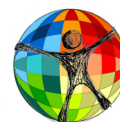


Amnestysia: On the intersection of amnesty and truth- seeking in pursuit of national reconciliation under the shadow of the 2020 elections in Côte d'Ivoire

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ABSTRACT

As the 2020 elections are looming in Côte d'Ivoire, both the national and international communities are asking themselves an important question: have the transitional justice mechanisms adopted thus far been sufficient to break the cycle of violence which has plagued the country since the 1990s? Since its latest conflict following the 2010 election, Côte d'Ivoire has adopted a multitude of transitional justice tools in its pursuit of national reconciliation. This paper will look towards the country's Dialogue, Truth and Reconciliation Commission in order to assess the recent blanket amnesty law passed in 2018, as it exemplifies the wider underlying issues which have impeded the country's reconciliation efforts. This paper will argue that although the CDVR had a lot of potential and followed recommended guidelines, it ultimately failed in achieving its mandate and its reconciliatory potential. However, it is not too late for the amnesty law to be refined, in order to establish a basis of historical truth on which reconciliation can start being built. Amnesty is yet another opportunity to learn from the shortcomings of the CDVR while the population remains open-minded to state led transitional justice efforts. While it may not lead to justice per se, it may instead lead to peace or reconciliation by allowing cohesive collective remembrance to emerge. As the 2020 elections are imminent, the time for genuine action is now if we wish to ward off another wave of conflict and break the cycle of violence which has plagued the country for the past three decades.

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Introduction

As the 2020 elections are looming in Côte d'Ivoire, both the national and international communities are asking themselves an important question: have the transitional justice mechanisms adopted thus far been sufficient to break the cycle of violence which has plagued the country since the 1990s? Since its latest conflict following the 2010 election, Côte d'Ivoire has adopted a multitude of transitional justice tools in its pursuit of national reconciliation. These include the four pillars of transitional justice, namely criminal accountability at national and international levels, reparations for victims, various institutional reforms and truth-seeking efforts.¹

This paper will be focusing on the country's Dialogue, Truth and Reconciliation Commission (*Commission Dialogue, Vérité et Réconciliation*, henceforth "CDVR"). More specifically, this paper will focus on how the CDVR exemplifies the wider underlying issues which have impeded the country's reconciliation efforts. It is an opportune case study through which to analyse the multiple forces at play in shaping these processes, including national pressure from victims and civil society and how these may be weighed against international interests. In light of these forces, does the CDVR reach its reconciliatory potential? This paper will argue that although the CDVR had a lot of potential and followed recommended guidelines, it ultimately failed in achieving its mandate and its reconciliatory potential. This paper will establish its potential by first identifying the ways in which truth-seeking may be productively used towards the goal of reconciliation and how this has been developed through the internationally recognized right to truth. It will then look to the events which have driven the history of conflict in Côte d'Ivoire in order to show that the CDVR was not set up with this context in mind and with a genuine intention to build reconciliation.

The distinction between *memory* and *history* will play an important role throughout this paper, which will focus on the ways

¹ Economic Justice is sometimes referred to as the fifth pillar of transitional justice, and it will be discussed throughout this paper. Côte d'Ivoire has not adopted this pillar to the same extent as the other four.

in which these concepts are necessary for, although they can also risk impeding, reconciliation. I will attempt to show that while a minimum content of truth may be necessary *in some circumstances*, it is not always the best way forward – truth and justice do not necessarily lead to peace. Adopting truth-seeking efforts is inherently a context-specific decision, which must balance the importance of clarifying contentious historical issues with the plausibility of this being done effectively in the circumstances. For example, do the levels of corruption make it wholly unlikely that this process will be carried out in a sensible and productive manner? Is it likely to involve the community in its design and undertaking as is recommended, or is it likely to put in place a mechanism which looks good *prima facie*, but which only truly protects the interests of the governing party?

Most importantly, the truth-seeking process undertaken by the state will be assessed in relation to the recent blanket amnesty law passed in 2018. The amnesty model and its execution are in many ways perpetuating the same shortcomings apparent in the implementation of the country's CDVR. As such it is useful to view these "reconciliatory" initiatives side by side to assess the true intentions of the state in implementing these processes and in paving the way to reconciliation. Furthermore, while amnesties are often observed through a criminal accountability lens and critiqued for supporting impunity, they also intersect in important ways with truth-seeking processes, and may be either used to encourage or stifle the truth. In light of this, this paper argues that it is not too late for the amnesty to be further refined in order to help establish a basis of historical truth on which reconciliation can start being built. Amnesty is yet another opportunity to learn from the shortcomings of the CDVR while the population remains open-minded to state led transitional justice efforts. As the 2020 elections are upcoming, the time for genuine action is now if we wish to ward off another wave of conflict and break the cycle of violence which has plagued the country for the past three decades.

Truth-seeking and Reconciliation

Truth-seeking: A Transitional Justice Mechanism

Truth-seeking is one of the four pillars of transitional justice, and as such is generally seen as a necessary step towards

meaningful and *thick* reconciliation². It is touted as providing a cathartic effect in society by finally uncovering truth about an often-violent past, but also for helping identify patterns of crimes in order to acknowledge and make reparations for past wrongs.³ It can help shed light on a silent past or help honour the memory of the victims and survivors by enabling communities to undertake important cultural mourning practices. In short, it provides social and psychological healing for a people by providing some sense of closure and clarity. This is especially important in oppressive regimes which have in the past manipulated the truth or rewritten history in order to deny atrocities and legitimize themselves.⁴ By providing a historical record, truth-seeking helps avoid future information manipulation and similar crimes. Importantly, truth-seeking mechanisms tend to be nonjudicial.⁵

Truth-seeking can take many forms, including official and unofficial truth-seeking mechanisms. Official mechanisms include commissions of inquiry and fact-finding, state-led national or community-level truth commissions, exhumation and official investigations into the missing and disappeared. These are essentially any initiatives sanctioned by the state, which lends more legitimacy to the projects.⁶ This paper will focus on Côte d'Ivoire's truth commission, a state-led initiative.

Unofficial truth-seeking is a way for civil society to uncover the truth or honour the memories of citizens when the state is unable or unwilling to do so. They have sometimes spurred official state-led mechanisms or supplemented incomplete state efforts.

² As opposed to thin reconciliation which is based "on coexistence with little or no trust, respect or shared values", "thick" reconciliation is based on the restoration of "dignity, reversing structural causes of marginalization and discrimination, and restoring victims to their position as right bearers and citizens." See Paul Seils, "The Place of Reconciliation in Transitional Justice" (2017) at 1, online (pdf): International Center for Transitional Justice [Seils].

³ Priscilla Hayner, *International Conflict Resolution After the Cold War*, (Washington, DC: The National Academies Press, 2000) at 347 [Hayner].

⁴ International Center for Transitional Justice, "Truth and Memory" (2019), online: ICTJ <<https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>> [Truth and Memory].

⁵ Kelli Muddell & Sibley Hawkins, "Gender and Transitional Justice: A Training Module Series" (2018) at 10, online (pdf): International Center for Transitional Justice <

https://www.ictj.org/sites/default/files/2_Gender%20%26%20TJ%20-%20Truth%20Seeking%20-%20Speaker%20Notes.pdf> [Gender and TJ].

⁶ *Ibid.*

These can take the form of civil society led truth commissions, documentation centers, mock trials or tribunals, creative pursuits, monuments or museums.⁷ These efforts may have differing mandates which will in turn affect their results. They may prioritize the need to establish historical records, to record and honour memory, the need to educate communities, etc., and these priorities will dictate what kind of information is brought to the forefront and legitimized. Notably, the distinction between history and memory is crucial, as prioritizing one over the other leads to inherently different results and fills different goals. Although exploring the unofficial truth-seeking methods employed in Côte d'Ivoire is beyond the scope of this paper, the attributes of history and memory for the purpose of reconciliation will be explored below.

