

Best Practice or Procedural Obligation? Reassessing Victim Participation in Truth and Reconciliation Commissions under International Human Rights Law

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Abstract

This research inquiry explores whether International Human Rights Law (IHRL) imposes procedural obligations on states to guarantee victim participation in truth and reconciliation commissions (TRC). Through a doctrinal analysis with a qualitative interpretative dimension, it investigates how such obligations emerge across the design, implementation, and follow-up phases of TRCs. Particularly, it questions whether meaningful victim participation is a necessary procedural component of the state's duty to uphold the rights to truth and an effective remedy. The findings of this study provide the strongest indication for the existence of state duties to enable victim participation during the implementation phase of TRCs. In the design and follow-up phases, this study identifies emerging legal expectations and normative developments that increasingly frame participation as a duty. Thus, this paper contributes to the clarification of procedural obligations and advocates for more robust safeguards to facilitate victim engagement in transitional justice processes.

Keywords: Victim Participation, Truth and Reconciliation Commission, Procedural Obligation, International Human Rights Law, Transitional Justice

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List of Abbreviations

ACHR	American Convention on Human Rights
AUTJP	African Union Transitional Justice Policy
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECtHR	European Court of Human Rights
HRC	Human Rights Council
HRCtee	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
IHRL	International Human Rights Law
OHCHR	United Nations Office of the High Commissioner for Human Rights
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations

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Chapter 1: Introduction

Amid the aftermath of conflict, a space is forged where sustainable peace, reconciliation, and accountability become imaginable. Within these transitional environments, the limited possibility to extensively prosecute all alleged perpetrators demands the creation of truth and reconciliation commissions (TRCs).² As part of a broader effort to address human rights violations and victims' grievances, TRCs may take various forms, adapting to the specific needs and conditions of each setting.³ Their effectiveness in delivering forms of justice, guarantees of non-recurrence, truth, and reparations, however, hinges on the meaningful participation of those affected.⁴ Genuine involvement of victims and their representatives relies on their ability to shape and influence decision-making throughout the design, implementation, and follow-up phases of TRCs.⁵ Transitional justice (TJ) scholarship and international organisations increasingly recognise victim participation's legitimising effect on TRC processes and outcomes.⁶ Moreover, they have posited that such engagement contributes to broader efforts to guarantee the dignity, safety, needs, and emancipation of those who suffered violence.⁷ However, burgeoning literature has largely sought to fortify arguments in favour of victim-centred participation as a normative ideal and procedural virtue in truth-seeking, instead of interrogating its legal status within TRC processes.

This lacuna elicits an investigation into how victim participation is situated within the obligations and principles set out under International Human Rights Law (IHRL). This inquiry

² Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge university press 2006) 3.

³ Huma Haider, 'Transitional Justice: Topic Guide' 1, 4–5.

⁴ UN Secretary-General, 'Guidance Note of the Secretary-General: Transitional Justice, A Strategic Tool for People, Prevention and Peace' (UN Secretary-General 2023) 4, 8.

⁵ Pablo de Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (2016) UN Doc N A/HRC/34/62 para 28.

⁶ Haider (n 3) 10.

⁷ UN Secretary-General (n 4) 8.

explores whether IHRL, through an analysis of legal standards and normative understandings, provides a persuasive basis for recognising victim participation as a procedural obligation that states must fulfil. Within this legal space, states retain discretion in addressing human rights violations, rendering TRCs an ad hoc mechanism or policy choice.⁸ Once a TRC is instituted by the State, however, it assumes duties to uphold the mechanism's impartiality, independence, and commitment to human rights standards, particularly where such requirements are articulated in the commission's founding legislation.⁹ In line with these responsibilities, TRCs, much like judicial bodies, are also bound by principles of procedural fairness.¹⁰ Consequently, this study explores whether victim participation in TRCs constitutes a derivative procedural obligation, arising from the state's duty to fulfil recognised rights, namely the rights to truth and remedy.¹¹ These entitlements closely correspond to the investigative and reparative mandates of most TRCs, serving as the remedy through which states implement these obligations under IHRL.¹² This study does not suggest that victim engagement in TRCs represents an independent justiciable entitlement per se; rather, its scope-framing research question asks: *Does International Human Rights Law impose procedural obligations on states to enable victim participation in Truth and Reconciliation Commissions?*

This thesis constitutes an active attempt to clarify human rights standards in TRC contexts and to strengthen the role of victims in shaping processes and outcomes that directly impact their lives. Despite the repeated commitments towards victim-oriented approaches by TRCs and other transitional justice mechanisms, victim participation frequently remains tokenistic or a discretionary policy choice.¹³ This thesis posits that if victim participation were

⁸ Freeman (n 2) 6.

⁹ *ibid* 89.

¹⁰ *ibid* 109.

¹¹ Simon Robins and Jasmina Brankovic, 'CSVR | Maximising Popular Participation in Transitional Justice in Africa: A Guidance Paper for Multilateral Actors' 2.

¹² Freeman (n 2) 6.

¹³ Elke Evrard, Gretel Mejía Bonifazi and Tine Destrooper, 'The Meaning of Participation in Transitional Justice: A Conceptual Proposal for Empirical Analysis' (2021) 15 *International Journal of Transitional Justice* 428, 432.

recognised as part of a state's duty to fulfil recognised human rights, such as the rights to truth and remedy, a firmer legal foundation could be forged, enabling victims to challenge their superficial contributions or exclusion. While TRCs are not themselves courts, their truth findings, particularly in identifying victims and perpetrators, often inform reparative measures and subsequent criminal proceedings in courts.¹⁴ Accordingly, if participation remains an institutional choice rather than a procedural obligation, the legitimacy and fairness of both process and outcome may be undermined. As participation remains “infinitely malleable” and victimhood context-specific, the absence of clear legal parameters risks subverting its enforceability and normative universality.¹⁵

As such, this thesis adopts a nuanced investigative approach that recognises human rights law does not operate in a vacuum, but is shaped and applied through a complex interplay of social, political, and institutional factors. Assessing whether IHRL imposes procedural duties on states to enable victim participation in TRCs first necessitates a succinct elaboration on the employed research design, followed by a conceptualisation of what ‘victims’ and ‘victim participation’ constitute for this inquiry. Thereafter, a discussion on the institutional dimensions around which this analysis is centred will take place. While this inquiry does not directly engage with victim experiences, it draws selectively on the Liberian TRC to ground this investigation in practice.¹⁶ Chapter Two establishes the conceptual, normative, and legal framework of the analysis to address the research question and aims. It commences by examining how participation is situated within IHRL to clarify the nature and scope of states’ duties. After this, the investigation will turn to transitional justice discourse to examine how victim participation is understood in theory and practice, particularly in the design,

¹⁴ Freeman (n 2) 4.

¹⁵ Andrea Cornwall, ‘Unpacking “Participation”: Models, Meanings and Practices’ (2008) 43 *Community Development Journal* 269, 269; Kevin Hearty, “‘Victims of’ Human Rights Abuses in Transitional Justice: Hierarchies, Perpetrators and the Struggle for Peace’ (2018) 22 *The International Journal of Human Rights* 888.

¹⁶ Kjersti Skarstad, ‘Critical Human Rights Research’ (2024) 23 *Journal of Human Rights* 297, 297.

implementation, and follow-up stages of TRCs. This discussion forges the analytical framework and grounds the analysis, in Chapter Three, in a victim-centred approach. Finally, Chapter Four will discuss the analysis's findings and reflect on the research's relevance, design, and limitations.

1.1 Methodology

This section outlines this inquiry's research design and methodological approach. It will discuss the guiding aims and objectives, the chosen legal-analytical methods, retrieved data, generalisability of findings, and the positionality of the researcher.

1.1.1 Research Objectives

The forthcoming investigation will tackle the central research question: *Does International Human Rights Law impose procedural obligations on states to enable victim participation in Truth and Reconciliation Commissions?* To address this, this thesis aims to conceptualise victim participation as a procedural condition necessary for the realisation of recognised rights and not as an autonomous right per se. The rights to truth and an effective remedy are selected due to their normative and legal relevance in TJ contexts and frequent enshrinement in TRC mandates.¹⁷ To grasp where procedural obligations to enable victim participation emerge for states, this study seeks to map how engagement is framed and operationalised in IHRL across three phases of TRC processes: design, implementation, and follow-up. In turn, this study aims to clarify the legal weight of such framing to determine whether a state's failure to enable victim participation would constitute a violation of the rights

¹⁷ Freeman (n 2) 6.

to truth and remedy or whether its enablement in TRCs is solely a procedural expectation or best practice. This requires an analysis of human rights instruments with varying degrees of binding force, including treaties, Inter-American Court of Human Rights (IACtHR) jurisprudence, and soft law. Given that IHRL operates in complex landscapes and that this study focuses on processes, a victim-centred and procedural fairness lens is applied to critically evaluate how participatory guarantees align with broader principles of inclusion, equality, and accountability.

1.1.2 Research Method and Data

In line with the research aims and central question, this study adopts a doctrinal method complemented by a qualitative interpretative element.¹⁸ The doctrinal analysis involves a close reading and interpretation of human rights instruments, including treaties and IACtHR case law, to extrapolate core principles and participatory procedural guarantees. These are then interpreted using soft law documents to assess the applicability of these interpreted IHRL principles in TRC processes and to identify gaps. This is further supported by a qualitative dimension, which analyses how legal texts engage with the normative frameworks set out in Chapter 2. Here, attention is given to the structure, language, and emphasis laid on participation, where engagement is also positioned vis-à-vis the rights to truth and an effective remedy. As previously noted, the method is guided by an analytical framework which separates victim participation in the design, implementation, and follow-up of TRCs. Consequently, the subsequent documents were analysed:

¹⁸ Faraji M Rushagama, 'Combined Doctrinal and Qualitative Approach in Legal Researches: An Overview' (2024) 9; Matthew Mitchell, 'Analyzing the Law Qualitatively' (2023) 23 *Qualitative Research Journal* 102.

Table 1: Analysed human rights documents

Types of legal Instruments	Document
Treaties	<ul style="list-style-type: none"> • ICPPED, Article 24 • ICCPR, Article 2(3) • ACHR, Article 25
IACtHR Cases	<ul style="list-style-type: none"> • <i>Baldeón Garcia v Peru</i> • <i>Garzón Guzmán et al. v Ecuador</i> • <i>Vereda La Esperanza v Colombia</i> • <i>Afro-Descendant Communities Displaced from the Cacarica River basin (Operation Genesis) v Colombia</i>
Soft law and guidelines	<ul style="list-style-type: none"> • Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1 (Joinet/Orentlicher Principles) • Human Rights Council Resolution 9/11, ‘Right to the Truth’ (24 September 2008) UN Doc A/HRC/RES/9/11 • African Union Transitional Justice Policy (2019) • Rule-of-Law Tools for Post-Conflict States: Truth Commissions (2006) HR/PUB/06/1 • Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) UN Doc A/RES/60/147 (Bassiouni Principles) • Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc A/HRC/34/62 (27 December 2016) • Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/24/42 (28 August 2013) • UN Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Canada’ (13 August 2015) UN Doc CCPR/C/CAN/CO/6

1.1.3 Generalisability and Positionality

Due to the study’s scope, not all relevant human rights documents were analysed, which may limit the generalisability of the findings, especially given the context-dependent nature of TRCs. However, the results are most applicable where TRCs operate as non-judicial TJ mechanisms and engage with human rights standards. Furthermore, the produced analytical framework on victim participation aims to be transferable to analyses of other non-judicial mechanisms. Regional differences in human rights systems may also affect how participatory

duties are enforced. Rather than prescribing a one-size-fits-all approach, this inquiry critically examines state obligations to recognise and support victims in post-conflict situations. Finally, the research was conducted from a victim-centred perspective, while being aware of the researcher's positionality.

