke them so elliptically here, it is to provide a glimpse of the wealth and the extreme complexity of the debates that the emergence of a human right to the truth cannot fail to elicit. Consequently, I shall confine myself here to a few reflections drawn notably from my own experience, underscoring the distinction at the same time as the connection between the right to the truth first as an individual right and then as a collective right.

A. The Right to the Truth as an Individual Right

If it were to be definitively recognised as a human right, the individual right to the truth would have to be made an absolute right, with no possibility of limiting it. Each individual has the absolute right to know the truth about the tragedies that have affected their life, which have radically changed them. I fail to see how there could be, in this respect, any 'abuse of memory', for what authority, and in the name of what, could deprive a person of their past, force them to forget. Forgetting may be, must be an individual choice and in this respect it is impossible to pass judgment. For some victims, the search for the truth and the hope of finding it at last has become a reason (sometimes the last reason) to go on living; whereas for others, it is forgetting that is given precedence, in a sort of stoic quest to appease suffering. Even then it must be agreed what the contents of this absolute right to the truth are; and close consideration must be given to what it is that unites it with the right to justice and the right to reparation.

1. Micro-truth

It is no chance matter that the recognition of the right to the truth has developed in connection with enforced disappearance and that the first recognition of this right by treaty concerns that same crime. In matters of enforced disappearance, there is an 'elementary' truth, a micro-truth that bears on a straightforward alternative: Is the person who has disappeared alive or dead? If alive, it is a question of finding out where the person is (typically, the Working Group on Enforced Disappearances asks for an address or, if the person is still being held, the place of detention). If the person is deceased, it is a matter of confirming death by returning the remains and having the family identify them. That is the 'truth' to which the relatives of the missing aspire. It is no more and no less than the ending of the enforced disappearance, that is, the ending of the torture deliberately inflicted by the perpetrators of the disappearance on the relatives of the person who has disappeared. There is no doubt that this right to the truth of the families of persons who have disappeared is an absolutely intangible right that cannot be subject to any restriction. The Working Group, in its general observation on the right to the truth, inferred this intangible character from the fact that such a disappearance is an act constituting torture for the relatives:

> No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right. This absolute character also results from the fact that the enforced disappearance causes "anguish and sorrow" (5th preambular paragraph of the Declaration) [for the protection of all persons from enforced disappearance, 1992] to the family, a suffering that reaches the threshold of torture, as it also results from article 1§2 of the same Declaration that provides: "Any act of enforced disappearance (…) constitutes a violation of the rules of international law guaranteeing, (…) the right not to be subjected to torture or

verte, 1997).

> other cruel, inhuman or degrading treatment or punishment." In this regard, the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.[22]

But having posited this absolute character, we are far from having resolved everything because even obtaining this micro-truth may be problematic. The Working Group accepts that 'There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result'. This holds for instance when it seems the victim's remains cannot be readily located:

> A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate.[23]

The same is true when the criminals have taken care to make the body disappear, for example by throwing it into the sea – as with the 'death flights' in Argentina – or by burning it. In this case, it is hard to achieve more than a presumption as to the person's fate and not any absolute truth. According to the Working Group, 'The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person'.

When the remains can be located and recovered, there is still the question of their formal identification. For the 'truth' requires that exhumed remains be attributed with certainty to the disappeared person, failing which there is always an intolerable margin of uncertainty. In this regard, advances with DNA analysis, superseding traditional forensic medicine techniques, have changed matters entirely. DNA identification was first used systematically to identify the remains of persons who had disappeared in Bosnia-Herzegovina under the impetus of an international organisation sponsored by the United States, the International Commission on Missing Persons (ICMP).[24] Since then the technique has been used in other countries, especially Latin America, where similar programmes to the ICMP's have been launched. DNA analysis dramatically changes the expectations of the relatives of persons who have disappeared. They can no longer settle for testimony telling of the execution of their relatives, but wish to recover the bones, identified as those of their relatives with 99.9999… per cent certainty. Now, although the techniques enabling such identification have been greatly simplified and have become more affordable, they still require the implementation of substantial resources and input from well trained experts, for exhumation, conservation of remains, collection of the relatives' DNA and comparison with the victim's DNA. It is not sure that the expectations of relatives can be satisfied everywhere equally for all victims. Some countries facing substantial economic difficulties and deploring the very many victims buried in mass graves will hesitate to implement such programmes, unless they receive considerable aid from international organisations.