Truth-seeking: History, Memory and Shortcomings

State led initiatives such as truth commissions often tend to focus on the “historical truth”, an objective, indisputable rendering which everyone can agree on. This is done for the sake of the history of the country, to right wrongs which have been denied and for the sake of non-repetition. Establishing the truth should ideally be attempted while perpetrators and victims of crimes are still alive in order to access both perspectives, but also to avoid eternalizing imperfect or second hand memories.⁸ This condition is necessary but hardly sufficient for establishing the historical truth, seeing as truth commissions are often composed of partial parties. To achieve an objective truth, the commissioners must be committed to investigating the past as a historian would, “investigating the facts and letting the chips fall where they may.”⁹ The problem is that these two necessary conditions will often be hard to achieve together if the commission is led while perpetrators of crimes remain in power and have a certain amount of control over the process, a tension which became apparent in Côte d'Ivoire's truth-seeking efforts. Yet it must be attempted early on (if it will be attempted at all), since as time goes on, not only will first-hand information be harder to obtain, but if some level of reconciliation has already been achieved the potentially divisive

⁷ *Gender and TJ*, *supra* note 5 at 11.

⁸ David Rieff, *In Praise of Forgetting* (New Haven and London: Yale University Press, 2016) at 84 [Rieff].

⁹ *Ibid.*

truth may then be viewed as “unpatriotic” or to have “morally emancipatory effects”.¹⁰ This hints at two larger conclusions of this paper: first, that corruption might make a historical objective truth very hard to achieve; and second, that perhaps in some circumstances truth does not offer the clearest path to reconciliation.

Civil society is more likely to focus on *memories* seeing as they lack the resources to obtain the full multi-faceted truth, especially when the state is either unwilling to cooperate or is not pursuing the truth-seeking process in a satisfactory fashion. This goal is not to be diminished – these mechanisms, especially when none others are available can often fill a very important role in society. For one, it is more often a truly victim-focused approach¹¹, whereas state initiatives often take a top-down approach to truth-seeking, in the most extreme (yet not uncommon) cases not making space for victims’ perspectives.¹² It fulfills the important task of recording the victim’s perspective, which could eventually be used by the state. In the meantime, it can promote the recognition of victims not just as citizens, but as people with inalienable human dignity entitled to rights.¹³ It can help with capacity-building, so that victims may reclaim their lives and become better advocates for their rights. It provides a platform for narratives and helps create social cohesion.

The problem with memory, however, is that over time it is increasingly likely to be distorted hindering the search for truth, at which point hanging onto this search for the sake of justice or moral obligation might actually prove detrimental to peace.

¹⁰ Some scholars, such as Jeffrey Blustein, hold that fear of these types of divisive truths may be unfounded, especially if the truth is accompanied by some kind of significant apology. *Ibid* at 86.

¹¹ This is not always the case in situations which have turned memorialization into a business (“the memory business”); Yet this remains a tool which is often effectively used by communities and for communities. See Johanna Selimovic, “Making peace, making memory: peacebuilding and politics of remembrance at memorials of mass atrocities” (2013) 1:3 Peacebuilding 334 at 339.

¹² This has been the case for many truth commissions, such as that in the Congo in 2007.

¹³ International Center for Transitional Justice, “ICTJ Program Report: Truth and Memory” (2014), online: ICTJ <<https://www.ictj.org/news/ictj-program-report-truth-and-memory>>.

Remembrance has often run opposite to reconciliation¹⁴, and does not necessarily lead to non-repetition¹⁵. Other needs and interests might simply be more pressing and outweigh that of justice, reflected in the recent addition of economic justice as a transitional justice pillar. This can include accessibility to jobs, infrastructure development, or democracy – all of which might fairly be felt to take precedence over a truth-seeking process.

Some communities have shown a strong aversion to truth-seeking efforts to establish historical truth, regardless of whether it is undertaken in a timely manner. In the South African region of KwaZulu Natal for example, when the Truth and Reconciliation Commission visited the region, the communities had no interest in having the Commission point out those responsible for previous violence. This was likely to disturb the fragile peace they had finally reached through patchy local peace agreements, especially now that those displaced were returning home.¹⁶ This reflects the larger concern that timely truth commissions could spark revenge violence or exacerbate tensions such that in some situations it would be ill advised to set one up. Seeing as we can already identify flaws with both timely and untimely truth processes, we start to see how some situations might not warrant them. This simply points to what should be an intuitive conclusion that this is inherently a context-specific process,¹⁷ and that each country should pick the truth-seeking mechanism, if any, which makes sense for its population.¹⁸

¹⁴ Rieff cites the examples of Northern Ireland and the Balkans where for generations, remembrance sustained conflict. *Rieff, supra* note 8 at 87.

¹⁵ Rieff describes this as “magical thinking of a fairly extreme kind”. *Ibid* at 83.

¹⁶ *Hayner, supra* note 3 at 361.

¹⁷ It has been seen again and again in international aid that imposing “cookie-cutter” prescriptions on countries without addressing the specificity of the context is a failed tactic. See how this approach also failed in the application of the “Washington Consensus”. Eric Posner, “The Case Against Human Rights”, *The Guardian*, 2014.

¹⁸ This is a non-exhaustive account of the shortcomings of the truth-seeking process.

Truth-seeking in light of reconciliation

What does all this mean for reconciliation? Truth-seeking is undeniably important, but the above suggests that it must be adapted to the needs of each country, and that it must incorporate the perspective of victims so that they feel represented in the process. Citizens need to feel that the state is taking ownership of the process, and that it is not simply being imposed by, or fulfilled for, the international community.¹⁹ If victim representation or state ownership is found to be lacking, civil society is likely to find alternative means of remembrance, creating new clashes of historical renditions, whereas a state led commission should seek to address a contested past.

The five pillars of transitional justice are often used in tandem to achieve reconciliation, an important goal for transitional justice.²⁰ Reconciliation requires a holistic approach; indeed, the pillars might more aptly be described as vines, seeing as they do not stand apart from each other but strengthen and inform one another. These pillars must also seek to address the different types of reconciliation which exist: individual, interpersonal, institutional and socio-political.²¹ Truth-seeking mechanisms may, if used effectively, address all four types of reconciliation, or, alternatively, none at all. Truth-seeking mechanisms could simply establish the truth, without truly attempting to pursue reconciliation. What is often more important to the outcomes of these pillars applied, are the processes themselves: how the pillars are discussed, what decisions are made in establishing them, and their participatory nature.²² It is about their perceived transparency, impartiality and legitimacy. These are the elements which may allow a truth-seeking process to truly be reconciliatory.

¹⁹ *Seils*, *supra* note 2 at 14. This is the case in Syria, where the population remains wary of the international community and its “plan for the country”.

²⁰ *Ibid* at 1. The extent to which each pillar will be used is always adapted to the needs of the country.

²¹ *Ibid* at 5.

²² *Ibid* at 10.

Reconciliation, according to Hayner, can be assessed using three questions: How is the past being dealt with in the public sphere? Are relationships between former opponents based on the present or the past? Is there one version of the past or many?²³ Seeing as countries often turn to truth-seeking first in an attempt to build reconciliation²⁴, these questions are important to keep in mind when assessing the results of its processes. Truth-seeking mechanisms can lead to many issues and exacerbation of tensions, yet they are continually adopted and recommended because of their great potential for reconciliation, among other goals. Their potential has been further affirmed through the international effort to conceptualize and give rise to an enforceable right to truth.