1.2 Conceptualising Victim Participation

To elucidate whether IHRL recognises victim participation in TRCs as a procedural obligation, a clarification of what is meant by 'participation' and 'victim' within the broader context of this study, transitional justice, is needed. Accordingly, the working definition this study employs for the term 'victim' is based on Principle 8 of the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (Bassiouni Principles):

*"...victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation."*¹⁹

The term 'victim' also includes those who have indirectly suffered harm, commonly referred to as indirect victims.²⁰ Subsequently, this inquiry's understanding of victim participation in TRCs is rooted in Robins and Brankovic's definition of participation in

¹⁹ UN General Assembly, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147.

²⁰ Basia Spalek, *Crime Victims: Theory, Policy and Practice* (Palgrave Macmillan 2006); Catherine C Byrne, 'Benefit or Burden: Victims' Reflections on TRC Participation,' (2004) 10 *Peace and Conflict: Journal of Peace Psychology* 237, 238.

transitional justice: “the involvement of victims/survivors [...] in one or more stages of a [truth and reconciliation] process in ways that enable their agency over the goals, form and outcomes of that process”.²¹ Moreover, victim participation refers to the active and effective involvement in the decision-making processes during the design, implementation, and follow-up of TRCs. The promotion of meaningful participation reflects a deliberate effort to reaffirm victims’ status as rights-bearers and active agents in shaping the processes that affect their lives.²²

1.3 The Functional and Institutional Attributes of TRCs

Whether states, under IHRL, are obligated to enable participation in TRC processes to fulfil victims’ rights to truth and remedy first necessitates a clarification of the broad parameters within which this study is situated. Hence, this section preliminarily defines what TRCs are, both functionally and institutionally. In turn, to improve our understanding of how the proposed definition of TRCs materialises in practice, this section will succinctly discuss the Liberian TRC’s mandate and powers. It should be noted, however, that as an ad hoc domestic accountability mechanism, the nature of TRCs may adapt over time and across contexts, reflecting the varying legacies of human rights abuses and domestic needs. Considering this fluidity and adaptability, Hayner’s definition will be employed as it broadly defines these mechanisms.²³

*A truth commission (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experience; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the state under review.*²⁴

²¹ Robins and Brankovic (n 11) 3.

²² European Commission, ‘The Human Rights Based Approach (HRBA)’ (2025).

²³ Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge 2011) 10–13; Angelika Schlunck, ‘Truth and Reconciliation Commissions’ (1998) 4 415, 417.

²⁴ Hayner (n 23) 11–12.

The increased focus on TRCs, as suitable post-conflict transitional justice mechanisms, may partially be attributed to notions that truth-telling forges reconciliation and social healing.²⁵ Moreover, they have emerged as an international norm and played a critical part in shaping post-conflict environments.²⁶ The mechanisms' role as human rights investigators can contribute to the production of collective narratives of suffering and the realisation of human rights.²⁷ TRCs are often seen as vehicles for shaping national identities and fostering a sense of unity, both traditionally viewed as essential for democratic transitions, neoliberal state-building, and peace.²⁸

In Liberia, the commitment to establish a TRC was articulated in the 2003 Accra Comprehensive Peace Agreement (CPA) and later codified by the transitional government in the 2005 Truth and Reconciliation Commission Act (hereinafter 'TRC Act').²⁹ As an independent body, created by Liberian law, the TRC was required to operate in accordance with international law, including IHRL.³⁰ Moreover, it was tasked with:

*Promoting national peace, security, unity and reconciliation by, among other things, investigating, identifying the antecedents of, and determining responsibility for egregious domestic crimes, gross human rights violations and serious humanitarian law violations.*³¹

To achieve these aims, the Liberian TRC investigated alleged human rights violations that occurred between January 1979 and October 2003.³² It did so by gathering statements and

²⁵ Steven D Roper and Lilian A Barria, 'Why Do States Commission the Truth? Political Considerations in the Establishment of African Truth and Reconciliation Commissions' (2009) 10 Human Rights Review 373, 375.

²⁶ Schlunck (n 23) 415; Michal Ben-Josef Hirsch, Megan MacKenzie and Mohamed Sesay, 'Measuring the Impacts of Truth and Reconciliation Commissions: Placing the Global "Success" of TRCs in Local Perspective' (2012) 47 Cooperation and Conflict 386, 386.

²⁷ Hirsch, MacKenzie and Sesay (n 26) 387; Freeman (n 2) 3.

²⁸ Hirsch, MacKenzie and Sesay (n 26) 387.

²⁹ William J Long, 'Liberia's Truth and Reconciliation Commission: An Interim Assessment' (2008) 13 International Journal of Peace Studies 1, 1–4; Richard Lappin and David Harris, 'The Liberian Truth and Reconciliation Commission: Reconciling or Re-Dividing Liberia?' (2010) 9 Alternatives: Turkish Journal of International Relations 181, 181–182.

³⁰ Truth and Reconciliation Commission of Liberia, 'Final Report: Volume II: Consolidated Final Report' (2009) 29.

³¹ Truth and Reconciliation Commission of Liberia, 'Final Report: Volume I: Findings and Determinations' (2009) 25.

³² *ibid* 7.

conducting public and private hearings, where victims, perpetrators, and witnesses could share their lived experiences.³³ Furthermore, Article VII Section 26(j) of the TRC Act required the mechanism to provide recommendations pertaining to continuing investigations and inquiries, prosecutions, legal institutional and other reforms, and reparations.³⁴ Despite this, the produced recommendations and narrative of suffering were largely dismissed by the government, banishing the report from public offices and libraries, and exacerbating a culture of impunity.³⁵ While the newly elected government pledged to establish a war crimes court, prosecutions have yet to materialise.³⁶

³³ Truth and Reconciliation Commission of Liberia (n 30) 2.

³⁴ An Act to Establish the Truth and Reconciliation Commission of Liberia, 2005 art VII s 26(j).

³⁵ Aaron Weah, 'George Weah's Politics of Silence' (*JusticeInfo.net*, 12 October 2023).

³⁶ UN Human Rights Committee, 'Report on Follow-up to the Concluding Observations of the Human Rights Committee' (29 August 2024) UN Doc CCPR/C/141/2/Add.3.

Chapter 2: Victim Participation in IHRL and Truth

Commissions

This chapter provides the conceptual, normative, and legal foundation for understanding victim participation in TRCs, situating it within the broader frameworks of IHRL and transitional justice. Assessing whether IHRL imposes procedural obligations on states to enable victim participation in TRCs first requires a clarification of participation's legal parameters. Gaining a deeper understanding of what IHRL requires of states concerning the right to engage in public affairs is vital. This will provide a partial foundation for analysing whether victim participation in TRCs forms part of the state's duty to fulfil legal obligations and what appropriate measures should be taken. This does not suggest that a failure to ensure participation in TRCs is automatically justiciable. Rather, it indicates that victims may be granted a broader legal basis to challenge the violations of the rights to remedy and truth. This legal framing serves as the basis for examining critical TJ discourse to identify the normative and strategic rationales underpinning victim participation. While these rationales are not binding in a legal sense, they offer important insights into evolving standards and the emergence of participatory norms. Their emphasis on victims' ability to shape decision-making in the design, implementation, and follow-up phases of TRCs will inform the analytical framework used in this study, guiding the subsequent doctrinal and qualitative interpretative assessment. Finally, attention must also be given to the various structural and contextual barriers that may limit the scope and universality of such duties, as well as the rights to truth, remedy, and their overlap.

2.1 Participation under IHRL and Procedural Obligations

Understanding whether victim participation in TRCs is a best practice or a procedural obligation requires an examination of how engagement is framed under IHRL, particularly through the legal parameters of the right to participate in public affairs. In doing so, it is also crucial to consider the principle of procedural fairness, not as a separate concept, but as a lens through which participation can be interpreted as a procedural obligation derived from the rights to truth and remedy. While this principle is more commonly associated with judicial contexts, its underlying logic, that individuals must have a fair opportunity to influence processes impacting their rights, equally informs procedural expectations in quasi and non-judicial mechanisms such as TRCs.³⁷

This study's framing of participation as a duty, derived from fulfilling rights, does not solely stem from TJ literature, where participation is frequently regarded as an ideal. It is also grounded in Human Rights-Based Approaches (HRBAs), which conceptualise participation as both a fundamental human right in decision-making processes and a crucial means for the realisation of all other rights.³⁸ This dual role is reflected in the commonly used PANEL Principles, where participation stands alongside accountability, non-discrimination and equality, empowerment, and legality.³⁹ Within this framework, meaningful participation enables individuals to claim their rights, monitor their fulfilment, and influence relevant interventions or policies.

This procedural role of participation, in the fulfilment of rights, is further reflected in United Nations human rights treaties. Article 25 of the International Covenant on Civil and

³⁷ Joe Tomlinson and others, 'Whose Procedural Fairness?' (2023) 45 *Journal of Social Welfare and Family Law* 278.

³⁸ European Network of Human Rights Institutions, 'Human Rights-Based Approach'.

³⁹ *ibid.*

Political Rights (ICCPR)⁴⁰ and Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴¹, for instance, frame participation as a necessary condition for inclusion in political or public life. Although Article 25 of the ICCPR and its interpretation in General Comment 25 primarily frame participation in electoral contexts, they also extend its scope to broader dimensions of public affairs, including administrative and policy decision-making.⁴² The OHCHR ‘Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs’ further elaborate on this broader interpretation, clarifying the obligations and duties attached to participation. Echoing the PANEL Principles, they affirm that “laws, policies and institutional arrangements should ensure the equal participation of individuals and groups in the design, implementation and evaluation of any law, regulation, policy, programme or strategy affecting them”.⁴³ Moreover, states should ensure participation before, during, and after political or administrative decision-making; if this right is violated, they must provide effective remedies.⁴⁴ Crucially, the Guidelines underscore that this right cannot be interpreted in isolation but must be realised in an environment where all human rights are respected and promoted.⁴⁵ Participation is thus positioned on a continuum, reflecting the evolving nature of obligations within IHRL.

Without clear legal guarantees and parameters, participation risks becoming tokenistic or superficial, serving more as symbolic inclusion than a meaningful exercise of agency. In judicial contexts, this is mitigated by explicit legal provisions, such as Article 67 of the Rome Statute. This article grants victims the right to participate in criminal proceedings, with

⁴⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25.

⁴¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 7.

⁴² UN Human Rights Committee, ‘General Comment No 25: Article 25 (Participate in Public Affairs and the Right to Vote)’ (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7 para 5.

⁴³ Office of the High Commissioner for Human Rights, ‘Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs’ (2018) 6.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

particular attention to their dignity, protection, and ability to influence outcomes.⁴⁶ This procedural right, grounded in the principle of procedural fairness, enables victims and perpetrators to contribute substantively to proceedings that determine redress and accountability.