The 'micro-truth' about enforced disappearance may also prove difficult to establish in the case of children who are the victims of enforced disappearance through the disappearance of their mothers.[25]

22. General comment on the right to the truth, in *Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance*, note 15 above.
23. *Ibid*.
24. See the WGEID report on its mission in Bosnia-Herzegovina: A/HRC/16/48/Add.1 and M. Klinker, 'Proving genocide? Forensic expertise and the ICTY', (2008) 6 *International Journal of Criminal Justice*, 447 ff.
25. See especially the decision of the Interamerican Court in *Gelman v. Uruguay*, 24 February 2011. The daughter-in-law of the poet Juan Gelman, Maria Claudia Garcia de Gelman, disappeared in Argentina in 1976 at the same time as her husband, Marcelo Gelman. She was pregnant at the time she disappeared. Marcelo Gelman's remains were identified by the Argentine forensic anthropology team in 1989. In 1978, Juan Gelman had received a message, 'The child was born'. He set about looking for his grandchild and eventually traced a young woman in a Uruguayan family in 2000. After being contacted by her grandfather, Macarena Gelman accepted a DNA test, which proved positive and led her to ask for her identity to be restored. The 'abuelas' estimate that some three hundred children were victims of forced disappearance of their parents. A hundred or so have

Such trafficking of children occurred on a large scale as part of Plan Condor for cooperation among dictatorships of the Southern Cone to systematically eliminate political opponents. The *abuelas*, the grandmothers of Plaza de Mayo enquired into the fate of these babies, who were taken from their mothers shortly after birth to be unlawfully adopted by supporters of the dictatorship. The only way to confirm the line of descent is to conduct DNA tests from samples from the illegally appropriated child, who has since grown to adulthood. Argentinian law makes it possible to compel someone whom it is thought might be an appropriated child to undergo such testing. Such a constraint is understandable from the view point of grandparents who are elderly and wish to know the truth before they die. But one cannot ignore the shock for the children who discover their true origins, the murder of their biological parents and, sometimes, the knowing involvement of their adoptive parents in this child trafficking.

2. From micro-truth to macro-truth

Beyond this micro-truth that is already so problematic lies a macro-truth that is far more complex still to reveal, namely the truth about the *circumstances* and the *context* in which the violations occurred. This question can be raised for enforced disappearances; the certainty about the fate of the person who has disappeared does not answer all the questions, far from it. This certainty ends the torture of disappearance but, in itself, it prevents relatives from feeling like victims and even prompts the emergence of a feeling of guilt; because the victim was killed and the blame cannot be ascribed to the perpetrators – within the anonymity of the system – the blame must be attributed either to the relatives who proved unable to adequately protect the person who disappeared or to the victim who certainly 'looked for' or 'deserved' their fate one way or another. In refusing to assume full responsibility, to provide any explanation at all, the perpetrators of the disappearance are still looking to make believe in the 'lawfulness' of their behaviour, that is, its 'official' character – they seek to hide the infamy of it behind the veil of state sovereignty. In this context, returning the remains to the family, and in particular their identification, without further process, does allow them to grieve and where applicable to bury the remains in keeping with religious rites, but it is also perceived as a gesture laden with *disrespect*, because it means that the state can detain, torture and kill arbitrarily without having to justify itself and compensate for the incommensurable damage thus caused. Return of the remains without any narrative, without justice and without reparation is a *denial of recognition* both of the responsibility of the criminals and of the victimhood of the relatives of the disappeared.[26]

For other violations of human rights, such as summary executions or torture, the question arises from the outset: the 'truth' in this case, directly designates the circumstances and the context of the violation, especially the identity of those responsible, whether they are operatives or principals, the sequence of

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been identified so far.