The Right to Truth

The right to truth remains elusive and is far from being firmly defined in international law. Yet, the past 20 years have seen an upsurge in its development. It evolved from the right to know as it was articulated in article 32 of the Additional Protocol I to the Geneva Conventions, and in 2005, an updated version of the UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity referred to The Inalienable Right to Truth²⁵. Since then, the right to truth has been explicitly incorporated into many international instruments,

²³ Hayner, *supra* note 3 at 365.

²⁴ *Ibid* at 353.

²⁵ "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." Dermot Groome, "Part II The Right to Know, A General Principles, Principle 2 The Inalienable Right to the Truth", Oxford Commentaries on International Law, the United Nations Principles to Combat Impunity [Groome].

including treaties²⁶, charters²⁷, universal declarations²⁸, conventions²⁹, as well as principles³⁰, key resolutions³¹ and reports³². It has also seen key resolutions³³, reports³⁴ and publications³⁵ address it expressly. As of yet, there is no international convention specifically on the right to truth, and so there exists no legally binding right to truth per se.

The right to truth incorporates many individual and collective rights, such as the right of access to justice and information, the equal protection of law and the right to family life.³⁶ It creates an obligation for states to put in place mechanisms that help establish the truth, specifically in the wake of serious human rights violations. Yet, defining this right internationally has proven difficult, since it has reached a customary status in that

²⁶ The International Convention for the Protection of All Persons from Enforced Disappearance was the first to guarantee the right to truth in 2010. International Convention for the Protection of All Persons from Enforced Disappearance 20 December 2006, UN GA Res 61/177 (date of entry into force 23 December 2010).

²⁷ E.g. United Nations Charter. Charter of the United Nations, 26 June 1945, Can TS 1945 no 7.

²⁸ E.g. Universal Declaration of Human Rights. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

²⁹ E.g. Convention on the Prevention and Punishment of the Crime of Genocide. Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948, UNGA Res 260 A (III) (entered into force 12 January 1951).

³⁰ Such as the updated UN principles mentioned previously. United Nations Security Council, "Purposes and Principles of the United Nations", online: United Nations Security Council <<https://www.un.org/securitycouncil/content/purposes-and-principles-un-chapter-i-un-charter>>.

³¹ E.g. A/HRC/RES/21/15, Human rights and transitional justice (2012). Human Rights and Transitional Justice, GA Res 21/15, HRC, 21st Sess (2012).

³² E.g. A/HRC/27/21, Report of the Office of the UN High Commissioner for Human Rights, Analytical study focusing on gender-biased and sexual violence in relation to transitional justice, Report on the 27th session, HRC, 2014.

³³ E.g. General Assembly Resolution, Right to truth (2014). Right to Truth, UN GA Res 9/11, HRC, (2014).

³⁴ E.g. A/HRC/15/33, Report of the UN High Commissioner for Human Rights on the Right to the truth, Report on the 15th session, HRC, 2010.

³⁵ E.g. OHCHR publication: HR/PUB/06/1, Truth commissions. Office of the United Nations High Commissioner for Human Rights, "Rule-Of-Law Tools for Post-Conflict States: Truth Commissions" (2006), online: OHCHR <<https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionse n.pdf>>.

³⁶ Groome, *supra* note 25 at para 7.

victims of human rights violations expect that they have a right to the truth. As such, the right to truth must be defined in tandem to its development in customary law, so that its definition reflects the legal obligations which flow from customary norms³⁷, the initiatives states feel compelled to adopt, and the responses victims have towards these initiatives so that definitional development truly reflects the needs of victims.³⁸

An illustration of the strength of this customary norm is the prominence of truth commissions globally. Although the right to truth is not internationally legally binding, some regional and national courts have confirmed its enforceability. The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have both agreed that this right was established by the American Convention on Human Rights³⁹, and it is also claimed that the right to truth is implicit to many articles of the African Commission on Human and Peoples' Rights⁴⁰. Countries such as Brazil and Guatemala justified the establishment of their truth commissions, by acknowledging their citizens' right to truth.⁴¹

Unfortunately, many truth commissions are not borne out of a recognition for the right to truth but are instead driven by ulterior motives which only have a *prima facie* interest in the truth. For example, truth commissions set up by presidential decree are often perceived as politically motivated tools used for the persecution of regime opponents, or as attempts to draw attention away from real issues and real action.⁴² Since states spend so

³⁷ The formation and identification of customary international law is still the source of a lot of disagreement, described as "somewhere above a good argument and somewhere below a clear legal rule". James Sweeney, "The Elusive Right to Truth in Transitional Human Rights Jurisprudence" (2018) 67:2 ICLQ 353 at 359 [Sweeney].

³⁸ Groome, *supra* note 25 at para 8.

³⁹ Eduardo González & Howard Varney, Truth Seeking: Elements of Creating an Effective Truth Commission, eds (Brasilia: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice, 2013) at 5 [Gonzalez].

⁴⁰ Sweeney, *supra* note 37 at 384.

⁴¹ Gonzalez, *supra* note 39 at 6.

⁴² Charles Manga Fombad, "Transitional Justice in Africa: The Experience with Truth Commissions" (2017): Hauser Global Law School Program <https://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html> [Fombad].

much money and time setting up these commissions, the fact that they often choose to ignore their findings leads observers to conclude that the commissions are being used as publicity stunts; a means of postponing real action while appeasing the international community by abiding to their customary norms.

Where does this customary right to truth truly stem from, and can this help us understand why the right to truth is often used as a front for pursuing other goals? In considering the recent proliferation of truth commissions, it is important to consider whether these customary laws flow from perceived international norms and obligations which pressure states into creating truth-seeking mechanisms, or whether they flow from inside the nation, from the normative demands of citizens. Seeing as customary norms are driving the evolution and the definition of what a right to truth looks like, this is a critical distinction, which will ultimately determine what purpose these commissions will serve and who will best be served by them. It has become apparent that truth commissions do not purely and wholly serve the purpose of fulfilling a customary right to truth which is felt to be owed to victims; instead, truth commissions are often being used as political tools with often flagrant disdain for the population's participation. This would suggest that the customary norms in reality do not stem from internal pressures, but instead from international ones. This leads me to an analysis of the historical developments which led to the CDVR established in Côte d'Ivoire in 2012, its discernable overt and covert intentions, as well as what truly came of it.

Case Study: Côte d'Ivoire

Historical Contextualization

The 2011 post-electoral conflict was borne out of a long, complicated series of conflicts stemming from the 1990s. In order to understand whether national reconciliation efforts have had a real chance at success, it is important to understand the underlying tensions which led to the 2011 conflict.

Around the time of Côte d'Ivoire's independence in the 1960s, it experienced unprecedented economic growth attracting

many migrant workers.⁴³ This was spurred by President Felix Houphouët-Boigny's (the first president of the newly independent country) efficient development of the cocoa and coffee industries, as well as his open policy which encouraged free trade and free movement in West Africa. He sustained this high influx of migrants by strategically and equitably distributing wealth and positions⁴⁴ of power among different ethnic groups.⁴⁵ He was a strong advocate of dialogue and compromise between the various ethnic groups of the country as he increasingly assigned rights to live and work to migrants; he also introduced liberal land ownership laws which drew many immigrants.⁴⁶ Unfortunately, this laid the groundwork for what eventually became great ethnic tensions once the prices of cocoa and coffee dropped on the international market, leading to significantly reduced living standards. This set the stage for land disputes between natives and migrants of Côte d'Ivoire, and also led to the "North versus South" divide.