Notably, regional human rights courts have articulated a similar logic. Indeed, TRCs are not judicial bodies and operate in a vastly different remedial framework; it should be acknowledged, however, that both institutions are committed to human rights, procedural fairness, uncovering the truth, and preventing recurrence.⁴⁷ The IACtHR in *Caracazo v Venezuela* and *Heliodoro Portugal v Panama*, as well as the ECtHR in *Finucane v the United Kingdom*, have underscored that states must adopt measures to ensure victims are meaningfully involved in processes that affect the realisation of their rights.⁴⁸ These judgements perhaps signal a broader procedural expectation, across international legal systems, that states must regard participation as a key component in the pursuit of judicial justice.

A crucial question arises: can the above framing of participation under IHRL as a procedural obligation, derived from the realisation of rights, be extended to key TRC rights and contexts? Furthermore, do the legal parameters discussed above, such as the need to ensure dignity, safety, and agency of participants, retain their relevance in non-judicial contexts? As previously noted, regional and international legal bodies have treated participation as a procedural step for the realisation of individuals' rights. In such judicial settings, the underlying principles suggest that insufficient participation may be inconsistent with international standards. This raises the possibility that TRCs, though distinct, may be subjected to procedural

⁴⁶ Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 67.

⁴⁷ Freeman (n 2) 72–83.

⁴⁸ *Finucane v the United Kingdom* App no 29178/95 (ECtHR, 1 July 2003) [71]; *Heliodoro Portugal v Panama*. (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 186 (12 August 2008) [143]; *Caracazo v Venezuela* (Reparations and Costs) IACtHR Series C No 95 (29 August 2002) [116].

expectations due to their similar commitment to applying and effectuating human rights law and standards in their operation and truth-seeking efforts.

2.1.1 The Procedural Fairness Lens

Building on this, procedural fairness offers a doctrinal lens through which the legal and participatory dimensions of TRCs can be better understood. An instrumental complexity that truth commissions face is ensuring the fairness of their processes; the imperative to do so stems from the notion that safeguards that protect and respect victims' dignity legitimise TRC outcomes.⁴⁹ Procedural fairness not only underpins the credibility of these mechanisms but also connects them to broader obligations under IHRL. As Tomlinson and others have noted, procedural fairness has a broad application, encompassing non-judicial and administrative contexts.⁵⁰ While TRCs are not judicial bodies, the human rights principle ensures that decision-making about an individual is fair and legitimate and translates into concrete obligations concerning, for instance, statement-taking, hearings, and investigations. Freeman emphasises that since TRCs investigate serious human rights abuses, they must uphold human rights standards.⁵¹ A failure to do so is attributable to the sponsoring state and triggers its legal responsibility under international law.⁵²

Procedural fairness, thus, offers a normative and legal bridge between TRCs and international human rights standards. As will be further explored, it supports this study's view that participatory obligations may extend beyond the operational phase to include the design and follow-up stages of TRCs. For this study, procedural fairness is not treated as an end, but as a foundational lens through which an assessment of legal instruments will occur. It helps

⁴⁹ Freeman (n 2) xi–xii.

⁵⁰ Tomlinson and others (n 37).

⁵¹ Freeman (n 2) 89.

⁵² *ibid.*

frame participation as a procedural condition in decision-making and for realising victims' rights to truth and remedy in a manner that is reflective of their needs, agency, and lived experiences.

2.2 Victim Participation as a Normative Ideal in TRCs

TJ discourse has increasingly placed victim participation at the heart of TRC processes, rendering it a means for recognising individual dignity, agency, and lived experiences. Its sanctioned value is also derived from its legitimising effects on procedural outcomes.⁵³ Yet, participation in TRCs should not be treated as a mere mechanical exercise; rather, it must be understood as a meaningful act grounded in needs, justice claims, and dignity.⁵⁴ The previous section examined the procedural role participation adopts under IHRL, only sketching a partial foundation for the analysis. This section will examine how participation's materialisation in practice is critiqued and what ideals emerge from it, improving our understanding of how victim engagement in TRCs is normatively conceptualised and envisaged by critical TJ discourse. In turn, these aspirations will shed light on evolving understandings of victim-centred approaches in TJ, forging the structural framework for the analysis in Chapter Three. That is, much like the previously discussed standards, found in the 'Guidelines for States on the Right to Participate in Public Affairs', TJ discourse aspires for the victim or their representative to participate and influence a TRC's design, implementation, and follow-up phases.⁵⁵ As will become evident, mapping the emergence of procedural obligations across the

⁵³ Julián Andrés Pimiento Echeverri and Irit Milkes, 'Beyond Democracy Meaningful Public Participation as a New Approach to Public Decision-Making in the Context of Colombia's Transitional Justice Process' in David Bilchitz and Raisa Cachalia (eds), *Transitional Justice, Distributive Justice, and Transformative Constitutionalism* (1st edn, Oxford University Press Oxford 2023) 393; Hearty (n 15) 888.

⁵⁴ Haider (n 3) 10; REDRESS and Impunity Watch, 'Victims Front and Centre. Lessons on Meaningful Victim Participation from Guatemala and Uganda' (2020) 9.

⁵⁵ Mijke De Waardt and Sanne Weber, 'Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia' (2019) 11 *Journal of Human Rights Practice* 209, 223.

various TRC phases embeds this study's analysis within a victim-centred approach and strengthens the relevance and depth of its findings. Furthermore, it facilitates this study to grasp whether the analysed human rights instruments are victim-centred.

Criticisms surrounding how victim participation materialises in practice suggest how it remains largely tokenistic, performative, or even harmful.⁵⁶ As Waardt and Weber noted, victims frequently face deep cultural, geographic, and informational barriers that make an ideal form of engagement, in TJ mechanisms, unattainable.⁵⁷ Despite the heavy embrace of 'victim-centred' rhetoric by TRCs and transitional judicial bodies, participation is often limited to passive contributions and presence as statement givers.⁵⁸ Gready and Robins suggest that this may render participation a performance, validating state-led narratives of violence and institutional objectives without enabling victims to shape outcomes substantively.⁵⁹ Such claims are particularly poignant when TRCs are top-down and elite-driven processes, further reinforcing existing power dynamics under the guise of inclusion.⁶⁰ The above suggests that victims must be regarded as decision-makers in TRC processes, where their engagement is not just treated as a legitimising formality. It further emphasises how TJ mechanisms must reflect the needs and experiences of victims; if not, then rights-based recognition is likely to become superficial.

Superficial participation hinders the realisation of justice claims, rights, and needs, and (re)produces harm. In the South African TRC, Byrne observed these effects and noted that victims experienced participation in hearings as psychologically taxing and disempowering, due to inadequate support and limited transparency about what their engagement would yield.⁶¹

⁵⁶ Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339, 357; Anna Triponel and Stephen Pearson, 'What Do You Think Should Happen? Public Participation in Transitional Justice' (Social Science Research Network, 1 August 2010) 107.

⁵⁷ De Waardt and Weber (n 55) 210–212.

⁵⁸ *ibid* 212.

⁵⁹ Gready and Robins (n 56) 357.

⁶⁰ Evrard, Bonifazi and Destrooper (n 13) 429.

⁶¹ Byrne (n 20) 253.

These findings underscore a deeper issue in the presumed neutrality of participation, which frequently presupposes that victims possess the emotional, cultural, legal, and procedural capacity to engage without TRC or state-supported frameworks to enable this.⁶² Consequently, literature suggests that victims' participation cannot be separated from equal access to information, safety, support, and recognition as rights-bearers.⁶³ In the absence of these, participation risks becoming an empty procedural formality. Equally important is permitting victim organisations or the representatives to bring the victims' claims, needs, and experiences forward.⁶⁴

TJ literature has sought to respond to the above burdensome effects of participation in practice and proposes various models and frameworks to forgo symbolic inclusion and retraumatisation.⁶⁵ Moreover, they have placed participation within a victim-centred approach and on a continuum, positing that it ought to be meaningful at every stage of the TRC. Consequently, meaningful victim participation in TRCs refers to their *active* and *effective* engagement in the processes that shape the (1) design, (2) implementation, and (3) follow-up phases.⁶⁶ Crucially, this vision of participation should not be conflated with a notion that TRCs are traditional decision-making authorities. Instead, it acknowledges that the procedural, institutional, and accountability decisions, such as the formulation of mandates or creation of recommendations, carry direct legal and political implications for victims and thus require their active and sustained input. Such input should not be limited to superficial consultations or physical access. Rather, it refers to their genuine capacity to shape every stage of the TRC process according to their willingness and amalgamation of needs, interests, identities, and experiences.⁶⁷

⁶² Evrard, Bonifazi and Destrooper (n 13) 429.

⁶³ De Waardt and Weber (n 55) 223; Robins and Brankovic (n 11) 5–6.

⁶⁴ Robins and Brankovic (n 11) 6.

⁶⁵ Evrard, Bonifazi and Destrooper (n 13); Robins and Brankovic (n 11).

⁶⁶ De Waardt and Weber (n 55) 212, 223.

⁶⁷ Robins and Brankovic (n 11) 1.

Despite the above normative framing and ideal form of victim participation's materialisation being valuable and significant, it is arguably insufficient. The framing of participation as a best practice and ideal, arguably, leaves it vulnerable to symbolic implementation or political expediency. It could be posited that the creation of new victim-centred participatory models and approaches may still rely on the institutional goodwill of TRCs and states to implement these. If victim participation is to be truly safeguarded and not instrumentalised, it must be anchored within a victim-oriented human rights framework from the outset. However, this does not suggest that solely anchoring victim participation in TRCs within human rights constitutes the solution to the above issues. Instead, it provides an avenue through which state duties can be observed, providing a more legally robust accountability safeguard in case of exclusion. It should be noted that the framing of participation in IHRL, including the PANEL Principles, and in critical TJ literature, does converge on the notion that participation must occur before, during, and after processes. While it does not yet convincingly suggest that participatory obligations emerge in TRC contexts, it does perhaps signal that IHRL already contains an implicit structure for recognising such duties.

2.2.1 An analytical framework: Three TRC phases and victim participation therein

Meaningful or victim-centred participation in TRCs should entail victims' active and effective engagement across all stages of the TRC process, not just their mere inclusion as sources of information. As previously discussed, such engagement should occur during the design, implementation, and follow-up, reflecting the architecture of TJ processes and the procedural fairness principles that underlie IHRL. In this context, procedural fairness refers to victims' ability to meaningfully present their claims to a decision-making authority and

influence the outcomes that impact their rights.⁶⁸ It is rooted in, for instance, principles of dignity, non-discrimination, transparency, impartiality, and accessibility.⁶⁹ This section delineates the analytical framework of this investigation, drawing on the Liberian TRC to contextualise it.

Design

Victim participation in the design phase of TRCs is crucial, as this is when foundational decisions are made regarding, for instance, the mandate, methodology, composition, and scope. Participation at this stage must go beyond symbolic consultation and should represent a sustained, early, and representative involvement in moulding the structure and goals of TRCs.⁷⁰ As Robins and Brankovic emphasise, when consultations only occur after the mechanism is chosen and its parameters set, participation becomes performative, a procedural box-ticking exercise that reinforces top-down or elite-driven processes.⁷¹ Instead, meaningful victim participation demands an informed inclusion prior to the finalisation of institutional contours, including during peace negotiations, policy-making, and mandate drafting.⁷²

Notably, the Havana process in Colombia, which led to a peace agreement, included five victim delegations who were granted a forum to present individual testimonies and submit proposals to the negotiating parties.⁷³ It influenced the eventual design of the TJ architecture, reflecting victims' needs and experiences.⁷⁴ Contrastingly, in Liberia, victims were not systematically included as co-designers or decision-makers during the peace negotiation or

⁶⁸ Trevor Robert Seaward Allan, 'Review: Procedural Fairness the Duty of Respect' (1998) 18 *Oxford Journal of Legal Studies* 497, 508–509.