26. Such deprivation of recognition corresponds to the second form of 'disrespect' identified by Axel Honneth in *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, transl. J. Anderson (Cambridge, Polity Press, 1995), pp. 133–134: 'What is specific to such forms of disrespect, as exemplified by the denial of rights or by social ostracism, thus lies not just in the forcible restriction of personal autonomy but also in the combination with the feeling of not enjoying the status of a full-fledged partner to interaction, equally endowed with moral rights. For the individual, having socially valid rights-claims denied signifies a violation of the intersubjective expectation to be recognized as a subject capable of forming moral judgments. To this extent, the experience of this type of disrespect typically brings with it a loss of self-respect, of the ability to relate to oneself as a legally equal interaction partner with all fellow humans.' Similarly, A. Garapon, *Des crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale* (Paris, Odile Jacob, 2002), who observes p. 207 that 'To combat impunity is therefore not to seek punishment, but to express a new expectation of justice that is more narrative than punitive. To establish the true facts, to characterise them fairly and ascribe them to persons in flesh and blood by a court of law, therefore by a democratic instance, begins to make an end to that crime. … For this reason, more still than for ordinary crimes, *hearing and determining the crime* makes a start at reparation for the victims by giving them back a place, by giving them standing as victims.'

events that led to the violation, the nature of the 'system' or the systematic practice introduced and under cover of which the crime was committed, and so on. Those are facts that cannot readily be unearthed or pieced together, especially if some time has elapsed since the violation. But above all, such truth closely affects other rights in the shape of the 'right to justice' and the right to reparation. Knowing the name of the perpetrators of the crime, is that not to accuse them, is it not almost, by the same token, to call for them to be tried and sentenced? Knowing the circumstances of the crime, is that not to claim that the loss be acknowledged, thus entailing a duty of reparation for the perpetrators and the state?

In this double transition – from micro-truth to macro-truth and from the right to the truth to the rights to justice and reparation – something fundamental is at issue, in which the complexity of the right to the truth lies; the 'micro-truth' of the individual right to the truth is that of a de-politicised individual, it is that of the face of the other me, suffering. When I look at the mother of the disappeared person, I imagine her suffering and that alone counts. And it is this emotion caused by identification with my fellow human that can lead me, as a human being, to support her call for the truth about the fate of the disappeared person dear to her. But when that face seeks the dignity of a victim, that is, the status of a person with a right to have rights, it is re-politicised and by the same token poses in different terms the question of the possibility of emotion with regard to it. Can I sympathise and on that basis grant the rights she claims if that should lead to my downfall? Can I sympathise if her claim competes with mine or threatens the social group I am assigned to? The politicisation of the individual erases her face and shows it to me as another different from me, making the expression of Rousseauist 'pity' less likely.[27]

In other words, the individual right to the truth leads to the collective right to the truth: there is no sharp divide between the two, once the relatives of the disappeared become aware of their victimhood. By calling for 'the whole truth', that is, a narrative about the circumstances and the context of the crime, that is, when it comes down to it, by challenging the system by which the crime has become a sovereign act, the relatives of the disappeared position themselves once again in the social and political realm. They come out of their isolation, come together and call for a *collective* right to the truth.

B. The Right to the Truth as a Collective Right

Let us take up our critical strand of thought again. For Nietzsche, History is of interest to man 'as a being who suffers and seeks deliverance',[28] which leads to recognising that a 'critical history' is cogent:

> If he is to live, man must possess and from time to time employ the strength to break up and dissolve a part of the past: he does this by bringing it before the tribunal, scrupulously examining it and finally condemning it;[29]

In this Nietzsche does not deny the cogency of what goes to the very principle of experiences of transitional justice, namely the need to determine the truth so as to construct the future. Probably no one more than Archbishop Desmond Tutu, President of the South African Truth and Reconciliation Commission, has so lucidly brought out this principle:

> However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.

27. I. Makus, 'Pity, pride, and prejudice: Rousseau and the passions' in R. Kingston and L. Ferry, *Bringing the Passions Back In. The Emotions in Political Philosophy* (Vancouver, Toronto, UBC Press, 2008), pp. 145-154.
28. Nietzsche, *Untimely Meditations*, p. 67.
29. *Ibid*. p. 75/76.