At this same time, Côte d'Ivoire received strong pressure from the French government at the La Baule Summit to continue to liberalize their economy and open up their markets to foreign investment, or to otherwise lose privileges which came with the relationship.⁴⁷ This opened up the stage for more political contestants, who saw the economic contraction and the ethnic tensions as an opportunity to champion votes. The three leading politicians during this period – Alassane Ouattara, Henri Konan Bédié, and Laurent Gbagbo – "manipulated the already sour ethnic discourse in original and innovative ways to gain political

⁴³ Ibrahim Bangura, *A Report on Transition Justice Mechanisms in Côte d'Ivoire*, (Senior Fellow, University of Sierra Leone, 2019) [unpublished] [Bangura].

⁴⁴ Houphouët-Boigny had set up a system of ethnic quotas within government institutions. Tom Ogwang, "The Root Causes of the Conflict in Ivory Coast" (2011) at 2, online (pdf): *Africa Portal* <<https://www.africaportal.org/publications/the-root-causes-of-the-conflict-in-ivory-coast/>> [Africa portal].

⁴⁵ Regional Bureau for Africa, *The Conflict in Côte d'Ivoire and its Effects on West African Countries: A Perspective from the Ground*, United Nations Development Program, Issue Brief (2011) at 1.

⁴⁶ *Africa Portal*, *supra* note 44 at 3.

⁴⁷ Privileges such as financial aid, for example. see Coleman Kitchen & Jean-Paul Paddock, "The 1990 Franco-African Summit" (1990) online (pdf): *Center for Strategic and International Studies*: <<https://www.csis.org/analysis/africa-notes-1990-franco-african-summit-august-1990>>.

advantage".⁴⁸ Bédié, who was first to succeed Houphouët-Boigny in 1995 and who was eventually removed by a military coup in 1999, gave rise to the concept of "Ivoirité": "an ethno-nationalist concept that defined citizens as those 'who called Côte d'Ivoire his or her country, be born of Ivorian parent native to one of the numerous ethnic groups native to Côte d'Ivoire.' "⁴⁹ This cemented the North vs. South divide, since it meant that most northerners (who were largely immigrants) became perceived as stateless people and elevated the Akan ethnic group of the south to the top of the social hierarchy.⁵⁰ This was also a way of attacking Ouattara who was from the North and was born from one immigrant parent. Bédié removed all northerners from positions of power, and codified the notion of Ivoirité, barring anyone who did not have two Ivorian parents from running for the presidency.⁵¹

These foundational events set the scene for the two civil wars and the many conflicts which followed. The first civil war, which took place in 2002, was a failed coup which tried to oust President Gbagbo for perpetuating prejudice against northerners.⁵² Although he managed to stay in power until 2010, he finally ceded under international and national pressure to hold elections. The main opposition leader was Ouattara, and after the election they both claimed to have won and were separately inaugurated. Ouattara's victory was certified by the UN and broadly supported by the international community, whereas Gbagbo's success was based on the decision of the country's

⁴⁸ *Bangura, supra* note 43 at 12.

⁴⁹ Isiaka Badmus, "Even the Stones are Burning: Explaining the Ethnic Dimensions of the Civil War in Côte d'Ivoire" (2017) 18:1 J Soc Sci 45 at 51 (T&F).

⁵⁰ *Bangura, supra* note 43 at 12.

⁵¹ *Fombad, supra* note 42. After the military coup in 1999, a Mediation Committee for National Reconciliation was set up to investigate the violence which led to the death of 171 citizens. Its most important recommendation was the establishment of the National Reconciliation Forum, which acknowledged that Ouattara was Ivorian.

⁵² *Africa Portal, supra* note 46 at 5; In 2003, the Linas-Marcoussis Peace Agreement was signed, after which French and UN peacekeepers arrived. The UN Office of the High Commissioner for Human Rights led the International Commission of Inquiry in 2003, and the UN Security Council set up a second International Commission of inquiry in 2004 to investigate all human rights violations and identify those responsible. *Fombad, supra* note 42.

Constitutional Council.⁵³ This is the event which triggered the 2011 post-electoral conflict. Although the standoff between the two leaders and their forces only lasted about a month, it resulted in over 3,000 officially reported deaths and over 500,000 displaced. It ended once Gbagbo was captured, at which point he was transferred to the International Criminal Court.⁵⁴

The general impression of the public after Ouattara finally came into power, was that he had won the war, but not necessarily the elections.⁵⁵ There was a strong sense, which probably stemmed from the continuing deep divide of the country, that Gbagbo's removal had been a coup d'état by the victors⁵⁶ and that Ouattara only won because the international community⁵⁷ favoured him.⁵⁸ It was under this very tense setting that the first steps towards peacebuilding and reconciliation were taken. Ouattara publicly announced that he was committed to holding perpetrators of violence accountable for their crimes, and on the 28th of September 2011, President Ouattara swore in the National Commission for Dialogue, Truth and Reconciliation.⁵⁹ Uncovering the truth can be especially important in places where history tends to repeat itself. Based on the conflict trend outlined, it seems as though Côte d'Ivoire is one such place where uncovering the truth might enable the country to move forward and break the cycle of violence which remains rooted in a couple key issues. We might also want to consider how international support for Ouattara, which ultimately helped him win the election, might also influence the CDVR's inception and purpose.

⁵³ *Africa Portal*, *supra* note 46 at 5.

⁵⁴ *Bangura*, *supra* note 43 at 16.

⁵⁵ Alexandra Novosseloff, "The Many Lives of a Peacekeeping Mission: the UN Operation in Côte d'Ivoire" (2018) at 19, online (pdf): *International Peace Institute* < https://www.ipinst.org/wp-content/uploads/2018/06/1806_Many-Lives-of-a-Peacekeeping-Mission.pdf >.

⁵⁶ *Ibid.*

⁵⁷ This included the UN, the AU, ECOWAS and the EU. United Nations Operation in Côte d'Ivoire, "post-election crisis", online: *peacekeeping UN*: < <https://peacekeeping.un.org/en/mission/past/unoci/elections.shtml> >.

⁵⁸ *Bangura*, *supra* note 43 at 16.

⁵⁹ International Center for Transitional Justice, "Côte d'Ivoire" (2019), online: *ICTJ*: < <https://www.ictj.org/our-work/regions-and-countries/c%C3%B4te-divoire> > [ICTJ Cdl].

National Commission for Dialogue, Truth and Reconciliation

The CDVR's Focus on Reconciliation

The composition and mandate of the CDVR were defined in article 5 of the 13th of July 2011 presidential decree. The CDVR's mission was "to work independently in the reconciliation and strengthening of social cohesion among all communities living in Côte d'Ivoire"⁶⁰. The emphasis was on reconciliation, and its main tasks reflected that:

- The identification of human rights violations;
- The pursuit of the truth in order to assign responsibility for past and recent events;
- To obtain the victims' renditions of events in order to have perpetrators acknowledge the wrongs done and extend apologies;
- Propose means which can contribute to healing the trauma suffered by victims;
- Identify and make propositions for actions that could help reinforce social cohesion and national unity;
- Identify and make propositions which aim to fight injustices, inequalities, tribalism, nepotism, exclusion and any other forms of hate;
- Educate on peace, dialogue and peaceful coexistence;
- Contribute to the emergence of a national conscience and for the collective adhesion to the common interest;
- Promote respect of differences and democratic values.⁶¹

These tasks and the initial aims of the commission showed a lot of promise. It sought advice from the truth and reconciliation commissions from South Africa, Ghana, Peru, Sierra Leone and

⁶⁰ Translated from French: République de Côte d'Ivoire, *Résumé du Rapport Final Commission Dialogue, Vérité et Réconciliation*, (Octobre 2016) (Président de la Commission: Charles Konan Banny) <http://www.pncs.ci/images_activite/fichier_00946.pdf> [CDVR resume].

⁶¹ This list taken and translated from: République de Côte d'Ivoire, *Rapport Final Commission Dialogue, Vérité et Réconciliation*, (Décembre 2014) (Président de la Commission: Charles Konan Banny) <[http://www.gouv.ci/doc/presse/1477497207RAPPORT%20FINAL_CDVR.p df](http://www.gouv.ci/doc/presse/1477497207RAPPORT%20FINAL_CDVR.pdf)> [CDVR].