⁶⁹ Freeman (n 2) 132.

⁷⁰ De Waardt and Weber (n 55) 210.

⁷¹ Robins and Brankovic (n 11) 12.

⁷² Pamina Firchow and Yvette Selim, 'Meaningful Engagement from the Bottom-Up? Taking Stock of Participation in Transitional Justice Processes' (2022) 16 *International Journal of Transitional Justice* 187, 189.

⁷³ Robins and Brankovic (n 11) 12.

⁷⁴ *ibid.*

initial drafting of the TRC. Instead, their involvement in the design phase was largely mediated through civil society and various community leaders, an approach partly attributable to the limited existing victim organisations at the time.⁷⁵ Moreover, the consultative process mainly occurred after the TRC was established and largely pertained to its operational framework.⁷⁶ The above suggests that procedural fairness, as a result of meaningful participation, is not only relevant during, for instance, TRC hearings but is also essential in legitimising the procedural architecture itself, further demanding representativeness for marginalised victim groups from the outset.

Implementation

The implementation phase refers to the operational period of the TRC, including testimony collection, awareness-raising, hearings, investigations, and the drafting of findings.⁷⁷ Victim-centred implementation ensures that survivors can engage with, influence, and contribute to the truth-seeking processes in ways that coincide with their rights, needs, and lived experiences.⁷⁸ Involvement must be structurally embedded through victim support units, regular consultations, advisory roles, and the translation of victim feedback into procedural adjustments. Implementation should respond to and recognise the impact violations have had on victims.⁷⁹

As seen in South Africa, this remains instrumental, given that involvement through testimonies may place emotional and material burdens on victims. In Liberia, implementation

⁷⁵ Cristián Correa, Julie Guillerot and Lisa Magarrell, 'Reparations And Victim Participation: A Look At The Truth Commission Experience' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill | Nijhoff 2009) 393; Carla De Ycaza, 'A Search for Truth: A Critical Analysis of the Liberian Truth and Reconciliation Commission' (2013) 14 Human Rights Review 189, 194.

⁷⁶ Truth and Reconciliation Commission of Liberia (n 30) 42.

⁷⁷ Robins and Brankovic (n 11) 14.

⁷⁸ Firchow and Selim (n 72) 188.

⁷⁹ Roger Duthie, 'Transitional Justice and Prevention: Summary Findings from Five Country Case Studies' (ICTJ 2021) 11.

was significantly challenged by administrative, budgetary, and operational issues.⁸⁰ Additionally, it initially struggled to publicise its mandate and programs to the Liberian public outside of Monrovia, leading to uneven awareness across the country.⁸¹ The TRC suffered from limited awareness of its various policies, was criticised for granting amnesty, and failed to adequately protect witnesses and victims, discouraging many from participating.⁸² While Volume II of the TRC Report documents efforts to engage the public and marginalised communities, particularly women, critics suggest it lacked sufficient outreach.⁸³ This may reveal a disconnect between the Liberian TRC's intended participatory approach and its effectuation in practice. Similar to judicial proceedings, procedural fairness in TRCs' implementation requires not just physical access, but that victims in processes are psychologically supported, informed, protected, and afforded genuine opportunities to meaningfully influence the decisions and outcomes reached by the commission.

Follow-up

The publication of a TRC's final report and recommendations does not constitute the end of victim participation in TJ mechanisms. The follow-up or post-commission process pertains to, for instance, the implementation of recommendations, the distribution of the truth, and the monitoring of institutional reforms.⁸⁴ It raises a crucial question concerning whether participatory obligations under IHRL extend beyond the formal operational phase of TRCs. Robins and Brankovic stress that follow-up in transitional justice demands the active and sustained engagement of civil society and victim groups to ensure local ownership, that their

⁸⁰ Long (n 29) 5.

⁸¹ *ibid.*

⁸² De Ycaza (n 75) 205; Amnesty International, 'Liberia: A Brief Guide to the Truth and Reconciliation Commission' (2006) 8.

⁸³ De Ycaza (n 75) 205; Truth and Reconciliation Commission of Liberia (n 30) 43–44.

⁸⁴ Robins and Brankovic (n 11) 15.

most pressing justice claims are addressed, and that outcomes are perceived as legitimate.⁸⁵ The exclusion of victims from these processes may undermine the legitimacy of the entire process and perpetuate the marginalisation and disempowerment that such initiatives claim to address.⁸⁶

In Liberia, the TRC proposed numerous reparations for victims and measures, including a ‘Reparation Trust Fund’ and an ‘Extraordinary Criminal Tribunal’.⁸⁷ Despite this, state implementation has been largely absent, and there is minimal evidence of robust mechanisms for victim oversight or involvement.⁸⁸ Although some of the produced recommendations are binding on the state, its institutional silence perhaps reflects a failure to uphold procedural fairness principles and IHRL standards beyond the life of the TRC.⁸⁹

Conclusion

The foregoing analytical framework discussed how victim participation could potentially evoke procedural obligation throughout the design, implementation, and follow-up of TRCs. However, the practical and legal enforceability, but also universality, is not solely shaped by legal or normative elements. Contextual, structural, and political constraints, including the variation of TRC mandates, victimhood, state capacity and willingness, also impact it.

⁸⁵ *ibid.*

⁸⁶ Duthie (n 79) 3.

⁸⁷ Truth and Reconciliation Commission of Liberia (n 30) 268, 276.

⁸⁸ Weah (n 35).

⁸⁹ De Ycaza (n 75) 207.

2.2.2 Limits to the Enforceability of Procedural Obligations

Determining whether procedural obligations surrounding victim participation in TRCs emerge in the realisation of the rights to truth and remedy cannot be fully addressed without interrogating the precondition of these processes. While logistical challenges, including limited time and budget, may hinder the realisation of participation across the design, implementation, and follow-up phases, the following will discuss the dynamics of victimhood, victim-centredness, institutional, and political hindrances.

The victim status operates as a qualifying precondition for participation in TRC processes, and by extension, for the realisation of the rights to truth and remedy. However, literature informs that a victim identity does not naturally exist but is an attributed status produced through intersecting legal, political, technical, and social factors.⁹⁰ Consequently, access to participation is not inherent, but mediated by institutional determinations of who qualifies as a victim. For this study, this has direct implications for the enforceability of procedural obligations, where those who are not recognised may be excluded from meaningfully participating, despite having experienced harm. Waardt and Weber identify this as a sorting process that creates official victims, those granted ownership over the processes, and unofficial victims, those who remain invisible or marginalised.⁹¹ Moreover, TRCs are inherently political bodies, often situated within broader state-building agendas.⁹² Therefore, states may seek to instrumentalise these mechanisms for political legitimacy, possibly giving way to selective victim recognition if the commission lacks independence and impartiality.⁹³

Crucially, the discretionary nature of these determinations further complicates the recognition of participation as a procedural obligation under IHRL. For instance, in Liberia,

⁹⁰ Hearty (n 15) 888.

⁹¹ De Waardt and Weber (n 55) 212.

⁹² Roper and Barria (n 25) 374.

⁹³ Shauna N Gillooly, Daniel Solomon and Kelebogile Zvobgo, 'Co-Opting Truth: Explaining Quasi-Judicial Institutions in Authoritarian Regimes' (2024) 46 Human Rights Quarterly 67, 69.

under Article VII, Section 26(e) of the TRC Act, the Commission held “exclusive discretion” to decide who could participate in its hearings and processes.⁹⁴ This discretionary power, while perhaps administratively functional, may conflict with the previously discussed PANEL Principles and render engagement a conditional ‘prize’. If participation depends on prior recognition and is context-dependent, may this complicate claims that states can, in a normative sense, be universally obliged to ensure engagement for *every* victim, official or not, in realising the rights to truth and remedy? Moreover, even if participation is instrumental in the realisation of certain rights, can states invoke contextual discretion to circumvent such obligations?

Finally, even if IHRL frames victim participation as a procedural obligation in TRCs, effective enforcement may remain limited. In contexts like Liberia, TRCs are typically established through domestic law in settings where the judicial system is non-functional or weak. Such institutional fragility may obstruct accountability, making it difficult to attribute responsibility to states for failing to fulfil rights, such as truth and remedy, due to inadequate participation. While this structural limitation is crucial to acknowledge, it falls outside the scope of the present inquiry.

2.3 The Rights to Truth and an Effective Remedy

Before answering this study’s research question, it is vital to discuss the content and function of the right to truth and an effective remedy. Though conceptually distinct, these rights often converge in TJ settings, where they mutually underpin efforts to provide redress for systemic violations and promote accountability.

⁹⁴ The TRC Act of Liberia 8.

The right to truth has increasingly been recognised as a fundamental principle in international human rights law, particularly following extensive human rights abuses.⁹⁵ Indeed, while a general right to truth has not yet been explicitly enshrined in treaty provisions, its significance and authority have been fortified by the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), soft law instruments, regional jurisprudence, and UN resolutions.⁹⁶ It entitles victims, their families, and the public to request and receive information on alleged human rights violations, the conditions in which they occurred, and the extent of state involvement.⁹⁷ Though frequently framed as a procedural entitlement, given its association with duties to investigate, consult, and disclose, the right to truth may also carry more substantive dimensions.⁹⁸ That is, its recognition of victims' suffering and the creation of an official individual or collective record.⁹⁹ The right to truth in TRCs operates both at an individual level, allowing victims and relatives to seek clarity and accountability, and at a societal level, facilitating forms of reconciliation, foregoing denialism, and building towards guarantees of non-recurrence. In this dual sense, TRCs are frequently regarded as the non- or quasi-judicial embodiment of this right, tasked with truth-seeking and truth-telling.

In contrast, the right to an effective remedy is firmly grounded in binding human rights instruments and recognised as imposing both positive and negative obligations on states. Article 2(3) of the ICCPR, Article 8 of the Universal Declaration of Human Rights (UDHR), and regional provisions such as Articles 10, 25, and 63(1) of the American Convention on Human Rights (ACHR) require states to ensure accessible, adequate, and timely redress for

⁹⁵ Office of the High Commissioner for Human Rights, 'Study on the Right to the Truth' (2006) UN Doc E/CN.4/2006/91.

⁹⁶ Yasmin Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 *International Review of the Red Cross* 245, 273.

⁹⁷ UN Secretary-General (n 4) 14.

⁹⁸ Office of the High Commissioner for Human Rights (n 95) 12.

⁹⁹ Naqvi (n 96) 245.

rights abuses. This includes the obligation to investigate violations, hold perpetrators accountable, provide reparations, and ensure non-recurrence.¹⁰⁰ Moreover, its procedural element requires states to guarantee access to a competent authority, while its substantive element concerns the redress or reparation one may receive if a violation has been established. For instance, Principle 12 of the Bassiouni Principles further expands the scope of remedies or understandings of ‘competent authorities’ to include non-judicial mechanisms as adequate vehicles for fulfilling these duties.¹⁰¹

Though perhaps legally distinct, the rights to truth and an effective remedy converge in transitional justice settings. The right to truth supplies the factual grounding for the right to a remedy, while the latter operationalises the state’s commitments to investigate and acknowledge violations. Both require procedural guarantees to be meaningful. This paper posits that participation emerges as the procedural condition for realising these rights, shaping the processes and outcomes in a manner that reflects dignity, agency, and needs. This study, however, does not suggest that a complete right to truth or remedy is possible in TRCs; rather, their legitimacy and effectiveness are enhanced when victims are active agents within these mechanisms.