> In our case, dealing with the past means knowing what happened. Who ordered that this person should be killed? Why did this gross violation of human rights take place? We also need to know about the past so we can renew our resolve and commitment that never again will such violations take place. We need to know about the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future.[30]

But in his *Untimely Meditations*, Nietzsche warns against the dangers of such critical history:

> It is always a dangerous process, especially so for life itself: and men and ages which serve life by judging and destroying a past are always dangerous and endangered men and ages. For since we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes; it is not possible wholly to free oneself from this chain. If we condemn these aberrations and regard ourselves as free of them, this does not alter the fact that we originate in them. The best we can do is to confront our inherited and hereditary nature with our knowledge and through a new, stern discipline combat our inborn heritage and inplant in ourselves a new habit, a new instinct, a second nature, so that our first nature withers away. It is an attempt to give oneself, as it were *a posteriori*, a past in which one would like to originate in opposition to that in which one did originate: – always a dangerous attempt because it is so hard to know the limit to denial of the past and because second natures are usually weaker than the first. What happens all too often is that we know the good but do not do it, because we also know the better but cannot do it.[31]

But this risk of weakening life by critical history may be overcome by definitively substituting 'second nature' for 'first nature', in other words by rewriting History by resolving the conflict:

> But here and there a victory is nonetheless achieved, and for the combatants, for those who employ critical history for the sake of life, there is even a noteworthy consolation: that of knowing that this first nature was once a second nature and that every victorious second nature will become a first nature.[32]

It can be understood through this text how critical Nietzsche is of this critical history, while ranking it among the right uses of History. This standpoint heralds the criticisms that are levelled at the right to the truth today. Two perils supposedly await transitional justice and the call for the truth about *untimely crimes*: competition among victims, leading to the dislocation of society into communities, and the leaden weight of an official history that is not open to discussion. These two perils correspond to the two dangers Nietzsche evokes: a conflict between a supposedly hereditary 'first nature' and a 'second nature' that others seek to impose to reconcile themselves to their past, in a disagreement leading to a loss of energy and life, endless and boundless division, Nietzsche says, because it is so difficult to find a limit to the negation of the past; definitive substitution of 'second nature' for 'first nature', the second becoming the new indisputable 'true' nature, the new federating political consensus, built on the judgement of the past that is itself situated in History, a sort of postulated objectivity, pending some future challenge, some future crisis of critical History.

And the fact is that no historical experience of transitional justice is entirely safe from one or other of these criticisms. Truth to tell, any process of victim recognition, aimed at providing victims with the truth about past crimes, is a process of recognition of certain victims to the exclusion of others, or even against other victims. Any process of recognition of some victims at the expense of others is a process

30. D. Tutu, Foreword to the Truth and Reconciliation Commission Report, §§ 27-28, http://www.sahistory.org.za/archive/trc-final-report-volume-1
31. Nietzsche, *Untimely Meditations*, p. 76.
32. *Ibid.* p. 76/77.

that confers different degrees of recognition on different categories of victim. There are always those excluded from recognition, or victims of lesser recognition. The choice of victims, the choice to emphasise the suffering of certain victims at the expense of others, is a political choice. At best, this choice may be the subject-matter of a democratic political process. It may arise out of democratic debate or at least a consensus among the various political forces in contention. It may also be the subject of a decision imposed by the majority upon the minority. In both cases, the political decision draws a line between oppressors and oppressed and defines the category of the oppressed. It may then be a question of a 'justice of the victors' when the line runs close to the line between victors and vanquished. It may be a question of just plain 'justice', when the victor, at the risk of being vanquished by History, accepts to feature on the side of the oppressors and to acknowledge the oppressed.

In any event, the victims are under the constraint of a political writing of History. Their call for a right to the truth is dependent on this political process of writing History. Depending on the outcome of this process, the face of suffering will gain political status as a victim and recognition of that suffering, from which truth and rehabilitation can derive; or on the contrary it will remain in the simple state of a face of suffering, possibly interiorising its suffering as guilt: 'If I am not recognised, it is probably because I have deserved not to be'. This is why the process of destruction and reconstruction of History is successful. After the Nuremberg Trials, German guilt became the first nature of Europe. The change was successful. It was, by Nietzsche's reckoning, good use of History, that serves the living.