Togo in its creation. Throughout its three-year mandate, it also welcomed the help of many local and international NGOs.⁶²

The fact that the commission chose to not only focus on truth, but also on reconciliation and dialogue is important. This followed in South Africa's footsteps, which was the first country to incorporate reconciliation into its title signalling wider ambitions than uncovering historical truth. In many places, reconciliation is intentionally left out such as in the Yugoslavian or the Sri Lankan commissions.⁶³ Reconciliation is a complex goal to add to a truth commission, since it should ideally address individual, interpersonal, institutional and socio-political levels of reconciliation as needed.⁶⁴ The South African Commission's final report distinguished between the various dimensions of truth which must be uncovered in order to effectively address reconciliation and its levels: judicial truth, personal truth, social truth and restorative truth.⁶⁵

With these in mind, Côte d'Ivoire set up 4 sub-commissions:⁶⁶ the Specialized Commission of Inquiry and Healing, the Special Heuristics Commission, the Specialized Commission on Reparation, and the Specialized Commission on Memorialization.⁶⁷ Seeing as it had decided to make reconciliation its aim, the CDVR was critiqued for spending most of its time on the Special Heuristics Commission, which concerned itself with the historical truth just as an ordinary truth commission would. But even in this aspect it fell short, failing to address the more contentious historical issues or incorporate the victims' perspectives. It talked a lot about the economic structures which

⁶² *Ibid.* At least in theory, as claimed by the acknowledgment section of the CDVR.

⁶³ Kevin Avruch, "Truth and Reconciliation Commissions: Problems in Transitional Justice and the Reconstruction of Identity" (2010) 47:1 *Transcult Psychiatr* 33 At 35 [Avruch]; Sri Lankan Commission on Forcibly Disappeared Persons in Sri Lanka finished its report in 1997 and used no rhetoric of reconciliation. Hayner, *supra* note 3 at 366.

⁶⁴ Seils, *supra* note 2 at 5.

⁶⁵ Donald Shriver Jr, "Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?" (2001) 16:1 *JL & Relig* 1 at 4.

⁶⁶ International Center for Transitional Justice, "Socio-Political Analysis and Strategy for ICTJ's Engagement on Transitional Justice Issues in Côte d'Ivoire" (2015) [unpublished, Quarterly Report, ICTJ Abidjan, Côte d'Ivoire].

⁶⁷ CDVR, *supra* note 62 at 22.

failed the people, but not enough about the underlying ethnic nationalist discourse which fuelled a lot of the conflicts.⁶⁸

The CDVR's Failure to Truly Address Reconciliation

Various versions of the truth must be uncovered to achieve thick reconciliation, which is inherently "intersubjective and multiple", which requires "admitting the other's truth into one's own narrative".⁶⁹ This is crucial in Côte d'Ivoire, where there remains a widespread feeling of victimization, of having suffered more than anyone else during the war. This victim rhetoric at the very least needs to be expanded to a common feeling of victimization, to the recognition and understanding of the suffering of others.⁷⁰ Various truths help bridge the gap between individual reconciliation and collective reconciliation.⁷¹

Furthermore, commissions often fail to specify what level of reconciliation they are working towards establishing, which not only sets expectations very high but is likely to lead to failure.⁷² The first thing people will look at is whether the commission's mandate has been fulfilled. This is in itself rare since mandates tend to be overbroad and over-ambitious, as is the case for Côte d'Ivoire, and therefore unlikely to be fulfilled within a short amount of time with limited funds.⁷³ Since conceptions of reconciliation can vary widely, for the purpose of peace, the simplest form of reconciliation should be prioritized, namely "that of establishing ground on which conflicting groups can coexist side by side in a peaceful manner".⁷⁴ For thicker reconciliation, acknowledgment and apologies are likely to be required, as well as creative, context-specific thinking as to how a truth-seeking process can lead to wider spread, national reconciliation. These

⁶⁸ Bangura, *supra* note 43 at 41.

⁶⁹ Herbert Kelman, "Reconciliation as identity change: A social psychological perspective" in Y Bar-Siman-Tov (ed), *From Conflict Resolution to Reconciliation* (Oxford: Oxford University Press, 2004) at 123.

⁷⁰ Interpeace, "Dynamiques et Capacités de Gestion des Conflits à l'Ouest de la Côte d'Ivoire" (2013) at 11, online (pdf): *Interpeace* <<https://www.interpeace.org/2013/03/cote-divoire-causes-of-conflict/>>.

⁷¹ Hayner, *supra* note 3, at 364.

⁷² *Ibid.*

⁷³ Yet many argue that the mandate should be sufficiently broad to address the full range of abuses that occurred. See Eric Brahm, "Uncovering the Truth" (2007) 8 *Int Stud Perspect* 16 at 30 (JSTOR) [Brahm].

⁷⁴ Hayner, *supra* note 3 at 364.

are all components which were acknowledged in the CDVR's main tasks. Ultimately, this is most likely to happen when pre-existing ties, genuine connections and understandings between groups existed in the country before the conflict took place.⁷⁵ Côte d'Ivoire, a country that was for a long time known for its harmony and peace, would seem like the ideal candidate.

Côte d'Ivoire's CDVR mentions that it seeks to establish "true" reconciliation. In its final report it dedicates only four lines to defining what it means by the pursuit of reconciliation. It states that reconciliation will only be obtained after the identification and the implementation of local, collective and national reconciliation measures. It describes a process which needs to be authentic and active at many levels: within communities, between communities, and between communities and institutions. Although this established what levels of reconciliation were sought, it did little to show how this could be achieved.⁷⁶

In the results section of the CDVR report it describes the creation of local commissions aimed at assisting the reconciliation process, with the help of prefects, mayors, elected locals and religious guides.⁷⁷ The aim was to fully integrate all communities in the process, and to allow as many people as possible to participate. An effort was also made to ensure that this included women and youth. In the end, no concrete recommendations were made relative to reconciliation.⁷⁸ In total, the commission collected the testimonies of 72,483 victims, including 28,064 from women and 757 from children throughout the country. In many ways this was in line with the commission's interest in engaging the population in dialogue. Unfortunately, it lacked in that while it listened, it never consulted; it never provided psychological support, and only 28% of the population was able to take part in one of the CDVR's activities. The popular feeling after the CDVR's mandate came to an end was that there was no true political will and there lacked veritable dialogue in that communication felt forced and without any true intent or reflection on the part of the

⁷⁵ Hayner, *supra* note 3 at 366.

⁷⁶ CDVR, *supra* note 62 at 28.

⁷⁷ *Ibid* at 98.

⁷⁸ *Ibid* at 117. Although the table of contents indicates that recommendations in relation to reconciliation are made, this section instead offers recommendations concerning gender issues.

commissioners on how to productively use this information towards reconciliation.⁷⁹ Out of these 72,483 hearings, only 80 ended up being arbitrarily selected for a national public audition, which were never broadcast.⁸⁰

On paper, the CDVR adopted many recommendations as to how truth commissions should be set up, but unfortunately it was bogged down by deeper structural problems both in its inception and its subsequent performance. The structural problems which have been mentioned by commentators include: the lack of consultation with civil society during the CDVR's design; the selection of a partial, politically motivated president for the commission, chosen at Ouattara's discretion;⁸¹ the slow release of the final report, which Ouattara reluctantly released two years after receipt; and the isolation of the multiple transitional justice processes, which acted in a disjointed manner, leading to inefficient use of resources.⁸²

How do things look now, five years after the final report was released?⁸³ Looking back to some of the components

⁷⁹ Hélène Calame, "La Commission Dialogue Vérité et Réconciliation ivoirienne: une belle coquille vide?" (2015) at 7, online (pdf): *Institut Hautes Études sur la Justice* < <https://ihej.org/programmes/justice-penale-internationale/la-commission-dialogue-verite-et-reconciliation-ivoirienne-une-belle-coquille-vide/> > [Calame].