Conclusion

This chapter has laid the conceptual, legal, and normative foundation for assessing the status of victim participation in TRCs by positioning it at the intersection of TJ and IHRL. By engaging with victim-centred approaches, procedural fairness, and evolving understandings of meaningful victim participation, it established the importance and validity of analysing

¹⁰⁰ UN Human Rights Committee (HRC), ‘General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add. 13 para 8.

¹⁰¹ United Nations General Assembly (n 19).

participation not as a discretionary good, but as a procedural condition for the realisation of other rights. By mapping participation across the design, implementation, and follow-up phases, per legal parameters and ideals, this chapter forged a framework for understanding where procedural duties may emerge and what they embody.

Chapter 3: Analysing Victim Participation under IHRL

Understanding whether IHRL imposes procedural obligations on states to enable victim participation in TRCs requires a doctrinal analysis of key human rights instruments, with qualitative interpretative elements. The following analysis maps state duties across the design, implementation, and follow-up phases, framing victim participation as a procedural requirement for fulfilling the rights to truth and remedy. Doing so provides a more legally and analytically robust basis for identifying procedural state duties. Through a procedural fairness lens, this analysis draws on key treaty documents, IACtHR jurisprudence, and relevant soft law and guidelines that address the rights to truth and remedy, (victim) participation, TJ, and/or TRCs. This involved identifying and coding participatory elements, as conceptualised in the preceding chapter, and applying them to TRCs through soft law. In line with a core objective of this thesis, findings are categorised according to their legal weight, from hard to soft law, to clarify the legal and normative status of any identified procedural obligations or best practices. Finally, the findings of this chapter will be discussed in Chapter 4, bridging the various results from each analysis.

3.1 Binding International Human Rights Instruments

Human rights treaties generate binding obligations for State Parties to respect, protect, and fulfil recognised rights, requiring them to refrain from interfering and take positive steps to ensure their realisation. While few treaties explicitly reference victim participation in TJ processes, treaty law remains the primary legal source for establishing enforceable obligations under IHRL. Despite the absence of explicit references, it remains essential to grasp whether duties, to ensure participation, arise when the rights to truth and remedy are at stake. As previously discussed in Chapter 2, participation is often framed as an enabling right or

condition for effectuating procedural and substantive justice. To address the research objectives, this section also asks whether inadequate participation renders states' measures incompatible with their obligation to guarantee the right to truth and remedy. To improve comprehension of this analysis, *Table 2* sets out the scope of each analysed provision and summarises whether participatory guarantees emerge.

Table 2: Treaty provisions and participatory guarantees

Provisions	Scope	Participatory guarantee
Additional Protocol I to the Geneva Conventions, Art. 32	“Right of families to know the fate of their relatives” (Wartime Context)	Absent
ICPPED, Art. 24(2)	Victims have “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.”	Implicitly requiring engagement to know the truth. (Implementation and follow-up)
ICPPED, Art. 24(7)	“Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.”	Explicit right to form/participate in truth-seeking organisations. (Design, implementation, potentially follow-up)
ICCPR, Art. 2(3)	Any person whose ICCPR rights or freedoms are violated shall have an effective remedy. “To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” “To ensure that the competent authorities shall enforce such remedies when granted.”	Implicit during implementation (including investigations and proceedings)
ACHR, Art. 25	“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a	Implicit during implementation (including

	competent court or tribunal for protection against acts that violate his fundamental rights [...] even though such violation may have been committed by persons acting in the course of their official duties.” State Parties must provide anyone claiming a remedy for their rights to be determined by a competent authority, develop judicial remedies, and ensure that competent authorities enforce remedies.	investigations and proceedings)
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Analysis

The evolution of the right to truth in international law signals a growing recognition that participation may serve as a procedural obligation in truth-seeking efforts. The embedded principle of this right finds its early expression in Article 32 of the Additional Protocol I to the Geneva Conventions, which enshrines “the right of families to know the fate of their relatives”.¹⁰² While significant and foundational, its scope is limited to armed conflict and does not explicitly establish participatory obligations. However, the encapsulated principle arguably evolved into a more concrete human right, as evidenced by Article 24 of the ICPPED.¹⁰³

Notably, ICPPED Article 24(2) does not explicitly impose participatory obligations on State Parties to fulfil the victim’s right to truth. The Convention’s supervising body, the Committee on Enforced Disappearances (CED), however, elaborates that victims must be able to participate during investigations regarding alleged violations.¹⁰⁴ This may suggest that direct or indirect victims are not passive agents in uncovering the truth, but must be able to actively

¹⁰² Office of the High Commissioner for Human Rights (n 95) 5; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 32.

¹⁰³ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 24.

¹⁰⁴ Committee on Enforced Disappearances, ‘Communication No 1/2013’ (2016) UN Doc CED/C/10/D/1/2013 para 10.8.

influence how it is cultivated. In contrast, Article 24(7) can be interpreted to explicitly impose participatory duties on states to enable the right to truth. Indeed, at first glance, it may appear that the framing of this provision is limited to the right to freedom of association; however, this does not negate that participation is rendered as its enabling factor. Furthermore, when interpreting this provision, one should not disregard the context in which it is placed, that is, truth-seeking. Moreover, its placement within the remedial framework of the Convention, where states are obliged to both guarantee the rights to reparation under Article 24(5) and truth under Article 24(2), may suggest that participation has a broader function. That is, participation, in this context, may also operate as a procedural route through which the right to truth, as a remedy, can be pursued and realised.

Participation is a ‘procedural route’ as Article 24(7) seemingly suggests that victims are entitled to influence the design and subsequent implementation of truth-seeking organisations or associations. More precisely, the provision’s emphasis on the victim’s right to ‘form’ truth-seeking initiatives, arguably, highlights a principle that encapsulates a state’s duty to create opportunities for victims to shape their architecture. In the context of TRCs, as investigatory truth-seeking efforts, this may translate to the victim’s provided opportunity to shape their *design*. While soft law may improve our understanding of whether the identified principle, enshrined in Article 24(7), is transferable to TRC contexts, this insight is significant for identifying the legal basis from which participatory procedural duties may emerge during the design phase. Secondly, understanding that Article 24(7) implicitly suggests a state’s duty to ensure victim engagement during the implementation of truth-seeking efforts stems from how participation is frequently framed and operationalised in TRCs and IHRL. As discussed in Chapter 2, participation is often limited to the implementation phase and understood as an individual’s ability to present their claims and influence a decision-making authority or commission. Applying this understanding to the State Party’s duty to guarantee the right to

‘participate’ in organisations and associations under Article 24(7) suggests that this right may represent a procedural obligation to facilitate and ensure victim engagement as part of its broader duty to facilitate truth-seeking. Following this interpretation, participation is not merely a procedural obligation for the realisation of other rights but is also framed as a right in itself. This is significant as this provision may provide victims in transitional environments a legal basis for claiming a violation of Article 24 due to superficial participation or exclusion from, for instance, investigations.

Moreover, when read alongside the OHCHR’s guidelines (see Chapter 2.1), which frame the right to participate in non-electoral public affairs as a continuum spanning before, during, and after decision-making, this provision can be interpreted more expansively, supporting a wider understanding of public engagement. These guidelines require states to create policies, laws, and programmes to enable participation in each stage, highlighting positive duties to enable such engagement. Consequently, ‘participation’ in Article 24(7) may also be broadened to include the evaluation or follow-up phase of an organisation’s truth-seeking efforts. Indeed, such an interpretation is not absolute; however, it may gesture towards a notion that participation in truth-seeking efforts should not be limited to mere presence but must constitute one’s entitlement to influence. Arguably, the ICPED offers a legally grounded yet normatively expansive blueprint for embedding victim participation in the procedural fabric of the realisation of rights in TJ, signalling a state’s duty to ensure meaningful participation in both truth and remedial processes.

Nonetheless, the above interpretation is not authoritative. The absence of explicit references or direct application to TRCs renders its legal scope ambiguous. Furthermore, its contextual positioning in enforced disappearance cases raises concerns about the provisions’ applicability to other violations typically addressed by TRCs. While the Convention does not apply to the Liberian TRC, the mechanism, like many others, covers a wider variety of ‘Gross

Human Rights Violations’.¹⁰⁵ Solely based on the above provisions, future truth-seeking efforts must perhaps only ensure participation in cases of enforced disappearances, creating a complex legal space. Additionally, while Article 24(7) may be seen to support participation as a procedural duty in truth-seeking, it falls short of explicitly articulating a participatory framework that includes the design, implementation, and follow-up of such mechanisms. These stages are central to both procedural fairness and victim-centredness, where engagement is not solely functional but also vital for legitimacy, inclusion, and redress. In this regard, although Article 24 of the ICPPED may contribute to the construction of a procedural basis or evolving norm in support of victim participation in TRCs, it does not crystallise a universal and uniform duty or right that aligns with TJ discourse’s envisioned form of participation and the subsequent need to include different lived experiences. These limitations highlight a lacuna between normative ideals of victim inclusion and procedural obligations grounded in IHRL.

Ambiguity may arise when the right to truth is not explicitly anchored as a procedural condition for fulfilling the right to an effective remedy. For instance, Article 2(3) of the ICCPR and Article 25 of the ACHR obligate State Parties to ensure access to prompt and effective judicial recourse. However, when applied to TRC contexts, neither provision suggests that victims must be included in the design or follow-up of such remedies. As the Human Rights Committee (HRCtee) interprets through General Comment 31, Article 2(3) of the ICCPR mandates State Parties to ensure access to an effective remedy and a competent decision-making authority.¹⁰⁶ Here, participation is implied through the victim’s ability to assert a violation of their rights under the Covenant and to influence the decisions of competent bodies. While the establishment of a TRC may fulfil the state’s obligation to provide remedies and investigate human rights violations, neither the provision nor its interpretation suggests that the

¹⁰⁵ Truth and Reconciliation Commission of Liberia (n 30) 33–34.

¹⁰⁶ UN Human Rights Committee (HRC), ‘General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add. 13 para 15.

state is required to guarantee participation beyond the implementation phase. This phase, which encompasses efforts such as investigations, testimonies, and hearings, arguably constitutes the extent of required participation under the ICCPR. Indeed, when a violation is found, these remedies must be enforced through reparations; however, the provision and its interpretation place the sole responsibility on the state to enact this.¹⁰⁷ By placing the responsibility on the state to narrate the truth through, for instance, public memorials, a tension with the principle of agency can be observed.¹⁰⁸

Similarly, ACHR Article 25(1) guarantees that everyone has the right to a “simple and prompt recourse”¹⁰⁹, focusing primarily on procedural availability or accessibility rather than participatory inclusion. Access, here, may be interpreted narrowly, emphasising the removal of, for instance, language barriers by states during the implementation phase, instead of ensuring the victim’s meaningful role in shaping and informing the remedial structure and outcome. This textual silence may indicate that participation, as meaningful engagement before, during, and after the operational period of a mechanism or policy, is not overarchingly procedurally obligated within these two IHRL instruments. Through a procedural fairness lens, this raises concerns about whether such remedies and mechanisms can comprehensively meet the aforementioned normative standards of legitimacy, victim agency, and inclusion. The absence of explicit participatory guarantees in various stages of a remedy may again reveal a lacuna between victim-centred normative ideals and formally enshrined procedural obligations in the realisation of recognised rights.