In the face of this incontrovertibly powerful criticism several answers must be outlined. First, inherent in the tone of this criticism, is a temptation towards purity. Since it is impossible to secure recognition and truth for all victims, it is unfair to confer a right to the truth on some of them. Such judgements are invariably disastrous because they lead to inaction, paralysis; they are always an attack on the living. Even if we wanted to follow Nietzsche's criticism of History, we would have to concede that this is a temptation to be avoided. The fear of judging wrongly must not preclude all judgment.

Secondly, criticism may also give rise to a form of scepticism or post-modern relativism. Everything is equal. As Nietzsche says in his *Untimely Meditations*: 'every past, however, is worthy to be condemned'.[33] So it would supposedly be impossible to separate the 'parties' or the 'belligerents', to sort the victims into categories. One would seem to be compelled to a form of neutrality at the risk of lapsing into moral judgments that would necessarily be situated and consequently biased; at the risk of having the victor's historical narrative prevail over that of the vanquished, by 'winning the battle' of History after winning the war.

Now, and this may be the point of separation with Nietzsche's thinking that is to be asserted, the parties are not necessarily politically and morally equal. It must be *said* that it was the folly of Nazi ideology that engendered the crime and that those who resisted that ideology, sometimes at the cost of their lives, were right to do so, even if they themselves have blood on their hands and committed crimes, for which they must answer *in law*. This pre-eminently political judgement is crucial to rebuilding society in order to put things in their proper places. Similarly, it cannot be said that a state crime and a crime committed by a private individual are equivalent, even if that individual claims to be politically motivated. The state – and by extension any group aspiring to the capacity of a state – claims to represent legality and, in the midst of modernity, defines itself as a protecting power. This moral value of the state must be preserved or restored, when the state, under cover of the law and in its sovereign majesty, adopts a

33. *Ibid*. p. 76.

criminal policy. When the leaders of the Nazi regime appeared in Nuremberg, something politically fair was established, something that re-established a deep and incontrovertible historical truth, namely that Nazism was a criminal and crime-inducing system and that those who were its victims were victims not of state justice or of the law but of a crime, that is, a violation of everything that the idea of legality might mean. When the generals of the Argentine junta appeared before the national courts charged with the enforced disappearance and theft of children, it is stated that in no event could the ideology of 'communist threat' and 'national security' justify the state subjecting thirty thousand people to enforced disappearance. Thus the cogency of the political dimension of a collective process of truth-seeking must be asserted. 'Before turning over a new leaf one must have read the old one',[34] not because of the risk of 'competition among victims' and the breakdown of society, not because the risk of an endless search for the truth should be neutralised, but because it is necessary to state that all 'parties' were not morally and politically on the same footing.

But the question, then, is how can things be organised so as not to completely ignore the individual right to the truth of all victims, including those assigned to a group that is stigmatised for participating in crimes? If I assert, rightly, that at Srebrenica, there was a genocide against the Muslims of Bosnia-Herzegovina,[35] that the Muslims were the victims and the Serbs the perpetrators, that the two parties were not politically and morally equal, must I for all that refrain from considering the suffering of a Serb victim? And in this stand-off between two ethnic groups, should I ignore the victims that belong to neither side, the Jews or Roms?[36] It seems to me that the answer to this awful dilemma lies, at least in part, in law; in the idea, inherent in the democratic principle, of a dissociation between the legal and the political. Upon the political judgment on accountability – which is crucial to the reconstruction of a society, provided it is the outcome of a genuine process to seek the truth – must be superimposed a legal judgment which by essence relates to individual cases and not the situation as a whole. In other words, it is a matter of *guaranteeing* everyone a legal and effective right to the truth, that is a human right (recognised equally to everyone as a human being) to the truth. Elevating the right to the truth to the dignity of a genuine universal human right is therefore not the *problem*, but the beginning of a solution, insofar as it makes it possible to escape from the potential discrimination, against victims, of a political judgment on History. Even if someone were to be denied the political status of victim, because left by the wayside in the political process of truth-seeking, they would still have the possibility and the right to acquire the legal status of victim, conferring on them rights equal to those of other victims. Conversely, the 'resistance fighter', that is, someone fighting for a just cause, still remains *legally* a criminal and answerable for their actions.[37] It seems to me that it is on this basis that Archbishop Desmond Tutu explains what might

34. Final report of Louis Joinet on combating impunity, note 12, p. 11, § 50. See also L. Joinet, *Lutter contre l'impunité. Dix questions pour comprendre et pour agir* (Paris, La Découverte, 2002).