⁸⁰ Fombad, *supra* note 42.

⁸¹ Ouattara picked his old political adviser as the head of the commission, without any consultations with the public and at his full discretion. Bangura, *supra* note 43 at 67.

⁸² Ouattara and the President of the CDVR spoke of having criminal accountability and truth-seeking processes working simultaneously. The president always spoke of the importance of conducting trials in addition to having truth-seeking, unlike the South African "truth for amnesty" model. In practice there was no collaboration between the "Cellule Spéciale d'Enquête et Investigation" (the main investigation cell for the crisis) and the CDVR towards this goal, which could have resulted in efficient synergies. Calame, *supra* note 80 at 5; Bangura, *supra* note 43 at 36.

⁸³ The truth commission boom has been criticized for having very little real data about their long-term effectiveness, and for often being focused on a small, biased sample of successful commissions (e.g. the South African Commission). It is also said that a lot of energy is put into tracking their establishment, their activities as they are underway and their immediate reception, but that little is known about their long-term success once their relatively short mandates expire. Brahm, *supra* note 74 at 19. At the end of 3 years, Mr. Banny felt that the mandate and the action plan which had been put in place had been completed. He balanced this statement by acknowledging that reconciliation

mentioned at the beginning for assessing state-led truth-seeking, this one falls short. Not only did it fail to sufficiently address the historical truth, it did not make sufficient efforts to adapt to its context and to answer the needs expressed by its population. The central issues they wanted addressed were those of land tenures as well as ethnic tensions and their political instrumentalization, which remain important topics in this upcoming election.⁸⁴ Seeing as it did not do enough to meaningfully involve the victims in the process and it lacked transparency and impartiality, it came across as empty and as driven by ulterior motives. What are these ulterior motives? Looking back to the right of truth and how developing countries may approach this right, it often is construed as an imposed international norm, whereby the “redemption or salvation of the state is solely dependent on its submission to human rights norms”.⁸⁵ This pressure elicits the adoption of elegant transitional justice mechanisms (among many other human rights tools) which check the boxes prescribed by international norms without producing the results anticipated by their mandates. In light of the 2020 elections, similar trends emerge which led to the 2011 post-electoral crisis. Ethnic divides are once again being opportunistically used by politicians, and the two frontrunners remain the same: Ouattara and Gbagbo. As of yet, there has not been any singular truth with sufficient backing to break this cycle and so in many ways, we remain stuck in the past.

The shortcomings of the CDVR have contributed to a growing sense of mistrust of transitional justice.⁸⁶ By some it is perceived as a foreign self-serving political tool, and by others as a process used by pro-Gbagbo victims to create obstacles to a

takes a long time and that it will now depend on the execution of his recommendations. Christophe Châtelot “Charles Konan Banny: “En Côte d’Ivoire, le désarmement n’est pas achevé”, *Le Monde Afrique* (7 August 2015), online: <https://www.lemonde.fr/afrique/article/2015/08/05/charles-konan-banny-en-cote-d-ivoire-le-desarmement-n-est-pas-acheve_4713071_3212.html>.

⁸⁴ Human Rights Watch, “Côte d’Ivoire Events of 2018” (2018), online: *Human Rights Watch* <<https://www.hrw.org/world-report/2019/country-chapters/cote-divoire#2335c1>>.

⁸⁵ Makau W Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 *Harv Int’l LJ* 201 at 203 (SSRN).

⁸⁶ Adou Djané Dit Fatogoma, *Resistance to transitional justice in the context of political violence in Côte d’Ivoire*, 1st ed by Briony Jones & Julie Bernath (London, UK: Routledge, 2017) at 45 [Adou].

victor's justice.⁸⁷ The CDVR was convincingly established with the help of national and international transitional justice experts which led to widespread hope and excitement in the population. It had an ambitious mandate, a complex structure, and employed symbolism, speeches, and quantitative analysis to impress and convince.⁸⁸ Sadly, after its completion, the overwhelming sense amongst Ivorians is that it was not genuine in its undertaking, which does not bode well for the future of transitional justice in Côte d'Ivoire. One important factor in the success of any transitional justice undertaking is the public's engagement. As they become increasingly wary of it, the less likely any such mechanism is to succeed.⁸⁹ In light of developing reluctance to engage in state led transitional justice processes, civil society has taken up the task of providing the solace victims crave by developing many alternative truth-seeking and memorialization initiatives.

Amnesty Laws

Foe or hero?

Amnesty laws have long been adopted as a tool for the promotion of reconciliation, although as of late they have been increasingly perceived as antithetical to justice. Amnesty laws have especially been widely used in South America, where it was common for outgoing dictatorships to pass blanket amnesties applicable to everyone involved in its crimes.⁹⁰ This evolved into more refined amnesties which are no longer predominantly used to promote impunity, but which have reconciliatory potential. A highly regarded example is the "truth for amnesty" South African model, whereby its truth commission had the power to grant amnesties to perpetrators who came forward and confessed. South Africa developed this model in response to the failure of blanket amnesties in Latin America, which did not effectively encourage perpetrators to cooperate with national truth-seeking

⁸⁷ Adou, *supra* note 86 at 19.

⁸⁸ Calame, *supra* note 80 at 7.

⁸⁹ James Cavallaro & Fernando Delgado, *The Paradox of Accountability in Brazil*, ed by Vesselin Popovski & Mónica Serrano (Tokyo: University Nations University Press, 2012) at 9.

⁹⁰ Kieran McEvoy & Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy" (2012) 39:3 *J Law Soc* 410 at 415 (JSTOR) [McEvoy].

and reconciliation efforts. Why then did Côte d'Ivoire, which often looked to South Africa in designing its transitional justice process, choose to adopt a blanket amnesty in 2018?

When Ouattara set up the CDVR in 2011, he proudly proclaimed that although he would follow the commendable South African model, he remained committed to criminal accountability and therefore would not adopt its "truth for amnesty" component.⁹¹ In the years that followed, many were prosecuted but it became apparent that these were predominantly from the Pro-Gbagbo camp, both nationally and internationally.⁹² A lot of these individuals had been subjected to very long pre-trial detentions and so when the amnesty came in 2018, it was met with relief.⁹³ But this relief was not only felt by pro-Gbagbo supporters—this amnesty has been critiqued for being strategically passed right before the elections. In the event that Ouattara is not re-elected, this is a way of protecting himself and his followers from prosecution under new leadership, not unlike what motivated outgoing South American dictators in passing their blanket amnesties. This is all part of a larger trend in Côte d'Ivoire, where the incoming president passes a blanket amnesty to absolve himself and his allies of responsibility, as well as his opponents, seeing as impunity for one side has become dependent on the impunity of the other.⁹⁴ Ouattara deviated from this trend for some time by not granting an immediate amnesty, but eventually crumbled under the fear of not being re-elected.

This blanket amnesty does not exclude war crimes and crimes against humanity, which must be prosecuted as stipulated by international treaties ratified by Côte d'Ivoire: the Convention

⁹¹ ICTJ Cdl, *supra* note 59.

⁹² The ICC was prosecuting Gbagbo and his minister of youth, Blé Goudé, at the same time. Ludovic Lado, "The Politics of Reconciliation in West Africa" (16 March 2016) online (blog): *Africa Up Close A Wilson Center Blog* <<https://africaupclose.wilsoncenter.org/the-politics-of-reconciliation-in-west-africa/>>.