¹⁰⁷ *ibid* 15–17.

¹⁰⁸ *ibid* 15–17.

¹⁰⁹ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 25(1).

3.2 Regional Human Rights Jurisprudence

The IACtHR has been crucial for articulating procedural obligations related to truth-seeking and effective remedies.¹¹⁰ Building on the previous analysis of treaty provisions, this section seeks to understand whether the Court's jurisprudence expands or strengthens procedural obligations related to victim participation. Arguably, the IACtHR offers a rich understanding of the right to truth and remedy, expansively interpreting ACHR provisions considering victims' dignity, agency, and inclusion. Moreover, analysing regional jurisprudence will enable this study to grasp whether, through judicial reasoning and binding judgements, participation has been framed as a procedural condition to the rights to truth and remedy. It should be noted, however, that a TRC, like in Liberia, and regional human rights courts operate within vastly different institutional and remedial frameworks. Furthermore, the IACtHR judicial reasoning is not fundamentally transferable to TRCs. Nevertheless, the normative guidance jurisprudence provides on IHRL standards may enable this study to fill critical gaps or observe emerging and transferable understandings. The relevance of analysing IACtHR jurisprudence for TRC contexts further lies in their shared adherence to IHRL, commitment to uncovering the truth, preventing recurrence, and providing forms of redress.¹¹¹

Analysis

Victim participation in the analysed IACtHR cases, arguably, constitutes a procedural duty of states in judicial truth-seeking and remedies. In *Baldeón García v Peru*¹¹² and *Garzón Guzmán et al. v Ecuador*¹¹³, the IACtHR repeatedly recognises the state's obligation to ensure

¹¹⁰ Patricia Naftali, 'Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?' (2016) Vol. XIII Champ pénal.

¹¹¹ Freeman (n 2) 72–83.

¹¹² *Baldeón García v Peru* (Merits, Reparations and Costs) [2006] IACtHR Series C No 147 [199].

¹¹³ *Garzón Guzmán et al v Ecuador* (Merits, Reparations and Costs) [2021] IACtHR Series C No 434 [105].

that victims and their next of kin have access to legal proceedings. The Court further widens these obligations by emphasising the victim's entitlement to actively and meaningfully participate throughout "all stages and instances" of domestic truth-seeking investigations and court proceedings.¹¹⁴ In the context of the Liberian TRC or other truth-seeking efforts, this may translate to victims' active engagement during the human rights investigations and subsequent hearings. Carrying out investigations constitutes an essential state duty for realising the rights to remedy and truth. The previous analysis highlighted how participatory elements of this right under the ACHR are limited; however, the Court's interpretation suggests a broader understanding of what an effective remedy and truth-seeking require of states. Crucially, it recognises a principle related to the importance of meaningful victim participation during the implementation phase of a judicial truth-seeking project.

Furthermore, in both cases, the Court appeared to situate victims within a broader procedural fairness framework, emphasising the victim's right to be heard, as well as their entitlement to be informed and supported in their effort to fulfil their right to truth.¹¹⁵ This understanding of victim participation, as a vehicle for the realisation of the rights to truth and to be heard, may give rise to two implications. First, by linking participation to both the right to truth, which can function as a remedy, and procedural fairness, the Court recognises procedural state obligations to guarantee participation beyond mere access. This may further suggest an acknowledgement of victim participation's legitimising and dignity-promoting effects.

Second, in line with the discussed TJ discourse's normative ideals, the Court's reasoning suggests a state duty to create institutional, psychological, and informational conditions to enable victim participation to be active and effective.¹¹⁶ While the Court does not

¹¹⁴ *Baldeón García v Peru* (n 112) [199].

¹¹⁵ *ibid* [93–93, 139]; *Garzón Guzmán et al. v Ecuador* (n 113) [86–90].

¹¹⁶ *Garzón Guzmán et al. v Ecuador* (n 113) [114, 147.7].

articulate these requirements as explicit duties of care, it may demonstrate an expectation that states actively work towards removing barriers to participation and provide necessary support. It seemingly transforms participation from passive testimonial contributions to actively shaping decision-making during the implementation phase or judicial proceedings. Indeed, the direct transferability of this interpretation to the Liberian, or any other, truth commission is not automatic. Nonetheless, the normative guidance emerging from this jurisprudence regarding victim participation during proceedings, particularly vis-à-vis the rights to truth, remedy, and procedural fairness, does articulate certain expectations and procedural standards under IHRL.

The notion that victim participation must be part of the procedural framework in proceedings, for realising the rights to an effective remedy, is further emboldened in *Vereda La Esperanza v Colombia*.¹¹⁷ In this case, the Court investigated whether the State in the Colombian TJ process, *Justice and Peace*, violated Articles 8 and 25 (the rights to a fair trial and remedy) due to an alleged breach of the right to truth, and a lack of participation and participant protection measures.¹¹⁸ The Court found that limited protection measures for victim participants violated Article 8(1).¹¹⁹ Further, it noted that victims must have “ample opportunities” to be heard and to clarify facts to influence the determination of responsibility and reparations.¹²⁰ Despite no violation of judicial guarantees being found regarding a lack of victim participation, the Court’s consideration of it, in this context, highlights the procedural importance of engagement in TJ proceedings. It transforms participation from a benevolent institutional practice into a core component of judicial safeguards, demanding its investigation when determining violations of the rights to a fair trial and remedy. Moreover, its emphasis on procedural fairness, including the protection of victims, access to information, and victims’

¹¹⁷ *Vereda La Esperanza v Colombia* (Preliminary Objections, Merits, Reparations and Costs) [2017] IACtHR Series C No 341.

¹¹⁸ *ibid* 191.

¹¹⁹ *ibid* 213.

¹²⁰ *ibid* 215.

ability to contribute, signals a recognition of meaningful participation being a procedural precondition for effective justice.

As illustrated in *Baldeon-Garcia v Peru* and *Garzón Guzman et al. v Ecuador*, the IACtHR emphasised that meaningful participation must span across the entire investigative and judicial process. This includes, but is not limited to, the identification and searching of victims as a necessary procedural step to ensure their rights are protected and recognised. In *Vereda La Esperanza v Colombia*, especially in the context of enforced disappearance, the Court mandated the state to conduct a coordinated and diligent search for victims, employ appropriate methods, and establish a communication strategy with family members to enlist their participation.¹²¹ These demands underscore a notion that direct and indirect victims should be afforded opportunities to participate and thus influence the earliest possible stages, especially in establishing the truth and accessing effective remedies. Accordingly, the State must search for victims and clarify facts, as well as provide mechanisms that enable active involvement in these processes. Moreover, the IACtHR's reasoning may further imply that meaningful and representative decision-making is enhanced by the inclusion of diverse experiences and needs. This principle may also emerge outside of the Inter-American context. For instance, in Liberia, civil-society-led awareness campaigns around the TRC's mandate and helped raise public understanding of its functions.¹²² This enabled individuals, to a certain extent, to recognise their own victim status, which is a crucial step toward voluntary victim participation in truth-seeking processes.

Nevertheless, while the IACtHR has progressively interpreted the principle of participation as a procedural obligation in criminal proceedings, particularly during investigations, truth-seeking, and remedies, the extension of such duties to a phase that may

¹²¹ *ibid* 273–275.

¹²² Truth and Reconciliation Commission of Liberia (n 30) 145–146.

replicate the *design* stage in TRCs remains uncertain. Indeed, soft law instruments may facilitate this study to clarify the applicability of certain IACtHR-produced principles; however, it is also vital to recognise the variability of judicial and TRC processes. Moreover, in the analysed cases, the IACtHR is less explicit about whether participatory state obligations extend to the planning of judicial mechanisms. A possible justification for this may be that regional and domestic courts, compared to TRCs, are typically pre-defined, while TJ mechanisms are ad hoc or designed through various consultative processes. Consequently, the IACtHR's jurisprudence, in these cases, does not offer a clear IHRL principle or articulation of the state's obligation to ensure victim participation during the initial structuring of judicial or TJ processes. This echoes the findings of the analysis on ACHR Article 25 and ICCPR Article 2(3), casting doubt on whether IHRL recognises procedural state obligations during design phases of truth-seeking efforts that are not concerned with enforced disappearances.

Victim participation during the follow-up phase, such as determining the specific form of reparations or shaping institutional reforms, is procedurally significant. Notably, this TJ ideal is reflected in the IACtHR's procedural framework, which, in certain cases, explicitly requires states to ensure victim participation during the follow-up phase to strengthen the legitimacy and effectiveness of reparations.¹²³ In *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, the Court affirmed that transitional justice reparations or redress must be legitimate and achieved through "consultation with and participation" of victims.¹²⁴ The Court further noted that requirements vis-à-vis the reparative mechanisms must be adopted in good faith and with social inclusion. This jurisprudence may highlight that the state in the Inter-American Human Rights System (IAHRS) does not hold a monopoly on determining what victim-centred redress may constitute.

¹²³ *Afro-Descendant Communities Displaced from the Cacarica River basin (Operation Genesis) v Colombia* (Preliminary objections, merits, reparations and costs) [2013] IACtHR Series C No 270 [470].

¹²⁴ *ibid.*

Crucially, it produces a principle of victim ownership by fusing their participation with the legitimate enforcement of remedies, elevating engagement to a procedural requirement when shaping the process and content of reparations. This arguably aligns with TJ discourse's normative ideals by suggesting how the enforcement of remedies must be reflective of victims' needs and experiences. When applying this understanding to TRCs, it may ensure that the implementation of recommended reparative mechanisms does not reflect state and elite interests.

This victim-centred imperative was further present in *Garzón Guzmán et al. v Ecuador*, where the IACtHR obligated the state to both publicly acknowledge wrongdoing and agree with victims on the details and “means of compliance”.¹²⁵ This understanding, related to the public's right to truth, extends beyond consultation, demanding that victims of human rights abuses have genuine influence over the implementation and form of redress after proceedings. This approach frames participation as a procedural necessity in the normative commitment to reparative justice and victim-centredness.

3.3 Soft law as a basis for enabling victim participation in TRCs as a procedural obligation

Despite lacking formal binding force, soft law instruments and guidelines have played a critical role in developing victim participation's normative architecture in TJ. It has offered interpretative guidance on how states may operationalise procedural obligations, under IHRL, in truth-seeking and remedial institutions. Compared to normative ideals, analysing non-binding instruments enables a more comprehensive understanding of whether their enshrined norms, standards, or authoritative guidance on state practice can clarify, expand, or echo the

¹²⁵ *Garzón Guzmán et al. v Ecuador* (n 113) [121].

previously identified principles and procedural obligations. Furthermore, they enable this study to grasp whether these principles and duties apply to TRC contexts. De Greiff, as the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, asserted that victim participation in TJ processes must be scrutinised across their design, implementation, and monitoring phases.¹²⁶ The following section builds on this by analysing how soft law instruments envisage the role of states in operationalising such engagement. Hence, in line with the research objectives, this analysis informs whether the convergence or gaps between soft law instruments and the analysed treaty provisions and IACtHR judicial reasoning point towards participation in TRCs constituting a procedural best practice or an emerging obligation under IHRL.