35. See the relevant case law of the ICTY on the Srebrenica genocide and the judgment on the merits of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 26 February 2007. On the concept of genocide and these cases, see O. de Frouville, *Droit international pénal. Sources, incriminations, responsabilité* (Paris, Pedone, 2012).

36. On the exclusion of these two categories in the settlement of the conflict in Bosnia, see the *Case of Sejdic and Finci versus Bosnia and Herzegovina* in the European Court of Human Rights, judgment of the Grand Chamber of 22 December 2009.

37. However, one must not give in to the temptation of considering responsibilities as equal, which would lead us to the post-modern attitude denounced earlier of 'everything is equal'. See in this respect the – justified – criticism of the accusation by the Prosecutor against Naser Oric before the ICTY, R. Maison, *Coupable de résistance. Naser Orić, défenseur de Srebrenica, devant la justice internationale* (Paris, Armand Colin, 2010) p. 196 questioning the motives for prosecuting Orić: 'One last hypothesis may be made that does not necessarily rule out the previous ones: it is the hypothesis about the *power of certain representations*. The power of discriminatory propaganda, in the case in point the propaganda of the Serbian nationalists against the Bosnians, which carries conviction beyond the circle of their allies. The power of a relativistic form of cynicism, that might be stated like this: anyone involved in war is naturally lead to commit atrocities – as is well known – so everyone involved

appear to be a form of double standards to those who criticise the South African commission: namely, the condemnation without appeal of apartheid as a system and the justification of the ANC's combat against that system, at the same time as the condemnation of the crimes committed by ANC members.[38] With the right to the truth as a human right, victims are able to establish the legitimacy of what they have to say in the face of the political process of writing History that tends to engender a perhaps morally justifiable but invariably simplified narrative.[39]

Admittedly, the dissociation between Law and Politics is a *regulative idea* that one must relentlessly endeavour to achieve without ever being able to attain it completely. There are situations in which such dissociation does indeed seem difficult to implement: the Prosecutor for the Criminal Tribunal for Rwanda, Carla Del Ponte, understood the cost of wanting to hold to account soldiers of the Rwandan Patriotic Front, the former Tutsi guerrilla force, that had come to power in the post-genocide Rwanda.[40] To say that the RPF committed crimes and that its victims also are entitled to see the perpetrators of those crimes brought to justice, like the perpetrators of genocide, is a demand that seems to be *politically* out of reach, even if it may be *legally* founded. How blind can justice be? When the call for truth becomes a call for justice, it is no longer life that is threatened but the possibility of a world in common: *fiat justicia, pereat mundus* … And so the historicity of the right to the truth itself – its necessary inclusion in History – must be accepted.

CONCLUSION

I am aware that these few thoughts fall well short of providing even an overview of the question. And yet they are an invitation to further reflection, particularly by looking into the various procedures for restoring the truth, and at their comparative advantages and drawbacks. They are also an invitation to reflect upon the question of the legal characterisation of crimes, the symbolic value of which alone is a major political issue. One need merely think of the term 'genocide', its repercussions, and the claims laid to it by all the victims and the descendants of victims of all the massacres of History.

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should therefore be prosecuted. This stance precludes identifying just causes for fighting and differentiating among forms of combat. Naser Orić is the almost archetypal symbol of the just character of a struggle, he is the figure of heroic absolutism: does he not deserve as such to be cut down to size? Lastly, there is a final temptation that goes along with genocide, that of negation. Henceforth it takes on the form of the twin accusations conflating torturers and victims.'