⁹³ Mohamed Suma, "Côte d'Ivoire's Continued Struggle for Justice and Reconciliation" (2019), online: *International Center for Transitional Justice* <<https://www.ictj.org/news/cote-d%E2%80%99ivoire%E2%80%99s-continued-struggle-justice-and-reconciliation>>.

⁹⁴ The New Humanitarian "President approves amnesty law for rebels", *The New Humanitarian* (4 July 2003), online: <<http://www.thenewhumanitarian.org/fr/node/212896>>.

against Torture (article 4)⁹⁵, the Geneva Conventions (under Chapter IX, Repression of Abuses and Infractions, articles 49-50 addressing the sanctions of Grave Breaches)⁹⁶, and the Rome Statute (articles 5-8)^{97, 98}. Blanket amnesties, especially in regard to these crimes, are incompatible with international customary laws.⁹⁹ In its latest 2016 Constitution, article 54 states that Côte d'Ivoire must respect its international commitments, and its preamble confirms its ratification of the Constitutive Act of the African Union (2001) whose guiding principles reject impunity.¹⁰⁰ The latest amnesty law only omitted "blood crimes" and perpetrators which were already being tried in international courts. Civil society organizations have called on the government to make sure that this does not cover individuals charged with serious crimes.¹⁰¹

The Intersection of Amnesty and Truth

The blanket amnesty also goes against the right to truth. The Inter-American Court of Human Rights has gone as far as declaring that amnesty laws "lack legal effect" and are therefore

⁹⁵ *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

⁹⁶ *The Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 at 52 (entered into force 21 October 1950).

⁹⁷ *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

⁹⁸ Amnesty International, "Côte d'Ivoire: No Amnesty for Serious Crimes of 2010-11 Crisis" (7 August 2018), online: *Amnesty International* <<https://www.amnesty.org/en/latest/news/2018/08/cote-ivoire-no-amnesty-for-serious-crimes-of-crisis/>> [amnesty intl].

⁹⁹ Interestingly, the granting of broad amnesties is recognized as a norm of customary international law, under rule 159 of customary IHL, but in its application and interpretation it has been understood to not apply to the international crimes which include the crimes listed above. See *Rule 59*. Amnesty (2005), Cambridge University Press, Customary IHL Database (vol II, ch 44, s D), online: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule159>.

¹⁰⁰ Côte d'Ivoire's Constitution of 2016, (2016) Preamble, Online: *constitute project*: <https://www.constituteproject.org/constitution/Cote_DIvoire_2016.pdf?lang=en> [Cdl Constitution]; *Ibid* title III, ch II, art 54.

¹⁰¹ *Amnesty intl*, *supra* note 99.

null and void¹⁰², which is partially because the Inter-American Human Rights system remains one of the strongest advocates for the right to truth. It perceives the right to truth not as a stand-alone right, but one which incorporates judicial guarantees and judicial protection leading to prosecution, as was first found in the case *Bámaca Velásquez v Guatemala*¹⁰³. The Inter-American Human Rights system has conceptualized a right to truth from an analysis of the group of rights recognized in the American Declaration on the Rights and Duties of Man (articles 4, 18, 24) and the American Convention on Human Rights (articles 8, 13, 25), as intrinsically flowing from these judicial guarantees and protections.¹⁰⁴ As seen, the right to truth is borne from the right to know in the Geneva Convention, to which Côte d'Ivoire is a party. It is also implicit to the African Charter on Human and Peoples Rights (1986), which states that "every individual shall have the right to receive information". Although this is vague, combined with the right to dignity asserted in article 2 of Côte d'Ivoire's constitution and article 18 which also confirms the right to information, we start to see how a right to truth could emerge.¹⁰⁵

Amnesties can go against the right to truth in blatant and practical ways. The word amnesty stems from the Greek word for "forgetfulness" which reflects its origins as a tool for "forced amnesia".¹⁰⁶ The original concept underlying amnesty is not only that the crime be forgiven, but that it must also be erased and obviated.¹⁰⁷ The implications of this can be dire, as was seen in a case litigated by the International Center for Transitional Justice in

¹⁰² The Inter-American court has declared that amnesty laws "lack legal effect" and are therefore null and void seeing as self-amnesty laws are incompatible with the American Convention on Human Rights, which judges are bound by. Alonso Gurmendi, "At Long Last, Brazil's Amnesty Law is Declared Anti-Conventional" (16 August 2019), online: *Opinio Juris*: <http://opiniojuris.org/2019/08/16/at-long-last-brazils-amnesty-law-is-declared-anti-conventional/>.

¹⁰³ *Bámaca Velásquez v Guatemala* (2000), Inter-Am Ct HR (Ser C) No 70 at paras 30, 32.

¹⁰⁴ OAS, Inter-American Commission on Human Rights, *The Right to Truth in the Americas* OEA/SerL/V/II152/Doc 2 (2014) at para 69.

¹⁰⁵ These are often the kind of provisions which have been found to implicitly lead to a right to truth. *CdI Constitution*, *supra* note 101 at title I, art 1, 18.

¹⁰⁶ McEvoy, *supra* note 91 at 414.

¹⁰⁷ *Ibid* at 415.

South Africa.¹⁰⁸ This case revolved around the right of victims to talk about their experiences with reference to perpetrators of violence who had been granted amnesty. The lower courts had decided that in the name of national reconciliation, the past could be obliterated, and victims should not publicly identify perpetrators—giving perpetrators the benefit of not being held publicly or morally accountable, on top of not being held criminally accountable. It also gave perpetrators the right to sue victims for defamation, a devastating decision for victims who speak their truth as part of their healing process. The Constitutional Court reversed this judgment, upholding the right to truth and asserting that truth is necessary for reconciliation. This is yet another reason why amnesties have been more carefully crafted as of late. It is easy to imagine how the vague and overbroad amnesty passed by Ouattara could lead to similar results.

Salvaging Ouattara's Amnesty

Ouattara in passing this amnesty law, repeated the same mistakes he made when he established the CDVR. Reoccurring trends start to emerge, notably that for these processes to work, they need to be developed for the victims (as opposed to political parties or the international community) and actively engage the victims in its processes. He crafted it with no input from the public on the scope or objectives of the amnesty. He supposedly went even further this time in his abuse of power, and has been accused of not following the proper procedure to pass this amnesty law as stipulated in the new constitution he passed in 2016.¹⁰⁹ As such, this amnesty in its inception is even more flawed than the CDVR. Not only does it not accord with domestic or international laws, it does not take amnesty design recommendations into account (as was done with the CDVR) which all strongly recommend against passing blanket amnesties.

How can it be salvaged at this point or altered to become compatible with the right to truth and broader goals of reconciliation? Amnesties are more effective when they are

¹⁰⁸ Interview of Howard Varney ICTJ Truth-Seeking Consultant (5 February 2011) on ICTJ, *Amnesty Does Not Erase Truth*, online: <<https://www.ictj.org/news/amnesty-does-not-erase-truth>>.

¹⁰⁹ *CdI Constitution*, *supra* note 101, title V.

conditional, time-limited tools, victim-focused, and part of wider post-conflict justice measures.¹¹⁰ Uganda's amnesty provides a good example of a law which was refined as time went on and which resulted in support from the population.¹¹¹ The government formalized *de facto* amnesties¹¹² because of pressure from the community. It refined who could receive them, limiting their applicability to foot soldiers as distinguished from leaders of insurgent groups, and did not extend them to state actors. An amendment in 2006 also gave the minister of internal affairs the power to exclude named individuals from the amnesty. To be eligible for amnesty, its requirements included individual surrender, a renouncement of future involvement in the rebellion as well as the completion of a form (which did not require information about crimes committed). This amnesty was context-specific and in many ways reflected the needs and demands of the community.