Analysis

Design

The African Union Transitional Justice Policy (AUTJP) informs that victim participation in the design phase of TRCs must commence before the mechanism is selected, ideally during peace negotiations.¹²⁷ If participation is only enabled once the institutional frameworks are fixed, TRCs risk producing elite-driven processes that fail to recognise victims' needs and experiences.¹²⁸ The OHCHR's 'Rule-of-Law Tools for Post-Conflict States: Truth Commissions' corroborates this by identifying five core principles for TRC establishment: (1) national choice, (2) the need for a comprehensive transitional justice perspective, (3) expect a unique and country-specific model, (4) political will and operational independence, and (5)

¹²⁶ de Greiff (n 5) para 28.

¹²⁷ African Union, 'African Union Transitional Justice Policy' (2019) paras 44, 46(iv).

¹²⁸ Evrard, Bonifazi and Destrooper (n 13) 429.

international support.¹²⁹ Markedly, these tools for states stress that decisions to establish TRCs should emerge through broad national consultations, especially with victims who, in turn, must be fully informed of their limitations, strengths, and functions.¹³⁰ This is particularly significant as it supports this study's interpretation of ICPPED Article 24(7) as enshrining victims' ability to influence the design of truth-seeking efforts. Moreover, the OHCHR Rule-of-Law Tools clarify what this, in TRC contexts, may require of them. While less explicit on the role of victims, this notion of national ownership is similarly reflected in the AUTJP, which reaffirms that all stakeholders should be part of the design.¹³¹

The above arguably strengthens the procedural character of participation, conceiving it not as an aspiration but as a prerequisite for ensuring local legitimacy and ownership, as well as various forms of justice. Within this, the AUTJP merges this principle of local ownership with principles of non-discrimination, dignity, and equality, echoing a core procedural fairness notion.¹³² Meaning, all victims are more than affected parties and are rights-holders whose input must actively influence the decision-making surrounding the design and contours of truth-seeking mechanisms.

Such notions and principles are reinforced under Principle 6 of the Joinet/Orentlicher Principles, which articulates a clear procedural expectation for states. It emphasises that the establishment, mandate, and composition of truth-seeking bodies, as remedies, must be produced "upon broad public consultations", with particular attention to victims.¹³³ While this is qualified by the phrase "to the greatest possible extent", introducing capacity-based and contextual limitations, it does, arguably, not negate the core principle enshrined within it.¹³⁴

¹²⁹ Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States: Truth Commissions' (2006) UN Doc HR/PUB/06/1 5–6.

¹³⁰ *ibid* 7.

¹³¹ African Union (n 127) para 28.

¹³² *ibid* 32–33.

¹³³ UN Commission on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 6.

¹³⁴ *ibid*.

Meaning, it still imposes a positive duty on states to enable participation in correspondence with their national capabilities. HRC Resolution 9/11 on the Right to the Truth echoes this by emphasising the public's entitlement to access information on state actions and decision-making "to the fullest extent practicable".¹³⁵ While not a direct mandate for participation in decision-making surrounding the realisation of the right to truth, this emphasis complements a broader procedural framework directed toward inclusion, non-discrimination, accountability, and transparency. This advisory language is similarly reflected in the Special Rapporteur's recommendations in the report on victim participation in TJ processes, "urg[ing] those responsible for the design of transitional justice measures not to think of victim participation as marginal, but to incorporate it as an essential element of transitional justice policy-making".¹³⁶ While he does not explicitly note this is a state duty, he does suggest that those responsible should enable participation to have an impact on TJ measures, staffing, outreach, implementation, and monitoring.

Together, these instruments alone do not establish a procedural obligation that may lead to, for instance, a violation of the right to an effective remedy. They do, however, enable an understanding of whether enshrined principles in treaty law and IACtHR jurisprudence can be applied to TRC contexts. Moreover, they account for the gaps in IACtHR jurisprudence and Article 2(3) of the ICCPR concerning victim participation in the design phase. Crucially, these instruments and state guidance contribute to the emergence of soft law consensus that victim participation, regardless of whether this is for realising rights, in the design phase, is not discretionary. It is a normative expectation grounded in transparency, agency, dignity, and equality. Here, the OHCHR Rule-of-Law Tools broadly conceptualise victim participation to include consultation processes that should shape both the decision to establish TRCs and their

¹³⁵ Human Rights Council, 'Resolution 9/11: Right to the Truth' (24 September 2008) UN Doc A/HRC/RES/9/11, 3.

¹³⁶ de Greiff (n 5) para 97.

mandate.¹³⁷ This is significant for addressing this study's research question, as it renders victim participation a procedural best practice in the design of TRCs and applies the principles and duties previously identified in the context of the rights to truth and remedy to the TJ mechanism. It should be noted, however, that while these expectations for states are persuasive, they are articulated in soft law and qualified by contextual limitations, potentially limiting their universal weight.

Implementation

The state's legal duty to investigate serious human rights violations, as emphasised by the Joinet/Orentlicher Principles and Bassiouni Principles, forms a conceptual cornerstone of TJ mechanisms' implementation.¹³⁸ While these soft law instruments are not binding, they do offer crucial normative and legal clarification of how states should realise the rights to truth and remedy in TRCs. That is, Principle 4 of the Joinet/Orentlicher Principles explicitly articulates "the imprescriptible right to know the truth" as both a collective and individual entitlement.¹³⁹ Principle 5 reinforces this and instructs states to establish non-judicial measures, such as TRCs, as an appropriate mechanism to give effect to this right and obligation.¹⁴⁰ The emphasis, here, on state responsibility and institutional design may imply a need for procedural safeguards. Similarly, both the HRC Resolution 9/11 and the Special Rapporteur's report clarify that the right to truth entails more than mere access to information.¹⁴¹ They require states to establish appropriate remedies, including mechanisms, institutions, and procedures to facilitate victims seeking knowledge about violations.¹⁴² While this explicitly suggests that

¹³⁷ Office of the United Nations High Commissioner for Human Rights (n 129) 7.

¹³⁸ Freeman (n 2) 9.

¹³⁹ UN Commission on Human Rights, 'Updated Set of Principles to Combat Impunity' (2005) UN Doc E/CN.4/2005/102/Add.1, Principle 4.

¹⁴⁰ *ibid*, Principle 5.

¹⁴¹ UNHRC Res 9/11 (n 135) 3–4; Pablo de Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 July 2013) UN Doc A/HRC/24/42 para 20.

¹⁴² UNHRC Res 9/11 (n 135) 3–4; de Greiff (n 141) para 20.

states must facilitate truth-seeking, its framing of these remedies may also implicitly indicate that obtaining the truth is perhaps only achieved when victims can participate during the implementation phase. Moreover, it reflects this study's findings of the analysed IACtHR cases, indicating that the Court's produced understandings on victim participation, in judicial proceedings, for the realisation of the rights to truth and remedy may be applied to the implementation phase of TRCs.

On the other hand, the nature of these instruments introduces a paradox for this analysis. HRC Resolution 9/11, for instance, acknowledges that the realisation and scope of the right to truth are context-dependent and shaped by domestic legal systems.¹⁴³ This interpretative flexibility, combined with the variation of TRC mandates, raises concerns about the consistency and practical enforceability of victim participation across legal systems. In the absence of a uniform understanding of the right to truth, the advancement of victim participation for the entitlement's realisation, during the implementation phase, may ultimately depend on institutional goodwill.

However, the variation of TRC mandates and interpretative flexibility of the right to truth must, arguably, not be a challenge to claims that victim participation under IHRL constitutes a procedural expectation or even obligation. Meaning, as previously shown, the implementation phase may encompass numerous aspects under IHRL, including, for instance, judicial proceedings or investigations that influence decision-making. In this sense, regardless of what constitutes the implementation phase or whether a TRC's mandate includes, for instance, public hearings, the previously discussed soft law instruments, coupled with treaty provisions and IACtHR jurisprudence, arguably treat participation during this phase as a procedural baseline, one that operates separately from TRC contours. Hence, despite the universality of victim participation as a norm being possibly challenged by institutional

¹⁴³ UNHRC Res 9/11 (n 135) 3.

variation, the broad framing of the implementation phase across various IHRL instruments and understandings allows for an identification of a more widely applicable participatory procedural expectation across TJ processes.

These expectations for states regarding victim participation, in this phase, are further outlined by the Bassiouni Principles, which establish a set of procedural guarantees. Principles 12 and 13 suggest that states should disseminate information, assist, ensure the safety of participants, and facilitate collective victim claims.¹⁴⁴ These measures go beyond mere access, moving towards actively enabling victim participation. Markedly, while these are formally framed under the imperative of improving access to justice, these standards reflect the TJ normative ideals identified earlier in this thesis, particularly those that treat participation as a process necessitating sustained support and procedural fairness. This alignment highlights an understanding that the implementation of TRCs, facilitated by states, cannot be guided by symbolic inclusions alone, but must be structured in a manner that is reflective of victims' experiences, needs, and agency.

By ingraining procedural expectations to guarantee support and security, these instruments indirectly assert that victim participation cannot be meaningful unless it is supported, safe, and informed. As Special Rapporteur de Greiff noted, a government's commitment to TJ can partially be assessed by "the seriousness of its efforts to guarantee the security of participants".¹⁴⁵ Moreover, the Special Rapporteur critiqued that few countries have sufficiently established psychological support during public or private truth commission hearings, reinforcing the claim that meaningful participation must be supported by practical institutional guarantees.¹⁴⁶ These claims arguably further operationalise the procedural obligations identified by the IACtHR for realising the right to truth. Importantly, it places the

¹⁴⁴ United Nations General Assembly (n 19) Principles 12, 13.

¹⁴⁵ de Greiff (n 5) para 65.

¹⁴⁶ *ibid* 99.

burden on states to create conditions that enable victims not only to provide information but to be heard and influence the decision-making authority without fear.

Follow-up

A victim-centred approach to the right to an effective remedy and the public's right to truth, particularly following the publication of a TRC's final report and recommendations, requires that states ensure victims are meaningfully involved in the monitoring and shaping of truth-telling, reparations, and institutional reform. As previously discussed, core TJ ideals underscore the importance of victim participation in the follow-up or evaluation stage of a TRC process. Such participation both enhances the legitimacy of the entire process and helps ensure that reparative measures are responsive to victims' needs and lived experiences. While some of the analysed soft law instruments, such as the OHCHR Rule-of-Law Tools, remain notably vague regarding what victim participation in the follow-up phase of TRCs requires of states, others more clearly articulate procedural expectations.

The Bassiouni Principles on the right to an effective remedy exemplify a state-centred approach that tends to forgo the active and effective role victims must have in truth-telling processes. These processes, as seen in the Liberian TRC's recommendations, may include victim memorials.¹⁴⁷ Principle 22(b) explicitly recognises the importance of a state disclosing the truth without causing further harm to the victim or their relatives.¹⁴⁸ In TRCs, such disclosure would materialise following the publication of the final report. A notable issue of the principle lies in its omission of the role victims should play in how the truth is told, potentially framing victims as passive recipients instead of active participants in how their experiences are narrated.¹⁴⁹ This stands in contrast to the jurisprudence of the IACtHR, which,

¹⁴⁷ Truth and Reconciliation Commission of Liberia (n 30) 276.

¹⁴⁸ United Nations General Assembly (n 19) art 22(b).