38. D. Tutu, Final Report, p. 109-110: 'Some have criticised us because they believe we talk of some acts as morally justifiable and others not. Let us quickly state that the section of the Act relating to what constitutes a gross violation of human rights makes no moral distinction – it does not deal with morality. It deals with legality. A gross violation is a gross violation, whoever commits it and for whatever reason. There is thus legal equivalence between all perpetrators. Their political affiliation is irrelevant. If an ANC member tortures someone, that is a gross violation of the victim's rights. If a National Party member or a police officer tortures a prisoner, then that is a gross violation of the prisoner's rights'. However, Archbishop Tutu emphasises 'the same kind of act attracts different moral judgements. A venerable tradition holds that those who use force to overthrow or even to oppose an unjust system occupy the moral high ground over those who use force to sustain that same system. That is when the criteria of the so-called "just war" come into play … This does not mean that those who hold the moral high ground have *carte blanche* as to the methods they use. … I cannot, however, be asked to be neutral about apartheid. It is an intrinsically evil system'. On a more legal level as concerns the dismissal of 'just cause' as a mitigating factor in criminal law, see the trial of the Civil Defence Forces before the Special Court for Sierra Leone and the Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, SCSL-04-14-T-796, T. Ch. I, 9 October 2007.

39. See S. Lefranc, *Politiques du pardon* (Paris, PUF, 2002), not. p. 348: 'The constant reminder, by victims' associations such as the Madres de Plaza de Mayo or the Chilean AFDD, of the primacy of the victim's point of view and the absence of any resolution of the question of the "disappeared", "missing" from national history, thus prevented legitimising an "official" historical narrative that often emphasised the bilateral character of violence, the shared responsibility of the "two demons" … The plan for unification by forgetting disputes that was promoted by democratic governments in relative continuity from authoritarian regimes, ran up against the victims' obstinacy.'

40. See F. Hartmann, *Paix et châtiment. Les guerres secrètes de la politique et de la justice internationales* (Paris, Flammarion, 2007), pp. 262-275.

There is one final point, though, that I would like to address in speaking in my own cause, namely, the importance of the action of international inspection bodies in the process of truth-seeking within a society. International bodies for the protection of human rights, such as the Working Group on Enforced or Involuntary Disappearances, but also the regional courts for human rights or even the International Criminal Court,[41] play an important part in promoting the right to the truth in transitional contexts. Primarily they fulfil essential functions to *guarantee* this right internationally. They offer redress when all other national channels are closed. In a situation of total denial by the state, or at least reluctance to reveal the truth, only international inspection bodies are able to confer an actual status of victim that is binding on the state under its international obligations. In the case of the WGEID, its data base, containing more than forty-three thousand cases of enforced disappearance in more than seventy countries, holds out a promise of truth to relatives. A promise based on the guarantee that the name of each of the disappeared will not be forgotten, crushed by a national process of political writing of History forcing the victims to be forgotten.

More fundamentally, the judgments or even the mere statements of the international body may promote the dissociation between the legal and the political spoken of above. A society that is the prisoner of its own political demons may find help in the intervention of some third party which, by imposing a strictly legal perspective from the outside (and consequently not being construed as having political reach on the inside), may shift the middle ground and change the perspective, restoring a degree of serenity to public debate. As Marc Osiel points out, the purpose of a historical truth-seeking process is not necessarily to establish a consensus about History but to civilise the dissensus, to reintegrate the expression of dissensus into the sphere of democratic public debate.[42] Besides, the scrutiny of an international body may put an end to the overpowering stand-off between opposing groups by imposing an egalitarian perspective based on human rights and consequently the abandoning of prejudices that preclude the emergence of discussion on a fair and honest basis. The international body may provide a perspective of the other on the self which in itself may engender a new perspective for the self on the other and in so doing meet the demand for recognition made by the various groups of the society. Far from 'killing off life' the right to the truth is on the contrary a way to 'revive' it by a new agreement between the future and History, a new birth, based not on forgetting or transcendence but on memory and immanence.

41. The Rome Statute of the International Criminal Court confers a status and rights on victims of international crimes that the Court is tasked with prosecuting and judging – whereas the ad hoc tribunals for former Yugoslavia and Rwanda recognise victims only as witnesses and do not provide for any right of reparation. See S. Pellet, 'La place de la victime', in H. Ascensio, E. Decaux and A. Pellet, *Droit international pénal* (Paris, Pedone, 2012), p. 933.

42. Osiel, *Juger les crimes de masse*, note 4 above. See also Garapon, *Des crimes qu'on ne peut ni punir ni pardonner*, note 25, pp. 228-229.