This period following the amnesty presents a new opportunity for Ouattara to create something that involves victims, instead of yet another top-down mechanism designed for the elite. It can still be further refined to "complement both top-down elite driven programs to establish a common history and legitimate political institutions, and bottom-up, grassroots measures to encourage individual and communal reconciliation".¹¹³ There are many ways in which he can make the amnesty more legitimate; for example, by letting it only apply to low-ranking perpetrators of violence during the crisis, those responsible for less serious crimes, or those forced to commit violations. These alterations are needed to counteract the current impression that it is another tool instrumentally deployed at an opportune time to preserve the interests of the current government in power.

¹¹⁰ Louise Mallinder, *Global Comparison of Amnesty Laws, The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice*, ed by Cherif Bassiouni (Antwerp: Intersentia, 2010) at 114 [Mallinder].

¹¹¹ *Ibid* at 110.

¹¹² *De facto* amnesties are measures which do not explicitly bar prosecution but have that effect in practice. "EIP Explainer: Amnesties" (2019), online: European Institute of Peace <<http://www.eip.org/en/news-events/eip-explainer-amnesties>>.

¹¹³ Mallinder, *supra* note 111 at 16.

Amnesty, History, Memory and the Way Forward

Another question we can ask ourselves is what memories need to be rescued at this point, to serve the present and the future. Historical remembrance, as separate from the academic discipline of history, “is generally considered valuable insofar as it is of service to society”.¹¹⁴ As seen in the introduction to truth-seeking, truth for truth’s sake might not always be the quickest path to peace and reconciliation. In light of this, what truth is essential to establish in order to have a solid base of cohesive historical remembrance on which to pursue reconciliation? Humans, as well as states, need collective memory and traditions on which to build their future¹¹⁵ – this is often what motivates truth-seeking, an attempt to objectively rebuild a past on which everyone can more or less agree and build off. As seen with many countries which have tried to undertake this process, including Côte d’Ivoire, it is anything but easy especially when political will is lacking. In such cases, historical truth simply ends up becoming, as Nietzsche pessimistically predicts, a reflection of power and not of truth, which is what is witnessed in the CDVR’s historical rendition.¹¹⁶

In looking to form common ground, the most obvious commonality these days is that of pain, suffering, and the experience of injustice.¹¹⁷ This is not necessarily the sour base on which we want to build collective memory in looking towards the future and towards reconciliation. Rieff suggests that the solution might lie in forgetting and that this should not necessarily be perceived as a moral and political affront. Building remembrance based on feelings of victimization¹¹⁸ (which, as was mentioned, is still widely felt) and pain can lead to dangerous social and political repercussions, since it keeps the need for vengeance and retribution embedded in the social fabric.¹¹⁹ Half-hearted attempts at building remembrance, such as those by the CDVR, are exactly the kind of initiatives which could nurture feelings of resentment, since with every fresh set of results, victims feel further disenfranchised and lack recognition of the truth which is being

¹¹⁴ Rieff, *supra* note 8 at 22.

¹¹⁵ *Ibid* at 45.

¹¹⁶ *Ibid* at 67.

¹¹⁷ *Ibid* at 49.

¹¹⁸ *Ibid* at 117.

¹¹⁹ *Ibid* at 129.

presented. They are constantly being reminded that this process does not reflect their needs and their past experiences and so these initiatives instead remain bitter reminders of the past. This can have the result that “long after the quarrel has stopped making any sense the memory of the grudge endures”.¹²⁰

We remain at a point though where it may be important to untangle Côte d’Ivoire’s past in order to establish some common historical remembrance. The importance of establishing a basis of historical truth about the past in this context, is two-fold: it is a recent past and it is a repetitive past. Pursuing truth-seeking for its own sake can sometimes be detrimental, especially when it is continually done half-heartedly and with the wrong intentions, since it can keep a population from forming healthier collective memories as it is stuck dwelling on its past. Collective memories and remembrance can also be problematic when they are based on truths passed down through generations and which are therefore impossible to verify.¹²¹ But this is not the case here—the majority of perpetrators and victims are alive and we therefore remain in a period where we have the opportunity to collect lived and individual memories to paint a broader more accurate picture of the historical truth on which to build common ground. Rieff is also of the opinion that forgetting is not necessarily the best course of action when perpetrators remain free and we have but recovered from a great crime.¹²² Furthermore, we are witnessing a pattern of crime which is relatively new – only 3 decades old – and which is continually based on the same issues, such that it could still be broken if adequately addressed. When truth, forgiveness and accountability are plausible alternatives they should be sought; but the standard should be one of probability and feasibility and not one based on ideals.¹²³ These windows of opportunity are quickly closing and soon we will be within the realm of ideals, instead of the realm of the feasible.

¹²⁰ Rieff, *supra* note 8 at 144.

¹²¹ *Ibid* at 74.

¹²² *Ibid* at 87-88.

¹²³ *Ibid* at 101.

Conclusion

“Human rights workers... proceed on the basis that without justice there can be no lasting peace... as opposed to the entirely defensible claim that there can be no decent society without justice, which I often feel is what human rights activists actually mean.”¹²⁴

This quote emphasizes the idea that peace and reconciliation may reasonably be possible without justice. What it implies though is that even if there is peace, if there is no justice because its mechanisms cannot seem to be implemented in transparent, legitimate and impartial ways, this probably is a symptom of wider spread dysfunctionality. This dysfunction will block the proper and healthy performance of many other aspects of society, many of which could realistically also lead to reconciliation and peace. Prosperity, for example, could in many situations help lead to reconciliation –the value of a steady income, job security, and reliable infrastructure cannot be understated. Unfortunately, without the infrastructure which could help bring justice to its people, corrupt countries will often lack the infrastructure necessary to lead to equitable and widespread prosperity. So, while the lack of justice in itself might not block reconciliation, corruption might. Côte d’Ivoire is one such corrupt country, as witnessed through its design and execution of key transitional justice processes (e.g. CDVR). It remains 105th of 180 countries on Transparency International’s corruption index¹²⁵ (1st being least corrupt), and 93rd of 126 countries on the World Justice Project’s index¹²⁶.

Yet I do not think it is necessarily too late for Côte d’Ivoire. Accountability and truth-seeking have proven difficult and unproductive processes, but the new amnesty may present a final opportunity for the state to proactively build thick reconciliation. It could opt to finally address the multifaceted truth about the past few decades with the granting of conditional amnesties. It could look to make this a tool built by the people, for the people, to help

¹²⁴ Rieff, *supra* note 8 at 90-91.

¹²⁵ “Côte d’Ivoire” (2018), online: *Transparency International* <<https://www.transparency.org/country/CIV>>.

¹²⁶ “Côte d’Ivoire” (2019), online: *World Justice Project* <<http://data.worldjusticeproject.org/#/groups/CIV>>.

develop a sense of unity and social cohesion. The president could also issue a sincere apology¹²⁷ acknowledging the causes of land disputes and the ethnic tensions which have fuelled the past few decades of harm. This could be a constructive way of addressing the cycle of violence and could potentially shed enough light on the ethnic manipulations which arise during elections to warn against them in the upcoming 2020 elections to finally start truly working towards national reconciliation. Unfortunately, political will seems to be lacking, and the country may not be ready to change. Therefore, the amnesty is likely to remain a broad blanket statement. This will further alienate the population, at which point forgetting, as suggested by Rieff, might be the most viable path towards national reconciliation.

¹²⁷ There are many factors which will help make apologies effective. See "More Than Words: Apologies as a Form of Reparation" for a full account. Ruben Carranza, Cristián Correa, Elena Naughton, "More Than Words: Apologies as a Form of Reparation" (2015), online (pdf): *International Center for Transitional Justice*.

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