¹⁴⁹ *ibid.*

for instance, affirmed in *Garzón Guzmán et al v Ecuador* the victim's agency during the follow-up period of the Court's judgment, further emphasising the participatory form it should have in the realisation of the right to truth.¹⁵⁰ By envisioning state discretion over truth-telling initiatives as a best practice, the Bassiouni Principles render victim involvement largely reactive to the disclosure of collective suffering.

HRC Resolution 9/11 similarly omits the role victims should play in the follow-up process. That is, it “encourages the States concerned to disseminate, implement and monitor implementation of the recommendations of non-judicial mechanisms such as truth and reconciliation commissions”.¹⁵¹ This raises a crucial question: does the absence of explicit guidance of victim involvement in the follow-up or truth-telling phase imply that the right to truth can be realised without those affected actively participating in its narration? Yet perhaps if, for instance, memorials are not created in consultation with victims, then does that not limit the principle of agency in the narration of the individual and collective's sufferance?

It cannot be claimed, however, that every analysed soft law instrument or treaty body overarchingly omits the state's duty to enable victim participation in the follow-up or evaluation stage of TRC and TJ processes. Several understandings and recommendations support a vision that states are expected to enable victim participation beyond testimonial engagement. The HRCtee in its Concluding Observations on the sixth periodic report of Canada, noted that “the State party should, in consultation with indigenous people, [...] (d) fully implement the recommendations of the Truth and Reconciliation Commission with regard to the Indian Residential Schools”.¹⁵² While perhaps vague, this framing may suggest that victim participation, as in consultation, is increasingly recognised as a requirement of TJ. This notion that victim participation is not a discretionary practice is similarly reflected in the

¹⁵⁰ *Garzón Guzmán et al. v Ecuador* (n 113) para 121.

¹⁵¹ UNHRC Res 9/11 (n 135) 3.

¹⁵² UN Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Canada’ (13 August 2015) UN Doc CCPR/C/CAN/CO/6.

Special Rapporteur's concerns over the lack of "uptake by national authorities of commission recommendations," highlighting how this may undermine the legitimacy of TRCs.¹⁵³ The Liberian TRC's recommendations faced a similar challenge, where the state failed to implement them. Per such challenges, de Greiff further called upon the critical role victim organisations play in monitoring the implementation of TRC recommendations, producing an implied expectation that states should enable those possibly representing victims to not only receive the truth but to operationalise its outcomes.¹⁵⁴ These observations strengthen the applicability of the previously identified principles in IACtHR cases, in which participatory procedural obligations also emerged during the follow-up phase. Moreover, they seemingly suggest that the right to remedy cannot be fulfilled if states do not provide victims the ability to shape the redress they need.

According to the discussed TJ ideals, victim participation is about being heard and actively shaping and designing reparative mechanisms and institutional reforms. As seen in Liberia, reparations in a TRC's recommendations may materialise as trust funds.¹⁵⁵ Principle 32 of the Joinet/Orentlicher Principles states that "victims and other sectors of civil society should play a meaningful role in the design and implementation" of reparation programmes.¹⁵⁶ While the Bassiouni Principles do not explicitly echo this expectation of victim involvement, Principle 32 of the Joinet/Orentlicher Principles underscores a shift away from a top-down, state-driven approach and asserts that reparative measures should be shaped by those affected. Similarly, regarding guarantees of non-recurrence, Principle 35 states that "institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil

¹⁵³ de Greiff (n 141) 1; de Greiff (n 5) 10.

¹⁵⁴ de Greiff (n 5) para 39.

¹⁵⁵ Truth and Reconciliation Commission of Liberia (n 30) 276.

¹⁵⁶ UN Commission of Human Rights (n 84) Principle 32.

society”.¹⁵⁷ In contexts where TRCs recommend institutional reform, such as Liberia, this expectation becomes more significant.¹⁵⁸ It arguably fuses the principle of democratic participation with procedural expectations, imposed on states, regarding the enabling of meaningful remedies and redress.

¹⁵⁷ *ibid* 35.

¹⁵⁸ Truth and Reconciliation Commission of Liberia (n 30) 278–283.

Chapter 4: Discussion and Conclusions

To address this study's research question, IHRL imposes procedural obligations on states to enable victim participation in TRCs, particularly during their implementation. These procedural obligations are, rather, emerging and context-dependent during the design and follow-up phases. This puzzle was tackled through a doctrinal analysis with qualitative interpretative elements of human rights-related documents. Accordingly, it is important to discuss the findings and their implications for states and victims in transitional environments, as well as their academic and methodological significance. Lastly, this chapter will consider this investigation's limitations and propose future avenues for research.

The findings indicate that IHRL provides a substantive basis for recognising procedural state obligations to enable victim participation across the design, implementation, and follow-up phases of TRCs, particularly in fulfilling the rights to truth and an effective remedy. Moreover, these obligations emerge through this study's interpretation of the interplay of treaty provisions, IACtHR jurisprudence, and soft law instruments.

In the design phase, this study identifies a potential source of an enforceable procedural obligation in Article 24 of the ICPPED, which provides victims of enforced disappearance a right to truth and their subsequent right to participate in and form truth-seeking organisations and associations. Indeed, the analysed jurisprudence of the IACtHR does not gesture towards a participatory duty in the design phase of judicial or non-judicial mechanisms; however, this thesis posits that such an absence may stem from the institutional nature of fixed judicial bodies and contextually constructed TRC mechanisms. Moreover, it finds that the applicability of the interpretation of Article 24(7) to TRC contexts was enabled by soft law, which supports the principle that the creation and scope of truth-seeking mechanisms must be informed and shaped by the active and genuine consultation with victims. This is significant as it reflects an evolving

understanding of victim ownership over the TJ processes that alter their lives, reinforcing the expectation that states must enable the participation of victims to strengthen the perceived legitimacy and procedural fairness of truth-seeking mechanisms. Resultingly, this study finds that the results of the analysis convincingly support claims that procedural obligations for victim participation, as derived from Article 24, extend to the design phase of TRC processes when interpreted in light of soft law instruments. It should be acknowledged, however, that while this study supports the emergence of participatory procedural duties when designing TRCs, the foundation of this claim is rooted in contexts of enforced disappearances. As such, it would be ill-considered to assert that this constitutes a universal obligation, applicable to all rights. Instead, the degree and meaningfulness of participation may possibly vary as states retain discretion in how they operationalise their duties regarding differing human rights violations.

The findings provide the clearest indication that victim participation is a procedural obligation that states, in their duty to fulfil the rights to truth and remedy, must enable during the implementation phase of TRCs. They suggest that such obligations can be rooted in the interplay of Article 24(7) of the ICPPED, which emphasises victims' rights to participate in truth-seeking efforts, Article 2(3) of the ICCPR, as well as the IACtHR's interpretation of Article 25 of the ACHR. Together, these provisions support the notion that victim participation, as the given opportunity to present claims and influence a competent decision-making authority, constitutes a procedural condition of the right to an effective remedy. Moreover, the findings on the IACtHR's jurisprudence highlight how the participation of victims must be facilitated in all stages of truth-seeking investigations and domestic proceedings. This suggests that victims must not only be provided access to the truth, but also allowed to actively shape its cultivation and the outcomes that follow. The Court's linkage of participation, procedural fairness, and the right to an effective remedy, which affirms that victim participation is not

optional, is further upheld by soft law instruments. Crucially, the findings suggest that soft law identifies TRCs as a means of guaranteeing the right to an effective remedy. These instruments indicate that truth commissions or truth-seeking efforts cannot fulfil their remedial functions if victim participation is not enabled. Resultingly, in light of the above, the findings convincingly reveal that IHRL imposes procedural obligations on states to enable victim participation during the TRC's implementation phase.

Determining whether IHRL imposes procedural obligations on states to enable victim participation in the follow-up phase of TRCs reveals a complex and yet-evolving normative landscape. While the analysed treaty provisions are largely silent on victim participation during the enforcement or follow-up of reparative measures, the IACtHR's jurisprudence reveals a developing interpretation of state duties. The Court emphasised in some of the analysed cases that the legitimacy and effectiveness of reparations hinged on victims' being provided the opportunity to be included in the follow-up process. This, perhaps, signals a shift away from a state-centric attitude in treaty provisions and TJ, towards a participatory approach that prioritises victim agency and ownership. The Court, arguably, implicitly challenges the notion that states hold exclusive authority in enforcing remedies or TRC recommendations. When interpreted alongside soft law instruments, a similar tension, as seen between the analysed treaty provisions and IACtHR jurisprudence, can be identified. Despite some instruments or guidelines advocating for victim participation in the follow-up stage of TRCs, others primarily focus on the obligation that states must implement TRC recommendations, omitting the victim's role from this process. This variance may show that, though victim participation cannot assertively be recognised as a procedural obligation under IHRL during a TRC's follow-up process, it can be categorised as a procedural expectation or best practice. Hence, the findings point towards an emerging space in IHRL for such obligations to be more fully

recognised as part of its enabling function in the realisation of the rights to truth and an effective remedy.

The realisation of these identified procedural obligations and expectations demands that states shift how they regard victims, not as passive recipients of a form of justice, but as active rights-holders and agents in shaping the TJ processes that alter their lives. The findings echo TJ discourse's normative ideals, suggesting that participation in TRCs should not be tokenistic, harmful, or limited to the implementation phase. Moreover, the analysis illustrates how states must create supportive and safe conditions that hinder retraumatisation and disillusionment to enable victims to actively, effectively, and voluntarily participate in all three phases of the TRC process. Here, victims must be granted the opportunity to narrate their suffering to strengthen the TJ mechanisms' legitimacy and commitment to upholding dignity. Drawing back to the OHCHR Guidelines on the 'Effective Implementation of the Right to Participate in Public Affairs', states may meet the identified procedural obligations and expectations by generating legal reforms, facilitating institutional capacity-building of their TRC, and developing infrastructure and strategies to enable the participation of victims.

This research contributes to ongoing efforts to enhance the victim-centredness of IHRL and TJ. Through the clarification of procedural standards under IHRL and the examination of their application within TRCs, this paper demonstrates that victims have a convincing basis for challenging their superficial contributions, unprotected forms of participation, or exclusion from the implementation and perhaps even design phases of these TJ mechanisms. Whether such exclusion from the follow-up phase alone would amount to a violation of the rights to truth or remedy remains to be further explored. Nevertheless, the findings show a growing recognition, especially in the IASHR, of the importance of victim engagement in the follow-up phase.

The legal and academic significance of this study justifies a concise discussion on its implications. That is, the produced analytical framework may enable future research to investigate whether victim participation across the design, implementation, and follow-up of other TJ mechanisms constitutes a procedural obligation under IHRL. Furthermore, the doctrinal method, with qualitative interpretative elements, proved useful for addressing the research question and aims by enabling this study to interpret and extrapolate IHRL principles and further understand them through a victim-centred and procedural fairness lens.

An initial limitation of this study pertains to its interpretative nature, rendering its legal reading of instruments, through the employed lenses, subjective. Furthermore, its reliance on IACtHR cases may limit the generalisability of findings and identified obligations to other regional human rights systems. Finally, it should be noted that not all legal instruments related to this inquiry were examined, possibly omitting diverging standards on procedural obligations.

Future research efforts should interrogate whether a space in IHRL exists to recognise victim participation in TRCs as a right. Probing whether such a right can emerge as a result of the inherent dignity and agency of the victim may account for the encountered issues of universality. This is as it may create independent state obligations that are not contingent on the realisation of the rights to truth and remedy.

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